BUSINESS BRIEF: CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

Raines Feldman LLP

VOLUME 2 , AUGUST 12th 2019

CASES

THIS EDITION

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Workers Can Use Accurate Overtime Adjustments to Penalize Even Generous Employers

BY: ALLISON WALLIN

SUMMARY: Wal-Mart paid its employees a quarter-end incentive bonus. Wal-Mart then adjusted prior overtime payments to account for the bonus and paid a lump sum identified as "OVERTIME/INCT" on wage statements without including the "hours worked" or "hourly rate." This violates Labor Code section 226 because the description did not adequately identify the payment and the employees' hours worked and hourly rate were missing. A class of employees who received the bonus and wage statement sued over the technical wage statement violation because Walmart failed to include required information. The trial court awarded employees $102 million in penalties, half under the Private Attorneys General Act ("PAGA"), even though Wal-Mart had paid the correct overtime rate. The federal court judge ordered Walmart to pay $48 million, the bulk of it for noncompliant wage statements, and $54 million in penalties under California's Private Attorneys General Act, which allows workers to sue their employer on behalf of themselves and other employees. The employees demanded $131 million.

RULE: Labor Code section 226(a)(9) requires that wage statements contain "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." The Court found that Walmart's wage statements did not include enough information for an employee to determine how the business calculated the overtime adjustment and whether the calculation was accurate. Walmart needed to describe the payment better and include the applicable hours worked and hourly rate for the overtime adjustment.

TAKEAWAYS: Close enough is not good enough. California law requires employers to deliver wage statements that contain legally mandated categories of information with each pay check. Minor technical violations can generate considerable penalties.

NLRB Invalidates Arbitration Agreements that Fail to Carve Out NLRA Claims

BY: MATTHEW GARRETT-PATE & PHILLIP MALTIN

SUMMARY: The National Labor Relations Board ("NLRB" or "Board") ruled that an employer's arbitration agreement was unenforceable because the agreement could be interpreted to preclude an employee from pursuing administrative claims before the Board. While the NLRB avoided ruling on whether broad language excluding certain statutory claims was enforceable, the Board did endorse arbitration agreements that carve-out administrative proceedings before the NLRB and employees' Section 7 rights under the National Labor Relations Act ("NLRA").

RULE: Arbitration agreements that can be interpreted to cover an employee's claims in administrative proceedings before the NLRB are unenforceable in their entirety.

TAKEAWAYS: Employers should update their arbitration agreements to include an express carve-out for administrative proceedings before the NLRB and employees' Section 7 rights under the NLRA.

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Ninth Circuit Asks California Supreme Court to Determine Whether Dynamex Standard for Independent Contractors Applies Retroactively

BY: MATTHEW GARRETT-PATE & PHILLIP MALTIN

SUMMARY: The Ninth Circuit Court of Appeals ruled earlier this year that the California Supreme Court's *Dynamex* decision, establishing a new test (called the "ABC test") making it easier for workers to prove they were employees and not independent contractors, applies retroactively. In *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, defendant Jan-Pro Franchising International, Inc. ("Jan-Pro") used a three-tiered franchising system by which it classified janitors as independent contractors and required them to become franchisees to work under the Jan-Pro name. The janitors filed a class action lawsuit alleging Jan-Pro designed the franchising system to misclassify them as independent contractors rather than employees. The Ninth Circuit had held the ABC test from *Dynamex* applied retroactively. This allowed the janitors to reach back further in time than the date of the Dynamex decision, April 30, 2018. The Ninth Circuit, however, reversed itself. It withdrew its opinion in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, and asked the California Supreme Court to determine whether California courts should retroactively apply the ABC test.

RULE: As a reminder the ABC test is an acronym where each letter refers to a step in the analysis. In short, "A" evaluates whether the worker is free from control and direction. "B" considers whether the worker performs work that is outside the usual commercial focus of the business. "C" evaluates whether the worker customarily engages in an independently established trade.

TAKEAWAYS: The ABC test is complicated and often converts independent contractors into employees. Businesses may no longer try to escape liability by relying on the timing of a misclassification issue or whether the worker filed the lawsuit prior to the *Dynamex* holding. The California Supreme Court will now determine how far back in time a plaintiff can reach for damages. Contact legal counsel to ensure your business is correctly classifying independent contractors.

Ninth Circuit Confirms Federal De Minimis Doctrine does not Apply to California Labor Code Claims for Regular Amounts of Off the Clock Work

BY: ELAINE CHANG & PHILLIP MALTIN

SUMMARY: Nike required its retail employees to undergo off the clock exit inspections before leaving for the day. The employees considered this part of their workday and sought compensation. The trial court ruled in Nike's favor. The Ninth Circuit reversed the trial court, relying on last year's California Supreme Court's decision in a case against Starbucks dealing with off the clock work.

Last June, the California Supreme Court held in *Troester* that the federal *de minimis* doctrine rarely, if ever applies, to California wage claims. *Troester* found Starbucks must compensate non-exempt employees when they perform closing tasks that take a few minutes a day, because the work regularly occurs and adds up over time.

RULE: In light of *Troester*, the Ninth Circuit concluded that the ten-minute threshold for a *de minimis* finding under federal law is inconsistent with California labor laws. Moreover, the burden is on employers to determine how to record work time. The Ninth Circuit interpreted *Troester* as "mandating compensation where employees are regularly required to work off the clock for more than "minute" or "brief" periods of time" but not split seconds of time. Therefore, where a business requires employees to work more than trifling amounts of time "on a regular basis or as a regular feature of the job," *Troester* precludes a California employer from claiming the work was *de minimis*.

TAKEAWAYS: Employers cannot rely on the *de minimus* defense for regularly occurring off the clock work. "Regular" off the clock work includes tasks such as daily bag inspections or closing and lock up tasks. Thus, if moving the employee time clock closer to the exit is not feasible, employers should consider other methods of estimating regular off the clock work. *Troester* suggested employers could use reasonable estimates applied through time studies, employee surveys, or fair rounding policies to compensate workers for this time.

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RECENT NOTEWORTHY VERDICTS

Investigate Complaints, Engage in the Interactive Process and Keep Good Notes

BY: PHILLIP MALTIN

SUMMARY: In June, a Los Angeles jury ordered a fast food restaurant to pay $15.4 million including a stunning $5.4 million in compensatory damages (which usually include lost wages and emotional distress). In her lawsuit, a 53-year old employee, Blanca Ramirez, a former supervisor, alleged (i) the company failed to offer to accommodate restrictions on her work after two job-related injuries, (ii) her boss called her "grandma," and (iii) the company retaliated against her after she complained that a 22-year-old supervisor was engaging in "serious misconduct" with 16-year-old subordinates. The company, in contrast, argued it fired Ms. Ramirez for manipulating the restaurant's "speed-of-service system" that obligates employees to serve customers in less than four minutes. At trial, the company showed video of Ms. Ramirez instructing a customer in the drive-thru lane to back up to reset the system. The company also argued that Ms. Ramirez did not request accommodations. The jury concluded age was a "substantial motivating reason" for the company's decision to fire her, and that the company fired Ms. Ramirez because of her disabilities and her complaints about a hostile work environment.

TAKEAWAYS:

Note the modern culture of corporate mistrust: Mistrust of corporations is often behind runaway jury verdicts. Consider a poll from 2017, that finds most Americans "believe companies share too little of their success with employees," while more than two-thirds believe shareholders, not employees, are a company's priority. (Just Capital [2017].) The poll also found that 63% of Americans think CEOs of large companies must act in socially responsible ways.

Investigate harassment allegations even if the employee has quit. Investigations into workplace misconduct are the best way to protect a business, but only if the business swiftly acts based on the information it uncovers. This seems easy, but many professionals overlook it—for reasons they believe are sound. For example, a business may receive a notice that a former employee, or an employee on leave, has filed a complaint for harassment or discrimination with the EEOC or the Department of Fair Employment and Housing. It does not matter whether the employee is no longer with the organization. The "victim-employee" may have left, but the "problem-employee" remains. If the former victim-employee sues, and the business has done nothing to evaluate his/her allegations, the business may find itself before a jury trying to explain why. In short, act swiftly. Take notes and keep them. Preserve video before the system copies over it.

The business must not wait for the employee; it must prompt the "interactive process." The employer must initiate the interactive process to determine whether the worker needs reasonable assistance to do the functions central to the job. If the "employer" (a supervisor, manager or executive-level leader) learns about an employee's injury or disability, the business must initiate the conversation about whether the employee needs assistance and what kind. A business cannot pretend it did not know. It cannot say, "it's the employee's fault; if someone in management knew about the person's physical limitations we would have done something." Train your supervisory staff to ask, once they learn a worker may have physical or mental limitations, "is there something you think you may need to help you do your job?" The employee does not get to demand the accommodation. The employee gets what is reasonable. And that's why the process between worker and employer is supposed to be "interactive." Ask your lawyers for help navigating this complex area.

Disrespectful Disagreements over Allegations of Sexual Harassment Lead to Statement-Making Verdicts

BY: PHILLIP MALTIN

SUMMARY: In April 2019, a Los Angeles jury ordered hologram producer Alki David and two companies he owns to pay Chasity Jones $3 million in compensatory damages (which usually include lost wages and emotional distress) and $8 million in punitive damages for sexual harassment. Ms. Jones testified Mr. David inappropriately touched her, showed her pornographic videos at work, and hired a male stripper to perform in the workplace. She also said that Mr. David fired her for refusing to have sex with him. According to her lawyer, Jones will suffer from post-traumatic stress disorder for life because of what she endured while working for Mr. David. Mr. David responded that Ms. Jones praised Mr. David in a birthday wish and on social media. She also denied he harassed her in a declaration. Finally, Mr. David argued Ms. Jones alleged harassment only after he ended her employment. As he testified, Mr. David erupted in personal insults against the opposing attorney, calling her "an abhorrent woman," and taunting her to "[d]o something with your life, woman," "you have no morals." Mr. David said about the verdict, "Ridiculous . . . I'm not paying it."

TAKEAWAYS: Don't do what Chasity Jones alleged Alki David did. Also, take advantage of the state's mandated anti-harassment and anti-bullying training to discuss issues with employees and ensure your human resources department responds swiftly to allegations. Anti-harassment policies must be current. Treat "victims" of sexual harassment (meaning those who complain) with respect and remind them the business will not tolerate "retaliation." (Instead of using that word, tell the employee to let human resources know immediately if the employee thinks someone is treating them badly because they complained.)

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IN FOCUS : TIPS AND TRENDS

Social Security Administration's Renewed Use of No Match Letters Presents Dilemma for California Employers

BY: MATTHEW GARRETT-PATE & PHILLIP MALTIN

SUMMARY: After a hiatus in 2012, the Social Security Administration ("SSA") is starting to issue "No Match" letters, also known as "Employer Correction Requests," that inform employers the information submitted on employees' W-2s does not match SSA records. While the letters state they are not immigration-related and do not indicate a person's citizenship status, Immigration and Customs Enforcement has used receipt of No Match letters to argue an employer knew about an employee's undocumented status.

Employers receiving No Match letters may think they should reverify their employees' work authorizations, but reverification exposes the employer to liability, especially in California. California courts could interpret adverse action against an employee after a business receives a No Match letter as unlawful discrimination. Moreover, California now prohibits reverifying an employee's I-9 work authorization except in limited circumstances, which do not include receiving a No Match letter. Employers who reverify an employee's I-9 documents outside of those limited exceptions are subject to fines up to $10,000. Thus, employers who receive No Match letters from the SSA should be cautious and take appropriate steps to verify the information the employee provided on their W-2, but should not ask an employee to provide their identification documents. The business should resubmit the W-2 to the SSA once the employer has identified and corrected the error on form W-2.

RULE: Consult with your legal experts to determine what to do when your business receives a No Match letter. Generally, the employer should immediately log into the SSA's "Business Services Online" portal to determine the affected employees. (The letter will not disclose the names.) The employer should then review its records and determine whether an error caused the mismatch. If the records match, the employer should ask the employee if their W-2 accurately reflects the information on their Social Security Card. If the employee says it does not, the employer should instruct the employee to contact their SSA office to remedy the issue. Once the error has been fixed, a corrected W-2 should be submitted for the affected employee.

TAKEAWAYS: Renewed use of No Match letters is forcing employers to balance complying with immigration laws and avoiding possible discrimination and/or civil penalties in California. Employers should act swiftly after receiving a No Match letter and take the steps outlined above to make sure the SSA has accurate information. Since a No Match letter may result from something as innocuous as a changed name after marriage, employers should not take adverse action against employees simply because of a No Match letter. Most importantly, California employers must not reverify an employee's I-9 documents after receiving a No Match letter.

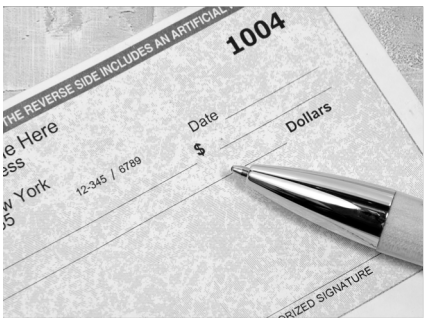
Another Raise, Already? Minimum Wage Increases Have Arrived

BY: RICARDO ROZEN & PHILLIP MALTIN

ISSUE: Minimum wage increases are here. Effective July 1, 2019, many cities and counties throughout California have a new minimum wage. The new rate varies depending on several factors including: (i) the employer's location, (ii) where the employee works, (iii) the kind of business (hotel workers, for example, receive higher wages in some cities), and (iv) the number of employees working for the company.

In the County of Los Angeles, smaller business (with 25 or less employees) in unincorporated areas now must pay workers $13.25 an hour while businesses with 26 or more employees must pay $14.25. Incorporated areas in the County of Los Angeles may have their own ordinance controlling the rate change. In the City of Los Angeles, for example, minimum wage for smaller businesses increased from $13.25 per hour to $14.25 for employers with 26 or more workers. Incorporated areas with no specific ordinance follow the State of California rate changes of $11.00 for smaller businesses and $12.00 for employers of 26 or more. Malibu, Pasadena and Santa Monica have their own ordinances.

TAKEAWAYS: Employers must stay current. Substantial penalties apply to even good faith mistakes in the minimum wage paid.



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IN FOCUS : TIPS AND TRENDS

California Pay Equity Reporting Requirements: Are you ready?

BY: PHILLIP MALTIN & DAVID JONES

SUMMARY: The California legislature is set to pass SB 171, a bill that purports to require employers with 100 or more employees to report pay data to the Department of Fair Employment and Housing ("DFEH") including hours worked, race, sex, and ethnicity of every employee. This mirrors obligations federal law imposes on employers to report to the Equal Employment Opportunity Commission ("EEOC") via form EE0-1. The Obama administration directed the EEOC to collect this information, however, the Trump administration terminated it. In April 2019, a federal judge ordered the EEOC to collect the information for 2017 and 2018, with race, ethnicity and gender data due by September 30, 2019.

TAKEAWAYS: (i) Under SB 171, reporting in California will not occur until at least March 31, 2021. However, business should view this as an opportunity to perform payroll audits to insure pay equity among their workers and to avoid penalties under California's Equal Pay Act, requiring equal pay for employees who perform "substantially similar work." This legislation will not permit the DFEH to publish the data submitted by specific employers. The DFEH, however, is permitted to aggregate and publish data across industries only if the public cannot trace the statistics to a business. Once enacted, the statues will require the DFEH to report the data to the Department of Labor Standards Enforcement ("DLSE"). The DLSE could, in turn, use the information to enforce pay equity laws by filing actions against businesses out of compliance. Workers' rights lawyers may try to uncover this information and use it as evidence the business knew it was violating California's Equal Pay Act and discriminating against workers.

(ii) Ensure pay equity across your company to protect against potential liability. Contact us if you need assistance auditing payroll practices or preparing an EEO-1 form.

Require Employees to Comply with Your Current Arbitration Agreement

BY: RICARDO ROZEN & PHILLIP MALTIN

ISSUE: Many employers require their workers to sign an agreement requiring the employee and the business to resolve their legal disputes in arbitration rather than in court. California and federal courts, including the United States Supreme Court, evaluate arbitration agreements for unfairness in two technical legal categories: substance and procedure. A court may invalidate an arbitration agreement if it finds the terms (its substance), and the way the business presents it to the employee (the procedure), unfair. What courts deem unfair shifts from time to time, and small shifts can have a seismic impact.

Sometimes, employees refuse to sign arbitration agreements. A business has the right to establish (legal) policies of the workplace and to enforce them. Requiring arbitration is a policy a business may enforce. Each situation is unique, and calls for thoughtful techniques by which to enforce the policy, preserve control over the workplace and inspire a culture of fairness and morale.

The first thing an employer should do with workers who refuse to sign the arbitration agreement, or the personnel handbook containing the agreement is speak to them. A simple conversation and explanation may resolve the issue. If it doesn't, the business may wish to confirm, in writing, the arbitration agreement is a policy of the company that all employees must follow. California courts have found continued employment represents implied acceptance.

TAKEAWAY: Arbitration can give a business advantages not available in state or federal courts. (It also has disadvantages a business should consider.) Ensure your arbitration agreement is current. Remember, a business has options if it encounters problems when asking a worker to sign an arbitration agreement.

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