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CALIFORNIA LABOR AND EMPLOYMENT LAW UPDATE

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Topics

- Practical Implications of New Wage & Hour Cases
- High Risk Areas for Healthcare Employers
- Arbitration Agreements
- Sexual Harassment
- Cannabis and Employee Privacy
- Questions

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Practical Implications of New Wage & Hour Cases

Wage and Hour

Surprising New Rules Regarding On-Call Shift Policies

- *Ward v. Tilly's, Inc.*, California Court of Appeal (February 4, 2019)
- Held employees must be given "reporting time pay" under Wage Order No. 7-2001 when an employer requires its employees to **call in two hours before** a potential shift to learn whether the employee is needed for work and the employee is told **not** to show up for work that day
- This decision does not follow the general understanding that "reporting time pay" would only cover the situation where the employee physically goes into work but is sent home early (due to a lack of work)

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Wage and Hour

Surprising New Rules Regarding On-Call Shift Policies

- The court emphasized the employee's uncompensated opportunity-cost, including:
  (1) the employee's inability to schedule shifts at other jobs, attend classes at school, and commit to social plans;
  (2) the cost of childcare or elder care which the employee may be committed to even if he or she is not called into work; and
  (3) the employee's inability to commit to any other activity incompatible with making a phone call to the employer two hours before his or her potential shift

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Wage and Hour

Surprising New Rules Regarding On-Call Shift Policies

- The court expressly limited its holding to Tilly's alleged on-call system (an on-call system giving employees two hours' notice and disciplining employees for noncompliance); the court did not hold that calling in to work qualified as "reporting" for all possible scenarios
  - It is unclear how *Ward* will be applied to different on-call systems
  - Future courts will likely look at the same opportunity-cost analysis

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Wage and Hour

Risk of Rounding

- *Donohue v. AMN Services, LLC*
  - California Appellate decision from December 10, 2018
  - The court affirmed that a rounding policy is "fair and neutral" where "on average, it favors neither overpayment nor underpayment," *regardless* of whether it involves an underpayment for certain employees or certain periods of time
  - How are you currently analyzing your rounding policy?

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Wage and Hour

Timesheet Certifications

- Lessons from the *Donohue* case
  - The court rejected the plaintiff's declaration as inadmissible where she claimed she did not receive all of her rest and meal periods in contradiction of her timesheet certifications
  - With each submitted timesheet, the plaintiff had certified that she was "provided the opportunity to take all meal breaks to which I was entitled, or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks"

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Wage and Hour

Importance of Accurate Time Records and Document Retention Policies

- Lessons from the California Supreme Court's February 7, 2019 decision in *Goonewardene v. ADP LLC*:
  - The employer is ultimately responsible for ensuring that its employees are provided adequate documentation and records regarding their compensation, not the payroll provider
  - This decision reinforces the rule that employers can face significant liability for the failure maintain appropriate wage and hour records
  - Employers should protect themselves through measures such as indemnification agreements, etc.

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Wage and Hour

California's Labor Code generally* requires that wage statements contain:

1. Gross wages earned
2. Total hours worked
3. The number of piece-rate units earned
4. All deductions
5. Net wages earned
6. The inclusive dates of the period for which the employee is paid
7. Employee's name and last 4 digits of SS or ID number
8. The name and address of the legal entity that is the employer
9. All applicable hourly rates and the corresponding number of hours worked

- *Exempt employees do not need total hours worked
- Employers should also notify employees each pay period of the sick leave they have accrued

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Wage and Hour

Voluntary Meal Period Waivers for Healthcare Employees

- General rule in CA: employers must provide a 2nd meal period for shifts of more than 10 hours, but the employee can waive this if they did not waive the 1st meal period and the total work period is 12 hours or less
- The health care industry lobbied for a more flexible option for its employees, and the IWC amended 2 wage orders to allow health care employees to waive the 2nd meal period **with no 12-hour cap**
- This was challenged in state court, and it went up to the California Supreme Court

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Wage and Hour

Voluntary Meal Period Waivers for Healthcare Employees

- *Gerard v. Orange Coast Memorial Medical Center*
  - California Supreme Court held that voluntary meal period waivers are permissible for healthcare employees who work long shifts, even if they work **more than 12 hours**
- Healthcare employees can choose to waive one of their two meal periods, which preserves a choice for employees who work 12-hour plus shifts and only want to take one meal period

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High Risk Areas for Healthcare Employers

High Risk Areas for Healthcare Employers

Joint Employer Issues

- The NLRB issued proposed rulemaking on the Joint Employer Standard in September 2018
- Under the proposed rule, an employer would be considered a "joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction"

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High Risk Areas for Healthcare Employers

Joint Employer Issues

- Consider the risks when using temporary agencies, including but not limited to:
- Wage and hour: How is the temporary agency paying its employees working at your site?
- Training/policies: Does the temporary agency provide the training and appropriate policies to its employees?
- Indemnification: Do you have an indemnification agreement with temporary agency if its employees sue you?

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High Risk Areas for Healthcare Employers

Non-Solicitation Agreements

- AMN Healthcare Inc. v. Aya Healthcare Services, Inc. (2018)
- The court found that an employee non-solicitation clause as applied to travel nurse recruiters was an invalid and unenforceable restraint on trade, because it effectively restrained recruiters from engaging in their chosen profession
- The fact that it was about recruiters makes it a unique situation
- Barker v. Insight Global (N.D. 2019)
- The court stated that it was "convinced by the reasoning in AMN that California law is properly interpreted ... to invalidate employee non-solicitation provisions"
- Stay tuned for more California cases...

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High Risk Areas for Healthcare Employers

Pre-Employment Background Check Forms

- Gilberg v. Cal. Check Cashing Stores, LLC (9th Cir. 2019)
- The court held a single form combining nearly identical federal and state disclosures violates both federal and state laws
- Employers who conduct pre-employment background checks must now provide applicants with two separate standalone forms:
- Disclosure and consent under Fair Credit Reporting Act; and
- Disclosure and consent under California's Investigative Consumer Reporting Agencies Act (or other applicable state law)
- This applies to employees providing services in California, Arizona, Hawaii, Alaska, Idaho, Montana, Nevada, Oregon and Washington

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Arbitration Agreements

Arbitration Agreements

Diaz v. Sohnen Enterprises (2019)

- Mandatory arbitration
- Plaintiff and coworkers attended in-person meeting where the COO gave notice that it was adopting mandatory arbitration policy
- Employees received a copy of the agreement and the COO explained that continuation of employment would constitute acceptance
- The COO explained that "continued employment by an employee who refused to sign the agreement would itself constitute acceptance"

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Arbitration Agreements

Diaz v. Sohnen Enterprises

- Plaintiff said she did not want to sign agreement
- The COO advised her again that continuing to work would constitute acceptance of the agreement
- 20 days later, Plaintiff and her lawyer presented a letter saying that Plaintiff was rejecting the agreement, but indicating Plaintiff intended to continue employment
- On that same day, Plaintiff filed her lawsuit
- The company filed its Motion to Compel Arbitration
- The trial court denied the motion because the agreement was presented on a "take-it or leave-it" basis and a contract of adhesions

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Arbitration Agreements

The Court of Appeal (Second Appellate District) Reversed

- The appellate court reversed
- "[W]hen an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement"

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Arbitration Agreements

- The court distinguishes this from other cases finding that no agreement was formed where arbitration was a condition of employment
- In Mitri v. Arnel Management Co. (2007) the employee acknowledged receipt of an employee handbook containing an arbitration provision, but the acknowledgement form did not reference or contain any agreement to comply with the arbitration provision
- In Gorlach v. Sports Club Co. (2012) the handbook told employees they had to sign the arbitration agreement, implying it was it was not effective (and unless) they did so
- Here, Plaintiff was already bound by the arbitration agreement prior to presenting her letter purporting to reject it, because she had worked for 20 days after receiving notice

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Arbitration Agreements

Takeaways

- Consider the risks/rewards of mandatory arbitration
- Make sure you can prove that it was communicated to the employees (i.e. email read receipt, signature of acknowledgment, supervisor declaration)
- Incorporate language that expressly says that initiating employment or continuing employment will constitute acceptance of the agreement

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Sexual Harassment

Sexual Harassment

#MeToo and Employment Arbitration

- A recent analysis by the Economic Policy Institute found more than **60 million** U.S. workers are subject to mandatory employment arbitration
- Use of mandatory arbitration has come under fire since the advent of #MeToo, due to the confidential nature of arbitration proceedings
- Some employers have announced they are discontinuing the use of mandatory arbitration

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Sexual Harassment

Sexual Harassment Training Requirements (SB 1343)

- Employers who employ 5 or more employees, including temporary or seasonal employees
- Must provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees
- By January 1, 2020, and once every 2 years thereafter

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Sexual Harassment

Discrimination and Harassment (SB 1300)

- SB 1300 makes it unlawful "for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment" to "require an employee to sign a release of claim or right"
- Prohibits non-disparagements or other agreements that would "deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment"

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Sexual Harassment

Discrimination and Harassment (SB 1300)

- Restrictions do not apply to "a negotiated settlement agreement to resolve an underlying claim . . . that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process," so long as such agreement is voluntary and involves valuable consideration

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Sexual Harassment

What Else Does SB 1300 Do?

- Extends employer liability for sexual harassment committed by non-employees to all forms of harassment prohibited by FEHA, so long as the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action
- Lowers the standard for what types of conduct are sufficiently "severe or pervasive" to constitute actionable harassment under FEHA. Specifically, the bill clarifies that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment"

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Sexual Harassment

What Else Does SB 1300 Do?

- Makes it harder for employers to win summary judgment on harassment claims by expressly codifying that "[h]arassment cases are rarely appropriate for disposition on summary judgment"

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Sexual Harassment

Takeaways

- Update handbooks, policies and protocols regarding harassment in workplace
- Update NDAs and other confidentiality agreements
- Update settlement, separation and severance agreement templates
- Take a critical look at internal investigation policies and internal investigators

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Cannabis and Employee Privacy

Employee Privacy

Marijuana and Drug Testing

- In California, employees have a constitutional right to privacy, which restricts employers from monitoring or controlling off-duty conduct
  - In 1996, California passed the Compassionate Use Act, which permits people to use marijuana to treat medical conditions
  - As of January 2018, adults over 21 may consume, purchase, and possess up to 28.5 grams without facing **state** criminal penalties
- Marijuana use for any reason by anyone is still illegal under **federal** laws
  - But employees' off-duty right to privacy is not concerned with whether the off-duty conduct is legal
- Ultimately, California case law still upholds drug testing and zero-tolerance policies

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Employee Privacy

Marijuana and Drug Testing

- Pre-employment drug testing
  - During this stage, employees have a lesser expectation of privacy
  - Generally permissible when:
    - A conditional job offer has been made
    - There is a reasonable business need to screen applicants
    - Testing is administered in a fair and consistent manner as part of a regular preemployment medical examination, to which all applicants applying for the position are subject

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Employee Privacy

Marijuana and Drug Testing

- Drug testing once the employee has started working
  - Employees have a higher expectation of privacy while employed
  - Generally permissible when:
    - Random testing is based on legitimate or important business necessity
      - Note: Random testing is risky
    - Suspicion-based testing to prevent impaired performance or a safety risk
    - Post-accident testing: acceptable, but limit it to the employee(s) who may have the accident, not just the employee(s) who were injured
      - Otherwise, potential claim based on workers' compensation/disability

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Employee Privacy

Marijuana and Drug Testing

- Courts have held that the FEHA still does not require employers to accommodate employees who use medical marijuana on a physician's recommendation
- Ross v. Raging Wire (2008) Cal. Sup. Ct.
  - "The Compassionate Use Act . . . Simply does not speak to employment law . . . and it did not put employers on notice that they would thereafter be required under the FEHA to accommodate the use of marijuana"

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Employee Privacy

Marijuana and Drug Testing

- Proposed Assembly Bill 2069
  - Would require employers to provide reasonable accommodations for those using marijuana to treat a known physical or mental disability
  - AB 2069 was tabled in the Appropriations Committee in June 2018
  - It will not be the last bill we are likely to see pushing for the FEHA to include limited protections against termination for medical marijuana use

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Questions?

Thank you for joining me!

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