

Session 9 - Employment Law Update: Build Your Muscles in 2016

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Session 9

2016 Employment Law Conference ~ *Strength in Balance*

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Agenda

- Wage & Hour Issues
- PAGA
- Discrimination Issues
- Retaliation Issues
- Terms & Conditions of Employment

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Piece-Rate Compensation

- Labor Code § 226.2 imposes additional requirements that increase the complexity of paying employees on a piece-rate basis.
- **Impact:**
- Ensure that employees are separately compensated for rest and recovery periods and all non-productive time.
- Properly calculate the wages owed during those periods.
- Ensure itemized wage statements of piece-rate employees contain all piece-rate information as required.

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California Fair Pay Act

- In 2015, SB 358 was enacted to address the gender wage gap in California and expanded equal pay protections under existing law. SB 358 modified Labor Code § 1197.5.
- **Impact:**
- Ensure equal employment opportunity and anti-discrimination policies expressly prohibit wage discrimination.
- Refrain from prohibiting or discouraging employees from discussing their wages or the wages of other employees.
- Audit pay practices for pay differentials.
- Document guidelines and requirements for salaries and bonuses.
- Train managers to comply with federal and state equal pay laws.

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California Fair Pay Act *Continued*

- Introduced February 16, 2016, SB1063 could further amend Labor Code § 1197.5 to include race and ethnicity.
- **Impact:**
- Employers should monitor the progress of SB 1063 which may be acted upon as early as March 2016.

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EEOC Proposes Requesting Equal Pay Data From Employers

- On July 14, 2016, the EEOC published a revised proposed plan to require employers with 100 or more employees to report pay data in an effort to uncover potential pay discrimination.
- **Impact:**
- If finalized, employers will face an additional administrative burden in compiling this annual report.
- Data may be used to bring actions for alleged pay discrimination.
- Be prepared to provide detailed explanations for pay discrepancies.

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Pending Legislation: The Double Pay on the Holiday Act of 2016

- AB 67, which was read for the first time on January 27th, would enact Labor Code § 511.5. This section would require retail and grocery store employers to pay at least 2x the regular rate of pay to an employee who works on Thanksgiving Day.
- **Impact:**
- The most recent version revises the double pay requirement to apply to employers with more than 500 employees.
- Retail and grocery store organizations who meet this criteria should stay up on this new proposal for holiday pay.

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Pending Wage & Hour Cases to Watch

- **California's Day-of-Rest Requirements**
 - Labor Code §§ 551 and 552
 - *Mendoza v. Nordstrom, Inc.* (9th Cir. 2015) 778 F.3d 834
- **Impact:**
- Until a decision is rendered by the CA Supreme Court, consider implementing policies and procedures that ensure employees do not work more than six consecutive days.
- May reduce potential exposure in the event of an adverse ruling by the Court.

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Pending Wage & Hour Cases to Watch

Continued

- **On-Call Rest Periods**
 - *Augustus v. ABM Security Service, Inc.* (2014) 233 Cal.App.4th 1065
- **Impact:**
- Until a decision is rendered by the CA Supreme Court, employers should relieve employees of all duties during their rest breaks.
- If employees remain on call or otherwise available to work during their rest breaks, employers should implement procedures to allow employees to report interrupted rest breaks.
- Be prepared to pay employees one hour of premium pay for missed rest breaks if the employee performs work.

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Pending Wage & Hour Cases to Watch

Continued

- **Automobile Salesperson Exemption**

– *Navarro v. Encino Motorcars, LLC* (9th Cir. 2015) 780 F.3d 1267

- **Impact:**

- Under Wage Order 7, §3(D), commission salespersons who sell to the public, such as service advisors, may be exempt from overtime if their earnings exceed one-and-one-half CA minimum wage, and more than half of the employee's compensation represents commissions.
- A similar exemption is contained in the FLSA. (29 U.S.C § 207(i).) Where employees meet the criteria and are compensated in accordance with the provision, *Navarro* will be insignificant.

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Revisions to FLSA Overtime Provisions

- **Proposed Increase in Federal Salary Basis Test**

- Minimum salary to \$47,476.

- **Impact:**

- Start preparing for the new regulations now by reading the proposed rule and the DOL's FAQs publication.
- The final regulations should be published in July 2016 and could become effective 60 days later.

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PAGA Issues



- Allows individual employees to bring a representative lawsuit for civil penalties on behalf of other aggrieved employees based on alleged Labor Code violations. (Labor Code §2699)

– *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348

– *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425

- **Impact:**

- A PAGA waiver is not currently enforceable under *Sakkab* and *Iskanian*.
- Employers may still compel arbitration on the underlying Labor Code claims.

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SB 836 (6/27/16)

- PAGA claims & responses must be filed online with \$75 filing fee
- Extends review period to 60 days for LWDA
- Plaintiff cannot file suit until 65 days after sending PAGA notice
- Employer still has only 33 days to cure

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Limited "Cure" Period for Wage Statement Violations

- Labor Code § 226 requires employers to provide employees itemized wage statements containing nine specific items, including inclusive dates of pay and the name/address of the employer.
 - Allows employees suffering injury to recover all actual damages
 - Effective October 2, 2015, Assembly Bill 1506 amended PAGA to provide employers a limited opportunity to cure a violation
- **Impact:**
- Employers who receive a PAGA notice regarding defective itemized wage statements should immediately take steps to determine whether they are able to cure the violation.

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Curtailment of PAGA Suits May Be On The Horizon

- Governor Brown recently submitted a budget proposal to the California Legislature that would increase state oversight of PAGA claims and amend the PAGA statute.
- **Impact:**
- The proposal could make it more difficult for employees to bring PAGA claims against employers.
- Could lower the cost of doing business in CA.
- Proposal could increase the rate of administrative handling of PAGA cases vs. the courts.
- Proposal already facing criticism from individuals who view the proposed changes as an attack on worker protections.

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Discrimination Issues



- Requesting a Reasonable Accommodation is Now Protected Conduct.
 - AB987 amended FEHA to prohibit retaliation
 - *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425
- **Impact:**
- Train managers on the revised version of the FEHA and ensure that company policies and practices conform to the law.


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Violating Company Policy During CFRA Leave

- On January 29, 2015, the CA Supreme Court issued a decision demonstrating employees are not completely insulated from disciplinary action during/after CFRA leave.
 - *Richey v. AutoNation, Inc.* (2015) 60 Cal. 4th 909.
- **Impact:**
- The *Richey* decision highlights the importance of carefully documenting policies, procedures, and communications with employees.

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Retaliation Issues



- Labor Code §132a, makes it a misdemeanor for an employer to discriminate against an employee who has filed a workers' compensation claim.
 - *Prue v. Brady Company/San Diego, Inc.* (2015) 242 Cal. App. 4th 1367
- **Impact:**
- Be aware that discharging an employee in close proximity to a filing of a workers' compensation claim may expose the employer to charges of retaliation pursuant to Labor Code § 132a.

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Increased Scope of Anti-Retaliation Rules

- CA employers prohibited from retaliating against an employee who makes a complaint to a government or law enforcement agency.
 - *Cardenas v. M. Fanaian, D.D.S., Inc.* (2015) 240 Cal.App 4th 1167
 - Employee has reasonable cause to believe that information discloses a violation of state or federal law
- **Impact:**
- Provides clarification of protected conduct.
- Be wary should conduct be considered protected activity.

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EEOC Position Statement

- In a 2/18/16 press release, the EEOC will give employees access to employer position statements.
- **Impact:**
- Ensure rationales for employment decisions remain consistent throughout litigation.

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Terms and Conditions of Employment



- Suitable Seating Requirement. "When the nature of work reasonably permits the use of seats."
 - *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 2013) 739 F.3d 1192.
- **Ruling (CA Supreme Court - April 2016):**
- Review tasks performed at a specific work location
- Consider totality of circumstances including business judgment and workspace layout

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Bills Prohibiting Human Trafficking

- AB 1595 is moving through the legislature which would require employers to provide mass transportation services to train certain employees to recognize the signs of human trafficking and how to report.
- **Impact:**
- Expect more government scrutiny for signs of forced exploitative labor.

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Hiring Practices

- Prohibition in requesting salary information.
- Prohibition on inquiries regarding custodial detentions and juvenile convictions.
- **Impact:**
- If proposed laws enacted, ensure that interviewers of prospective employees understand the prohibitions against requesting pay and criminal histories.

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Thank You

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