Mid-Year Employment Law Review

Newsletter from The Maloney Firm, APC

2018 has been a big year for legal developments and trends affecting employers, especially due to media attention geared towards sexual harassment.

In light of mainstream news media, twitter wars, and celebrity call-outs, California lawmakers have been hard at work responding to the *#MeToo* and *#TimesUp* movements with expanding anti-harassment training based on gender identity, gender expression, and sexual orientation.

Not only are California lawmakers ensuring that sexual harassment has no place at work, Governor Brown signed into law a number of employment bills that impacted California workplaces this year.

IN CASE YOU MISSED IT - NEWLY ENACTED LEGISLATION

Family Rights

AB 908 While on leave for either Paid Family Leave or State Disability Insurance, the state will increase the weekly benefit amount to employees.

For low income employees whose highest wage range during the quarter base period is $929 or less, the wage replacement rate will increase from 55% to 70%.

For workers whose highest wage range during the quarter base period is $930 or more, the wage replacement rate will increase from 55% to 60%.

SB 63 The California Family Rights Act (CFRA) requires employers with 20 or more employees within a 75-mile radius to grant a qualified employee's request to take up to 12 weeks of unpaid parental leave for new child bonding purposes.

LGBT

SB 396 California mandatory sexual harassment awareness training must now address harassment based on gender identity, gender expression, and sexual orientation.

Job Applicants

Salary History - AB 168 Employers can no longer ask applicants about their salary history and must provide the pay-scale for the position upon an applicant's request. This does not prohibit an applicant from voluntarily disclosing salary history information and does not prohibit an employer from considering or relying on the provided information in determining salary for that applicant.

Ban the Box - AB 1008 Employers with five or more employees are banned from inquiring or considering criminal history before making a conditional offer of employment. An employer may conduct a background check if the offer is accepted.

Immigration Enforcement - AB 450 Employers cannot provide voluntary consent to workplace raids by immigration enforcement agents unless an agent has a judicial warrant.

California Case Law Update

Not only has Governor Brown been hard at work signing new legislation, California courts and the United States Supreme Court have ruled on important issues that permeate employment law such as who is an independent contractor, how to calculate overtime pay for flat sum bonuses, who is protected by the Dodd-Frank Act, and whether class action waivers are enforceable. We have highlighted these rulings for you here.

ALL FOR ONE, AND ONE FOR ALL?

Epic Systems v. Lewis; Ernst & Young LLP v. Morris; and National Labor Relations Board v. Murphy Oil USA, Inc. (2018) 138 S. Ct. 1612

The United States Supreme Court consolidated three cases in a 5-4 decision that the Federal Arbitration Act requires courts to enforce mandatory arbitration agreements in which an employee agrees to arbitrate claims against an employer on an individual -- rather than on a class or collective basis. In ruling, the Court rejected the argument that class action waivers violate Section 7 of the Fair National Labor Relations Act.

continued

ABC, IT'S AS EASY AS 1-2-3, AS SIMPLE AS DO-RE-MI

Dynamex Operations West v. Superior Court (2018) 4 Cal. 5th 903

Workers who served as delivery drivers asserted that they had been misclassified as independent contractors rather than employees. On April 30, 2018, the California Supreme Court issued a unanimous decision that set out a new "ABC" test for determining if workers are independent contractors. Pursuant to the "ABC" test, the burden of proof is on the hiring entity to prove:

a. That the worker is **free from control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;

b. That the worker performs work that is **outside the usual course** of the hiring entity's business; and,

c. That the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work that he or she is performing for the hiring entity.

If all three elements are met, then the worker is an independent contractor. This new legal standard will make it much more difficult for businesses to classify workers as independent contractors. As a result, all California businesses with independent contractors will need to conduct a thorough evaluation of such workers to determine whether they are properly classified.

"If all three elements are met, then the worker is an independent contractor."

GOVERNED BY WHAT IS ENACTED, RATHER THAN INTENDED

Digital Realty Trust, Inc. v. Somers (2018) 138 S. Ct 767

The United States Supreme Court unanimously overruled a Ninth Circuit decision that relied on the Securities and Exchange Commission's (SEC) broad interpretation of the definition of a whistleblower under the Dodd-Frank Act.

Previously, the Ninth Circuit held that Dodd-Frank's anti-retaliation provision can be invoked not just by individuals who report concerns to the SEC, but also by individuals who complain to their employers internally.

The Supreme Court's ruling means that individuals who only report securities violations internally will no longer qualify for Dodd-Frank protection.

"The United States Supreme Court unanimously overruled … the definition of a whistleblower"

MADE IN GERMANY, SERVICED IN AMERICA, PAID BY INDUSTRY PRACTICE

Encino Motor Cars LLC v. Navarro et al. (2018) 138 S. Ct 1134

The United States Supreme Court determined that service advisers employed at car dealerships are exempt from overtime under the FLSA after a group of current and former service advisors sued a Mercedes-Benz dealership for overtime pay. The Court held that because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a "fair reading." The Court's new "fair reading" principle will make it easier for employers to defend claims that they misapplied an exemption. Employers still have the burden of proving that their application of an exemption is proper, but they will now be able to rely upon not only the statutory language involved, but also the intent of the exemption and industry practice.

"… easier for employers to defend claims that they misapplied an exemption."

WEEKEND PAY, OVERTIME SLAY

Alvarado v. Dart Container Corporation of California (2018) 4 Cal. 5th 542

The California Supreme Court has ruled that when a nonexempt employee receives a nondiscretionary flat sum bonus covering a single pay period, the hourly value of the flat sum bonus must be divided by the total non-overtime hours actually worked (rather than total hours worked) during the pay period in calculating the regular rate of pay.

Additionally, *Alvarado* requires that overtime on the flat sum bonus be paid at 1.5 times the regular rate derived.

"…overtime on the flat sum bonus be paid at 1.5 times the regular rate"

California Legislation Regulations

Policies effective July 1, 2018

Not only has it been a busy 2018 in the employment arena with the United States Supreme Court, the California Supreme Court, and the California legislature, but also now there are new California regulations that impact employment practices such as minimum wage increases, height and weight discrimination and English only policies effective July 1, 2018.

National Origin Definition

Regulations clarify the definition of National Origin. National Origin includes but is not limited to:

a. Physical, cultural, or linguistic characteristics associated with a national origin group;
b. Marriage to or association with persons of a national origin group;
c. Tribal affiliation;
d. Membership in or association with an organization identified with or seeking to promote the interests of the national origin group;
e. Attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
f. Names that are associated with a national origin group.

English Only Rules

The Fair Employment and Housing Council (FEHC) regulations make it an unlawful employment practice for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace, such as an English only rule, unless:

a. The language restriction is justified by business necessity;
b. The language restriction is narrowly tailored; and
c. The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

Height and Weight Requirements

Height and Weight requirements are unlawful unless the employer can demonstrate that the requirements are job-related and justified by business necessity.

Driver's License Requirements

Employers cannot require applicants or employees to present a driver's license unless:

a. Possession of a driver's license is required by state or federal law, or if
b. Possession of a driver's license is otherwise permitted by law.

Retaliation for Exercising Employment Rights - SB 306

It is an unlawful employment practice to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged.

Minimum Wage Increases - SB 3

State Minimum Wage
One to 25 employees: $10.50/hour
26+ employees: $11/hour

Los Angeles County Minimum Wage
One to 25 employees: $12/hour
26+ employees: $13.25/hour

San Francisco Minimum Wage
$15/hour

Upcoming Legislation

Stay tuned for updates from the California legislature regarding sexual harassment, increases in paid sick leave, personal liability for wage violation, and more.

Sexual Harassment Legislation

Proposed bill banning non-disclosure agreements in the context of sexual harassment and sexual allegations. Proposed bill expanding sexual harassment prevention training to supervisors.

Increase in Paid Sick Leave

Proposed bill to increase paid sick leave from 24 hours or three days to 40 hours or five days of paid time off.

Wage Liability

Proposed bill to make employers and officers personally liable for an additional penalty of $200 per employee, per pay period for wages that are not paid on time.

Marijuana Card Holders a Protected Class

Proposed bill making it unlawful for an employer to discriminate against a person if the discrimination is based upon the person's status as a qualified patient or person with an identification card entitled to the protections of the use of cannabis for medical purposes.

Pay Data

Proposed bill that would require employers with 100 or more employees to submit a pay data report to the Department of Industrial Relations. The reports must include information such as number of employees by race, ethnicity, and sex listed by job categories and the number of employees whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupation Employment Statistics survey.

The Maloney Firm is a Los Angeles law firm that represents clients in trials, arbitrations, and appeals in both state and federal courts. Our attorneys routinely represent clients in employment litigation, business litigation, and professional malpractice.

Our employment team of Patrick Maloney, Vanessa Willis, and Samantha Botros are happy to answer any questions you may have.

Please give us a call if your company would like more guidance on employment matters discussed on these pages.

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