2020 California Employment Law Update

Newsletter from The Maloney Firm, APC

January 2020

For employers in the Golden State, 2019 brought no shortage of employment law changes.

Some highlights include reclassification of thousands of gig workers as employees, minimum wage increases and more lactation accommodations.

Start the New Year right by staying informed about recent employment law developments.

California Employment Legislative Update

SB 3 – Minimum Wage Increase

SB-3 raises the state minimum wage to $13 an hour for workplaces with 26 or more employees and to $12 for workplaces with fewer than 26 employees.

AB-5 – Independent Contractor Status

Effective January 1, 2020, California businesses that utilize independent contractors must be prepared to comply with Assembly Bill 5's "ABC" test, which codifies and expands the California Supreme Court's *Dynamex* decision for determining employee vs. independent contractor status. Assembly Bill 5 also exempts professions such as licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, workers providing hairstyling or barbering services, and those performing work under a contract to provide professional services (e.g., lawyers).

A-B 9– Statute of Limitations on FEHA Claims

Assembly Bill 9 extends the statute of limitations for filing administrative claims under the Fair Employment and Housing Act ("FEHA") from one year to three years. Assembly Bill 9 does not restore expired claims.

AB-51 – Mandatory Arbitration Agreements

Effective January 1, 2020, California employers will no longer be able to require employees to sign arbitration agreements for state discrimination claims or claims brought under the California Labor Code. Assembly Bill 51 also prohibits arbitration agreements that require employees to opt-out of a waiver "or take any affirmative action in order to preserve their rights." Last, any violation of the various provisions in Assembly Bill 51 will itself be an "unlawful employment practice." Accordingly, violations will be subject to the private right of action under California's FEHA.

SB 83 – Paid Family Leave

As of July 1, 2020, California's Paid Family Leave (PFL) will increase from 6 to 8 weeks of subsidized time off to bond with a child or take care of a family member. The bill requires the Governor's office to convene a task force to develop a proposal to extend the duration of paid family leave benefits to six months by 2021.

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SB 142 – Lactation Accommodation

Senate Bill 142 expands California lactation-accommodation law by requiring employers to develop and implement a policy regarding any lactation accommodations and make it readily available to employees. In addition, SB 142 requires employers to provide a lactation room for employees that meets the following requirements:

1. Not bathrooms;
2. In close proximity to the employee's work area;
3. Shielded from view and free from intrusion while the employee is lactating;
4. Safe and sanitary for employees wishing to express milk;
5. Contain a surface to place a breast pump and personal items as well as a place to sit;
6. Access to electricity or alternate devices (e.g., extension cord, charging stations) that may be needed to operate a breast pump; and
7. Access to a sink with running water and a refrigerator suitable for storing milk.

This new law makes the denial of lactation accommodations a violation under rest period laws and subjects the employer to premium pay obligations as well as a $100 penalty per violation. In addition, the law contains an anti-retaliation provision. SB 142 has an undue hardship exemption for employers with fewer than 50 employees.

SB 188 – Hairstyle Discrimination

Effective January 1, 2020, California bans discrimination based on hairstyles. This new law, known as the Crown Act, expands the FEHA's definition of race to include traits historically associated with race, such as hair texture and "protective hairstyle" (e.g., braids, locks, and twists). Employers should update employee handbooks to include appropriate references to this law. Further, employers will need to review their workplace dress codes and grooming policies to ensure that they do not prohibit natural hair and protected hairstyles, including afros, braids, twists, and locks.

SB 229 –Administrative Review

California's Senate Bill 229 expands the appeal and enforcement mechanisms available when the Labor Commissioner cites an employer for violating the Labor Code's anti-retaliation provisions. Once the citation is issued, if the employer does not request a hearing within 30 days, the citation becomes final, and ten days after the citation becomes final, the Labor Commissioner applies for entry of judgment. The bill will establish procedures and deadlines to follow when deciding or contesting a citation.

AB 673 – Statutory Penalties for Late Payment of Wages

Assembly Bill 673 amends California Labor Code § 210 to create a new private right of action for employees to seek penalties for the late payment of payday wages. Previously, only the Labor Commissioner was permitted to seek penalties under § 210. Effective January 1, 2020, employees are entitled to recover $100 for each initial violation for failure to timely pay each employee, and $200 for a "subsequent violation, or any willful or intentional violation." Employers will also be liable for 25% of the amount unlawfully withheld for certain Labor Code violations. However, AB 673 prohibits employees from recovering statutory penalties and civil penalties under PAGA for the same violation.

SB 688 – Labor Commissioner to Pursue Additional Wage Claims

Senate Bill 688 extends the authority of the Labor Commissioner to cite an employer's failure to pay minimum wages under a contract. "Contract wages" means wages based on an agreement in excess of the applicable minimum wage for regular, non-overtime hours.

New Legislation - Continued on Page 3

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SB 707-Arbitration Fees

Employers who fail to pay arbitration fees or costs in employment or consumer disputes within 30 days of being due are in default and breach of the agreement. Non-payment can lead to additional penalties or a requirement that a civil court resolves the case.

AB 749 – No Rehire Provision in Settlement Agreements

Assembly Bill 749 prohibits "no rehire" provisions in settlement agreements entered into on or after January 1, 2020. The law includes several exceptions, including where the employer has made a good faith determination that the individual engaged in sexual harassment or assault or "if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person."

SB 778 – Sexual Harassment Prevention Training Deadline

Senate Bill 778 pushes back the deadline for completing mandatory sexual harassment prevention training until January 1, 2021.

AB 1223 – Organ Donor Leave

Private employers with 15 or more employees must provide an additional 30 days of unpaid leave per year for the purpose of organ donation. Currently, employers are required to provide 30 days of paid time off, for a total of 60 days of protected leave for organ donation.

AB 1554 – Flexible Spending Accounts

AB 1554 adds Section 2810.7 to the Labor Code, which requires employers to notify employees who participate in flexible spending accounts (FSAs) of any deadline to withdraw funds before the end of the plan year. Section 2810.7 provides a non-exhaustive list of how notice may be given, which includes by e-mail, phone, text message, postal mail, or in person. Although the law does not indicate when notice must be given, it does mandate that the notice be provided in two separate forms, one of which may be electronic.

California Case Law Update

Wage and Hour:

MAKE THE ROUNDS

Jessica Ferra v. Loews Hollywood Hotel, LLC **2019 Cal.App. LEXIS 1003**

When paying meal and rest period premiums, employers are not required to pay the regular rate of pay (which includes all compensation received, including commissions and non-discretionary bonuses). Instead, employers are only required to pay the employee's base hourly rate. The court further held that rounding systems comply with California law even where a small majority of employees lose compensation.

STEAL OR DEAL

Voris v. Lampert (2019) 7 Cal.5th 1141

Employees cannot bring conversion claims for wage non-payment.

TRY,TRY AGAIN

Rodriquez v. Nike Retail Servs. (9th Cir. 2019) 928 F.3d 810

The Ninth Circuit reversed the district court's judgment that held that Nike retail services did not have to compensate retail employees for "off the clock" exit inspections every time they leave the store. The Court of Appeal remanded the case for proceedings consistent with *Troester v. Starbucks* (2018) 5 Cal.5th 829 (rejecting the application of the federal "de minimis" doctrine to wage and hour claims under California law).

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IN BAD FAITH

Dane-Elec Corp., USA v. Bodokh (2019) 35 Cal.App.5th 761

Labor Code § 218.5 prohibits a prevailing party employer from recovering attorneys' fees unless the trial court finds the employee brought the wage claim in bad faith. To the extent the wage claim is inextricably intertwined with a contract claim, Labor Code § 218.5(a) controls, barring the recovery of fees.

2 FOR 10

Salazar v. McDonald's Corp. (9th Cir. 2019) 939 F.3d 1051

Plaintiffs argued that McDonald's, a franchisor of fast-food restaurants, was liable for its franchisee's wage and hour violations as a "joint employer." The Ninth Circuit held that plaintiffs were unable to show that McDonald's, at the national level, was a joint employer. The Ninth Circuit reasoned that McDonald's did not manage day-to-day aspects of the employees' work, nor did it have control over the wages, hours, or working conditions of store-level employees.

NO MORE PENALITIES FOR HE WHO WAITS

Naranjo v. Spectrum Security Services, Inc., (2019) 40 Cal.App.5th 444

Unpaid premium wages for meal break violations do not entitle employees to additional remedies under the California Labor Code for inaccurate wage statements or waiting time penalties.

Arbitration:

SAME, SAME BUT DIFFERENT

OTO, LLC v. Kho (2019) 8 Cal.5th 111

Arbitration agreement presented an "extraordinarily high" degree of procedural unconscionability when a service writer for a car dealership was given a "dense," "prolix," "single-spaced" one-page arbitration agreement "written in an extremely small font" that he was required to sign on the spot or lose his job. The Court turned to substantive unconscionability, and in a "counterintuitive" twist, reasoned that the arbitral process is too much like litigation and not enough like the informality of a Berman hearing. While the Court did not hold that the waiver of Berman procedures, in itself, makes an arbitration agreement unenforceable, the Court held that the arbitration agreement in this case was unenforceable and unconscionable.

Private Attorneys' General Act (PAGA) and Class Actions:

RUN OF THE MILL

Townely v. B.J.'s Restaurants, Inc. (2019) 37 Cal.App.5th 179

An employer is not required to reimburse employees for the cost of non-specialty shoes that offer some slip-resistant characteristics, but are otherwise ordinary clothing in nature.

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FAKE OUT

Savea v. YRC Inc. (2019) 34 Cal.App.5th 173

Wage statements may list employer's registered fictitious name and need not include zip + 4 code to comply with Labor Code § 226.

PROVE IT

Esparaza v. Safeway, Inc. (2019) 36 Cal.App.5th 42

Prior to June 17, 2007, Safeway paid no premium wages for missed meal periods, without regard to whether an employee had been discouraged from taking a meal break. Plaintiffs appealed from a judgment against them based on whether they could establish liability for the no-premium wages policy brought under California's unfair competition law. The Court of Appeal affirmed the trial court and held that Plaintiffs may not use unfair competition law to obtain class-wide recovery of meal period premiums without establishing that the employer failed to provide meal periods. An employer is not automatically liable for every short, late or missed meal period and restitution cannot automatically be sought for all non-compliant meal periods.

NO DOUBLE-DIPPING

Z.B., N.A. v. Superior Court (Lawson) (2019) 8 Cal.5th 175

Private litigants may not recover unpaid wages under the Labor Code and the Private Attorneys General Act.

Contact Us:

The Maloney Firm, APC, 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.

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