



California Employers' New Year Resolution: Be Prepared for 2016! California Employment Law Updates Webinar

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Today's Presenters



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KEY CASE UPDATES

CALIFORNIA



Wage and Hour: Regular Commute Time Possibly Compensable when Driving Employer's Vehicle

Alcantar v. Hobart Service (September 2015)

- Employer paid for service technician's time spent driving from home to first assignment and from last assignment back home only if it exceeded commute to and from branch office.
- Employee claimed regular commute time compensable because technicians remained under employer's control by driving employer-owned vehicles.
- Employer argued that technicians had a choice of whether or not to drive the service vehicle and therefore not subject to control.
- Ninth Circuit held that there were triable issues of fact as to whether the choice was genuine or illusory given that service technicians were responsible for tools and service parts stolen from vehicles, there were not enough secured parking spots at the company's facility for the vehicles, and no service technicians left their vehicles at work.

Wage and Hour: Drivers Misclassified as Independent Contractors

Alexander v. FedEx Ground Package System, Inc. (Settlement - June 2015)

- Class action by 2,300 FedEx drivers in California who were classified as independent contractors
- Ninth Circuit held that drivers were misclassified as independent contractors because FedEx exercised significant control over drivers, including assigning service areas, controlling which packages were delivered, requiring them to wear FedEx uniforms, paint their vehicles specific colors and mark them with a FedEx logo, and restricting times during which the drivers could provide services
- FedEx agreed to pay \$228 million to resolve the class action – one of the largest employment settlements in recent years

Wage and Hour: Employer may not be Required to Compensate Employees for Security Search

Frlekin v. Apple Inc. (Nov. 2015)

- Employees of Apple's retail stores sought compensation for time spent undergoing off-the-clock searches of their bags, purses, backpacks, briefcases, or Apple products while exiting the store at the end of their shift.
- U.S. District court held that prior cases require that bag checks be mandatory as well as controlled by the employer to be compensable.
- Summary judgment granted to Apple because employees could choose not to bring to work any bag or other items subject to the search rule and therefore avoid the security check.

FEHA: Inability to Work Under a Particular Supervisor Due to Stress Not a Disability

Higgins-Williams v. Sutter Medical Foundation (May 2015)

- Employee complained that she suffered from stress from her interactions with her manager and human resources
- Doctor said she could work without limitation if transferred to another department
- Employer granted employee a leave of absence instead
- After several months of leave, employee was terminated because she could not provide a date by which she could return to her existing position
- Appellate court held that an employee's inability to work under a particular supervisor because of anxiety and stress related to supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA

FEHA: Company Liable for Harassment of Contractor's Employees

Hirst v. City of Oceanside (May 2015)

- Plaintiff was an employee of a contractor working pursuant to a contract that her employer had with the Defendant.
- Plaintiff sued the defendant alleging she was a victim of sexual harassment by an employee of Defendant
- The general rule states that, a “person providing services pursuant to a contract” has standing to sue for sexual harassment.
- Defendant argued that Plaintiff did not have standing to sue under FEHA because she was not actually a party to the contract.
- Court of Appeal held that Plaintiff was a “person providing services pursuant to a contract” as defined in Cal. Gov’t Code § 12940(j)(1) even though she was not herself an independent contractor because she was an employee of a business that had entered into a contract with the Defendant

FEHA: Costs Recoverable by Prevailing Employers only for Plaintiff's Frivolous Suits

Williams v. Chino Valley (May 2015)

- Supreme Court held that unsuccessful FEHA plaintiffs can only be ordered to pay the defendant's ordinary litigation costs if plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit.
- Prior to *Williams*, this standard applied when defendants sought attorneys' fees, but there was a split in authority regarding whether this higher standard applied to awards of ordinary costs under California Code of Civil Procedure section 1032.
- Supreme Court resolved the split and held FEHA's Government Code section 12965(b) is an express exception to Code of Civil Procedure section 1032(b) and the former, rather than the latter, governs cost awards in FEHA cases.

Noncompetition: No-Rehire Provisions may be Invalid

Golden v. Cal. Emergency Physicians Med. Group (April 2015)

- Ninth Circuit called the legality of a no-hire provision into question, holding that Bus. and Prof. Code § 16600 is not just limited to non-compete agreements
- A potential settlement agreement in a discrimination case prevented Plaintiff from working at the emergency rooms and other facilities owned or run by the employer
- Plaintiff argued that this no-hire provision violated section 16600, which voids contracts restraining parties from engaging in a lawful profession, trade or business
- Court that Section 16600 prevents any “restraint of a substantial character,” no matter the form or scope
- Court declined to say if the agreement was actually void, but tasked lower court with additional fact-finding to determine if the provision created a substantial restraint

- *Augustus v. ABM Security Services, Inc. (rev. granted Apr. 2015)*
 - Supreme Court will review decision permitting employer to require that security guards remain “on-call” during rest periods
- *Mendoza v. Nordstrom Inc. (rev. granted Apr. 2015)*
 - Supreme Court will address three questions regarding day-of-rest provisions:
 - Under Labor Code Section 551, is the required day of rest calculated by the workweek or on a rolling basis for any consecutive seven day period?
 - Does the exemption under Section 556 apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week?
 - What does it mean for an employer to “cause” an employee to work more than six days in seven under Section 552: force, coerce, pressure, schedule, encourage, reward, permit, or something else?

- *Kilby v. CVS Pharmacy, Inc. and Henderson v. JPMorgan Chase*
(oral arguments Jan. 2016)
 - Supreme Court will decide the issue of how to interpret “nature of work” warranting suitable seating as referenced by the Wage Orders.
- *Dynamex Operations West, Inc. v. Superior Court* *(rev. granted Jan. 2015)*
 - Supreme Court will decide whether a class can be certified based on the Industrial Welfare Commission definition of employee in a wage and hour case alleging independent contractor misclassification
- *Baltazar v. Forever 21, Inc.* *(oral arguments Jan. 2016)*
 - Supreme Court will decide whether arbitration agreement that provides both parties provisional injunctive relief in courts is unconscionable given employer more likely to use

What's in the Pipeline?

- *Williams v. Superior Court (rev. granted Aug. 2015)*
 - Supreme Court will decide issues surrounding the discovery of aggrieved employees' names and contact information for PAGA actions.

KEY LEGISLATIVE UPDATES CALIFORNIA



State and Local Minimum Wage

State Minimum Wage:

- Currently \$10.00 per hour (as of January 1, 2016)



City Variations:

City/Locality	Wage	City/Locality	Wage
Berkeley	\$11.00/hr	Richmond	\$11.52/hr
Emeryville (<56 employees)	\$12.25/hr	San Diego	\$10.50/hr
Emeryville (56+ employees)	\$14.44/hr	San Francisco	\$12.25/hr
Mountain View	\$11.00/hr	San Jose	\$10.30/hr
Oakland	\$12.55/hr	Santa Clara	\$11.00/hr
Palo Alto	\$11.00/hr	Sunnyvale	\$10.30/hr

Practical Considerations

California Fair Pay Act (SB 358)

- Mandates equal pay across genders “for substantially similar work, when viewed as a composite of skill, effort and responsibility.”
 - Employers bear the burden of proof to demonstrate any difference in pay is reasonably and entirely based on one or more of the following specific factors: seniority, merit, quantity/quality of production or a bona fide factor other than sex.
 - Employee’s may not be discharged, discriminated against, retaliated against or otherwise punished for disclosing, discussing or inquiring about the wages of another employee.
 - This bill creates a private right of action for improper discharge, discrimination or retaliation based on the rights created by the legislation.
- All employers must maintain employee records for at least three years under this legislation.

Amending the Private Attorney General Act and Fair Employment and Housing Act

■ Curable PAGA Violations (AB 1506)

- The following PAGA violations concerning wage statements may be cured before an employee may bring a civil action:
 - Failure to provide employees with an itemized wage statement that contains the inclusive dates of the pay period; and
 - Failure to include the name and address of the legal entity that is the employer.
- Employers only have the opportunity to cure these violations once in a 12-month period.
- Urgency legislation: became effective October 2, 2015.

■ Religious and Disability Accommodation Requests Protected (AB 987)

- Common-sense amendment to FEHA, clarifying that an employer is prohibited from retaliating or discriminating against an employee for requesting a religious or disability accommodation, regardless of whether the request is granted.

Making Some Sense of *Bluford v. Safeway* and *Gonzalez v. Downtown LA Motors, LP*

- **Safe-Harbor for Retroactive Liability, and Compensation for Nonproductive Time and Rest and Recovery Periods (AB 1513)**
 - Legislation creates safe-harbor provision for employers who: (1) notify the Department of Industrial Relations, and (2) compensate affected employees for unpaid wages by December 15, 2016.
 - Nonproductive time (NPT) defined as “time under the employer’s control, exclusive of rest and recovery periods, that is **not directly related** to the activity being compensated on a piece-rate basis.”
 - Must be billed at the higher of a relevant contract rate or minimum wage.
 - Calculation and earnings must be identified on paystubs.
 - In periods where piece-rate compensation is earned, rest time must be calculated by dividing the worker’s total compensation by the hours worked (exclusive of rest time)
 - Must be paid separately from any piece-rate compensation.
 - Calculation and earnings must be identified on paystubs.

- **Clarification of School Activities Leave, “Kin Care” and Paid Sick Leave (SB 579)**
 - Protected school activities now include child care provider or school emergencies, and finding, enrolling or reenrolling in a school or child care provider.
 - The definition of “Parent” is expanded to include a parent, guardian, stepparent, foster parent, grandparent or person who stands *in loco parentis* to the child.
 - Allows “Kin Care” leave for the purposes specified in the Healthy Workplaces, Healthy Families Act of 2014.

■ **Unlawful Use of Federal E-Verify System (AB 622)**

- Expands the definition of “unlawful employment practice” to prohibit an employer from using the E-Verify system at a time or in a manner not required by federal law to check the employment authorization status of a current employee, or of an applicant who has not received an offer of employment.
 - Imposes a \$10,000 civil penalty for each violation

■ **Whistleblower Protection (AB 1509)**

- Extends protections for making *bona fide* complaints under the Labor Code, and for subsequent discrimination, retaliation or other adverse employment action, to family members who either: (1) make a complaint; or (2) who work for the same entity
- Protections expanded to cover “client employers” (e.g. staffing employers and client companies).

■ **Unemployment Insurance (AB 1245)**

- Effective January 1, 2017, requires employers with 10+ employees to file unemployment insurance records, and remit contributions, electronically.

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