January 2019 Legal Update

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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

2018 CASES OF NOTE

ABC Independent Contractor Test

- *Dynamex Operations West, Inc. v. Superior Court*
- The Court held that there is a presumption that individuals are employees, and that an entity classifying an individual as an independent contractor bears the burden of establishing that such a classification is proper under the “ABC test”

ABC Independent Contractor Test

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

(B) that the worker performs work that is outside 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 performed.

Cases Post Dynamex:

Jesus Cuitlahuac Garcia v. Border Transportation Group LLC, et al & *Curry v. Equilon Enterprises LLC*

The Garcia Case:

Involved a taxi driver and the transportation company that leased the driver his taxi cab. Driver filed suit against the Company citing violations of wage and hour laws along with wrongful termination and waiting time penalties.

Appellate court held: Dynamex only applies to claims based on wage orders. For non wage order claims courts will continue to apply the "control" test traditionally applied before Dynamex.

The Curry Case:

Appellate court concluded that the California Supreme Court had not intended for the ABC test to apply in the joint employer context.

More specifically, the court reasoned that the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections.

Rounding Time

- Under both the federal Fair Labor Standards Act and state law, an employer may use a time clock that averages to the nearest quarter hour for purposes of computing hours worked and meal and rest breaks–so long as the time clock rounding policy is facially neutral and does not, over time, undercompensate workers.

Rounding Time

- An employer may use a time clock that averages to the nearest quarter hour, so long as the employer can show that the rounding policy, over time, results in overcompensation of workers as a whole (even if the employer cannot show that the policy does not undercompensate any particular worker).

Rounding Time

- The employer need not show that the policy does not undercompensate any particular worker. It is enough if the employer shows that, over time, the policy results in overcompensation of workers as a whole and that a majority or close to a majority of workers are on average overcompensated.
- *AHMC Healthcare, Inc. v. Superior Court*

No De Minimis Time In CA

- Federal courts have regularly applied the De Minimus Doctrine in certain circumstances to excuse the payment of wages for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record.
- California Supreme Court held that the De Minimus Doctrine no longer applies in California, and employees must be compensated for ALL time worked, no matter how minor or trivial the time may seem.

No De Minimis Time In CA

- Starbucks's employee's claim that over the course of seventeen months, the company failed to pay him for a combined total of 13 hours of his time, which amounted to $102.67 (at $8 per hour).
- Starbucks argued that because the employee was only shorted for a few minutes each day, the de minimis exception applied, and the employees claim should be dismissed.

No De Minimis Time In CA

- The court disagreed. "What Starbucks calls 'de minimis' is not de minimis at all to many ordinary people who work for hourly wages." One hundred dollars is "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares."
- The court expressly noted that technological advances have made it easier for employers to record all of the time that employees work.
- *Troester v. Starbucks Corporation*

No De Minimis Time In CA

- California employers are now required to track every minute of work time, and courts will no longer by sympathetic to employers who fail to record time because it is “administratively difficult” to track.
- Adjust timekeeping policies, procedures, and systems.
- Consider changing employee handbooks, adopting new procedures, acquiring new technology, and re-training management.

Alvarado v. Dart Container Corp. of California

- For purposes factoring in **flat sum bonuses** to overtime computations, in determining an employee's "regular rate of pay," an employee's total compensation during the pay period should be divided by the total number of non-overtime hours worked, rather than the sum of hours actually worked during the pay period, which might include overtime hours.
- Court limited its ruling to apply just to flat sum bonuses, and so as of now piece-rate bonuses, production bonuses, and other types are not affected by this ruling.

Part of AB 450 Stuck Down

- AB 450 imposed fines on private employers of up to $10,000 per violation if they “voluntarily consent” to giving federal immigration authorities access to nonpublic areas of a “place of labor” and/or to employee records, and it mandated that the employer insist that the authorities obtain a judicial warrant or subpoena before such information would be turned over.

Part of AB 450 Stuck Down

- The court also struck down a provision of the law limiting an employer's ability to re-verify an employee's employment eligibility unless otherwise required by federal law on the ground that it "frustrates the system of accountability that Congress designed."
- The court left standing an employer obligation to warn employees with 72 hours written notice of an imminent inspection of I-9 forms by federal immigration authorities.

Part of AB 450 Stuck Down

- Employers may not be prosecuted for:
  - consenting to a federal immigration agent's request to enter the workplace;
  - granting federal immigration enforcement agents access to employee records; or
  - re-verifying an employee's eligibility to work in the United States.
- *US v. State of California*

Ehret v. Winco Foods, LLC

- 2 WinCo employees sued the company for failure to provide meal breaks.
  - These employees signed a CBA providing that an employee who works a shift of not more than 6 hours is not entitled to a meal break.
- Labor Code section 512 allows the employee and employer to waive a meal period of a shift is not more than 6 hours.
- The Court held that the CBA effectively waived the employee's meal periods because it explicitly stated that no meal period is required for shifts under six hours.
  - Because the provision was "flatly irreconcilable" with labor code section 512, it was a "clear and unmistakable" waiver of that statutory provision.
  - The court also flatly rejected the employee's argument that a waiver must explicitly use the words "waiver," "waived" or "waiving."

LEGISLATION SIGNED

Clarification on Salary History Ban

- Definitions:
  - Pay scale: salary or hourly wage
  - Reasonable request: request after an applicant has completed an initial interview
  - Applicant: individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.”
- Adds new LC 432.3(i) clarifying employer can ask about salary expectations

Clarification on Salary History Ban

- Amends Equal Pay Act: prior salary shall not justify any disparity in compensation.
- Any wage differential must be justified by one or more of the specified factors in section 1197.5 (e.g., education, training, experience, seniority system, merit system, etc.)
- AB 2282

Applicants for Employment: Criminal History (SB 1412)

SB 1412 amends Labor Code Section 432.7 and it was enacted as a follow up to the Ban the Box legislation that went into effect in 2018. This new law allows employers to ask an applicant about or to seek from any source, information regarding a particular conviction under the following circumstances.

- (1) Employers are required to obtain information regarding the particular conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
- (2) The applicant would be required to possess or use a firearm in the course of his or her employment.

- (3) An individual with that particular conviction is prohibited by law from holding that position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
- (4) Employers are prohibited by law from hiring an applicant who has that particular conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

Protections from Defamation Claims

- Defamation protections for complaints and investigations of sexual harassment allegations, as well as providing a safe harbor for employers to inform prospective employers that a former employee is ineligible for rehire due to prior sexually harassing behavior.

Protections from Defamation Claims

- “Common interest” privilege would apply to statements made “without malice” relating to a complaint of sexual harassment by an employee to an employer based upon credible evidence.
- AB 2770

California's Response to the #MeToo Movement

- SB 1343: requires all employers with five or more employees, including temporary seasonal employees, to provide at least two hours of sexual harassment training to all supervisory employees, and at least one hour of training to all nonsupervisory employees by January 1, 2020.
- AB 3109: voids any provision which waives a party's right to testify regarding criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding if the person called is pursuant to a subpoena, court order, or written request. Testimony must be in response to subpoena or written request.

California's Response to the #MeToo Movement

- AB 2770: protects both accusers and employers by creating a qualified privilege in three categories:
  - (1) complaints of sexual harassment made by an employee to an employer, based on credible evidence and made without malice;
  - (2) communications between an employer and "interested persons," (i.e., witnesses) regarding complaint of sexual harassment (i.e., communications made in investigations), made without malice;
  - (3) responses by an employer to a reference check as to whether the employer would rehire an employee, and, if not, whether that decision is based on the employer's determination that the former employee engaged in sexual harassment, so long as the statement is made without malice.

California's Response to the #MeToo Movement

- SB 820: concerns NDAs that are related to claims of sexual assault and sexual harassment. Courts will no longer enter any order that restricts the disclosure of factual information related to the claim. The limitation does not include non-disclosure requirements pertaining to the amount paid in settlement of claim. Plaintiff can request provision that shields his/her identity and all identifying facts.
- SB 1300: prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring the execution of a release of a claim under FEHA or from requiring an employee to sign a non-disparagement agreement or other document that would limit the employee's right to disclose information about unlawful acts in the workplace, including sexual harassment. This Bill finds and declares that one single incident can constitute sexual harassment, and harassment cases are rarely appropriate for summary judgment.

Minimum Wage Phase-In of AB 1066

California's Minimum Wage

- Effective January 1, 2019, the state minimum wage for employers with 25 employees or less increased to $11.00 per hour, and $12.00 per hour for employees with 26 employees or more.
- Note: The increase in the minimum hourly wage also has implications for exempt salaried employees because to be exempt, employees must meet both the "duties test" and the "salary test." Effective January 1, 2019, the minimum annual salary for exempt staff increased to $45,760 for employers with 25 employees or less and to $49,920 for employers with 26 or more employees.

Minimum Wage Phase-In of AB 1066

Date	MW for Employers with 25 Employees or Less	MW for Employers with 26 Employees or More
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	$15.00/hour

Exempt Salary (26 or More Employees)

Year	Hourly	Weekly	Monthly	Annually
2019	$12.00	$960	$4,160	$49,920
2020	$13.00	$1,040	$4,506.67	$54,080
2021	$14.00	$1,120	$4,853.33	$58,240
2022	$15.00	$1,200	$5,200	$62,400

Exempt Salary (25 or Less Employees)

Year	Hourly	Weekly	Monthly	Annually
2019	$11.00	$880	$3,813.33	$45,760
2020	$12.00	$960	$4,160	$49,920
2021	$13.00	$1,040	$4,506.67	$54,080
2022	$14.00	$1,120	$4,853.33	$58,240
2023	$15.00	$1,200	$5,200	$62,400

City-Specific Minimum Wage Increases

City	# of Employees	Minimum Hourly Wage Beginning January 1, 2019
Belmont	—	$13.50
Berkeley	—	$15.00
Cupertino	—	$15.00
Emeryville	56 or more 55 or fewer	$15.69 $15.00
Los Angeles (city)	26 or more 25 or fewer	$13.25 $12.00
Malibu	26 or more 25 or fewer	$13.25 $12.00

City-Specific Minimum Wage Increases

City	# of Employees	Minimum Hourly Wage Beginning January 1, 2019
Milpitas	—	$13.50
Mountain View	—	$15.65
Oakland	—	$13.80
Pasadena	26 or more 25 or fewer	$13.25 $12.00
San Francisco	—	$15.00
San Leandro	—	$13.00
Santa Monica	26 or more 25 or fewer	$13.25 $12.00