BUSINESS BRIEF: CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 1 , MAY 30th 2019

CASES

THIS EDITION

KEY CONTRIBUTORS

PHILLIP MALTIN
EDITOR-IN-CHIEF

RICARDO ROZEN
ASSOCIATE EDITOR

REPORTING ALSO BY:

BETH SCHROEDER
ELAINE CHANG
MATTHEW GARRET-PATE
DAVID JONES
ALLISON WALLIN

Arbitration in the Workplace, What's New?

BY: BETH SCHROEDER

SUMMARY : Two recent appellate court decisions remind employers about California's commitment to uphold employers' rights to enforce arbitration agreements. These cases follow last year's US Supreme Court decision in the *Epic Systems* matter and stress the importance of carefully crafting arbitration clauses.

RULE : A recent California appellate panel ruled that a Sohnen Enterprises worker was bound by her arbitration agreement, even though she objected to it and refused to sign it. The Court enforced it because her employer had made clear to her it would view her continued employment as consent to arbitrate disputes, notwithstanding her objection and refusal to sign the agreement.

In the same week, however, a California appellate panel refused to enforce an arbitration agreement against a non-English speaking employee where the English-only agreement was more than two dozen pages, required both parties to pay for arbitration, limited the parties' discovery rights, limited the damages an arbitrator could award and contained other provisions courts have found unconscionable, and therefore unenforceable. These drafting errors give courts an easy way to reject arbitration agreements.

TAKEAWAYS : In states like California, which are fertile ground for rampant and expensive wage and hour class actions, arbitration agreements containing class action waivers provide great protection to employers. Employers must, however, remain vigilant to ensure they carefully edit their arbitration agreements to track changes in the law. Other things employers may wish to do to increase their chances of a court enforcing their arbitration agreements include ensuring the employees sign the agreement and the business maintains the signed copy in the personnel file. However, in the rare circumstance where an employee refuses to consent to arbitration, as the worker did in the Sohnen Enterprises case, contact our office for the best way to handle the situation.

Erika Diaz v. Sohnen Enterprises;
Please contact Beth Schroeder for more information.

California Supreme Court Rules Employers Must Pay for Minutes Worked Off-the-Clock

BY: PHILLIP MALTIN & RICARDO ROZEN

SUMMARY : Last July, in another blow to employers, the California Supreme Court refused to apply the federal *de minimis* rule, which states employers do not need to pay employees for insignificant amounts of time spent performing work-related tasks off-the-clock, where tracking such time is difficult. In that case, the Plaintiff, a shift supervisor at Starbucks, filed a class action lawsuit alleging the company did not compensate him and other employees for tasks at closing accomplished off the clock, such as shutting off computers, locking the door, and setting the store's alarm. These tasks took an additional four to ten minutes to complete.

RULE : The California Supreme Court sided with the employee and stated the *de minimis* rule did not excuse the business from paying for the time. While the Court declined to determine whether other circumstances may excuse an employer from compensating employees for small amounts of working time, it held that, in cases where the employer requires employees to work minutes off-the-clock on a regular basis, the business compensate workers for their time.

TAKEAWAYS: m Employers may wish to revisit their practices to ensure they track and compensate employees for all work-related time. New technology is available to better track employees' time. Businesses should also review and amend written policies and train supervisors and managers to investigate all claims of off-the-clock work regardless of how insignificant they may seem.

Troester v. Starbucks Corp.
Please contact Ricardo Rozen for more information.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY
EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 1 , MAY 30th 2019

CASES

Ninth Circuit Ruling Mandates Hyper-Technical Compliance for Background Check Disclosure Forms

BY: ELAINE CHANG & PHILLIP MALTIN

SUMMARY : The Ninth Circuit Court of Appeals recently ruled in favor of a California employee suing her former employer for violations of the laws governing background check disclosure forms. Federal and California law require stand-alone background check disclosure forms. Employers who run credit checks, criminal background checks, or other consumer reports on applicants or employees need to consider all applicable federal, state, and local laws.

RULE : Over the last few years, litigation has increased over hyper-technical non-compliance with the Federal Fair Credit Reporting Act ("FCRA") and other background check laws. The Ninth Circuit Court of Appeals ruled in favor of hyper-technical compliance with the FCRA and the California Investigative Consumer Reporting Agencies Act ("CICRAA"). Specifically, the Court held that under the FCRA and the CICRAA, an employer may not combine a background check disclosure with any extraneous information, including other state-mandated disclosures. Disclosure forms may contain only the information mandated by law. Employers must provide additional information separately.

TAKEAWAYS : Although other federal Courts of Appeal have yet to comment on this issue, we recommend employers in all states who are using a third-party background check company, or using forms provided prior to this newsletter, review their background check forms with their legal counsel to ensure the forms comply with Federal, state, and local law. Employers may wish to ensure they use arbitration agreements with class action waivers, because plaintiffs have filed many of these background check claims as class actions.

Gilberg v. Cal. Check Cashing Stores, LLC
Please contact Elaine Chang for more information.

Business Owners and Managers Face Personal Liability for PAGA Penalties for Labor Code Violations

BY: ALLISON WALLIN

SUMMARY : Restaurant employees sued their former employer and its individual owner for wage and hour violations under the Private Attorneys General Act ("PAGA"). The trial Court ruled in favor of the Plaintiffs and awarded over $340,000 in personal liability against the owner, in his individual capacity (of that amount, $315,014 was attributable to the Plaintiffs' legal fees in the lawsuit) under California Labor Code section 558.1.

RULE : The Appellate Court upheld the PAGA award against the individual restaurant owner relying on the language of Labor Code sections 558 and 1197.1, which state both the employer and any "other person" who causes a wage and hour violation are subject to civil penalties. The Court concluded the individual owner who also acted as the company's president, secretary, and director qualified as an "other person" within the meaning of the Labor Code. However, other courts have clarified that if an employee sues an owner, operator, director or managing agent in an individual capacity, but that person did not "cause" the alleged Labor Code violations, the Court may grant summary judgment and dismiss the individual from the lawsuit.

TAKEAWAYS : Owners, officers, directors, managers and supervisors of companies with employees in California should learn the nuances of wage and hour compliance to avoid personal liability. Businesses may also choose to train their management employees in wage and hour basics.

Atempa v. Pedrazzani
Please contact Allison Wallin for more information.

BUSINESS BRIEF: CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 1 , MAY 30th 2019

NEW LEGISLATION FOR 2019

Pending Legislation to Lengthen the Statute Of Limitations on Discrimination Claims

BY: PHILLIP MALTIN

SUMMARY : A bill is working its way through the California Legislature that would extend to three years the period within which a person must file a lawsuit alleging employment discrimination. (AB 9.)

TAKEAWAYS : Businesses may wish to ensure they preserve personnel and other employment-related files, including emails, texts and coaching or disciplinary communications, even those given informally and review their record retention policies.

Legislature Makes Sexual Harassment Claims Easier to Prove

BY: PHILLIP MALTIN

SUMMARY : Until this year, a person suing for hostile work environment harassment needed to prove the behavior was "severe or pervasive." "Stray remarks" in the workplace could not justify requiring the employer to prove that it based its decisions to hire or promote on legitimate criteria. Comments unrelated to the decisions were insufficient to create liability. Beginning this year, the Legislature eliminated the "stray remarks" defense. A single incident of "harassing" conduct is enough to push a case to trial. An employee can prove hostile work environment with the totality of the circumstances "and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature [rejects] the 'stray remarks doctrine'."

TAKEAWAYS : Employers may wish to ensure their anti-harassment policy is current. Employers may also want to ensure they investigate all claims of harassment even if the allegations involve conduct that appears isolated or trivial.

California Disfavors Trial Courts Dismissing Most Harassment Claims before Trial

BY: PHILLIP MALTIN

SUMMARY : Changes to anti-harassment laws in California beginning on January 1, 2019, make it easier for employees alleging harassment to get to trial. The Legislature enacted this law: "Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms . . . that hostile working environment cases involve issues "not determinable on paper."

TAKEAWAYS : Employers may wish to work with their lawyers to establish legal defenses to harassment claims, such as statute of limitations. Lawyers, and their clients, may wish to consider early settlement negotiations and statutory offers to "compromise" claims that may protect the business.

Workplace Culture Is Irrelevant When Defending Against Harassment Claims

BY: PHILLIP MALTIN

SUMMARY : Some work environments are more rough-and-tumble than others. In fact, in upholding a trial court's decision to dismiss a sexual harassment case, the California Court of Appeal relied on the fact that the Plaintiff worked in a "salty" environment. It noted that "profanity, vulgarity and sexual taunting were commonplace [in the environment in which the Plaintiff worked] and apparently generally accepted." Beginning this year, "It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties."

TAKEAWAYS : While the state mandates anti-harassment training, employers may wish to include workplace culture and sensitivity training. They may also wish to ensure their human resources professionals are well trained and receive the support from upper management to enact the changes necessary.

Changes to Anti-Harassment Training: Businesses Must Train All of their Workers

BY: PHILLIP MALTIN

SUMMARY : Until this year, California required employers with 50 or more employees to deliver at least two hours of sexual harassment training to all supervisory employees every two years. By January 1, 2020, employers with five or more workers shall deliver at least two hours of "classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months" of hiring. The training should include discussions on preventing "abusive conduct." It should also train on how to eliminate harassment based on gender identity, gender expression and sexual orientation. The training should be practical and focus on preventing sexual harassment, correcting or changing workplace procedures and discussing the remedies available to victims of sexual harassment. The state looks at these as the minimum requirements, and expressed that employers may wish to provide "[l]onger, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination." The Legislature required the "Department of Fair Employment and Housing to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace . . . and to post the courses on the Department's Internet Web site."

Encouraged, but not required, is bystander intervention training, including "information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors."

TAKEAWAYS : Employers may wish to ensure their anti-harassment policy is current. They may also wish to consider required anti-harassment training "a gift," by using it to invite dialogue and to help create and preserve a sound, respectful workplace culture. Our lawyers are qualified and available to provide in person anti-harassment training in English and Spanish. We also conduct several anti-harassment webinars throughout the year in which your employees may participate to comply with the new law's requirements. Please visit our website or contact us for more information.

Summary of California's Limitations on Restrictions in Settlement Agreements

BY: PHILLIP MALTIN

SUMMARY : The California Legislature changed what parties can include in agreements that settle claims involving sexual misconduct. A settlement agreement may not prevent a person from disclosing "factual information" related to "a claim, regarding an act of (i) sexual assault (under Code of Civil Procedure section 1002); (ii) sexual harassment (under Civil Code section 51.9); and (iii) workplace harassment or discrimination based on sex (under Government Code section 12940(h), (i), (j) and (k))." In addition, a settlement agreement may not waive a party's right to "testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment" by the person, or business, or both, against which the person filed the complaint. Finally, an employer may not condition a raise, bonus or condition of continued employment by requiring the employee to release claims, or to admit he/she has no claims against the employer.

Similarly, the business may not require the worker to agree not to disparage the employer if it prohibits the person from disclosing information about unlawful acts in the workplace.

TAKEAWAYS: Confidentiality provisions are difficult to enforce, and anti-disparagement agreements can sometimes spawn next-generation lawsuits involving allegations that are difficult to prove. Businesses may wish to review all forms used for settlement and severance agreements to ensure compliance.

California Requires Gender Diversity: Females Must Receive Positions on the Boards of Directors of Publicly Traded Companies

BY: PHILLIP MALTIN

Summary: By the end of 2019, all publicly held corporations, with their principal offices located in California, must have at least one female director on their boards. That number increases, given the number of members on the board, through the end of 2021. (Three female directors if the board has six or more directors, two female directors if the board has five directors, and one female director if the board has four or fewer directors.) The Secretary of State may impose fines of $100,000 for the first violation and $300,000 for each future violation.
Takeaways: We expect California businesses to challenge the constitutionality of this law. Meanwhile, businesses may wish to ensure that a compliance officer is monitoring these changes, and that the business is gender neutral in its hiring and payroll.

Salary Questions a Business Can Ask During Job Interviews

BY: PHILLIP MALTIN

Summary: California's Equal Pay Act, Labor Code section 1197.5, prohibits employers from paying less than the rates paid to employees of the opposite sex for substantially similar work. Some exceptions, such as seniority, apply. That statute prohibits an employer from using "prior salary" to justify wage disparity. These apply to disparities in wages paid to workers based on race or ethnicity. Thus, a potential employee's prior salary is irrelevant when determining what to pay that person. Moreover, a question regarding an employee's prior salary invites concerns that the business intends to preserve salary disparities based on gender or race. A new statute, effective this year, permits a business to determine salaries for current employees based on the person's [PRIOR?] salary, as long as the decision complies with the rest of the statute. In addition, a current employee who applies for a different position in the same company is not a job "applicant" under the Equal Pay Act.
Takeaways: Employers may wish to train their human resources professionals, and all employees responsible for interviewing job candidates and setting salaries, about these changes. They may also wish to audit their payroll for unpermitted differences in pay.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY
EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 1 , MAY 30th 2019

IN FOCUS: TIPS & TRENDS

"Anticipation of Litigation" May Shield Documents from Discovery

BY: ELAINE CHANG AND PHILLIP MALTIN

Issue: Can the attorney *Work-Product Doctrine* protect the confidentiality of communications between workers before an employee files a lawsuit?

Federal law (and analogous state laws) protects documents and tangible things prepared in anticipation of litigation, or for trial, from disclosure *unless* the other side can show that it has a substantial need for the information and that it cannot, without undue hardship, get the information itself.

What does "anticipation of litigation" mean? The test looks at the time the business created the document and document's purpose. More than just a remote possibility of litigation must exist.

Examples where "anticipation of litigation" work-product privilege could apply:

- An employee sends a demand letter or files a complaint with a government agency;
- An employer investigation into specific complaints of misconduct;
- Witness statements taken after a major, catastrophic injury on premises (routine incident reports are *not* protected); and
- Reports from attorney-retained consultants in response to a government agency inquiry or investigation.

Takeaways: Where possible, a business may wish to ask its legal counsel to participate in internal exchanges involving employees the business believes may sue the company. The attorney-client privilege and the attorney work-product are likely to preserve the confidentiality of internal conversations that occur before a lawsuit is filed.

Please contact Elaine Chang for more information.

Employers Must Reimburse Employees for Business Expenses including Cell Phone Use, but What Else?

BY: PHILLIP MALTIN & RICARDO ROZEN

Issue: Recently, facility management company ABM settled a class action for $5.4 million dollars after a federal court certified a class of janitors who claimed the company did not reimburse them for the required use of their personal cellphones. This invites the question, what else must employers pay for?

Takeaways: Under California Labor Code section 2802, employers must reimburse employees for all necessary business expenditures. We know cell phone usage, even if minimal, qualifies, but what are some other necessary business expenses that may require reimbursement? If employees work from home, must you reimburse for their use of paper, tools, pens and pencils? If employees routinely send or respond to emails at home before or after work, do you need to reimburse for a portion of their internet service provider costs?

The single answer to these questions is: *possibly*. To eliminate liability, businesses may wish to review company reimbursement policies and practices. Employers should consider doing the following, in conjunction with their legal teams:

1. Determine whether employees check or update their schedules on their phones, via an app or online.
2. Determine whether employees email supervisors or co-workers before or after work.
3. Determine whether employees perform any work for the company outside of the physical location of the business.

Please contact Ricardo Rozen for more information.

PAGA Corner- What You Must Watch For

BY: PHILLIP MALTIN & DAVID JONES

Issue: The Private Attorney General Act (**"**PAGA") enables individuals to file "representative actions" against their employers. A representative action is a lawsuit a person brings on behalf of oneself and all similarly aggrieved employees. In addition to traditional Labor Code violations, such as the failure to provide meal and rest breaks, PAGA enables employees to recover penalties for each violation per pay period per employee (usually $50-$100), with subsequent violations penalized at higher rates ($100-$200). Additionally, unlike a class action, the employee bringing the suit doesn't need to satisfy the traditional class action requirements which are difficult to satisfy.

Takeaways: Employers may wish to ensure that employees are clear about procedures to follow when the business receives a letter demanding the payment of penalties under PAGA. The law allows employers to cure certain violations, but only within a short period of time. Businesses should contact their legal team as soon as they receive a PAGA action.

Please contact David Jones for more information.

BUSINESS BRIEF:
CALIFORNIA QUARTERLY
EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 1, MAY 30th 2019

CASES PENDING: CA SUPREME COURT

California Supreme Court will Clarify Whether the Termination of a News Media Producer by a News Outlet Constitutes the Exercise of Free Speech

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: The Plaintiff is a 51-year-old African- and Latino-American who worked for CNN for 18 years, 16 of them as a producer. A new Western bureau chief refused to promote him, and ultimately fired him, largely because he believed that Plaintiff had plagiarized passages of a story he produced. The Plaintiff sued CNN for discrimination based on age, race, color, ancestry and association with a person with a disability, and defamation, among other claims. CNN filed a special motion to strike the Complaint (which, if successful, would end the case) called an "Anti-SLAPP" motion. CNN based the Anti-SLAPP motion on its right to free speech in connection with a public issue. CNN argued that, as a news provider, all of its decisions regarding the Plaintiff involved "editorial discretion" making them "inextricably linked with the content of the news [and] that the decisions themselves" were acts involving CNN's right of free speech and connected with matters "of public interest." The trial court agreed. The first reviewing court, the Court of Appeal, disagreed.

Question for The Supreme Court: The Supreme Court wants to determine the interplay between CNN's free speech rights and Plaintiff's right to work free from discrimination and defamation (among other things). In other words, is this a private employment discrimination and retaliation case, or an action designed to prevent CNN from exercising its First Amendment rights? The Supreme Court's decision will have an impact on personnel decisions by news and media organizations. *Wilson v. CNN.*

Federal Ninth Circuit Court of Appeals Asks the California Supreme Court to Decide When Out-of-State Employers Must Comply with California Wage Laws

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

First Summary: The Federal Ninth Circuit Court of Appeals is considering three cases involving class actions by airline workers under the California Labor Code, related to two sets of airline employees. The first set is employees working in California under a collective bargaining agreement.

First Question for The Supreme Court: The Ninth Circuit asked the California Supreme Court to evaluate two things. The first, is whether the employer must follow California's detailed requirements, found in Labor Code section 226, about the information an employee must receive on wage statements, or whether a collective bargaining agreement supersedes that statute. The second, is whether section 226 applies to wage statements an out-of-state employer supplies to an employee who lives in, receives pay in and pays taxes in California, but who works principally outside of the state.

Second Summary: The second set is employees some of whom perform only a small portion of their work in California.

Second Set of Questions for The Supreme Court: The Ninth Circuit asked the California Supreme Court to decide three things. First, whether California's pay period and wage statement laws (Labor Code sections 204 and 226) apply to out-of-state employers paying employees for time worked in California during a pay period, even if the work performed in California lasted less than a full day. Second, whether California's minimum wage law applies to all work performed in California for an out-of-state employer by an employee who works in California only occasionally and for less than a day at a time. Third, to consider a United Airlines pay formula that at times averages flight attendants' pay in instances where averaging would result in a higher overall rate of pay for hours worked. The Ninth Circuit asked the California Supreme Court to determine whether California's prohibition on averaging an employee's pay applied when the averaging formula was only used in cases where it would result in overall higher pay for the employee, even though the employee did not receive pay for each hour worked. *Ward v. United Airlines, Inc., Vidrio v. United Airlines, Inc*, and *Oman v. Delta Airlines*.

California Supreme Court Will Determine (i) Whether to Enforce Arbitration Agreements that Bar Employees from Bringing Claims Before the Labor Commissioner, and (ii) When a Demand for Arbitration Must Be Made to Avoid Waiver

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

CASES PENDING: CA SUPREME COURT

Summary: The Court of Appeal reversed a trial court's order denying an employer's motion to compel the employee to arbitrate claims for unpaid wages the employee filed with the California Labor Commissioner. The appellate court ruled that arbitration, as a means of resolving the dispute, is sufficiently "accessible and affordable" when compared to "Berman" hearings at the Labor Commissioner. A Berman hearing is a "mini-trial" held at the Labor Commission. The rules of evidence do not apply. Following a Berman hearing, either party may appeal the Labor Commission's decision to the Superior Court. Thus, matters before the Labor Commission and arbitration resemble ordinary litigation in an "accessible and affordable" forum. The appellate court also decided that the employer had not waived its right to demand arbitration even though it waited until the morning of the Labor Commissioner's Berman hearing to demand arbitration.

Questions for The Supreme Court: The California Supreme Court will decide (i) whether an arbitration agreement prohibiting an employee to file a wage claim with the Labor Commissioner provides a sufficiently affordable and accessible arbitration forum making the agreement enforceable, and (ii) how far in advance of a Berman hearing the employer must demand arbitration to avoid waiving the right to enforce the arbitration agreement. *OTO, LLC v. Kho.*

California May Require Employers to Compensate Workers for Time Spent Inspecting their Personal Belongings when Shifts End

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: Employees sued Apple in a class action claiming Apple should pay them for the time it took security personnel to search employees' bags, purses and other personal belongings before the employees could leave Apple's premises. The personal items were not used for work. The employees brought them for their personal convenience.

Question for The Supreme Court: The Ninth Circuit Court of Appeals has asked the California Supreme Court whether the employees' time spent waiting for Apple to complete its search of their personal belongings is compensable. The Court's answer will determine whether businesses must compensate employees for the time they spend at the end of their shifts undergoing inspections to ensure they have not taken the company's property. *Frlekin v. Apple, Inc.*

Correctional Officers May Be Entitled to Compensation for Time Spent Under the Employer's Control Before and After Their Scheduled Shifts

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: Correctional officers filed a class action against the state alleging it did not compensate them for all time spent completing tasks (for example, putting on their gear) in advance of or after their shifts. The California Court of Appellate determined that the Fair Labor Standards Act applies to unionized correctional officers because their collective bargaining agreement ("CBA") calls for the FLSA to apply when determining hours worked. The FLSA's determination of hours worked is friendlier to employers and does not require the state to compensate for preparatory tasks completed off-the-clock. However, non-union officers not subject to the CBA must receive compensation for their off-the-clock work.

Question for The Supreme Court: The California Supreme Court will decide whether the FLSA or a California Wage Order determines correctional officers' compensable time, and whether unionized officers are subject to a different calculation of compensable time than non-union officers. *Stoetzl v. State of California.*

The California Supreme Court Will Review the Arbitrability of PAGA Claims Involving Unpaid Wages

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: The Plaintiff, an employee of a bank, had signed an agreement to arbitrate disputes with her employer. The employee filed suit in state court under California's Private Attorneys General Act ("PAGA") seeking penalties and underpaid wages under Labor Code section 558 on behalf of herself and other "aggrieved employees." The trial court ordered the matter into arbitration. The appellate court reversed the trial court's order holding that employees can only bring Labor Code section 558 claims under PAGA and PAGA claims cannot be forced into arbitration.

Question for The Supreme Court: A different Court of Appeal decision in 2017 issued an opposite ruling. The California Supreme Court will now decide whether a PAGA action seeking the recovery of individualized lost wages under Labor Code section 558 falls within the preemptive scope of the Federal Arbitration Act. The Court's ruling could have a broad impact on the arbitration of all PAGA claims, not just claims involving Labor Code section 558. *Lawson v. Z.B., N.A.* (S246711)

Raines Feldman LLP

VOLUME 1 , MAY 30th 2019

CASES PENDING: CA SUPREME COURT

Must Trial Courts Order Certain Union Employees to Arbitrate Their Claims for Unpaid Wages Upon Termination?

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: A security guard for the San Francisco Giants alleged the baseball team failed to pay him final wages, on time, upon termination, under Labor Code section 201. A collective bargaining agreement governs his employment. The employee sued. The baseball team moved to compel arbitration, a motion the trial court denied. The Court of Appeal ruled that federal law, the Labor Management Relations Act ("LMRA"), requires arbitration.

Question for The Supreme Court: The California Supreme Court will determine whether the LMRA preempts Labor Code section 201 and requires terminated employees, working under a collective bargaining agreement, to arbitrate their wage claims under Labor Code section 201.

Melendez v. San Francisco Baseball Associates, LLC

May an Employee Recover Unpaid Wages in a Conversion Lawsuit, Inclusive of Emotional Distress Damages?

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: The employee agreed to work for both wages and an ownership interest in the company. When the company did not pay the Employee, and withheld the stock certificates, the employee sued under traditional wage and hour laws and under the common law claim of civil theft called "conversion." The Court of Appeal recognized that adequate remedies already exist in the Labor Code for unpaid wages and refused to extend the tort of conversion to claims for unpaid wages.

Question for The Supreme Court: The California Supreme Court will decide whether an employee can recover wages through a claim for civil theft, or conversion. If the decision is in the affirmative, managers and other officers of companies could be personally liable for unpaid wages and other damages. *Voris v. Lampert.*

An Employer that Settles a Plaintiff's Individual Labor Code Claims May Defeat Associated PAGA Claims

BY: PHILLIP MALTIN & MATTHEW GARRET-PATE

Summary: An employee sued alleging wage and hour claims against his former employer both as an individual and as a representative of other employees in a Private Attorneys General Act ("PAGA") action. The employee had signed an arbitration agreement during his employment. The trial court ordered his individual claims into arbitration, while it "stayed," or paused, the PAGA action until arbitration ended. The employee settled his claims, and agreed to dismiss those claims in the trial court. The trial court granted the employer's motion and dismissed the PAGA claims because the employee was longer "aggrieved," meaning he could no longer sue under PAGA. The Court of Appeal agreed.

Question for The Supreme Court: The California Supreme Court will decide whether businesses can defeat PAGA claims by settling with the plaintiff. The specific question is whether an employee-plaintiff is still an "aggrieved employee" under PAGA, even though the employee has recovered the losses alleged in the lawsuit. *Kim v. Reins International California, Inc.*

Please contact Phillip Maltin for more information regarding any of the cases summarized above.

Breaks and Premium Pay? California Supreme Court to Review Break and Pay Policies for Ambulance Workers

BY: PHILLIP MALTIN & DAVID JONES

Summary: The Plaintiff, an ambulance driver worked 24-hour shifts, was paid for all 24-hours and received his meal and rest breaks, but was on call for emergencies during them. The employee claimed California law entitles him to premium pay (meaning one hour of additional pay) plus his wages because the company did not "relieve" him of "all duties" during the breaks. The trial court dismissed the case, granting summary judgment in favor of the employer. The employee appealed.

Question for The Supreme Court: The Ninth Circuit Court of Appeal asked the California Supreme Court to clarify the employer's obligations. The California Supreme Court will determine to what extent an employer must relieve workers of "all duties" to avoid liability for premium pay.

Takeaways: Businesses may wish to take a conservative approach and to ensure they relieve their workers of all duties during meal and rest breaks. They may also wish to audit their payroll practices to ensure they pay for "on-duty" meal breaks that workers regularly take "on duty."

Stewart v. San Luis Ambulance, Inc.

Please contact David Jones for more information.

For additional information on this business brief, please contact:
Phillip Maltin at pmaltin@raineslaw.com, or Ricardo Rozen at rrozen@raineslaw.com

You can also visit Raineslaw.com for the posted copy of this newsletter.
Direct link :