The Labor & Employment Year in Review: Is it Over Yet?

West Coast Session

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Speakers

David Ian Dalby
Partner
Hinshaw & Culbertson LLP

Mellissa A. Schafer
Partner
Hinshaw & Culbertson LLP

Case Law Update

Supreme Court and Beyond

Bostock v. Clayton County, Georgia, June 15, 2020

- 3 consolidated cases, each of which alleged sex discrimination under Title VII for unlawful termination on the basis of being gay or transgender
- Court extended Title VII protections to sexual orientation and gender identity

Our Lady of Guadalupe School v. Morrison-Berry, July 8, 2020

- Narrowed employment protections to secular school teachers in religious schools
- Applied "ministerial exception," which bars ministers from suing churches and other religious institutions for employment discrimination, by extending it to lay schoolteachers, because they played a key role in teaching religion to their students.
- Court's decision makes clear that a variety of factors (and not a fixed formula) may be important to the analysis of whether an employee "performed vital religious duties" when allowing an employer to use the First Amendment to shield it from employment discrimination claims.

Comcast Corp. v. National Association of African American-Owned Media et al., March 23, 2020

- Clarifies the burden for plaintiffs to meet in discrimination claims under 42 U.S.C. § 1981
- Plaintiff's must prove that "but-for" the existence of a certain fact (ex. race), they would not have been subjected to some complained-of adverse treatment
- Employers should take preventative measures to defend against such claims

Babb v. Wilkie, Secretary of Veterans Affairs, April 6, 2020

- Expands protections for federal workers under the Age Discrimination in Employment Act of 1967 (ADEA)
  - The Court's decision to apply the "motivating factor" test instead of the "but-for" test for causation is now used when considering age discrimination claims for federal workers
    - However, the but-for test still applies when obtaining remedies such as back pay, compensatory damages or reinstatement
  - For federal employees, an employer is liable if an employee proves age "taints the making of a personnel action" even if the agency would have reached the same outcome without considering age. Babb v. Wilkie, 140 S. Ct. 1168, 1181 (2020).
- This decision does not apply to private employers

Equal Pay Act – Rizo v. Yovino (9th Cir)

- Quick background: Math consultant (with 2 master degrees) for County of Fresno. County sets salaries by evaluating last salary earned and then using a progressive pay step system. Rizo determine that her male colleagues made more than her.
- Trial Court: County moved for summary judgement, which was denied noting that prior salary can never alone qualify as a factor other than sex.
- Appeal: Prior salary cannot be the sole justification to explain a pay difference between sex as historically, women made less than men. One of the 9th Circuit Appellate Judges died 11 days before the Opinion issued.
- Supreme Court remanded the case due to the death of the Appellate Judge.

Equal Pay Act – Rizo v. Yovino (9th Cir)

- 2/27/20 9th Circuit *en banc* decision: Appellate court, in essence , maintained the prior decision. "Setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination." This goes against the Equal Pay Act, which was enacted to eradicate women making less simply because they are women.
- Two concurring opinions maintain that prior wage can be a benchmark or a factor IF it does not encourage gender discrimination.
- 9th Circuit joins the 10th and 11th Circuit. However, the 7th and 8th Circuit differ noting that reliance on prior salary does not by itself violate the Act.

Religious Accommodation – EEOC v. Walmart

- Assistant manager candidate received an offer of employment to work at a 24 hour Walmart location that had one store manager and eight assistant managers. The assistant managers were required to work weekends. After receiving, the candidate advised Walmart that he could not work Saturdays due to his religion. Walmart withdrew the offer of employment, but, offered the candidate a non-managerial position as well as the assistance of Human Resources in his job search. Candidate filed suit alleging claims of religious discrimination and retaliation under Title VII.
- Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that could be accommodated without undue hardship.
- District Court granted Walmart's motion for summary judgment finding Walmart had offered a reasonable accommodation and that accommodating the candidate's request would have resulted in an undue hardship. Walmart did not need to create a permanent shift assignment for this candidate when the other assistant managers were not given the same benefit.
- A reasonable accommodation is one that eliminates the conflicts between employment requirements and religious practices. The offer of a non-exempt hourly position was a reasonable accommodation despite the difference in pay as it allowed the candidate to have Saturday off.

Federal Paid Leave Update

FFCRA

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FFCRA Overview

- **Emergency Paid Sick Leave**
  - Up to 80 hours (first 10 days)
  - 6 reasons
  - Full pay for first 3 reasons, 2/3 pay for last 3, subject to caps
- **Emergency FMLA**
  - Up to 12 weeks, first 2 unpaid
  - 1 reason only
  - Weeks 3-12 at 2/3 pay, subject to caps

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Emergency Family and Medical Leave Expansion Act

- Effective Period: April 2, 2020 – December 31, 2020
- Eligible employee for purposes of leave under this expansion means any employee who has been **employed for at least 30 calendar days**
- Covered employer for purposes of leave under this expansion is any employer with **fewer than 500 employees**

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Emergency Paid Sick Leave Act

- Effective period: April 2, 2020 – December 31, 2020
- Eligible employees includes any individual employed by an employer (FLSA), no exclusion based on date of hire
- Covered employer for purposes of leave under this law is any employer with **fewer than 500 employees**

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Is my business an employer subject to the FFCRA?

- If you have *less* than 500 employees, you are a covered employer that must provide PSL and EFMLA leave.
  - Health Care Provider Exemption
  - Small Business Exemption (fewer than 50) employees

If I have less than 50 employees, can I deny all FFCRA leave requests?

- No. If you have less than 50 employees, you may be eligible for the small business exemption which allows you to deny leave only when the basis for leave is due to the need to care for a son or daughter due to the closure of school/childcare
- You must meet the requirements of § 826.40(b)

Requirements of § 826.40(b)

- Must confirm that the imposition of the leave would jeopardize the viability of the business by having an authorized officer of the business determine:
  - The leave would result in the expenses and financial obligations exceeding available business revenues and cause the business to cease operating at minimal capacity;
  - The absence of the employee would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge or responsibilities; OR
  - There are insufficient workers able, willing and qualified who will be available at the time/place needed to perform the services provided by the employee requesting leave and these services are needed for the business to operate at minimal capacity.

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State of NY v. US DOL

- Federal court in the Southern District of NY struck down four key aspects of the DOL Final Rule implementing provisions of the FFCRA:
  - "Work availability" requirement
  - Definition of "health care provider"
  - Employer agreement for intermittent leave
  - Documentation requirements

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DOL Issues Revisions to Rule

- "Work availability" Requirement- EPSL and EFMLA grant paid leave to employees who are "unable to work (or telework)" due to a need for leave because of a specific COVID related circumstance.
  - Excluded employees from FFCRA benefits whose employers "do not have work" for them.
  - Limited to only 3 of 6 reasons for leave, rational for requirement deemed lacking.
- September 11, 2020 DOL issued new temporary rule addressing court decision, stands by "work availability" requirement, effective September 16, 2020

DOL Issues Revisions to Rule

- "Work availability"
  - Stands by "but for" causation interpretation… the qualifying reason must be the actual reason the employee is unable to work.
  - Clarifies that rule applies to all grounds for leave, not selectively to 3 of 6
  - Additional rationale and justification for regulation
    - Paid *leave* from work, very use of the term leave is best understood to require an employee is absent from work at a time when he or she would otherwise have been working
    - Consistent with DOL's interpretation of leave within the FMLA generally, when employer's operations not open, it does not count against an employee's FMLA leave entitlement.

DOL Issues Revisions to Rule

- Work availability caution
  - This requirement cannot be used by an employer to avoid granting FFCRA leave by purporting to lack work for an employee.
    - Not an hour by hour assessment as to whether the employee would have work to perform but rather whether the employee would have reported to work at all
  - The requirement should be understood in the context of the applicable anti-retaliation provisions, which prohibit an employer from discharging, disciplining or discriminating against employees for taking leave

DOL Issues Revisions to Rule

- "Health Care Provider"- The EFMLA and PSL both provide that an employer may elect to exclude an employee who is a "health care provider or emergency responder" from the benefits provided under the statutes.
  - FFCRA adopts the Family and Medical Leave Act's (FMLA), definition of "health care provider," which defines them as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate)," or "**any other person determined by the Secretary to be capable of providing health care services**."
- The rule, however, provided a broader definition and included **anyone employed at** any… hospital,… nursing facility, retirement facility, nursing home, home health care provider, … or similar institution, Employer or entity. Also included anyone that the highest official of a State determines is a health care provider necessary for the response to COVID-19.
- Revised rule adopts a narrower definition of health care provider.

DOL Issues Revisions to Rule

- "Health care provider" for purposes of the exclusion now defined to focus on the employee
- An employee is a health care provider if he or she is:
  - "capable of providing health care services."
  - "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and that, if not provided, would adversely impact patient care…"

DOL Issues Revisions to Rule

- "Health care provider" exemption
  - No longer enough for an employee to simply be employed by an entity that provides health care services
  - Definition includes nurses, nurse assistants, medical technicians and other persons who directly provide covered services
  - Those who provide covered services under the supervision, order or direction of or providing direct assistance to a covered health care provider (i.e. nurses, nurse assistants, medical technicians…)
  - Employees who are otherwise integrated into and necessary to the provision of health care services, such as lab techs who process results

DOL Issues Revisions to Rule

- Intermittent Leave- the original rule permitted employees to take FFCRA leave intermittently only if the Employer and Employee agree and only under a subset of qualifying reasons.
  - Limits the exercise of intermittent leave to "circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees."
- DOL reaffirms its position that employer approval is required to take FFCRA leave intermittently. Adds expanded rationale and support tied to FMLA.

DOL Issues Revisions to Rule

- Intermittent leave approval caution with hybrid school plan
  - FFCRA leave in full-day increments to care for a child whose school is operating on an alternate day (or other hybrid-attendance) basis is not considered an intermittent leave.
  - Per the DOL, in an alternate day/hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as directed by the school, not the employee.
  - Each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that).
  - Intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly.

DOL Issues Revisions to Rule

- The FFCRA permits employers to require employees to follow reasonable notice procedures to continue to receive paid sick leave after the first workday (or portion thereof) of leave. Sec. 5110(5)(E).
- 3102(b) of the FFCRA requires employees taking EFMLA to provide their employers with notice of leave as practicable, when the necessity for such leave is foreseeable.
- Documentation requirement- despite the above, the DOL rule required employees to submit documentation to the employer “prior to taking [FFCRA] leave” ...

DOL Issues Revisions to Rule

- Revised regulations clarify that the documentation need not be given "prior to" taking FFCRA leave, but may be given as soon as practicable, which in most cases will be when the employee provides notice to the employer
- For EFMLA, advanced notice is required as soon as practicable. If the need for leave is foreseeable, that will generally mean providing notice before taking the leave.

EEOC Update

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Opioid Use & Accommodation

- EEOC issued guidance this month on opioid-related disability issues and reasonable accommodation
  - Employers dealing with opioid use in the workplace have the right to assess whether the use is pursuant to a prescription, a medically-assisted treatment (MAT) program, or unlawful use, which includes the non-prescribed abuse of controlled substances, including codeine, oxycodone, and other opioids.

  - Opioid addiction ("opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be an ADA disability requiring reasonable accommodation.
  - Employees lawfully taking opioids because they have a prescription, are entitled to reasonable accommodation, so long as it does not pose a significant cost or an unreasonable burden on the operations of the employer or fellow employees.
  - An employer may deny an accommodation if the employee is using opioids illegally, even if the employee has an OUD. Further, employers are able to terminate employees for the unlawful use of opioids, even if there are no performance or safety problems.

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Employee Screenings

- ✓ Temperature checks
- ✓ Maintaining log of checks

- ✓ Monitoring for COVID-19 Symptoms
- ✓ Requiring symptomatic or potentially exposed employees to remain home

ADA & Employee Screenings

✓ COVID Testing

x Anti-body testing, however, is not deemed sufficiently accurate or reliable to meet the ADA standards for medical exams of employees

ADA Compliance Beyond the Basics

- Any logs maintained are confidential health records under the ADA and must be handled as such.
- An employer's obligations for non-discrimination and reasonable accommodation remain in force, so do not lose sight of compliance

DOL Update

DOL Issues New FMLA Forms

- https://www.dol.gov/agencies/whd/fmla/forms
- Issued July 17, 2020
- DOL forms remain optional, but include information that must be communicated to the employee
  - Notice of Eligibility & Rights and Responsibilities
  - Designation Notice
  - Certifications of Health Care Provider for Serious Health Condition and Military Family Leave

DOL: Independent Contractor Proposed Regulations

- "Core Factors"
  - The nature and degree of the worker's control over the work; and
  - The worker's opportunity for profit or loss based on initiative and/or investment
- Additional "Guideposts"
  - The amount of skill required for the work;
  - The degree of permanence of the working relationship between the worker and the potential employer; and
  - Whether the work is part of an integrated unit of production

DOL: Fluctuating Workweek

- Fluctuating work week can be used to compute overtime if employee's hours vary from week to week and other factors are met.

- DOL issued opinion letter on 8/31/20 clarifying that an employee's hours do not need to fluctuate above and below 40 hours per week to use this method of calculation

DOL: Salary Basis

- Effective January 1, 2020
- Threshold for Executive, Administrative and Professional Employees under the FLSA now $684/week ($35,568 per year)

- "Highly compensated employees" at $107,432 per year

NLRB Update

29 CFR § 103.40 Joint Employers - NLRB Final Rule

Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (2018)

In 2015, the NLRB issued a new joint-employer standard in ***Browning-Ferris Industries***, overruling cases holding that an entity must exercise direct and immediate control over the essential terms and conditions of employment of another entity's employees to be a joint employer under the National Labor Relations Act (NLRA). The board held that **indirect control or unexercised contractually reserved control alone could be enough**.

Upon review in 2018, the court of appeals held that unexercised reserved control and indirect control, analyzed as to the essential terms and conditions of employment, can be relevant factors in determining whether the entity is a joint employer.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(a) An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act, 29 USC §151 et seq.), may 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.** To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, **the entity must possess and exercise** such substantial direct and immediate control over one or more essential terms or conditions of their employment as **would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees**. [¶ inserted]

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(a) continued

Evidence of the entity's **indirect control** over essential terms and conditions of employment of another employer's employees, **the entity's contractually reserved but never exercised authority** over the essential terms and conditions of employment of another employer's employees, or **the entity's control over mandatory subjects of bargaining** other than the essential terms and conditions of employment **is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment**. Joint-employer status must be determined on the **totality of the relevant facts** in each particular employment setting. **The party asserting that an entity is a joint employer has the burden of proof**. (Emphasis added)

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(b) ‘‘Essential terms and conditions of employment’’ means **wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction**.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(c) ‘‘Direct and Immediate Control’’ means the following with respect to each respective essential employment term or condition:

(1) Wages.

An entity exercises direct and immediate control over wages if **it actually determines the wage rates, salary or other rate of pay that is paid to another employer’s individual employees or job classifications**. An entity does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(2) Benefits.

An entity exercises direct and immediate control over benefits if **it actually determines the fringe benefits to be provided or offered to another employer's employees**. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. An entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm's-length contract, to participate in its benefit plans.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(3) Hours of work.

An entity exercises direct and immediate control over hours of work if **it actually determines work schedules or the work hours, including overtime, of another employer's employees**. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(4) Hiring.

An entity exercises direct and immediate control over hiring if **it actually determines which particular employees will be hired and which employees will not**. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(5) Discharge.

An entity exercises direct and immediate control over discharge if **it actually decides to terminate the employment of another employer's employee**. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(6) Discipline.

An entity exercises direct and immediate control over discipline if **it actually decides to suspend or otherwise discipline another employer's employee**. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(7) Supervision.

An entity exercises direct and immediate control over supervision by **actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals**. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(8) Direction.

An entity exercises direct and immediate control over direction **by assigning particular employees their individual work schedules, positions, and tasks**. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(d) ‘‘Substantial direct and immediate control’’ means direct and immediate control that **has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees**. Such control is not ‘‘substantial’’ if only exercised on a sporadic, isolated, or de minimis basis.

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29 CFR § 103.40 Joint Employers - NLRB Final Rule

(e) ‘‘Indirect control’’ means indirect control over essential terms and conditions of employment of another employer’s employees **but not control or influence over setting the objectives, basic ground rules, or expectations for another entity’s performance under a contract**.

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29 CFR § 103.40 Joint Employers - NLRB Final Rule

(f) ‘‘Contractually reserved authority over essential terms and conditions of employment’’ means **the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer’s employees, but that has never been exercised**.

California Legal Update

So Much and So Little Time

Minimum Wage Update

Minimum Wage

- The minimum wage will increase in January to $14 an hour for workers at businesses with more than 25 employees, and to $13 an hour for businesses with 25 or fewer employees.
- Some counties and/or cities have already reached or exceeded this amount.
- Governor Newsom had not halted this increase despite the pandemic.

2020 California Minimum Wage City by City

© Paycor 10/7/20

County or City	2020 Minimum Wage	2021 Minimum Wage	2020 Minimum Wage for Small Businesses	2021 Minimum Wage for Small Businesses
California	$13.00	$14.00	$12.00	$13.00
Alameda	$15.00	$15.00	-	-
Belmont	$15.00	$15.90	-	-
Berkeley	$16.07	$16.07 + CPI (on 7/1)	-	-
Cupertino	$15.35	$15.35 + CPI	-	-
Daly City	$13.75	$15.00	-	-
El Cerrito	$15.37	$15.37 + CPI	-	-
Emeryville	$16.84	$16.84 + CPI (on 7/1)	-	-
Fremont	$13.00	$15.00 + CPI (on 7/1)	$13.50	$15.00 (on 7/1)

County or City	2020 Minimum Wage	2021 Minimum Wage	2020 Minimum Wage for Small Businesses	2021 Minimum Wage for Small Businesses
Half Moon Bay	$15.00	$15.00	-	-
Hayward**	$13.00	$15.00	$12.00	$14.00
Los Altos	$15.40	$15.40 + CPI	-	-
Los Angeles	$15.00	$15.00	$14.25	$15.00 (on 7/1)
Los Angeles County	$15.00	$15.00	$14.25	$15.00 (on 7/1)
Malibu	$15.00	$15.00	$14.25	$15.00 (on 7/1)
Menlo Park	$15.00	$15.00 + CPI	-	-
Milpitas	$15.40	$15.40 + CPI (on 7/1)	-	-
Mountain View	$16.05	$16.05 + CPI	-	-
Novato*	$14.00	$15.00	$13.00	$14.00
Oakland	$14.14	$14.14 + CPI	-	-

County or City	2020 Minimum Wage	2021 Minimum Wage	2020 Minimum Wage for Small Businesses	2021 Minimum Wage for Small Businesses
Palo Alto	$15.40	$15.40 + CPI	-	-
Pasadena	$15.00	$15.00	$14.25	$15.00
Petaluma	$15.00	$15.00 + CPI	$14.00	$15.00
Redwood City	$15.38	$15.38 + CPI	-	-
Richmond	$15.00	$15.00 + CPI	-	-
San Carlos**	-	$15.00 + CPI	-	-
San Diego***	$13.00	$14.00	-	-
San Francisco	$16.07	$16.07 + CPI (on 7/1)	-	-
San Jose	$15.25	$15.25 + CPI	-	-

County or City	2020 Minimum Wage	2021 Minimum Wage	2020 Minimum Wage for Small Businesses	2021 Minimum Wage for Small Businesses
San Leandro	$15.00	-	-	
San Mateo	$15.38	$15.38 + CPI	-	-
Santa Clara	$15.40	$15.65	-	-
Santa Monica	$15.00	$15.00	$14.25	$15.00 (on 7/1)
Santa Rosa	$15.00	$15.20	$14.00	$15.20
Sonoma	$13.50	$15.00	$12.50	$14.00
South San Francisco	$15.00	$15.00 + CPI	-	-
Sunnyvale	$16.05	$16.05 + CPI	-	-

Wage & Hour Update

SB 1384

Arbitration of Wage Claims

- The amends Labor Code section 98.4 to allow the Labor Commissioner to provide representation to an employee opposing an employer's petition to compel arbitration of the claim and represent the employee in an arbitration concerning the claim.

AB 1512

On-Call Rest Breaks in Security Industry

- Amends the Labor Code section 226.7, the rest break statute, to allow unionized security guards to remain on-call during their rest breaks.

AB 5 and Moving Forward

Dynamex

- In 2018, the California Supreme Court issued the *Dynamex* decision which adopted the "ABC test" to determine if a worker was an employee or an independent contractor. Despite the *Dynamex* holding, the independent contract argument remains in the news with AB 5, AB 2257 and Proposition 22.
- **ABC Test**

  A hiring entity classifying an individual as an independent contractor now bears the burden of establishing that such a classification is proper under the "ABC test." To do so, the entity must prove each of the following three factors:

  - (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;
  - (B) that the worker performs work that is **outside the usual course** of 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.

AB 5

- AB 5, effective 1/1/2020, adopted the *Dynamex* standard—the "ABC test"—for determining whether a worker is an employee or an independent contractor. While AB 5 has applied to California's Labor and Unemployment Insurance Codes since January 1, 2020, the ABC test did not apply to California Workers' Compensation until July 1, 2020.
- AB 5 expanded *Dynamex* where it makes the ABC test applicable to all Labor Code, Unemployment Insurance Code or Wage Order claims.
- Under the ABC test, an individual is presumed to be an employee and not an independent contractor, unless the hiring entity satisfies all three conditions under the ABC test.
- AB 5 has been litigated in the courts by numerous industries seeking an exemption to AB 5.

AB 5 and 1099 Independent Contractors

- Numerous industries categorized their service workers as 1099 independent contractors including truck drivers, gig economy workers, exotic dancers, IT workers, high level managers, entertainment industry, health care professionals, and janitors and housekeepers to name a few.

Enter AB 2257: Exemptions to AB 5

- Effective immediately.
- Provides for further exemptions from AB 5 including:
  - Business to business exemption
  - Referral agency exemption
  - Professional services exemption

Enter AB 2257: Exemptions to AB 5

- Sound recording or musical composition exemption
- Construction subcontractor exemption
- Data aggregator exemption
- Specific occupation exemptions
- Motor club exemption
- Real estate appraisers and home inspectors
- Insurance underwriters
- Fine artists, freelance writers, translators, editors, advisors, producers, copy editors, illustrators

AB 5 and Gig Economy Workers

- No exemption to date.
- Uber and Lyft disagree with AB 5 and requested an exemption. In response, the Attorney General for the State of California brought an action on behalf of the people seeking a preliminary injunction against Uber and Lyft that restrains them from classifying their drivers as independent contractors. It was granted on August 10, 2020. Uber and Lyft appealed.
- On October 22, 2020, the California Court of Appeals upheld the preliminary injunction that restrains Uber and Lyft from classifying their drivers as independent contractors.

Proposition 22

- Proposition 22 would consider app-based drivers to be independent contractors and not employees or agents. Therefore, the ballot measure would override AB 5, signed in September 2019, on the question of whether app-based drivers are employees or independent contractors.
- The ballot initiative would define *app-based drivers* as workers who (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform. Examples of companies that hire app-based drivers include Uber, Lyft, and DoorDash. The ballot measure would not affect how AB 5 is applied to other types of workers.
- And now we wait until election day, November 3, 2020.

California Consumer Privacy Act (CCPA) Update

The CCPA

- The California Consumer Privacy Act of 2018 (CCPA) gives consumers more control over the personal information that businesses collect about them. This landmark law secures new privacy rights for California consumers, including:
  - The right to know about the personal information a business collects about them and how it is used and shared;
  - The right to delete personal information collected from them (with some exceptions);
  - The right to opt-out of the sale of their personal information; and
  - The right to non-discrimination for exercising their CCPA rights.
- Businesses are required to give consumers certain notices explaining their privacy practices.
- Effective 1/1/2020. Enforced as of 7/1/2020.

The CCPA

- The CCPA applies to for-profit businesses that do business in California and meet any of the following:
  - Have a gross annual revenue of over $25 million;
  - Buy, receive, or sell the personal information of 50,000 or more California residents, households, or devices; or
  - Derive 50% or more of their annual revenue from selling California residents' personal information.

AB 1281

Extends Employer Exemption Under the Privacy Act

- Approves the continuation of an exemption under the California Consumer Privacy Act (CCPA) for personal information collected in the employment context and certain information collected in the course of a business-to-business (B2B) transaction or about B2B-related personnel.

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Family Leave Update

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SB 1383 – CFRA Expansion to Small Employers

- Previously CFRA did not apply to employers with fewer than 50 employees within a 75 mile radius. In addition, it did not require employers with fewer than 20 employees within a 75 miles to provide baby bonding.
- SB 1383 expands CFRA to now cover businesses with as few as five employees to provide an otherwise eligible employee with up to 12 weeks of unpaid leave during any 12 month period. Effective 1/1/21.
- An employee is eligible if they have 12 months with the employer and have worked 1250 hours in the previous 12 month period.
- The employer must maintain and pay for employee's health insurance just as if the employee was working.

SB 1383 – Expanded Reasons for Leave

- Leave can be taken now for the following reasons:
  - To bond with a new baby;
  - To care for themselves, a child, a parent, a grandparent, grandchild, sibling, domestic partner (previously it was child, parent, spouse or domestic partner);
  - Because of a qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the Armed Forces of the United States

SB 1383 – Other Changes

- If an employer employs both parents of a child, each parent is entitled to 12 weeks assuming they meet the eligibility requirements.
- Cannot refuse reinstatement of key employees.
- CFRA may or may not run concurrent with FMLA anymore.

AB 2017

- AB 2017 provides employees sole discretion to designate days taken as paid sick leave to attend to the illness of a family member (amending Section 233 of the Labor Code).
- Effective 1/1/21.

Settlements and Other Employment Updates

AB 1947

Extends Time for a Claim to the Labor Commissioner Authorizes Attorney Fee Award in "Whistleblower" Actions

Amends the Labor Code in two ways:

- Extends the time from 6 months to 1 year for a person to file a claim with the Labor Commissioner for wrongful discharge or discrimination under Labor Code Section 98.7
- Amends Labor Code Section 1102.5 to expressly authorize the courts to make an award of reasonable attorney's fees to an employee who prevails on a "whistleblower" claim.

AB 2143

No Rehire Provisions in Settlement Agreements

- Amends Code of Civil Procedure section 1002.5 prohibiting the inclusion of no rehire provisions in settlement agreements in employment cases by establishing stricter requirements for satisfying exceptions to the prohibition based on sexual assault, sexual harassment or criminal conduct.

SB 973

Employer Pay Data Reporting

- The law requires private employers with 100 or more employees to submit an annual pay data report to the California Department of Fair Employment and Housing ("DFEH").
- Employers with multiple establishments in California would be required to file a report for each establishment, as well as a consolidated report. The first annual report is due on or before March 31, 2021, and subsequent annual reports would be due on or before March 31 each year thereafter.

Last but not least – COVID-19 Legal Update

COVID-19 Playbook

- https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf
- Details how to safely return employees to the workplace.
- Details reporting guidelines.
- Details paid sick leave guidelines.

AB 1867 – Supplemental Paid Sick Leave

- Effective immediately, AB 1867 requires private employers with more than 500 employees nationally to provide their California employees with supplemental paid sick leave related to COVID-19 (in contrast to the FFCRA which applies to employers with less than 500 employees).
- The law is effective until Dec. 31, 2020 or the expiration of any federal extension of the Families First Coronavirus Response Act (FFCRA), whichever occurs later.

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AB 1867 – Supplemental Paid Sick Leave

- Designed to fill in gaps left by the federal law.
- Specifically covers food service workers (examples grocery stores, fast food restaurants, distribution centers), health care providers or emergency responders whose employer has elected to exclude them from EPSL under the FFCRA, or if an employee is required to self-quarantine or self-isolate due to government requirements, health care orders or health concerns.

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AB 685 – Notice and Reporting Obligations

- Signed on September 17, 2020. Effective 1/1/21 and expires on 1/1/23.
- Expands Cal/OSHA's authority to issue Stop Work Orders for workplaces that pose a risk of imminent harm due to COVID-19.
- Adds notice requirements to employers when there is potential exposure.

AB 685 – Notice Requirements

- ***Within one business day*** of receiving "notice of potential exposure" to COVID-19 in the workplace, an employer must:
  - Provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the infected individual within the infectious period and who may have been exposed to COVID-19;
  - Provide written notice to employee representatives, such as unions and attorneys;
  - Provide written notice to employees and/or employee representatives regarding COVID-19 benefits that the employee may receive including workers' compensation benefits, paid sick leave and the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and
  - Provide notice to employees regarding the company's CDC-compliant protocols for disinfection and safety plan to eliminate further exposure of COVID-19.

AB 2537

Acute Care Hospitals Personal Protective Equipment

- The law requires public and private employers of general acute care hospital employees to supply those workers who provide or support direct patient care with the personal protective equipment necessary to comply with the specified regulations; assure employees use the PPE supplied to them; and maintain a 3 month supply of the specified equipment.

SB 1159 – Rebuttable Presumption

- Emergency bill so effective immediately as of September 17, 2020. Effective until January 1, 2023.
- For employers of five employees or more, there is a rebuttable presumption that an employee who contracts COVID-19 within 14 days of being on site at the place of employment has sustained an industrial injury. The employee must have been doing work at the employer's direction.
- SB 1159 codifies Executive Order N-62-20, which created a rebuttable presumption for industrial causation to any employee who reported to their physical work location and contracted COVID-19. Now, the rebuttable presumption is extended from July 6, 2020 onward for firefighters, peace officers, fire and rescue coordinators, and certain health care workers, including in-home supportive care providers. In addition, SB 1159 creates a rebuttable presumption for all other employees if the employee worked for an employer with five or more employees and the employee tests positive for COVID-19 within 14 days after reporting to the workplace during an outbreak.
- What is an outbreak? If any of these occur within 14 days:
  - When an employer with 100 or less employees at a specific worksite has 4 employees test positive for COVID-19;
  - When an employer with more than 100 employees has 4% of the employees of the specific workplace test positive for COVID-19; or
  - When a specific workplace is ordered to close by a local health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to risk of infection of COVID-19.

SB 1159 – Rebuttable Presumption

- Employee must exhaust any COVID-19 supplemental paid sick leave before collecting any TD benefits.
- Presumption can be rebutted within 30 days.
- Date of injury will be the last day the employee performed work at the employer's place of employment at the employer's direction prior to the positive test.
- The specific place of employment excludes the employee's home or residence. Exception: in-home support services.

SB 1159 – Employer Reporting Requirements

- When an employer knows or reasonably should know that an employee has tested positive, the employer must report to its claim administrator in writing via e-mail or fax within 3 business days the following:
  - An employee had a positive COVID-19 test.
  - The date the employee tested positive (date specimen was collected).
  - The address(es) where employee worked on site at the place of employment during the 14 days preceding the date of the positive test.
  - The highest number of employees who reported to work at the employee's specific place of employment in the 45 day period preceding the last day the employee worked at each specific place of employment.

Questions?

Any questions not answered during today's presentation will be addressed at our **Advice on Tap** session on **Friday, October 30** at **12:00 Noon Central**.

THANK YOU

David Ian Dalby
415-263-8111 | ddalby@hinshawlaw.com

Mellissa A. Schafer
310-909-8000 | mschafer@hinshawlaw.com

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