Labor and Employment Law Update

2019: A Year In Review

I. New Laws

A. California

Unless otherwise stated, all new California laws set forth below went into effect on January 1, 2020.

1. California Extends Deadline for Mandatory Sexual Harassment Training Until 2021

In 2018, California passed a law that greatly expanded sexual harassment training requirements for employers. Under the law, employers of as few as five people must provide two hours of interactive sexual harassment training to their supervisors and one hour to all non-supervisory employees. The training was to have been completed by January 1, 2020. Just before Labor Day, California Governor Gavin Newsom gave employers a welcome reprieve by extending the deadline to comply with the new training requirements by a year — to January 1, 2021. The bill signed by the Governor that extended the deadline also confirms that those employees who received sexual harassment training in 2019 need not be re-trained again for two years.

2. California Signs Dynamex's *ABC Test Into Law*

On September 18, 2019, California Governor Gavin Newsom signed into law AB 5, codifying the "ABC test" adopted in the California Supreme Court decision, *Dynamex* and ensuring that most California workers should appropriately be classified as employees instead of independent contractors.

Though supporters state that the bill is aimed primarily at the so-called "gig economy," in reality AB 5 affects virtually every type of business in California.

Prior to *Dynamex*, courts used the *Borello* "economic realities test," which allowed for more workers to be classified as "independent contractors." However, under *Dynamex*'s "ABC test," any worker is considered an "employee" unless:

- the worker is free from the hiring entity's control regarding work performance;
- the worker performs work outside the hiring entity's usual course of business; and

- the worker is engaged in an independent trade, occupation, or business of the same nature as the work performed.

Previous court rulings had limited the application of *Dynamex* to lawsuits alleging violations of Industrial Welfare Commission's Wage Orders, including overtime requirements for non-exempt workers. But AB 5 expands the scope of the *Dynamex* "ABC test" to all other provisions of the California Labor Code, as well as unemployment insurance claims. AB 5 also empowers California prosecutors, including the Attorney General, to seek injunctions forcing employers to reclassify workers as "employees" consistent with the "ABC test."

The law exempts certain industries and occupations, including certain medical professionals, lawyers, architects, engineers, private investigators, accountants, construction subcontractors, insurance agents, architects, barbers, cosmetologists, and securities broker-dealers. The test for whether those workers will be considered "employees" will remain the *Borello* "economic realities test," which focuses on whether the worker controls the manner and means of performing the work to be done.

On December 17, 2019, the American Society of Journalists and Authors and the National Press Photographers Association challenged AB 5 on First Amendment freedom of speech and press grounds due to AB 5's limits on the number of submissions freelance journalists may make to individual publications per year. Additional challenges are expected. The law is set to take full effect on January 1, 2020. However, one federal district court has temporarily blocked enforcement of the law for the trucking industry by granting a restraining order in a case filed by the California Trucking Association. The restraining order will be in effect until the court decides on the preliminary injunction case. A hearing is set for Jan. 13.

3. Changes to General Release Language (C.C.C. § 1542)

Express waivers to Section 1542 of the California Civil Code are so ubiquitous in settlement and release agreements that most parties likely just note their presence without actually reading them. Previously, Section 1542 provided: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." California's Senate Bill No. 1431 amended Section 1542 to add "releasing party" and "released party" alongside creditor and debtor, respectively, and also changes "must have materially affected" to "would have materially affected" the releasing party's decision to settle, so that it states: "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

The legislature did not intend for this change to impact existing law; however, courts could determine that the changes to Section 1542 somehow create a different (albeit lower)

standard, namely with respect to the change of "must have materially affected" to "would have materially affected." Employers should make sure that their settlement and release agreements always include an express waiver to Section 1542, and that any template agreements are updated to reflect these recent changes.

4. California Prohibits Discrimination Based on Hairstyle

Governor Gavin Newsom signed California's "CROWN Act" (Create a Respectful and Open Workplace for Natural Hair) on July 3, 2019. The law amends the state's Education and Government Codes to define "race or ethnicity" as "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."

5. Mandatory Arbitration Agreements Prohibited

AB 51 bans the use of mandatory arbitration agreements and makes it a criminal misdemeanor for businesses to make workers or job applicants waive their right to sue for violations of the FEHA or the California Labor Code as a condition of employment. Employers are also prohibited from threatening or retaliating against employees that refuse to agree to arbitration. In addition to outlawing mandatory arbitration agreements, AB 51 also prohibits arbitration agreements that require employees to opt out of a waiver "or take any affirmative action in order to preserve their rights," which means that "voluntary" arbitration agreements, requiring that employees opt out (or are otherwise bound by the arbitration agreement) are prohibited as well. The express language of AB 51 provides that the law "is not intended to invalidate any agreement governed by the Federal Arbitration Act" ("FAA"). It also specifically does not apply to post-dispute settlement agreements or negotiated severance agreements.

AB 51 only impacts arbitration agreements entered into on or after January 1, 2020, meaning mandatory arbitration agreements signed by employees prior to that date will remain in effect. Despite AB 51's express statement that it does not apply to arbitration agreements governed by the FAA, employers will likely challenge the law's legality, as the FAA expressly preempts state laws that attempt to invalidate arbitration agreements that fall within the broad sweep of the FAA. While the outcome of any challenge remains to be seen, we recommend that all California employers with mandatory employment agreements or "voluntary" arbitration agreements that require an opt-out review those agreements with employment counsel. Those employers should certainly ensure that their arbitration agreements are expressly governed by the FAA (rather than California law) and should discuss the merits of using purely voluntary arbitration agreements starting January 1. It is unclear whether employers can incentivize employees or candidates to sign such purely voluntary agreements with monetary (or other) incentives.

6. Extended Statute of Limitations for Filing DFEH Charge

Also known as the Stop Harassment and Reporting Extension (SHARE) Act, AB 9 extends the deadline to file an allegation of unlawful workplace harassment, discrimination, or retaliation under the Fair Employment and Housing Act ("FEHA") from one year to three years. According to the State's own press release, "AB 9 will impose a statute of limitations period that is six-times the length of the federal standard and three-times the length of the current state standard." AB 9 does not revive lapsed claims. As a result of this extension of the statute of limitations, employers will likely face an increase in charges filed with the Department of Fair Employment and Housing ("DFEH") and lawsuits for harassment, discrimination, and retaliation based on protected characteristics such as sex and gender, sexual orientation, gender identity, race, age, religion, and disability. Additionally, it will be significantly harder for employers to argue that employees' claims are time-barred for failing to timely exhaust their administrative remedies.

7. No More "Don't Darken My Door" Provisions in Settlement Agreements

AB 749 voids "no rehire" provisions in settlement agreements entered into on or after January 1, 2020. The law does include several notable exceptions, including where the employer has made a good faith determination that the individual engaged in sexual harassment or assault. In addition, it does not require an employer to rehire an individual "if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person;" however, it is unclear exactly what constitutes such a "legitimate" reason (e.g., is an employee's filing of a frivolous claim or lawsuit a legitimate reason for an employer's refusal to rehire?). Prior to January 1, employers should have employment counsel review any standard settlement agreements that contain no re-hire provisions.

8. Employee Notification of Deadlines to Withdraw Funds from Flexible Spending Accounts.

AB 1554 requires employers to notify an employee (in at least two different prescribed manners, e.g., email, telephone, text message, post mail, in-person) who participates in a flexible spending account of any deadline to withdraw funds before the end of the plan year.

9. Expanded Lactation Accommodation Requirements

SB 142, in part, expands California's lactation accommodation requirements. The new requirements include that the employer-provided lactation room or location be "safe, clean, and free of hazardous materials" and that it contain a surface to place a breast pump and personal items and a place to sit. Employers must provide access to electricity or alternative devices, including, but not limited to, extension cords or charging stations, needed to operate an electric or battery-powered breast pump. Employers must also provide access to a sink with running

water and a refrigerator (or cooling device or cooler) in close proximity to the employee's workspace. SB 142 provides that employers with fewer than 50 employees may be exempt from these requirements if they can demonstrate undue hardship, in which case such employers must make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private. The new law also requires employers to implement written policies (e.g. in an employee handbook) related to lactation accommodations.

10. Employers Must Pay Arbitration Initiation Fees Within 30 Days of Due Date

SB 707 requires an employer to pay arbitration initiation fees within 30 days after the due date. If the employer does not, it is in material breach of the arbitration agreement, in default of the arbitration, and waives its right to arbitration. If the employer breaches, the employee can then proceed in a court of appropriate jurisdiction. The stated purpose of this bill is to prevent employers who draft arbitration agreements from delaying arbitration by refusing to pay the required fees to initiate the process.

11. Expanded Certification Requirements for Infants Working in the Entertainment Industry.

AB 267 expands certification requirements for infants working in the entertainment industry to cover any type of employment in the entertainment industry, rather than being limited to infants working "on any motion picture set or location."

12. Specified "Employment" for Motion Picture Production Workers for Unemployment Insurance Purposes.

AB 271 regulates what qualifies as "employment" for motion picture production workers in regard to where the services are performed for purposes of unemployment compensation. If the service is localized in California (or some of the services are performed in California and the worker's residence is in California), the worker's entire service qualifies as "employment," for purposes of determining eligibility for unemployment compensation benefits.

13. Film Shoot Pay Delay Law

On September 5, 2019, California Governor Gavin Newsom signed into law Senate Bill 671, the "Photoshoot Pay Easement Act," which went into effect immediately. This law specifies that any short-term print shoot employee (from models to crew members) can be paid on the employer's next regular pay day (including by mail), rather than on the last day they work.

California law generally requires that employees receive all owed wages on their last date of employment. One notable exception to this rule is for employees who are hired to work on

motion picture or television productions. Employers can wait until their last regularly-scheduled pay day to pay these employees. Senate Bill 671 extends this exception to all photo shoot employees.

A photo shoot is defined as a "still image shoot, including film or digital photography, for use in print, digital, or internet media." The passage of this bill is a win for producers, photographers and other employers who faced substantial penalties for failing to pay their assistants, crew members, models, and others on the last day of a shoot.

14. Paid Family Leave

Senate Bill 83 amends multiple sections of the Government Code, Labor Code and Unemployment Insurance Code to increase the maximum wage replacement benefits under California's Paid Family Leave (PFL) program from six to eight weeks, beginning July 1, 2020.

15. Leave For Organ Donation

AB 1223 amends multiple sections of the Education Code, Government Code and the Labor Code, adds sections to the Insurance Code, and expands employee protection for organ donation by requiring employers with 15 or more employees to provide an additional unpaid leave of absence (up to 30 business days per year) to an employee donating an organ (following the 30 business days of paid leave for organ donation required under current California law).

B. New York

1. Protecting Employees' Reproductive Health Decisions

New York State recently enacted a new law prohibiting discrimination by employers on the basis of an employee or their dependent's reproductive health decisions. Specifically, the law prohibits an employer from:

- Accessing an employee's (or their dependent's) personal information regarding reproductive health decision making without the employee's prior informed affirmative written consent;
- Retaliating or discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's (or their dependent's) reproductive health decision making; or
- Requiring an employee to sign a waiver or other document that denies an employee the right to make their own reproductive health care decisions.

Effective January 7, 2020, the new law also requires that any employer providing its employees with an employee handbook must include in its handbook a notice of employee rights and remedies under this section.

2. Prohibiting Religious Discrimination Based on Appearance

Effective October 8, 2019, New York State Law was amended to clarify that the existing ban on religious based discrimination includes any discriminatory action based upon "the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion . . . ." Notably, an employer may still rely on the law's existing undue hardship defense if they are able to demonstrate that after engaging in a bona fide effort, they were unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance without imposing an undue hardship on the employer's business.

3. Expanding Protections Against Discriminatory Pay Practices

Effective October 8, 2019, New York State enacted a new law extending equity pay protections. Formerly, the law provided gender equity pay protection to employees performing "equal work" as their opposite gender counterparts. The new law provides that any employee in a protected class may not be paid a lower wage than an employee outside the protected class in the same establishment for either equal work or "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions." Under New York State Law, protected class status extends to: sex, age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status.

Employers are still permitted to justify disparities in pay on factors such as (i) seniority system, (ii) a merit system, (iii) "a system which measures earnings by quantity or quality of production," or (iv) "a bona fide factor" such as education, training, or experience. Importantly, an employer would still be found to have violated the law where: (i) the employer's practice causes a disparate impact on the basis of a protected class; (ii) a viable alternative practice exists that would remove the wage differential and serve the same business purpose; and (iii) the employer refused to adopt the alternative practice.

4. Prohibiting Salary History Inquiries

Effective January 6, 2020, New York employers are banned from asking prospective and current employees about their wage or salary history. Under the new law, employer must refrain from:

- Relying on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual;

- Orally or in writing, seeking, requesting, or requiring the wage or salary history from an applicant or current employee as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;

- Orally or in writing, seeking, requesting, or requiring the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer;

- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee based on prior wage or salary history;

- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee because the individual did not provide wage or salary history in accordance with the law; or

- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current or former employee because the individual filed a complaint with the State's department of labor alleging a violation of the law.

Notably, prospective and current employees can voluntarily and without prompting disclose or verify their salary history, including for the purpose of negotiating wages or salary. An employer would also be permitted to confirm a prospective or current employee's salary history if at the time an offer of employment with compensation is made, the prospective or current employee responds to the offer by providing prior salary history to support a wage or salary higher than what is offered by the employer. The new law provides that prospective or current employees alleging violations of the law can file a civil action in court, and potential remedies include compensatory damages, injunctive relief, and attorneys' fees.

With the enactment of this law, New York State joins New York City, as well as Suffolk and Westchester Counties, all of which already prohibit salary history inquiries.

5. Prohibiting Gender Identity Discrimination

Effective February 24, 2019, New York State enacted the Gender Expression Non-Discrimination Act ("GENDA"). GENDA amends the New York State Law to prohibit discrimination on the basis of "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."

Employees who successfully establish claims of discrimination under the new law are entitled to back pay and compensatory damages. Effective November 1, 2019, GENDA also

expands New York's hate crime laws to include crimes against transgender and gender non-conforming people.

6. New York State Employees Eligible for Paid Voting Leave

Effective April 2019, Section 3-110 of the New York State Election Law has been amended to provide registered voters in New York with up to three hours of paid leave for the purposes of voting in primary, general, and special elections called by the governor. The law previously provided time off only where an employee did not have sufficient time during non-working hours to vote. The amendment requires that employees provide a minimum of at least two days' advance notice. Employers may continue to require that any requested time be taken at the beginning or end of the employee's shift. The amendment did not impact the Election Law's existing posting requirement, which requires that at least 10 days before a public election, employers must conspicuously post in the place of work, where it can be seen by employees, a notice setting forth the voting time off entitlement.

7. Stronger Protections against Workplace Discrimination and Harassment

Again this year, New York has implemented new employee protections against workplace harassment.

Training, Policies, and Procedures: As of August 12, 2019, all New York State employers must provide in writing both at the time of hire and at all subsequent (annual) sexual harassment prevention trainings thereafter, a notice, in English (and in an employee's primary language, if different) outlining the employer's sexual harassment prevention policy as well as any "information presented at the employer's training program."

Employment Agreements: Effective October 11, 2019, New York State employers are prohibited from entering into agreements that require employees to submit sexual harassment or unlawful discrimination claims to mandatory binding arbitration. Arbitration provisions in collective bargaining agreements are excluded, and wherever otherwise inconsistent with federal law. Employers are also prohibited from including confidentiality provisions relating to allegations of any unlawful discrimination or harassment unless the employee consents. In order to establish consent, an employer must provide the employee with 21 days to consider whether to consent to the confidentiality provision, and 7 days to revoke that consent. This law does not impact existing agreements.

Further, effective January 1, 2020, any contract or other agreement entered into by an employee or applicant containing a non-disclosure provision relating to any future claim of discrimination on the basis of any protected category is unenforceable, except where the agreement or contract expressly provides that it does not prohibit the employee or applicant from speaking with law enforcement, the Equal Employment Opportunity Commission, the New York

State Division of Human Rights, the New York City Commission on Human Rights, or an attorney retained by the employee or applicant.

Protections for Non-Employees: Effective October 11, 2019, New York State Law prohibits discrimination on basis of any protected category against "non-employees," who are defined as contractors, subcontractors, vendors, consultants, or any other person who provides services under a contract in the workplace or an employee of the same, and where the employer or its agents or supervisors knew or should have known that the non-employee was subject to sexual harassment in the employer's workplace, and failed to take appropriate corrective action.

Statute of Limitations: Effective August 12, 2020, the statute of limitations for reporting claims of sexual harassment to the New York State Division of Human Rights is three years, rather than the previous one year limit.

Employers under the New York State Human Rights Law: Effective February 8, 2020, the definition of a covered employer under the New York State Human Rights Law will be expanded to include all employers within the state, regardless of size. Previously, the law only applied to employers of all sizes as it relates to sexual harassment protections.

Lowered Burdens: Effective October 11, 2019, a complainant alleging sexual or workplace harassment will no longer need to show the harassment was "severe or pervasive" in order to succeed in their claims under New York law. Rather, the complainant need only show that they were subjected to "inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." An employer may defend such conduct on the basis that the harassing conduct does not rise above the level of "petty slights or trivial inconveniences." The law also precludes application of the *Faragher-Ellerth* defense in discrimination claims under New York law, which previously applied where an employee unreasonably failed to take advantage of an employer's internal complaint mechanisms with regard to the claims at issue.

8. Reasonable Accommodations for Victims of Domestic Violence

Effective November 18, 2019, New York State Law provides expanded protections for victims of domestic abuse. While the law previously prohibited workplace discrimination against domestic violence victims, the new amendment outlines specific prohibited discriminatory practices with respect to victims of domestic violence, including: (i) refusing to hire an applicant or discharging an employee, (ii) discriminating against an employee with respect to compensation or terms and conditions of employment, and (iii) expressing any limitation or discrimination in any statement, advertisement, publication or application, or in the making of any inquiry related to prospective employment. The new law also amends and expands the definition of "victim of domestic violence."

In addition, employers are required to provide reasonable accommodation to employees who are victims of domestic violence, except where such accommodation would pose an "undue hardship," in order to:

- seek medical attention for injuries caused by domestic violence;
- obtain services from a domestic violence shelter, program, or rape crisis center or obtain psychological counseling;
- participate in safety planning or to take other actions to increase safety from future incidents of domestic violence; and/or
- obtain legal services, assist in the prosecution of the offense, or appear in court in relation to the incident of domestic violence.

The law does not require that employees be paid when taking leave as a domestic violence-related reasonable accommodation. If an employer grants a reasonable accommodation, the employee may be required to take any available paid time off or otherwise take unpaid leave.

Earned Sick Leave Law: Effective March 30, 2019, Westchester County enacted a law providing eligible employers with up to 40 hours of paid sick leave (the "Earned Sick Leave Law" or "ESLL"). Full-time and part-time employees who work more than 80 hours per calendar year are entitled to paid sick leave under the ESLL after their 90th day of employment.

Under the ESLL, all employers are required to provide their employees a copy of the ESLL as well as written notice of the law. Employers are also required to display in a conspicuous location a copy of the ESLL and a poster in English, Spanish and any other language deemed appropriate. When use of sick leave or safe time is foreseeable, the employee is required to make a good faith effort to provide advance notice and shall make a reasonable effort to schedule the sick time in a manner that doesn't unduly disrupt the employer's operations. Any health or safety information regarding an employee or an employee's family member must be kept on a separate form and in a separate file from other personnel information.

Paid Leave for Victims of Domestic Violence: Effective October 30, 2019, Westchester County enacted an ordinance requiring employers to provide paid leave to all employees who are victims of domestic violence or human trafficking. This leave is *in addition* to the leave already provided under the Westchester's ESSL. The paid leave provided under the ordinance is not without its limitations: employers can require employees to make a good faith effort to provide advance notice where the need for such leave is foreseeable, and may request reasonable documentation (e.g., a police report, subpoena, or affidavit from an attorney) establishing that the leave time was used appropriately. An employer is required to keep in confidence any information obtained for the purposes of domestic violence related leave time,

and are prohibited from otherwise interfering or retaliating against an employee for exercising their rights under the law. Violations of the law could result in steep penalties, including reinstatement and back pay, attorneys' fees, and other monetary and equitable relief.

In subsequently issued guidance, the Westchester County Human Rights Commission clarified that employers are obligated to pay employees the hourly rate they would have otherwise earned had they reported to work when on paid leave. Moreover, employers are required to provide a copy of the safe leave ordinance (in both English and Spanish) and a notice of employee rights to eligible employees on the first day of employment or within 90 days of the law's effective date (i.e., no later than January 28, 2020), whichever is later. An employer's failure to comply with the notice and posting requirements of this ordinance can result in fines of up to $500 per offense.

II. Employment Discrimination Law

A. U.S. Supreme Court Decisions

1. Court Rules that Federal Courts Can Hear Title VII Claims If Employers Do Not Timely Raise Failure to File Charge with EEOC

The Court ruled that federal courts can hear discrimination claims under Title VII of the Civil Rights Act if employers do not timely raise the defense that workers failed to first file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") or state enforcement agencies, as Title VII requires, before filing suit in federal court. Title VII is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion.

In light of the Supreme Court's decision, an employer faced with a Title VII lawsuit brought by an employee should quickly determine whether the employee first filed a charge with the EEOC and/or a state enforcement agency. If not, the employer should timely bring the employee's failure to do so to the court's attention.

As of now, the *Fort Bend County* decision does not apply to cases filed under state non-discrimination laws and filed in state court. For example, prior to filing any such cases in California, employees must file a charge with the state's Department of Fair Employment and Housing ("DFEH").

B. Ninth Circuit Court of Appeals Decisions

1. Morbidly Obese Employee Failed To Establish Causal Relationship To His Termination

In *Valtierra v. Medtronic Inc.*, 2019 WL 3917531 (9th Cir. 2019), Jose Valtierra claimed he was terminated on account of his morbid obesity (370 lbs.) in violation of the Americans with Disabilities Act (ADA). Medtronic terminated Valtierra for falsifying records, which indicated he had finished more assignments than he had in fact completed before going on vacation. The district court granted summary judgment to Medtronic on the ground that obesity, no matter how great, cannot constitute a disability under the applicable EEOC regulations unless the obesity is caused by an underlying physiological condition. The Ninth Circuit affirmed summary judgment in favor of Medtronic on different grounds, holding that "we need not take a definitive stand on the question of whether morbid obesity itself is an 'impairment' under the ADA" because in this case Valtierra had failed to show some causal relationship between his alleged impairments and his termination – there is "no basis for concluding that he was terminated for any reason other than Medtronic's stated ground that he falsified records to show he had completed work assignments" and there was no evidence that Medtronic "ever knew of similar misconduct on the part of others" who were not subjected to termination.

2. Employee Could Rely Upon Former Supervisor's Statement Regarding Existence of Discrimination

In *Weil v. Citizens Telecom Servs. Co.*, 2019 WL 1891796 (9th Cir. 2019), David Weil sued Citizens Telecom Services for discriminatory failure to promote under Title VII, among other claims. In support of his failure-to-promote claim, Weil testified in his deposition that his former supervisor (identified in the opinion as "L.H.") told him that he did not receive the promotion because "You have three things going against you: You're a former Verizon employee, okay. You're not white. And you're not female." At the time L.H. made this statement to Weil, she was still working for the company though she was no longer Weil's supervisor. The district court excluded L.H.'s statement on the ground that it was inadmissible hearsay, and in the absence of other evidence of discrimination, the district court granted Citizens' summary judgment motion. The Ninth Circuit Court of Appeals reversed, holding that L.H.'s statement was not inadmissible hearsay because L.H. was still employed by the company (albeit in a different capacity) at the time she made the statement.

C. California Court of Appeals Decisions

1. Court of Appeals Reverses Two Summary Judgments Entered In Favor Of Hospital

In *Ortiz v. Dameron Hosp. Ass'n*, 37 Cal. App. 5th 568 (2019), Nancy Ortiz, a nurse of Filipino national origin, sued Dameron Hospital Association for constructive discharge arising

from allegedly demeaning criticisms directed at her by her former supervisor (Doreen Alvarez). Ortiz claimed she was harassed and discriminated against based upon her age and national origin. Ortiz contended that Alvarez "singled out" for criticism employees who spoke English as a second language and told them that another employee who was white "speaks good English," was "well-educated," and "is going to do a better job than most of you guys here because you guys don't know how to speak English." Alvarez also allegedly said the Filipino employees were "too old and had been there too long." Alvarez allegedly fired another employee (Bassey Duke) for refusing to lie about seeing Ortiz sleeping on the job (a terminable offense). Shortly thereafter, Ortiz resigned because she felt she was "about to have a mental breakdown from all the stress." The trial court granted the hospital's summary judgment motion "because Dameron engaged in no conduct in regards to Ortiz's resignation." The Court of Appeal reversed, holding that because Alvarez's status as a supervisory employee of the hospital was undisputed, the hospital could not escape liability based upon its own "nonaction." The Court further held that there was sufficient evidence to allow a reasonable trier of fact to find that the alleged harassment to which Ortiz was subjected was severe or pervasive.

2. Court of Appeals Rules that College Professor Was Retaliated Against For Complaining About Hostile Work Environment

In *Gupta v. Trustees of the Cal. State Univ.*, 40 Cal. App. 5th 510 (2019), Rashmi Gupta was denied a promotion to associate professor and lifetime tenure at San Francisco State University and was terminated after she and several other women of color in the University's School of Social Work complained about alleged "abuse of power and authority, excessive micromanagement, bullying, and the creation of a hostile environment." Gupta sued the University for discrimination and retaliation, and the jury awarded her $378,421 on the retaliation claim but found no liability on the discrimination claim. The trial court awarded Gupta an additional $587,161 in attorney's fees and costs, but denied her request for immediate reinstatement based upon there being no available position for her at the University. The Court of Appeal affirmed the judgment, holding that Gupta was not required to show she was "clearly superior" to a "comparator professor" who was granted tenure (but who had not complained).

3. Court of Appeals Holds that Discriminatory Failure-to-Hire Claim Must be Brought Under the FEHA

In *Williams v. Sacramento River Cats Baseball Club, LLC*, 40 Cal. App. 5th 280 (2019), Wilfert Williams sued the Sacramento River Cats Baseball Club under a common law tort action for allegedly failing to hire him as an assistant visitor clubhouse manager because of his race. The trial court sustained the employer's demurrer to the complaint on the ground that California law does not recognize a common law cause of action for failure to hire in violation of public policy. The Court of Appeal affirmed dismissal of the claim on the ground that only an employee (as distinguished from an applicant) may bring a common law claim for discrimination against an employer. The Court noted, however, "plaintiff is not without recourse" because Williams could have sued under the California Fair Employment and Housing Act ("FEHA").

D. New York State and City Agency Actions

1. Enforcement Guidance on Appearance and Grooming Policies

On February 19, 2019, the New York City Commission on Human Rights issued new enforcement guidance concerning discriminatory appearance and grooming policies that otherwise ban or restrict natural hair or hairstyles closely associated with racial, ethnic, or cultural identities. The Commission reiterated that such policies constitute a violation of the New York City Human Rights Law because prohibitions on "natural hair or hairstyles closely associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional." To show a violation, an individual must show they were treated less well or subjected to an adverse action, motivated, at least in part, by their membership in a protected class. The Commission's enforcement guidance applies to employers as well as operators of restaurants, fitness clubs, stores, schools, libraries and other areas of public accommodation.

2. Enforcement Guidance on National Origin and Immigration Status Discrimination

In September of 2019, the New York City Commission on Human Rights issued enforcement guidance addressing how it would evaluate possible complaints of national origin and immigration status discrimination. Under the enforcement guidance, examples of unlawful discrimination include:

- making harassing or threatening comments such as "go back to your country";
- threatening to call immigration authorities or law enforcement on undocumented workers as a means to force employees to work in unsafe, unequal, or unlawful conditions or otherwise based on a discriminatory or retaliatory motive;
- using terms like "illegal alien" or "illegals" with the intent to demean, humiliate, or offend;
- acting upon stereotypes or assumptions based on actual or perceived immigration status or national origin in making hiring, termination, or promotion decisions;
- prohibiting employees from speaking a language other than English where it is not a requirement for the work because it would make clients uncomfortable.

In remedying a violation, the Commission may seek penalties of up to $250,000.

III. Wage and Hour Law

A. California Court Decisions

1. California Supreme Court Rules That Plaintiffs Cannot Recover from Payroll Companies

In *Goonewardene v. ADP, LLC*, the California Supreme Court addressed the question of whether, when an employer hires an independent payroll service provider (or "payroll company") to take over all the payroll tasks that would otherwise be performed by an internal payroll department, the employee may bring a civil action against not only his or her employer but against the payroll company as well. The Court held that an employee who believes he or she has not been paid the wages due under the applicable labor statutes and Wage Orders may not maintain causes of action for unpaid wages against a payroll service provider for: (1) breach of contract, (2) negligence, or (3) negligent misrepresentation. In reaching this holding, the Court reversed the Court of Appeal's ruling that the employee may maintain those three causes of action for unpaid wages against the payroll company even though a payroll company cannot properly be considered an employer of the hiring business's employee.

First, the Supreme Court determined that an employee cannot maintain a breach of contract action against the payroll company under the third-party beneficiary doctrine. Under this doctrine, an individual or entity that is not a party to a contract may bring a breach of contract action against a party to the contract if the third party establishes that (1) it is likely to benefit from the contract, (2) a motivating purpose of the contracting parties is to provide a benefit to the third party, and (3) permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. The Supreme Court held that the third-party beneficiary doctrine does not apply to payroll service contracts in part because, instead of benefiting employees, an employer's contract with a payroll company is intended to provide a benefit to the employer.

Second, the Supreme Court held that, based on a variety of public policy considerations, "it is neither necessary nor appropriate to impose upon a payroll company a tort duty of care with regard to the obligations owed to an employee under the applicable labor statutes and wage orders and consequently that the negligence and negligent misrepresentation causes of action lack merit."

Overall, the California Supreme Court's decision is a win for payroll companies as well as employers, who would most likely bear the pass-through costs of increased litigation against payroll companies.

2. California Supreme Court Rules that Employee Can't Bring Conversion Claim for Unpaid Wages

The California Supreme Court ruled that a former start-up employee could not hold his former boss personally liable for unpaid wages based on the theory of common law conversion. Conversion is a legal term for theft. This is a win for employers as, if the Court had ruled otherwise, employers potentially could be held liable for tort damages (including punitive damages) for failing to pay wages.

In the case, *Voris v. Lampert*, the plaintiff, Voris, had worked alongside the defendant, Lampert, to launch three start-up ventures, partly in return for a promise of later payment of wages. After a falling out, Voris was fired and was never paid. He sued the companies and won on his claims for non-payment of wages under the California Labor Code and based on contract. Voris claimed he was unable to collect the monies he won because the companies did not have sufficient assets to pay. He then brought suit against Lampert individually, seeking to hold him personally responsible for the unpaid wages on a theory of common law conversion. Voris claimed that, by failing to pay the wages, the companies converted his personal property to their own use and that Lampert was individually liable for the companies' misconduct. The Supreme Court ruled 5-2 that a conversion tort was not the "right fit" for the wrong that Voris alleged.

3. California Supreme Court Limits PAGA Damages

In *Z.B., N.A. et al. v. Superior Court (Lawson)*, the California Supreme Court ruled that plaintiffs in cases brought under the Labor Code Private Attorneys General Act ("PAGA") cannot recover for their own or their fellow employees' unpaid wages, but instead are limited to recovering civil penalties set forth in the California Labor Code. Prior to this ruling, although the civil penalties recoverable under PAGA usually range from $50 to $200 per pay period for each employee violation, plaintiffs in PAGA actions asserting overtime claims could collect their unpaid wages in addition to the civil penalties. The plaintiff in *Lawson* brought a PAGA claim for unpaid overtime pursuant to Labor Code section 558, which provides not only for civil penalties but also permits an award for the amount of unpaid wages. Section 558 provides that an employer "shall be subject to a civil penalty" defined as $50 per employee per pay period for an initial violation and $100 per employee per pay period for each subsequent violation "in addition to an amount sufficient to recover underpaid wages." It further provides that "wages recovered pursuant to this section shall be paid to the affected employee." The Court ruled, in part, that back wages under section 558 are not recoverable in PAGA cases. The Court reasoned that back wages constitute "compensatory damages" paid to the individual employees, not civil penalties payable to the state of California. Based upon the Court's ruling in *Lawson*, while employees may pursue their individual wage claims in a civil action, or through a claim before the Labor Commissioner, they cannot recover unpaid wages through the PAGA statute, which is reserved as a means to obtain civil penalties only on behalf of the State.

4. California Court of Appeals Rules that Dynamex Goes Back in Time

On May 2, 2019, the Ninth Circuit Court of Appeals held that the California Supreme Court's ruling in *Dynamex Operations West, Inc. v. Superior Court* applies retroactively. Then, in September 2019, the Ninth Circuit withdrew that opinion and asked that the California Supreme Court decide the matter instead.

Not content to wait for the California Supreme Court, the California Court of Appeals in *Gonzales v. San Gabriel Transit, Inc.*, ruled on October 8, 2019 that *Dynamex* does, in fact, apply retroactively.

In *Gonzales*, a driver sued a transportation company that offers traditional taxicab and paratransit services for disabled individuals. The driver alleged that he was misclassified as an independent contractor and raised a variety of claims under Labor Code, including unpaid wages, meal and rest break violations, and failure to reimburse business expenses. The employer argued that the driver's claims were not specifically brought under an IWC Wage Order; therefore, the driver's status as an employee or independent contractor should be determined by the less stringent *Borello* standard, not the *Dynamex* "ABC test."

Before determining whether to apply the *Borello* or *Dynamex* test, the *Gonzales* court determined that it first must rule whether *Dynamex* applied retroactively to the hours the driver worked prior to the *Dynamex* decision, which was published April 30, 2018. The *Gonzales* court held that *Dynamex* did apply retroactively.

Judicial decisions apply retroactively unless they articular a new standard or rule of law. In ruling *Dynamex* applies retroactively, the *Gonzales* court held that *Dynamex* did not establish a *new* standard. Rather, it merely streamlined the prior *Borello* standard, which had become, in the court's opinion, overly complex. Therefore, the court ruled that was not unfair to apply *Dynamex* to hours worked before April 30, 2018.

The California Supreme Court will have the final say on whether *Dynamex* applies retroactively in a decision that is expected in 2020. However, the ruling in *Gonzales* should be of particular concern to employers, who now face potential liability for their past decisions to classify workers as independent contractors rather than employees under a standard that did not exist at the time.

5. California Court of Appeals Expands Dynamex's Reach

As discussed above, AB 5 goes into effect January 1, 2020 and applies the "ABC test" adopted by the California Supreme Court in *Dynamex* to all aspects of the Labor Code. But for wage and hour claims that accrued before January 1, 2020, the California Court of Appeals had previously ruled that *Dynamex* applies only to claims brought under the IWC Wage Orders.

Now, in addition to ruling that *Dynamex* applies retroactively, *Gonzales v. San Gabriel Transit, Inc.*, has expanded the scope of *Dynamex* to both IWC Wage Order claims and the Labor Code provisions that enforce those Wage Order requirements.

Background

In *Gonzales*, a driver brought a putative class action against a transportation services company, claiming a variety of Labor Code violations for the employer's alleged misclassification of drivers as independent contractors. The trial court ruled that the causes of action not based specifically on a Wage Order should be determined under the more lenient *Borello* standard, rather than the stricter *Dynamex* test. But the Court of Appeals reversed, noting that "wages orders are not statutes and are not independently actionable . . . [r]ather, wages order obligations are imposed by Labor Code provisions." Therefore, *Gonzales* ruled that courts should apply the same tests to the Wage Orders as the statutes that enforce them.

Gonzales specifically mentioned the following Labor Code provisions as enforcing Wage Order requirements:

- unpaid wages (Labor Code sections 1194 and 1197);
- meal and rest periods (Labor Code sections 512 and 516);
- itemized wage statements (Labor Code section 226); and
- expense reimbursement claims (Labor Code section 2802).

This ruling will impact employers who face wage claims relating to hours worked before January 1, 2020, where employees contend they were improperly classified as independent contractors. The ruling demonstrates the ever-expanding reach of California's new employee-friendly contractor classification test, and all California employers would be well advised to examine their current contractor classifications in light of this recent development if they have not done so already.

6. California Court of Appeals Rules that Employers Must Pay For Time Spent On-Call

The California Court of Appeals ruled in a 2-1 split decision that employees who are required to call in two hours prior to the start of their shifts to ask whether they needed to report to work are entitled to reporting time pay. In *Ward v. Tilly's, Inc.*, the Court held that Tilly's on-call policy triggered the "Reporting Time Pay" provision of California's Wage Order 7, which applies to the retail industry. The Ward majority held that Wage Order 7's Reporting Time Pay provision applied because Tilly's workers "reported" for work when they called-in.

Under the Reporting Time Pay provision, employers are required to pay employees reporting time pay, as follows: "Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay." For example, if a sales clerk is scheduled to report to work for an eight-hour shift and only works for one hour, the employer is still obligated to pay the employee four hours of his or her regular rate of pay.

In *Ward*, employees of Tilly's, Inc. were required to call-in two hours before the start of their scheduled shifts to see if they needed to come into work. If they were told to come in, the employees were paid for the shifts they worked; if not, they received no compensation for being "on call." The Court held that this is "precisely the kind of abuse that reporting time pay was designed to discourage." "[O]n-call shifts burden employees, who cannot take other jobs, go to school or make social plans during on-call shifts — but who nonetheless receive no compensation from Tilly's unless they ultimately are called into work."

Accordingly, based on the Court's decision in *Ward*, an employee who is required to call-in two hours before his or her shift to confirm whether the employee is required to report to work, must be paid for half the employee's scheduled shift for the day, but in no event less than two hours nor more than four hours of pay.

Given the inclusion of "Reporting Time Pay" provisions in all Industrial Welfare Commission's Wage Orders, the Court's decision in *Ward* broadly impacts all industries. Also notable is the rise in class action matters against companies with call-in practices similar to Tilly's, Inc.

7. California Court of Appeals Rules Employer Must Have Written Meal Period Agreement, Which Includes A Revocation Clause

In *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal. App. 5th 444 (2019), Spectrum, a federal government contractor that takes temporary custody of federal prisoners and ICE detainees who must travel offsite for medical treatment and other appointments, had a policy that required on-duty meal periods for which officers were paid at their regular rate, but it did not have a written agreement with its employees that included an advisement that employees could revoke, in writing, the on-duty meal break policy agreement at any time. The Court of Appeal held that the employees were entitled to premium wages since the employer did not have a written agreement that included an on-duty meal period revocation clause.

8. Court of Appeals Holds That Damages May Not Be Denied To Employee Based Upon His "Imprecise Testimony"

In *Furry v. East Bay Pub'g, LLC*, 30 Cal. App. 5th 1072 (2019), Terry Furry worked as a sales and marketing director for the East Bay Express (a weekly newspaper based in Oakland) and alleged, among other claims, that East Bay failed to pay minimum and overtime wages. Following a bench trial, the court determined that East Bay failed to meet its burden of proving that Furry was exempt from overtime and related wage and hour requirements. However, because Furry "failed to present sufficient evidence regarding the amount and extent of his [overtime] work" and because his testimony was "uncertain, speculative, vague and unclear," the court declined to award recovery for uncompensated overtime hours because "even a rough approximation of said hours would be pure guess work and unreasonable speculation on the court's part." The Court of Appeal reversed the judgment as to the overtime claims because East Bay failed to keep proper records and so "the imprecise nature of Furry's testimony was not a bar to relief."

9. California Court of Appeals Rules that EPL Insurance Carriers May Be On the Hook for Expense Reimbursement Claims

The California Court of Appeals held in *Southern California Pizza Co., LLC v. Certain Underwriters at Lloyd's, London Subscribing to Policy Number 11EPL-20208*, that claims for failure to reimburse business-related expenses under California Labor Code sections 2800 and 2802 were covered under the employer's employment practices liability ("EPL") insurance policy, even though the policy contained a "wage and hour" exclusion. While this case is certainly a win for employers, it does not mean that EPL insurance carriers will necessarily be forced to cover claims for expense reimbursement.

First, *Southern California Pizza Co.* is the only California state law case that has found an EPL insurer has a duty to defend a wage and hour class action lawsuit based on a claim (expense reimbursement) that typically is lumped in with other wage and hour claims and excluded. Second, the language in this particular wage and hour exclusion was quite narrow in scope (see the exact language below). Many U.S. insurers' wage and hour exclusions are more expansive. Third, moving forward, in light of this case, California EPL carriers will likely expressly exclude expense reimbursement claims from EPL coverage. This, however, may take some time. In the meantime, employers should look at the language in their EPL insurance policies to determine whether claims for reimbursement of business-related expenses fall outside of any wage and hour exclusions to the policies.

Southern California Pizza Co.'s EPL insurance policy contained the following wage and hour exclusion: "[t]his Policy does not cover any Loss resulting from any Claim based upon, arising out of, directly or indirectly connected or related to, or in any way alleging violation(s) of any foreign, federal, state, or local, wage and hour or overtime law(s), including, without limitation, the Fair Labor Standards Act; however, we will pay Defense Costs up to, but in no

event greater than $250,000 for any such Claim(s)…" In analyzing this language, the Court first looked at the meaning of "wage and hour laws." Citing definitions from dictionaries and caselaw, the Court concluded that the phrase "'wage and hour law(s)' refers to laws concerning duration worked and/or remuneration received in exchange for work." Applying that definition to the claims against the employer in the underlying lawsuit, the Court found that claims under Labor Code sections 2800 and 2802 alleging failure to reimburse employees for business-related expenses were not excluded because "neither statute mentions wages or hours, nor do they appear in the parts of the Labor Code titled 'compensation' or 'working hours.'" The Court found further support for their position in the fact that "disbursements for losses and work-related expenditures are not payments made in exchange for labor or services," and "our Supreme Court previously characterized claims seeking reimbursement of business expenses as 'nonwage' claims."

After finding that the section 2800 and 2802 claims fell outside the policy's wage and hour exclusion, the Court also found that the allegations were potentially covered under the policy's coverage for "Inappropriate Employment Conduct" which provided coverage for "any other employment related workplace tort." The Court further found that claims alleged against the insured for violations of Business and Professions Code § 17200 and the Private Attorneys General Act were also potentially covered, as those claims were derivative of the failure to reimburse business-related expenses. Lastly, the Court held that the policy's $250,000 limit on defense costs was inapplicable, as the limit applied only to excluded wage and hour claims.

In addition to its ruling regarding expense reimbursement claims, the Court of Appeals found that claims for inaccurate wage statements (under California Labor Code section 226) were properly excluded under the "wage and hour" exclusion, as "all…characteristics point toward the statute being a quintessential wage law…"

B. California State Agency Guidance

1. Sexual Harassment Education for Minors?

Last fall, Governor Jerry Brown signed into law AB 2338, which includes a provision requiring minors 14-17 years of age and their parents/guardians to receive sexual harassment prevention training prior to the issuance of an entertainment work permit by the California Labor Commissioner. Earlier this year, the Division of Labor Standards Enforcement ("DLSE") published its guidance regarding AB 2338 on its website. The DLSE's very brief guidance does answer some questions regarding the new law, yet leaves some unanswered.

First, the DLSE's guidance notes that applicants for 10-day temporary entertainment work permits are exempt from the training requirement.

Second, it provides two options for 13-year-old minors who will reach their 14th birthday during the period of a six-month entertainment work permit: (1) apply for a permit which will

expire on the minor's 14th birthday; or (2) the Labor Commissioner will issue permits to minors at least 13 years and six months of age, who provide satisfactory proof of sexual harassment prevention training as an age-eligible minor.

Third, the DLSE's guidance specifies that the sexual harassment prevention training must at a minimum include the components specified in the Department of Fair Employment and Housing's form, DFEH Form 185. This form includes general information regarding sexual harassment as well as employers' responsibilities related to sexual harassment. The training must be administered by a third-party vendor and may be provided electronically or on site, in a language the participants understand.

Although AB 2338 went into effect on January 1, 2019, the DLSE has stated that, due to the "unavailability of third-party vendors and applicable materials at this time," the Labor Commissioner would not enforce the new law "**until further notice.**"

C. New York Court Decisions

1. A Wage and Hour Victory for Home Care Industry Employers

Since the early 1970s, home care aides in New York State have been subject to a Department of Labor ("DOL") minimum wage order, which *inter alia*, provides that when a "residential employee" is sleeping and/or eating, they are not available for work, and thus not entitled to pay. After questions arose concerning the application of the minimum wage order, the DOL issued an opinion letter providing that live-in home care aides are not deemed to be working during normal sleep or eating hours, and as a result should only be compensated for 13 hours out of a 24 hour shift, with 8 hours excluded for sleeping and 3 hours excluded for meals.

Two class actions, *Andryeyeva v. New York Health Care, Inc.* and *Moreno v. Future Care Health Servs., Inc.*, were brought challenging the DOL's interpretation of the minimum wage order, and claiming that because home care aids were "on call" for the entire 24 hour shift, they should be compensated accordingly. The Second Department in *Andryeyeva* and *Moreno*, sided with the Plaintiffs, and ignoring long standing precedent that gives deference to DOL interpretations of wage statutes, held that live-in aides should be compensated for every hour of a 24 hour shift regardless of the time spent sleeping and eating. The defendants in *Andryeyeva* and *Moreno* appealed to the New York Court of Appeals which consolidated the appeals for disposition.

On March 26, 2019, the Court of Appeals upheld and deferred to the New York State DOL's interpretation of the minimum wage order, citing the State's long standing policy of giving judicial deference to agency determinations and giving credence to the DOL's expertise in interpreting wage orders, and handling labor law violations.

D. Federal Agency Guidance

1. U.S. DOL Issues New Overtime Rule

The U.S. Department of Labor ("DOL") unveiled the final version of its overtime exemption rule, which sets the annual salary threshold workers need to exceed to qualify for the Fair Labor Standards Act's ("FLSA") "white collar" exemptions at $35,568 per year (up from the current annual salary threshold of $23,660). The DOL estimates that about 1.3 million workers who hadn't previously been eligible for overtime will now stand to receive it once the rule takes effect on January 1, 2020.

The FLSA's "white collar" exemptions apply to employees employed in bona fide administrative, executive, professional, and computer-related capacities, as well as outside sales employees. If employees meet the requirements for these exemptions (including, where applicable, the salary basis requirement), employers need not pay them overtime for any time worked over 40 hours per week under federal law.

IV. Other Employment Law Developments

A. Arbitration Agreements

1. US Supreme Court Rules Trucking Company Cannot Compel Arbitration

In a blow to the transportation industry, the U.S. Supreme Court ruled that the trucking company, New Prime Inc., cannot compel arbitration in a class action alleging it failed to pay independent contractor driver apprentices minimum wage. In *New Prime Inc. v. Oliveira*, the Court held that transportation workers engaged in interstate commerce, including those classified as independent contractors, are exempt from the Federal Arbitration Act (the "FAA"). Justice Neil Gorsuch wrote the Court's 8-0 opinion (Justice Brett Kavanaugh was recused from the case).

Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In New Prime, the Court addressed two questions: (1) whether a dispute over the applicability of the Section 1 exemption must be resolved by an arbitrator based on a valid delegation clause or by a court; and (2) whether the Section 1 exemption covers independent contractor agreements. On the first question, the Court held that a court should decide whether the Section 1 exemption applies before sending a case to arbitration. "The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the act authorizes a court to stay litigation and send the parties to an arbitral forum."

In addressing the second question, the Court first assessed the meaning of the term "contracts of employment" in the FAA noting that, at the time the FAA was enacted in 1925, a

"'contract of employment' usually meant nothing more than an agreement to perform work." "As a result, most people then would have understood Section 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." The Court refused to explicitly draw the line between employees and independent contractors in the transportation sector for the purposes of the Section 1 exemption, instead ruling that, in 1925, a contract of employment did not necessarily imply the existence of an employer-employee or master-servant relationship.

So, what does the *New Prime* decision mean for transportation industry employers? Given the industry's common practice of hiring individuals as independent contractors rather than employees, *New Prime* could have broad implications. However, it does not necessarily sound a death knell for arbitration provisions in all transportation industry independent contractor agreements, as these arbitration agreements may still be enforceable as a matter of state law. In addition, since Section 1 of the FAA only applies to workers in foreign or interstate commerce, intrastate workers are not affected. Regardless, transportation industry employers should review their independent contractor agreements to ensure that any arbitration provisions will hold up in light of New Prime.

2. California Court of Appeals Says Employee Must Arbitrate Employment Dispute Once Employer Declares that Continued Employment Manifests Assent to Arbitration Policy

The California Court of Appeals ruled in *Diaz v. Sohnen Enterprises* that an employee must arbitrate her discrimination suit against her employer because she consented to an arbitration agreement by continuing to work. The split, three-judge panel sent the employee's claims to arbitration even though she never signed the written arbitration agreement and verbally rejected it.

In short, the Court held that "California law in this area is settled: when 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."

This case is a win for employers who have mandatory arbitration agreements. It also raises the question of whether the Court's reasoning might apply in a traditional labor negotiation context where the employer and the union are at an impasse over the employer's proposal to expand existing arbitration provisions in a collective bargaining agreement to cover statutory claims, and the employer thereafter implements the proposal.

3. California Supreme Court Invalidates Employer's Arbitration Agreement As Unconscionable.

In *OTO LLC v. Ken Kho*, the California Supreme Court ruled that an Oakland Toyota dealership's arbitration agreement with a former employee was unenforceable and was so unfair

and one-sided that it was procedurally and substantively unconscionable. "Arbitration is premised on the parties' mutual consent, not coercion, and the manner of the agreement's imposition here raises serious concerns on that score," the majority opinion said.

In 2013, Ken Kho, then an employee of the dealership, One Toyota, was asked to sign several documents, including an arbitration agreement. Kho signed it, and was later terminated.

The California Supreme Court acknowledged that California and federal laws strongly favor arbitration. However, the Court considered the following factors in determining that One Toyota's arbitration agreement was unconscionable:

- The arbitration agreement purported to waive Kho's right to file a wage claim with the Labor Commissioner and to have a "Berman" hearing before the Labor Commissioner (while not dispositive, the Court noted that this remains a significant factor in considering unconscionability of employee arbitration agreements);
- The agreement was presented to Kho in his workspace, along with other employment-related documents;
- Neither its contents nor its significance was explained;
- Kho was required to sign the agreement to keep the job he had held for three years;
- Because One Toyota used a piece-rate compensation system, any time Kho spent reviewing the agreement would have reduced his pay;
- A low-level employee (a porter) presented the agreement to Kho, "creating the impression that no request for an explanation was expected and any such request would be unavailing";
- By having the porter wait for the documents, One Toyota conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel;
- There was no indication that the porter had the knowledge or authority to explain the terms of the agreement;
- Kho was not given a copy of the agreement he had signed;

- The agreement was written in an extremely small font in the form of a "single dense paragraph" of 51 lines, and the text was "visually impenetrable" and "challenge[d] the limits of legibility";

- The sentences were complex, filled with statutory references and legal jargon;

- Kho was not offered a version to read in his native language (while the Court noted this factor, it did not consider it because it did not know Kho's English proficiency);

- The arbitration agreement did not make clear One Toyota's obligation to pay arbitration-related costs (and rather cited to statutory provisions and referenced legal precedent; the Court noted "It would have been nearly impossible to understand the contract's meaning without legal training and access to the many statutes it references. Kho had neither.");

- One Toyota's agreement did not mention how to bring a dispute to arbitration, nor did it suggest where that information might be found (e.g., by citing to a commercial arbitration provider such as JAMS or AAA); and

- One Toyota's arbitration process was complicated to navigate and would likely require an attorney, making it cost-prohibitive for Kho.

The Court concluded that "[w]e have not said no arbitration could provide an appropriate forum for resolution of Kho's wage claim, but only that this particular arbitral process, forced upon Kho under especially oppressive circumstances and erecting new barriers to the vindication of his rights, is unconscionable."

4. California Court of Appeals Compels Employee to Arbitrate Claims Even Though He Filed Suit Before Signing Arbitration Agreement

In *Quiroz Franco v. Greystone Ridge Condominium*, the California Court of Appeals compelled an employee to arbitrate his claims against his employer even though the employee filed his lawsuit two days before he signed an arbitration agreement. The Court held that the arbitration agreement was clear in that it required arbitration of any claims and that it did not contain any restriction based on when a claim was filed.

In the case, Quiroz Franco, the employee, was given an arbitration agreement on March 9, 2018, and a Spanish translation shortly thereafter. On March 19, 2018, he filed a lawsuit against his employer, alleging harassment, discrimination, and wage and hour claims among others. On March 21, 2018, Quiroz Franco handed in his signed arbitration form, which the employer used to attempt to compel him to arbitrate. The lower court ruled that the claims in the employee's suit started to accrue before he signed the arbitration agreement, so arbitration

couldn't be compelled. The employer appealed and the Court of Appeal overturned the lower court's decision.

5. California Court of Appeals Rules that Unfair Competition Law Claims Are Arbitrable

In *Clifford v. Quest Software Inc.*, the California Court of Appeals addressed whether an employee's claim against his employer for unfair competition under Business and Professions Code section 17200 (the UCL) was arbitrable, ruling that it was. The employee brought various wage and hour claims against his employer, and the employer moved to compel arbitration based on the parties' arbitration agreement. The trial court granted the motion in part and ordered to arbitration every cause of action except the employee's UCL claim, which the court concluded was not arbitrable. The Court of Appeals reversed, holding that the employee's UCL claim was subject to arbitration along with his other causes of action—more good news for California employers.

V. National Labor Relations Act

A. Board Decisions

1. NLRB Returns to Its Former Independent Contractor Standard

Recently, the National Labor Relations Board ("NLRB" or the "Board") returned to its long-standing independent-contractor standard, known as the common law agency test. In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the Board ruled that shuttle-van-driver franchisees of SuperShuttle at Dallas-Fort Worth Airport are not statutory employees under the National Labor Relations Act ("NLRA"), but rather independent contractors excluded from the NLRA's coverage.

In reaching this holding, the Board considered factors including the franchisees' leasing or ownership of their work vans, method of compensation, control over their daily work schedules and working conditions, absence of supervision, and the parties' understanding that the franchisees were independent contractors. The Board determined these factors provided the franchisees with significant "entrepreneurial opportunity" for economic gain. The Board's SuperShuttle decision expressly overruled its 2014 decision in FedEx Home Delivery, which modified the common law agency test by limiting the significance of a worker's entrepreneurial opportunity for economic gain.

While employers may celebrate the NLRB's return to this broader standard, they are still required to comply with state wage and hour laws. Some states may maintain stricter independent contractor standards. For example, the California Supreme Court's holding in *Dynamex* severely limited employers' abilities to hire individuals as independent contractors to perform work that is clearly or arguably within the course of the hiring entity's business. California employers who treat these individuals as employees under *Dynamex* (by for example,

withholding employment taxes, setting hourly rates of pay, providing for meal breaks and rest periods) may have difficulty later arguing that they are not employees (but rather independent contractors) under the NLRB's broader standard. Thus, the interplay between the NLRB's independent contractor standard and those under state law remains to be seen. Nonetheless, this new decision is welcome news for employers whose operations are subject to the NLRA.

2. NLRB Overrules Long-Standing Public Space Exception

In June, the NLRB overturned a nearly 38-year old precedent when it ruled that employers may deny nonemployee union representatives access to areas of their property open to the public, like cafeterias or restaurants, when the union representatives are there to solicit for or promote union membership. *UPMC et al*, 368 NLRB No. 2 (2019). In this ruling, the NLRB overruled its previous decisions that had recognized a "public space" exception under which employers were required to permit non-employee union organizers to engage in union activity in public cafeterias or restaurants if the organizers used the facility in a manner consistent with its intended use and were not disruptive.

As a result of the NLRB's recent decision to overrule the "public space" exception, employers now can decide what types of activities, if any, they will allow by nonemployees on private property, absent discrimination between nonemployee union representatives and other nonemployees. This new standard will apply retroactively.

Subsequent to the UPMC case, the NLRB issued three decisions along similar lines that further affirmed employer property rights. Just four days after the UPMC decision, the NLRB ruled in *Fred Meyer Stores, Inc. et al*, 368 NLRB No. 6 (2019) that an employer did not violate the NLRA when it instructed union representatives to meet employees in the break room where the union representatives' actions exceeded the scope of the rights in the parties' collective bargaining agreement ("CBA") and departed dramatically from their prior practices by sending extra representatives to the store.

In *Bexar County Performing Arts Center Foundation et al*, 368 NLRB No. 46 (2019) the NLRB ruled an employer may exclude from its property off-duty, onsite contractor employees engaged in NLRA Section 7 activity unless: (1) those employees work "regularly and exclusively on the property"; and (2) the employees "do not have access to reasonable alternative nontrespassory means of communicating their message." (Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities.").

Finally, in *Kroger Limited Partnership I Mid-Atlantic et al*, 368 NLRB No. 64 (2019) the Board ruled that an employer can limit the rights of nonemployee union supporters to access company property that is otherwise open to the public. However, if an employer permits access

to its property to other nonemployees, it cannot discriminate against nonemployee union agents by denying them similar access.

While the NLRB's decision in the UPMC case generally can be considered a favorable one for management-side lawyers and their employer clients, employers in California should remain cautious about the reach of this decision. In contrast to other states, California generally has adopted more expansive rights regarding where individuals may conduct expressive activities under the California constitution. Those rights extend to certain types of speech and communications on private property, even if the federal constitution might not afford these same rights to property owners. Therefore, California employers should not assume that the NLRB's recent decision categorically permits employers to exclude union organizers in all instances from coming onto the employer's property to discuss union matters or labor disputes. Before acting to exclude such persons from the employer's property, we strongly encourage employers to consult with experienced labor counsel.

3. NLRB Upholds Employer Conduct Related to Mandatory Arbitration Agreements

In *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019), the National Labor Relations Board (NLRB) addressed the lawfulness of employer conduct surrounding mandatory arbitration agreements for the first time since the U.S. Supreme Court's 2018 decision in *Epic Systems v. Lewis*, where the Court held that mandatory arbitration agreements do not violate the National Labor Relations Act (NLRA) (see here). In *Cordúa Restaurants*, the NLRB ruled in part that employers are not prohibited under the NLRA from: (1) informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge; and (2) promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

The NLRB's decision in *Cordúa Restaurants* is a natural extension of the Supreme Court's analysis and ruling in *Epic Systems*. There, the Court held that Congress, when passing the Federal Arbitration Act ("FAA") in 1925, instructed courts to enforce arbitration agreements as written. Since the passage of the FAA predates the NLRA by ten years, and since the NLRA says nothing about overruling the FAA, the NLRB could not, under the guise of enforcing the NLRA, rule that an arbitration agreement that otherwise is lawful on its face violates the NLRA. This decision by the NLRB is further evidence of that agency's retreat from past policies advanced by the NLRB in the prior administration and likely will not be overruled.

4. Arbitration Clauses Require Exceptions for NLRA Claims

Employers cannot force employees to sign broad arbitration clauses that require binding arbitration of all employment-related disputes, without a sufficient exception for resolving before the NLRB claims arising under the NLRA.

In *E.A. Renfroe & Company Inc. and Kimani Adams*, 368 NLRB No. 147 (2019), the employer discharged an employee who refused to sign an arbitration agreement. The agreement made arbitration the exclusive arena for resolution of statutory claims under the NLRA, requiring binding arbitration for all employment-related disputes "whether based in…federal statutory law, or any other legal theory." While the agreement had a carve-out titled "claims not covered," it merely excluded claims that "as a matter of law, the parties cannot agree to arbitrate." The NLRB found this exclusion clause legally insufficient, "constitute[ing] the type of vague, generalized language that requires employees to meticulously determine the state of the law themselves."

Even non-union employers, like E.A. Renfroe, should know that their mandatory arbitration clauses continue to draw NLRB scrutiny. The addition of a clear savings clause providing that employees retain the right to file charges with the NLRB, even if the agreement otherwise includes claims arising under the NLRA within its scope, may help limit or eliminate the potential for NLRB scrutiny. That said, because arbitration provisions are construed as a whole, it is wise to consult counsel to ensure that arbitration agreements are drafted in line with the law.

5. NLRB Rules on Restrictions on Communications Responsive to Inquiries From the Media

The NLRB under the current administration continues to issue decisions that factor in legitimate business considerations of employers when evaluating rules that are alleged to restrict employee protections under the NLRA. One such recently issued decision, *LA Specialty Produce Company*, 368 NLRB No. 93 (2019), may have particular significance to many of MSK's clients because it addresses an important issue on which we frequently have consulted with clients in the past — restrictions on communications responsive to inquiries from the media.

The restriction at issue in the LA Specialty case provided as follows:

"Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

The Board's general counsel issued a complaint alleging that the rule in its entirety violated the NLRA because it purportedly chilled employees from exercising their Section 7 rights under the NLRA, including the right to discuss work issues publicly when asked to comment by the press. The administrative law judge found the rule to be overly broad, and therefore unlawful, because on its face it could be construed to cover NLRA-protected activities; however, the Board disagreed with this reading of the rule. While the Board recognized that the first sentence of the rule, standing alone, might suggest that employees may never speak to the news media when approached for comment, it concluded that an objectively reasonable employee would understand that the second sentence qualified the first sentence by explaining

that only the company president was authorized and designated to comment on company matters. Thus, read as a whole, a reasonable employee would understand that he or she is only precluded from speaking on behalf of the employer when approached for comment.

6. NLRB Rules that Employers May Restrict Employees' Email Use to Business Purposes

Employees do not have a statutory right under the NLRA to use their employer's email system or other information technology ("IT") resources for NLRA Section 7 purposes. In doing so, the NLRB reversed its 2014 ruling in *Purple Communications* that held workplace rules prohibiting employee email use for NLRA Section 7 activity were presumptively invalid.

The decision, set forth in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019), reinstates the *Register Guard* standard, which held that because a corporate email system is the employer's property, an employer may prohibit non-business email communications, including those protected by Section 7. However, *Caesars* adds an exception to *Register Guard*, under which employees have no statutory right to use employer IT resources except when the employer's email system is "the only reasonable means for employees to communicate with one another."

7. Employers Can Prohibit Employees From Discussing Pending Investigations

Employers do not violate NLRA's Section 7 when they prohibit employees from discussing ongoing workplace investigations. The decision in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) reversed the NLRB's 2015 ruling in *Banner Estrella*, which demanded case-by-case determination of whether confidentiality is required in a particular investigation.

The NLRB concluded that rules prohibiting employees from discussing ongoing workplace investigations are lawful to the extent those rules apply only during open investigations. The NLRB recognized that the confidentiality provisions at issue could interfere with the exercise of Section 7 rights, but found the impact was slight in comparison to the employer's business justifications, such as protecting employee privacy and ensuring the integrity of investigations. While the NLRB recognized the potential for substantial or compelling reasons to extend a confidentiality requirement beyond the end of the investigation, it found such rules require individualized scrutiny.

The *Apogee* decision means that facially-neutral rules requiring workplace confidentiality during the term of an open investigation are lawful. In contrast, under the prior decision in *Banner Estrella*, the burden was placed on the employer to justify its confidentiality rule. Now the NLRB has approved of such rules without requiring a case-by-case review. The

jury is still out on rules requiring confidentiality with respect to closed investigations, so employers should tailor rules requiring confidentiality to apply only to open investigations.

8. Employers Do Not Need to Collect Union Dues After Collective Bargaining Agreement Expires

Employers have no obligation to continue deducting union dues from employees' paychecks pursuant to a dues checkoff provision in a CBA after the CBA expires. This ruling in *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center and Local Joint Executive Board of Las Vegas*, 368 NLRB No. 139 (2019) overruled the NLRB's 2015 decision in *Lincoln Lutheran of Racine* and returned to the long-standing *Bethlehem Steel* standard, which held termination of dues checkoff provisions in an expired CBA was mandatory under Section 8(a)(3) of the NLRA.

Dues checkoff provisions are considered mandatory bargaining subjects under the NLRA; however, the NLRB differentiated dues checkoff provisions from other mandatory bargaining subjects like wages, pension and welfare benefits and working hours, since these latter subjects are part of employment conditions that already exist from the commencement of the parties' bargaining relationship, whereas a dues checkoff provision is part of a "limited category" of mandatory bargaining subjects "that are exclusively created by the contract." Other examples that fall in this limited category include no-strike/no-lockout pledges, arbitration management rights, and union security clauses.

Under this decision, the NLRB restores an economic weapon taken away from employers in *Lincoln Lutheran of Racine*. A dues checkoff provision—like no-strike/no-lockout pledges, arbitration management rights, and union security—expires when the CBA expires, and as the NLRB explained, "an employer is free upon contract expiration to use dues checkoff cessation as an economic weapon in bargaining without interference from the Board."

9. Employers Given More Leeway in Restricting Use of Union Buttons

Employers will now be held to a new, lower standard when determining whether restrictions on employees' use of union insignia in the workplace runs afoul of Section 7 of the NLRA. The decision, *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), involved a Wal-Mart policy permitting employees to wear only "small, non-distracting" union insignia. The NLRB determined like policies, like Wal-Mart's, that restrict (rather than ban outright) the use of union insignia should be analyzed as "facially-neutral" policies, instead of under the previous standard that held such restrictions were presumptively unlawful, absent proof of "special circumstances."

In this instance, the Board ruled that Wal-Mart's restrictions as they applied to customer-facing employees were lawful because Wal-Mart's interest in providing its customers a satisfying shopping experience outweighed the employees' interest in having zero restrictions on

the size of the union insignia they could wear. However, the restriction was not lawful in employee-only zones where Wal-Mart's claimed justification would not apply.

B. Significant Advice Memoranda

1. Uber Drivers Are Independent Contractors According to NLRB

On May 14, the National Labor Relations Board ("NLRB") released an advice memorandum declaring that Uber drivers are independent contractors (not employees) and are, therefore, not eligible to unionize. The memo, dated April 16, 2019, said the drivers are independent contractors under the NLRB's recently-adopted SuperShuttle test, because they have "significant entrepreneurial opportunity" while driving for Uber. The NLRB's standard only applies in the labor context. It does not apply to California wage claims and lawsuits, where the California Supreme Court has adopted the ABC Test set forth in *Dynamex*.

The April 16th advice memo was drafted by Jayme L. Sophir, Associate General Counsel Division of Advice, in response to questions from the NLRB's San Francisco Regional Director, Jill Coffman, about claims that Uber violated workers' rights under the National Labor Relations Act ("NLRA"). The NLRA authorizes employees to unionize and protects their rights organize. The NLRA does not apply to independent contractors.

In the advice memo, Sophir applied the SuperShuttle test, which aims to gauge workers' entrepreneurial opportunity by examining ten aspects of their relationship to their alleged employer. The memo focuses on the extent of Uber's control over drivers, saying three features of its platform afford "drivers significant opportunities for economic gain and, ultimately, entrepreneurial independence." The features are: (1) workers' "unfettered freedom" to set their schedules by logging on and off the app, (2) their control over their work area based on where they log on, and (3) their ability to "toggle between different ride-sharing apps at will." The memo does state that some of the SuperShuttle factors (e.g., drivers' lack of special skills) suggest that Uber drivers are employees, but that "the strength of the evidence supporting independent-contractor status overwhelms those factors."

The advice memo is another indication of the current administration's pro-business policy agenda, which at times conflicts with this state's pro-labor policies.

Labor & Employment Law Update

January 15, 2020

ARBITRATION

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Pros

- Faster, no appeals (generally).
- Less formal, less expensive.
- Private.
- Arbitrators perceived as "better" than juries at deciding cases "correctly."
- No class actions.

Cons

- No judge!
- No jury!
- "Lower" awards!
- No appeal (generally)!
- Private!
- No class actions!

Federal Arbitration Act (1926)

- Passed due to judicial hostility to arbitration.
- Arbitration is a matter of contract – it's up to the parties to decide whether and what to arbitrate.
- States may not treat contracts to arbitrate any differently than other contracts.

Federal Arbitration Act (1926)

- Broadly applies to contracts affecting interstate commerce.
- Does not apply to transportation workers engaged in interstate movement of goods.

California's AB 51

- Assumes that employers have more bargaining power and "coerce" employees to accept employment subject to arbitration agreements.
- Assumes that arbitration results in employees "waiving" their rights to protection under California Fair Employment and Housing Act.

California's AB 51

- "Solves" this problem by banning mandatory arbitration agreements as of January 1, 2020.
  - No arbitration agreement required as "condition of employment"
  - No arbitration agreement required for "any employment related benefit"
  - No discrimination against applicants that refuse
  - No optional "opt out" procedures allowed

California's AB 51

- EXCEPT:

  "Nothing in this section is intended to invalidate a written arbitration agreement ***that is otherwise enforceable*** under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)."

California's AB 51

- AND:

  Temporarily enjoined based on FAA.
  To be continued.

AB 51 Predictions

- Expect more on the issue of preemption.
- Expect more litigation on whether FAA applies.
  - The U.S. Supreme Court held in *New Prime Inc. v. Oliveira*, that a court must decide whether the transportation worker exception applies.
- Expect California courts to continue to find agreements unenforceable under FAA.

CA Supreme Ct. Weakens Agreements

- Auto dealership's agreement procedurally and substantively unconscionable.
- Employee sought back wages in "Berman hearing" and agreement was invalidated because its proceedings were less affordable and less accessible than a Berman hearing.
- Very high emphasis placed on procedural unconscionability.
  - *Oto LLC v. Kho*

CA Supreme Ct. Weakens Agreements

- Agreement presented to employee while working, which reduced pay due to piece rate compensation.
- "Porter" stood by waiting for signature, no explanation offered or available.
- Employee would lose job of three years if did not sign.
- Employee not given a copy.

CA Supreme Ct. Weakens Agreements

- Agreement written in dense paragraph that was visually "impenetrable."
- Filled with complex sentences and legal "jargon."
- Required legal training to understand that the employer would pay the arbitration fees.
- Did not explain how to initiate arbitration.

CA Supreme Ct. Weakens Agreements

- Critically, agreement allowed full discovery, dispositive motions, and required same rules of evidence as would apply in court.
- Normally a positive, these rules were a negative because Berman hearings are informal and the Labor Commissioner can help the employee.
- Could be limited to facts due to preemption.

NLRB Filings Must Be Carved Out

- NLRB: Arbitration agreements that require arbitration of "all" claims must carve out claims before the NLRB for violations of the NLRA. *Prime Healthcare Paradise Valley LLC*

Ensuring Agreements Enforceable

- Give employees time to read agreements.
- Identify someone to answer questions.
- Make agreement easy to read and understand.
- Give arbitrator power to modify procedures to ensure they are "affordable and accessible."
- Keep forms up to date.

SB 707 (Arbitration Fees)

- If party responsible for arbitration fees does not pay them within 30 days of the due date, that party waives the right to arbitration.
- Preempted?

Some Good News

- U.S. Supreme Court: The Federal Arbitration Act does not allow a court to compel class arbitration when the agreement does not clearly provide for it. *Lamps Plus Inc. v. Varela*.

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Some Good News

- CA Court of Appeals: Employees can manifest assent to arbitration by continuing employment after being notified that agreement is condition employment. *Diaz v. Sohnen Enterprises.*
- Employees can be required to arbitrate unfair competition law claims. *Clifford v. Quest Software, Inc.*
- Arbitration agreement signed after lawsuit filed can cover lawsuit. *Quiroz Franco v. Greystone Ridge Condominium.*

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NEW LAWS

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Deadline for Mandatory Sexual Harassment Training Extended

- **Background:** In 2018, California passed a law that greatly expanded sexual harassment training requirements for employers:
  - Employers with 5+ employees: 2 hours for supervisors, 1 hour for employees.
  - All training was to have been completed by 2020.
- September 2019: Law amended to **postpone** compliance requirement to **January 1, 2021.**
  - New law also confirms that those employees who received sexual harassment training in 2019 need not be re-trained again for two years.

Update your separation agreements!

- **Cal. Civ. Code Section 1542:**
  - "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

California Prohibits Discrimination Based on Hairstyle

- Governor Gavin Newsom signed California's "CROWN Act" on July 3, 2019.
- The law amends FEHA to define "race or ethnicity" as "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."

Extended Statute of Limitations for Filing DFEH Charge

- Also known as the Stop Harassment and Reporting Extension (SHARE) Act, AB 9 extends the deadline to file an allegation of unlawful workplace harassment, discrimination, or retaliation with the DFEH from one year to <u>three years</u>.
- According to the State's own press release:

  *"AB 9 will impose a statute of limitations period that is **six-times** the length of the federal standard and **three-times** the length of the current state standard."*

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Expanded Lactation Accommodation Requirements

- **Employer-provided lactation room or location:**
  - Must be "safe, clean, and free of hazardous materials"
  - Must contain a surface to place a breast pump/personal items and place to sit.
- **Employers must also provide access to:**
  - Electricity or alternative devices (e.g. extension cords or charging stations) needed to operate an electric or battery-powered breast pump.
  - Sink with running water and a refrigerator (or cooling device or cooler) in close proximity to the employee's workspace.

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Expanded Lactation Accommodation Requirements

- Employers with fewer than 50 employees may be exempt from these requirements if they can demonstrate undue hardship.
  - If so, must make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.
- The new law also requires employers to **<u>implement written policies</u>** (e.g. in an employee handbook) related to lactation accommodations.

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No More "Don't Darken My Door" Provisions in Settlement Agreements

- AB 749 voids "no rehire" provisions in settlement agreements entered into on or after January 1, 2020.
- **Exceptions:**
  - where the employer has made a good faith determination that the individual engaged in sexual harassment or sexual assault.
  - "if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person"

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Photoshoot Pay Delay Law

- **"Photoshoot Pay Easement Act":** Any short-term print shoot employee (from models to crew members) can be paid on the employer's **next regular pay day** (including by mail), rather than on the last day they work.
- The law extends the previous exception for motion picture/television productions to **all photo shoot employees**.
- A photo shoot is defined as a "still image shoot, including film or digital photography, for use in print, digital, or internet media."

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Paid Family Leave Extended

Senate Bill 83 amends multiple sections of the Government Code, Labor Code and Unemployment Insurance Code to increase the maximum wage replacement benefits under California's Paid Family Leave (PFL) program **from six to eight weeks**, beginning **July 1, 2020**.

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Leave For Organ Donation

- Requires employers with 15 or more employees to provide **an additional unpaid leave** of absence (up to 30 business days per year) to an employee donating an organ (following the **30 business days of paid leave** for organ donation required under current California law).

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Minimum Wage/ OT Exempt

- Effective January 1, 2020, the **minimum wage** is now $12.00 (25 employees or less) and $13.00 (25 employees or more), respectively.
  - City of LA: July 1, 2020: $13.25/$14.25 to $ 14.25/$15.00
  - 2020 CA salary basis test: $54,080/$49,920
- **FLSA:** the new overtime rule as of Jan 1, 2020 raises the pay threshold for exempt workers to **$35,568** per year ($684/week) from its current level of $23,660 per year ($455/week).

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WAGE AND HOUR LAW

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Employer's On-Call Scheduling Practice Required Reporting Time Pay

Ward v. Tilly's, Inc., 31 Cal. App. 5th 1167 (2019)

- Employees with scheduled "on call" shifts were required to call-in 2 hours before to confirm shift
  - If not needed, employees received no pay
- Employees argued they were entitled to "reporting time pay", even if they didn't have to physically appear at the store
  - "Reporting time pay": Employees entitled to pay if required to ***report to work*** but (a) are not put to work; or (b) are given less than half of the scheduled day's work

Employer's On-Call Scheduling Practice Required Reporting Time Pay

- Holding: On-call practice required payment of reporting time pay
  - Employees still "reported" to work by calling in, even though they did not have to physically appear at the store
    - These on-call employees were missing other education, social, and employment opportunities waiting to see if they were going to work
  - Purpose of "reporting time pay": (1) to compensate employees; and (2) encourage proper notice and scheduling
    - "This is precisely the kind of abuse that reporting time pay was designed to discourage"

Employee Can't Sue Payroll Company for Negligence or Breach of Contract

Goonewardene v. ADP, LLC, 6 Cal. 5th 817 (2019)

- Employee filed lawsuit for unpaid wages against employer and independent payroll company (ADP)
- Lower court found ADP was not the "employer" for Labor Code purposes, but still permitted plaintiff to pursue negligence and breach of contract claims against ADP

Employee Can't Sue Payroll Company for Negligence or Breach of Contract

- Holding: Employee cannot sue payroll company for contract or negligence claims based on agreement with employer
  - A payroll company has no tort duty of care to employees in complying with the California Labor Code and Wage Orders
  - An employee is not a third-party beneficiary to a payroll services contract between a payroll company and the employer, as the contract is intended to benefit the employer, not the employee

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EPLI Policy Covered Expense Reimbursement Claim, Despite Wage and Hour Exclusion

S. California Pizza Co., LLC v. Certain Underwriters at Lloyd's, London etc., 40 Cal. App. 5th 140 (2019)

- Pizza franchisor's employment practices liability insurance ("EPLI") policy excluded claims arising under "wage and hour or overtime laws"
- Franchisor sought coverage to defend against delivery drivers' claims for expense reimbursement, but was denied coverage

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EPLI Policy Covered Expense Reimbursement Claim, Despite Wage and Hour Exclusion

- Holding: EPLI policy covered expense reimbursement claim
  - Labor Code Sections 2800 and 2802 (both requiring reimbursement) do not mention "wages" or "hours"
  - Those Sections also do not involve payments made in exchange for labor or services
  - Derivative PAGA and 17200 claims also covered
- Note, however:
  - Language in this policy's wage and hour exclusion was quite narrow
  - EPLI carriers likely will expressly exclude expense reimbursement claims

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No Derivative Penalties for Failing to Pay Unpaid Meal Period Premiums

Naranjo v. Spectrum Sec. Servs., Inc.,
40 Cal. App. 5th 444 (2019)

- Security company employer required on-duty meal periods per its written policy, but:
  - Did not have guards sign written agreements as required
  - Did not tell them of their rights to revoke that agreement
- Guards filed a class action and sought meal period premiums and derivative wage statement and waiting time penalties

No Derivative Penalties for Failing to Pay Unpaid Meal Period Premiums

- Holding 1: Employees are entitled to meal period premiums for on-duty breaks because Spectrum didn't have written agreements with a revocation clause
- Holding 2: Recovery of unpaid meal period premiums did not entitle employees to recover derivative waiting time or paystub penalties
  - In this context, meal period premiums are penalties, *not wages*
- Holding 3: Because Spectrum did not allow off-duty rest periods, a rest period class should have been certified, even if some guards took rest breaks and others did not

Unpaid Wage Claim Not Preempted Where CBA Did Not Need Interpretation

Melendez v. San Francisco Baseball Assocs. LLC,
7 Cal. 5th 1 (2019)

- Unionized security guards sued San Francisco Giants for failure to pay wages due at time of "discharge"
  - Claimed discharged after every homestand/event and entitled to pay after each event, seeking penalties for delay
- Giants moved to compel arbitration pursuant to CBA
  - Guards were year-round and remained employed until they resigned or were terminated / claim preempted by Labor Management Relations Act ("LMRA") because it required interpretation of CBA

Unpaid Wage Claim Not Preempted Where CBA Did Not Need Interpretation

- Holding: If a claim arising under state law doesn't require "interpretation" of CBA, it is not preempted
  - "Interpretation" is required if CBA provision is disputed or uncertain
    - Merely consulting or referencing the CBA isn't "interpretation"
  - Here, dispute concerned meaning of "discharge" under state law, not interpretation of CBA itself

No Unpaid Wage Recovery in PAGA Action

ZB, N.A. v. Superior Court, 8 Cal. 5th 175 (2019)

- Former employee brought a PAGA claim, seeking civil penalties AND unpaid wages per Labor Code § 558
  - Language of § 558 permits recovery of underpaid wages and civil penalties for violation of Wage Orders
- Holding: Cannot recover unpaid wages under PAGA
  - Supreme Court interpreted § 558 and concluded only the Labor Commissioner has the ability to assess civil penalties AND collect unpaid wages

Mandatory Food & Beverage Service Charge Could Be a Classified as Gratuity

O'Grady v. Merch. Exch. Prods., Inc.,
41 Cal. App. 5th 771 (2019)

- Banquet facility gave servers none of 21% *mandatory* service charge on banquet contracts for food/drinks
  - Servers argued the charge was a gratuity and, by law, all of it should go to those who actually serve food/drinks
  - Prior cases: mandatory service charge not a gratuity
- Holding: Just because the employer called it a "service charge," did not mean it was not a gratuity

California Law Gives More Time to Pay Photoshoot Employees

"Photoshoot Pay Easement Act" (SB 671)

- This is an exception to California's general rule that employees must receive all owed wages on their last date of employment
- Any short-term photoshoot employee can now be paid on the employer's next regular pay day (including by mail), rather than on the last day of work
  - Definition of photoshoot: a "still image shoot, including film or digital photography, for use in print, digital, or internet media"
  - "Employees" may range from models to crew

AB5 Update

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Dynamex ABC Test

For purposes of LC provisions pertaining to wage orders, a hiring arrangement is presumed to be one of employment and not IC unless all three prongs of the ABC test are satisfied:

- Prong A – worker is free from direction and control of hiring entity for performance of the work, both under contract and in fact
- Prong B (toughest to get around) – work in question must be outside the usual course of business of the hiring party
- Prong C – worker must be engaged in an established independent trade, occupation or business

- AB 5 was enacted in September of 2019, effective January 1, 2020, to codify Dynamex. Consequently, ABC test now applies to:
  - All provisions of LC (not just those pertaining to wage orders); i.e., Cal-OSHA provisions, LC 2802, etc.
  - Workers compensation statute (which is part of LC)
  - Unemployment insurance code

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Exceptions to ABC application:

- Occupational exceptions
- Professional services exception
- Business to business exception

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Occupational Services Exception

- state licensed medical and health care service professionals (doctors, dentists, podiatrists, psychologist)
- state licensed lawyers, architects, engineers, private investigators, accountants
- state licensed or SEC registered securities broker-dealers, investment advisors
- direct salespersons under unemployment insurance code
- commercial fisherman working on an American vessel

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Professional Services Exception

- Marketing
- HR administrator
- Graphic design
- Fine Artist
- Still photographer or photojournalist (limited to 35 submissions/yr, and excludes persons working on motion pictures)
- Freelance writer, editor or newspaper cartoonist (limited to 35 submissions/yr)

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Additional, exacting conditions attached to the professional services contract exception:

1. the worker must have his or her own "**business location**," which may be the worker's home, but that is separate from the hiring company;
2. the worker must have a **business license**;
3. the worker must **set his or her own rates**;
4. the worker must **set his or her own hours**, outside of project completion dates;
5. the worker must regularly do the same **work for other companies** or must advertise that they are available to do the same work for other companies; and
6. the worker must exercise "**discretion and independent judgment**" in performing his or her work.

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Business to Business Exception

Unlike the Professional Services exception, the Business-to-Business contracts exception is not limited to enumerated occupations. However, all business-to-business contracts must satisfy certain requirements in order to meet the exception:

1. the contract cannot be directly with the worker; the **worker must have his or her own business entity** (sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation) and the contract must be with that business entity;
2. the worker's business entity must be free from the **"control and direction"** of the hiring company "**in connection with the performance of the work**;"
3. the worker's business entity must provide **services directly to a company**, not to its customers;
4. the contract for work must be **written**;
5. the worker's business entity must have a **business license**;

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Business to Business Exception Cont.

6. the worker's business entity must have its own "**business location** (not the worker's residence);"
7. the worker's business must do **the same type of work** as the type in the contract with the company;
8. the worker's business must **regularly work for other companies** and have its own clients "**without restrictions** from the hiring entity";
9. the worker's business must **advertise to the public** that it is as available to work for other companies;
10. the worker's business must **provide its own tools**, vehicles and equipment;
11. the business must **negotiate its own rates**;
12. the worker's business must **set its own hours and location**, consistent with the nature of the work; and
13. the worker cannot be performing something that requires a contractor's license (i.e. electrical, plumbing, landscaping, and flooring).

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- Even if an exception to the ABC test is met under AB 5, this does not make the worker an IC; rather, the common law multi-factor test under Borello applies to determine the worker's employment status. AB 5 also gives a court the discretion to apply the Borello standard in any case where the ABC test "cannot be applied in a particular context."

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Potential exposure for misclassification

- For non-exempt workers, misclassification exposes the employer to:
  - overtime premium payments
  - liquidated damages
  - waiting time penalties for failure to pay wages due at time of termination
  - penalties for failure to have statutorily required pay cycles
  - penalties for failure to maintain accurate itemized wage statements
  - penalties for meal and rest period violations

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Potential exposure for misclassification cont.

- For non-exempt workers, misclassification exposes the employer to:
  - PAGA penalties
  - penalties for willful misclassification of employees as independent contractors.
  - indemnity obligations under Labor Code section 2802
  - penalties from the failure to withhold and remit appropriate tax deductions.

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Potential exposure for misclassification cont.

- For exempt workers, misclassification can still give rise to employer exposure:
  - labor code penalties for failure to issue itemized wage statements
  - waiting time penalties for failure to pay all wages due at time of termination.
  - penalties for willful misclassification of employees as independent contractors.
  - indemnity obligations under Labor Code section 2802
  - penalties from the failure to withhold and remit appropriate tax deductions.

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CBA Exemptions

- The foregoing penalties and remedies presumably will not apply in any instance where the worker's services are covered by a CBA that satisfies an exemption under a labor code statute or wage order allegedly violated by reason of a misclassification. For example:
  - Labor Code section 204(c) (CBA exemption applicable to pay cycles)
  - Labor Code section 512(d) (exemption for meal period violations if CBA provides certain protections)
  - Labor Code section 514 (exemption for overtime pay if CBA provides certain protections)
  - Labor Code section 245.5 (exemption for paid sick leave under state but not local law if CBA provides certain protections)
  - IWC Wage Order 12, section 3.(J) (CBA exemption for hours and days of work if CBA provides certain protections).

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- Loan out companies prohibited under AB 5? No. Question will be exposure, if any, under LC, and under state tax laws enforced by EDD, for use of this hiring arrangement

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Best practices re loan out hiring arrangements

- Loan out company must observe corporate formalities
- Written employment contract between loan out company and the individual providing the service
- Written contract between the loan out company and the party receiving the service

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Best practices re loan out hiring arrangements cont.

Written contract between the loan out company and the party receiving the service, containing the following:

- Warranty by loan out company that it has a "controlling position" over the person rendering service
- The individual is being loaned out for a particular project, rather than indefinitely
- The loan out company is in the business of providing services to other recipients
- Employer tax and reporting responsibilities assumed by the loan out company
- Indemnification as to all obligations assumed by loan out company

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Best practices re loan out hiring arrangements cont.

- Limit use of loan out hiring arrangements to high level, above the line talent (writers, directors, performers, producers)
- Exposure risk is minimized if worker is exempt under wage and hour laws, and is covered by CBA

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Legal challenges to AB 5

- Federal preemption of AB 5? Courts uniformly are holding that AB 5 cannot be applied to owner-operators in the trucking industry because it conflicts with federal transportation law, which prohibits states from enacting or enforcing laws "related to a price, route, or service of any motor carrier …with respect to the transportation of property."
- First amendment and equal protection challenge by American Society of Journalists and Authors, National Press Association – filed December 17, 2019 and now pending in federal district court in LA.

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National Labor Relations Act (NLRA)

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National Labor Relations Act, Section 7

- "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities for the purpose of collective bargaining or other mutual aid or protection**, …"

Return To Former Independent Contractor Standard

- *SuperShuttle DFW, Inc.*, 367 NLRB No. 75
  - SuperShuttle contracted with an airport to provide shared-ride services to travelers.
    - Agreement provided terms controlling business, including requirements to maintain complaint procedure and screen drivers.
  - SuperShuttle entered into franchise contracts, called Unit Franchise Agreements, with individual drivers.
    - Union sought to represent a unit of SuperShuttle drivers but SuperShuttle resisted by arguing could not organize because they were independent contractors.

Return To Former Independent Contractor Standard

- *SuperShuttle DFW, Inc.*, 367 NLRB No. 75
  - Ruling: Driver-franchisees are not employees under the NLRA, but are independent contractors.
    - Board considered factors including the franchisees' leasing or ownership of their work vans, method of compensation, control over daily work schedules and working conditions, absence of supervision, and the parties' understanding that the franchisees were independent contractors.
    - Overruled its 2014 decision in FedEx Home Delivery, which modified the common law agency test by limiting the significance of a worker's **entrepreneurial opportunity** for economic gain.

Advice Memoranda on Uber Drivers

- NLRB GC Advice Memo on Uber drivers released in wake of SuperShuttle DFW decision.
  - Like SuperShuttle drivers, Uber drivers are independent contractors.
  - Focus on entrepreneurial opportunity by examining aspects of relationship to alleged employer.
    - (1) "unfettered freedom" to set schedules by logging on and off app,
    - (2) control over work area based on where they log on, and (3) ability to "toggle between different ride-sharing apps at will."

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Review: Epic Systems Corp. (2018)

- In 2012, the NLRB ruled that employers cannot require employees, as a condition of employment, to agree to arbitration provisions containing a class action waiver.
- In 2018, U.S. Supreme Court held that neither the FAA nor NLRA prohibit class and collective action waivers in employment arbitration agreements.
  - Class and collective actions are not "concerted activities" protected by Section 7 of the NLRA.

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Board Upholds Employer Conduct On Mandatory Arbitration Agreements

- *Cordúa Restaurants, Inc.*, 368 NLRB No. 43
  - Restaurant accused of violating the NLRA when it fired workers for opting to participate in a class action that alleged company violated the FLSA and state wage and hour laws.
    - Prior to lawsuit, the restaurant had an arbitration agreement in which employees waived the right to "file, participate or proceed" in a class action lawsuit against the company.
  - After filing of the lawsuit, the restaurant required employees to sign a new agreement, which barred employees from opting into collective actions, unless the restaurant agreed in writing.

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Board Upholds Employer Conduct On Mandatory Arbitration Agreements

- *Cordúa Restaurants, Inc.*, 368 NLRB No. 43
  - Ruling: Employers are not prohibited from: (1) informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge; and (2) promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the FLSA or state wage-and-hour laws.

Review: Purple Communications (2014)

- NLRB held that employees who are given access to employer email systems for work are presumptively permitted to use those systems for certain union organizing and other concerted activities during nonworking time.
  - Discounted Employer property rights
  - Email has now become primary form of work communication, making it "uniquely appropriate" for union organizing

Employers May Restrict Employees' Email Use to Business Purposes

- *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143
  - Employer maintained employee handbook with rules governing employees' usage of employer's computers and IT systems.
  - Rules prohibited employees from using the employer's computer resources, including work email accounts, to "[s]end chain letter or other forms of non-business information," "[s]olicit for personal gain or advancement of personal views," and "visit inappropriate (non-business) websites."

Employers May Restrict Employees' Email Use to Business Purposes

- *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143
  - Ruling: Employees do not have a statutory right under the NLRA to use their employer's email system or other IT resources for union organizing or other concerted activities.
    - Must not discriminate against union activity
    - Overruled *Purple Communications*

Employers Can Prohibit Employees from Discussing Pending Investigations

- *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144
  - Had two rules regarding confidentiality of investigations:
    - Required employees to "cooperate fully in investigations and answer any questions truthfully and to the best of their ability," and indicated that both reporting persons and interviewees are "expected to maintain confidentiality."
    - Listed behaviors that could result in discipline, which included the "unauthorized discussion" of investigations or interviews "with other team members."
    - Employer never disciplined an employee for violating those rules, but asserted provisions were necessary business reasons.

Employers Can Prohibit Employees from Discussing Pending Investigations

- *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144
  - Ruling: Employers do not violate NLRA's Section 7 when they prohibit employees from discussing **ongoing** workplace investigations.
    - Reversed prior ruling *Banner Estrella* decision (2015) requiring investigation-by-investigation review of confidentiality rules.
    - Unclear re: confidentiality of closed investigations.

Board Overrules Long-Standing Public Space Exception

- *UPMC et al*, 368 NLRB No. 2
  - Nonemployee union representatives met with employees in the cafeteria of the UPMC Hospital to discuss union matters and distribute union materials.
    - Hospital permitted only patients, their families and visitors, and employees to use the cafeteria.
  - Security received complaints and asked the union representatives to leave. When they refused, security requested police assistance to escort the union representatives out.
    - Union subsequently filed charges alleging unfair labor practices.

Board Overrules Long-Standing Public Space Exception

- *UPMC et al*, 368 NLRB No. 2
  - Ruling: Employers may deny nonemployee union representatives access to areas of their property open to the public, like cafeterias or restaurants, when the union representatives are there to solicit for or promote union membership.
    - Overruled its previous decisions that had recognized a "public space" exception.
    - Employers can decide what types of activities they will allow by nonemployees on property, absent discrimination between nonemployee union representatives and other nonemployees.

Restrictions on Communications Responsive to Media Inquiries

- *LA Specialty Produce Company*, 368 NLRB No. 93
  - Produce distributor had a confidentiality policy mandating employees protect confidential and proprietary info, including vendor lists.
  - "Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization."
    - Union argued rule prevented employees from disclosing customer and vendor names to labor organization, and so, chilled concerted protected activity.

Restrictions on Communications Responsive to Media Inquiries

- *LA Specialty Produce Company*, 368 NLRB No. 93
  - Ruling: Employer policies that prohibit disclosure of confidential and proprietary information, and certain media contact rules are lawful.
    - Facially-neutral rules may be invalidated only if an objectively reasonable employee would interpret the rule to interfere with exercise of Section 7 rights.
    - Read as a whole, a reasonable employee would understand that he or she is only precluded from speaking on behalf of the employer when approached for comment.

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California Consumer Privacy Act

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- Policies and Procedures

and

- Consequences

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Background

- The CCPA took effect on January 1, 2020.
- The related regulations are now proposed (subject to comment) and will be finalized in time for July 1, 2020 - when enforcement starts.
- Deadline to comply re employment/internal uses has been deferred until January 1, 2021.
- The CCPA requires companies to institute new internal data privacy regimes.

Internal Data Uses

- If the data collection is for the purposes of a job applicant, an employee, owner, director, officer, medical staff member, or contractor of the business, such actions are exempt for one year - until January 1, 2021.
- Emergency contact and data needed to administer benefits is similarly exempted.

Covered Parties

1) Annual gross revenues in excess of $25 million (not limited to California revenue alone);

2) Companies which alone or in conjunction with others annually buy, sell, receive or share for commercial purposes, the personal information of 50,000 or more consumers, households, or devices; **or**

3) Companies which derive 50% or more of their annual revenues from selling consumer personal information.

Sale

- "Sell," "selling," "sale," or "sold," means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration.

Not a Sale

- Data is shared at the direction of the consumer, even with third parties.
- Uses the data to accomplish the consumer's opt-out instruction.
- Shares the data with a service provider to perform a business purpose.
  - Must give notice to the consumer and the service provider does not sell or use the data for any other purpose.
- M&A, bankruptcy or other transaction where third party takes control of all or part of the business and there is no change in the data uses.

Business Defined

- "A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that satisfies one or more [of the stated] thresholds… [emphasis added]"

Commercial Purposes

- " … [M]eans to advance a person's commercial or economic interests, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, or exchange products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction.
- Exceptions - e.g., political speech and journalism and public records.

Business Purpose Defined

- "… [As] the use of personal information for the business's or a service provider's operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected. Business purposes are:

- (1) Auditing related to a current interaction with the consumer and concurrent transactions, including, but not limited to, counting ad impressions to unique visitors, verifying positioning and quality of ad impressions, and auditing compliance with this specification and other standards.
- (2) Detecting security incidents, protecting against malicious, deceptive, fraudulent, or illegal activity, and prosecuting those responsible for that activity.
- (3) Debugging to identify and repair errors that impair existing intended functionality.

- (4) Short-term, transient use, provided the personal information that is not disclosed to another third party and is not used to build a profile about a consumer or otherwise alter an individual consumer's experience outside the current interaction, including, but not limited to, the contextual customization of ads shown as part of the same interaction.
- (5) Performing services on behalf of the business or service provider, including maintaining or servicing accounts, providing customer service, processing or fulfilling orders and transactions, verifying customer information, processing payments, providing financing, providing advertising or marketing services, providing analytic services, or providing similar services on behalf of the business or service provider.

- (6) Undertaking internal research for technological development and demonstration.
- (7) Undertaking activities to verify or maintain the quality or safety of a service or device that is owned, manufactured, manufactured for, or controlled by the business, and to improve, upgrade, or enhance the service or device that is owned, manufactured, manufactured for, or controlled by the business.

Exemptions

- California Confidentiality of Medical Information Act
- Health Insurance Portability and Accountability Act
- Health Information Technology for Economic and Clinical Health Act
- Federal Policy for the Protection of Human Subjects - clinical trial
- Personal information collected, processed, sold, or disclosed pursuant to a specified federal law relating to banks, brokerages, insurance companies, and credit reporting agencies, among others - Gramm-Leach-Bliley Act
- California Financial Information Privacy Act.
- Driver's Privacy Protection Act of 1994,
- If infringe on the noncommercial activities of newspapers and periodicals.

Basic CCPA Rights: To

- Opt out
- Notice (aka be informed)
- Disclosure
- Deletion
- Equal services and prices

Protocols Are Needed

- Information Notices
- Requests
- Marketing Practices
- Appeal Rights

CCPA Definitions

- Consumer - " ... [A] natural person who is a California resident … , however identified, including by any unique identifier."
- Household - "… [A] person or group of people occupying a single dwelling."
- Device - "… [A]ny physical object that is capable of connecting to the internet, directly or indirectly, or to another device."

Initial Questions

- What is our annual gross revenue?
- Do we have the personal information of at least 50,000 California consumers, households or devices?
- Do we derive 50% or more of our revenue from selling personal data?
- When and how do we collect that data?
- When do we give notice of what we are collecting?
  --- What do we say we are collecting?
- What do we say we do with that data?
  --- Is every use included?
- Do we sell that personal data?
- Do we disclose or share that personal data?

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Data Collection Survey

- What data is collected?
- From whom/what sources?
- What do you do with the data?
- Where is it stored?
- How long do you keep it?
- What about any marketing databases?
- What about payment processing?
- Who has access to it?
  - "Need to know" best practice
  - User name and password combinations unique to each user
  - Change the default password on all hardware and software when installed

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How do we store the data?

- Do we encrypt it?
- Do we redact it?
- Do we aggregate?
- Do we deidentify it?

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Consumer Rights

- California consumers now have the right to know in advance the categories and details of any personal information collected and the related purposes and uses, along with the sources from which the data was collected and the third parties with whom the business shares or sells the personal information;
  - ∞ Additional purposes/uses cannot be implemented without consumer pre-approval.

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When?

- The consumer must be informed "to, at or before" the point of collection about the categories of personal information to be collected and the purposes for which that data will be collected/used.

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Required Disclosures

- The privacy policy must include a description of the consumer's rights under the CCPA, how he or she may submit requests for disclosure, deletion and opting-out, and, of course, additional information about data collection and sharing practices.
- Notice may be provided through a link to the relevant section of the online privacy policy.

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Reminders

- Use "plain, straightforward language, a format that draws the consumers' attention to the notice, and providing the notice in the languages in which the business providers consumer contracts, and other things…"
- Include access for those with disabilities.
- Make sure all the uses to which you are putting the data are adequately disclosed.

Personal Information

- " … information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household:"
- (A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers.

- (B) Any categories of personal information described in subdivision (e) of Section 1798.80.
- (C) Characteristics of protected classifications under California or federal law.
- (D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
- (E) Biometric information - not further defined.

- (F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, or advertisement.
- (G) Geolocation data.
- (H) Audio, electronic, visual, thermal, olfactory, or similar information.
- (I) Professional or employment-related information.

- (J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act.
- (K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

Civil Code § 1798.80

- Plus: signature, physical characteristics or description, telephone number, state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information.

Personal Information Excluded

- "Personal information" does not include publicly available information. For these purposes, "publicly available" means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information.
- "Publicly available" does not mean biometric information collected by a business about a consumer without the consumer's knowledge.
- Information is not "publicly available" if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained.

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Not Personal Information

- Public records
- Data which is
  - Deidentified,
  - Aggregated or
  - Pseudonymized

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Another Exemption

- Single, one-time transactions are exempt provided no sale of the information occurs to any third party, or if not maintained as personal identification.

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Data Breach Notice - AB 1130

Expanded definition of personal information, which now includes any of the following: first name or initial and last name in combination with "any one or more of the following data elements, when either the name or the data elements are not encrypted:

- (A) Social security number.
- (B) Driver's license number, California identification card number, tax identification number, passport number, military identification number, or other unique identification number issued on a government document commonly used to verify the identity of a specific individual.

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Data Breach Definitions

- (C) Account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
- (D) Medical information.
- (E) Health insurance information.
- (F) Unique biometric data generated from measurements or technical analysis of human body characteristics, such as a fingerprint, retina, or iris image, used to authenticate a specific individual. Unique biometric data does not include a physical or digital photograph, unless used or stored for facial recognition purposes.

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Remaining Definitions

- (G) Information or data collected through the use or operation of an automated license plate recognition system, [as defined elsewhere in the law]
- (2) A username or email address, in combination with a password or security question and answer that would permit access to an online account."

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Give Notice

- Two methods required -
  - Toll free number
  - Through existing account
  - Website access
  - Drop down form
  - On-line only
  - Access for those with disabilities
  - Access for those without existing accounts

Third Party Sources

- If receive personal data strictly from other sources - need not give notice of collection to the consumer but must either
  - Contact the consumer directly and provide that notice or
  - Contact the source of the information and confirm the source has provided the required notice and obtain a signed attestation from that source describing how the source gave notice, to include a copy of the notice.
  - Attestations are to be retained for at least 2 years and made available to consumers upon request.

Right to Review

- California consumers have the right to demand the specific information being maintained about them, no more than twice in a 12 month period, subject to verification of the identity of the requesting party.
  - The 45 day period starts upon receipt of the consumer request.
  - Initial acknowledgment is due at 10 days - explain what the company will do and when to expect the completed response.
  - Explain appeal rights if deny request, even in part.
  - May charge for excessive requests.

Additional Rights

- Businesses are given 45 days to respond, although if "reasonably necessary" and the consumer is given notice, a total of 90 days to respond is possible.
- The information disclosed to consumers must be delivered free of charge and in as useable a portable fashion as possible.
- How will you handle incomplete requests?
- How will you notice appeal rights?

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Verification

- Sensitivity of the information
- Risk of harm from unauthorized access or deletion.
- Reasonable process
- Minimal additional data as warranted.
- Use an existing password protected account.
- Non-account holders - 2 or more data points - in some cases a declaration under penalty of perjury.
- Key - high degree of certainty as to the requestor's identity.
- Want to avoid fraudulent / malicious inquiries.

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Opt Out

- California consumers will also have the right to opt out of having their personal information sold or disclosed and companies are mandated to conspicuously provide instructions for doing so by way of a link entitled ***"Do Not Sell My Personal Information***" or ***"Do Not Sell My Info"***
  - Prominently placed either on the home or landing page or that page which is directed to California consumers.
  - Attorney General will develop recommended logo - after public input.
  - Applies if any personal data is sold or shared.

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Opt-Out - No?

- If no, exempt from the opt-out requirement.
- Cannot discriminate as to who may opt out, which includes denying goods or services, charging different prices or rates, or providing a different level of service or quality of goods.
- Unless those differences are reasonably related to the value provided to the business by the consumer's data.
- Loyalty and financial incentive programs are still allowed but are subject to specific notice requirements and must involve good faith estimates as to cost/value.

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Right To Be Forgotten

- California consumers will also have the right to be forgotten, unless the data is necessary for the business or service provider for legitimate uses, such as completing the transaction and security and system integrity reasons.
- GDPR contains the right of the consumer to correct information, there is nothing comparable in this law.

Data of Minors

- Data of those 16 and younger cannot be sold absent affirmative opt-in consent by minors between 13 and 16, and by a parent or guardian for those under 13.

Deletion Requests

- A business or a service provider shall not be required to comply with a consumer's request to delete the consumer's personal information if it is necessary for the business or service provider to maintain the consumer's personal information in order to:
- (1) Complete the transaction for which the personal information was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of a business's ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer.

- (2) Detect security incidents, protect against malicious, deceptive, fraudulent, or illegal activity; or prosecute those responsible for that activity.
- (3) Debug to identify and repair errors that impair existing intended.
- (4) Exercise free speech, ensure the right of another consumer to exercise his or her right of free speech, or exercise another right provided for by law.

- (5) Comply with the California Electronic Communications Privacy Act [law enforcement need warrant].
- (6) Engage in public or peer-reviewed scientific, historical, or statistical research in the public interest that adheres to all other applicable ethics and privacy laws, when the businesses' deletion of the information is likely to render impossible or seriously impair the achievement of such research, if the consumer has provided informed consent.

- (7) To enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business.
- (8) Comply with a legal obligation.
- (9) Otherwise use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information.

Privacy Policy Update

- Post the policy conspicuously - PRIVACY
- Update it every 12 months;
- Explain the consumer's right to request information about collected data and how;
- Information about the types of personal data collected - two lists mandated -
  - Categories of personal data sold, and
  - Categories of personal data shared/disclosed

Privacy Policy Disclosure

- The categories of personal data collected in the prior 12 months,
- Their source(s),
- The business purpose(s) for their collection or sale,
- The categories of third parties with which the data is shared/to whom it is sold, and
- The specific pieces of personal data collected about the consumer.

Plus

- Ensure that all individuals responsible for handling consumer inquiries are properly trained about the rights of consumers, including being able to explain those rights to consumers;
  - Attorney General interprets this requirement to apply only if 4 million or more consumer records are maintained.
  - Such entities will be required to post online the number of requests to know, delete and opt-out received in the previous calendar year, and the median number of days in which they took to respond.

Post Opt-Out Information

- On the website homepage,
- On the mobile app's landing page or
- On the page directed to California consumers.
- How will California enforce this law if the alleged violator has no operations in the state?

Businesses May Still

- (1) Comply with federal, state, or local laws.
- (2) Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.
- (3) Cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.
- (4) Exercise or defend legal claims.

- (5) Collect, use, retain, sell, or disclose consumer information that is deidentified or in the aggregate consumer information.
- (6) Collect or sell a consumer's personal information if every aspect of that commercial conduct takes place wholly outside of California, meaning while the consumer was outside of California, no part of the sale occurred in California, and no personal information collected while the consumer was in California is sold. A business may not store, including on a device, personal information about a consumer when the consumer is in California and then collect that personal information when the consumer and stored personal information are outside of California.

Enforcement - Originally

- In the hands of the Attorney General with fines capped at $7,500 per violation.
- Class action and private right of action are specifically barred.
- Consumer may file a civil action if his or her "non-encrypted or non-redacted" personal information is the subject of a breach.
  - Damages limited to between $100 and $750 per consumer per incident or actual damages, whichever is greater.
- Consumer does have the right to seek injunctive or declaratory relief or any other relief the court deems proper.

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Enforcement Changed

- Now, any consumer whose "non-encrypted and non-redacted" personal information is subject to "unauthorized access and exfiltration, theft or disclosure" as the result of the businesses failure to "implement and maintain reasonable security procedures and practices appropriate to the nature of the information" may be sued.
- The plaintiff is, however, limited to recover no less than $100 and no more than $750 per consumer per incident or actual damages, whichever is greater, along with injunctive or declaratory relief and any other relief the court deems proper.
- In reaching its decision, the court is instructed to "consider any one or more of the relevant circumstances …, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, and the defendant's assets, liabilities and net worth."

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Claims

- Prior to initiating any civil action, the consumer must provide the business with 30 days' written notice identifying the violations alleged by reference to the specific provisions of the CCPA.
- If the business is able to cure, does so within that 30 day period and provides express written notice about the cure and assurances that no further violations will occur, neither an individual nor class action lawsuit may be brought.
- No notice is required to recover "pecuniary" damages, i.e., out of pocket costs.
- If violations continue, the consumer may sue to enforce the written statement and pursue statutory damages for violation of the written assurance and other rounds. However, any such lawsuit may rely only on violations of the CCPA and no other grounds for recovery.

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Privacy Policy Update

- Post the policy conspicuously - PRIVACY
- Update it every 12 months;
- Explain the consumer's right to request information about collected data and how;
- Information about the types of personal data collected - two lists mandated -
  - Categories of personal data sold, and
  - Categories of personal data shared/disclosed

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Plus

- Ensure that all individuals responsible for handling consumer inquiries are properly trained about the rights of consumers, including being able to explain those rights to consumers;
  - Attorney General interprets this requirement to apply only if 4 million or more consumer records are maintained.
  - Such entities will be required to post online the number of requests to know, delete and opt-out received in the previous calendar year, and the median number of days in which they took to respond.
- Use of personal data is only for the stated purpose(s).

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Don't Forget

Not required under CCPA but good business practice dictates including -

- Data security
  - Written policies and procedures
  - Incident response plans
  - Appropriate / "reasonable"
- Service provider contracts
  - Vendor management / indemnity

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Questions?

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Thank You

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What's happening with the ACA

- Fifth Circuit Court of Appeals found the ACA individual mandate unconstitutional, since the penalty for failure to comply was reduced to zero by 2017 tax law and therefore could no longer be justified as a tax.
- The court remanded for a section-by-section determination by the federal district court whether this determination required that other sections be made unenforceable.
- Bottom line: no changes likely until after the 2020 election.
- Employer mandate, ACA reporting and all market reforms remain in effect.
- Except much delayed "Cadillac tax" on high cost employer health plans repealed by Congress before it became effective.

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California Individual Mandate

- California residents who do not have ACA-compliant health coverage for themselves and dependents will be subject to a penalty under California law.
- Penalty is equal to the greater of:
  - 2.5% of household income above the state income tax filing threshold; or
  - $695 per adult and $347.50 per child (up to $2,085).
- Main exceptions:
  - Financial hardship or religious conscience
  - Persons with income below the state tax return filing threshold
  - If premiums exceed 8.3% of household income
- Effective January 1, 2020.
- Reporting requirements similar to ACA reporting will apply to employers with self-insured plans effective in 2021.

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Enhanced California subsidies for coverage purchased through Covered California

- California subsidies will be available to eligible residents with household incomes up to 600% of the federal poverty level.
- Under federal law, subsidies are available only to individuals and families with incomes up to 400% of the federal poverty level.
- This means that an individual with up to $74,940 in income or a family of four with up to $154,500 in income can qualify for a subsidy under California law to be applied to the purchase of health insurance.
- Effective January 1, 2020.

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Congress passes SECURE Act

- Pooled Employer Plans ("Open MEPs")
  - Financial services companies, plan administrators and other entities can offer an individual account plan (e.g. 401(k) plan) to unrelated employers.
  - Common industry or other interest will no longer be necessary.
  - Pooled plan provider will serve as plan administrator responsible for non-discrimination testing, filing Form 5500 and other administrative functions.
  - Pooled plan provider or investment manager may serve as plan fiduciary with respect to choice of investment options.
  - Employers will have fiduciary liability for selection and monitoring of plan provider and any investment manager responsible for investment selection.
  - Economies of scale should result in lower administrative costs.
  - One employer's plan qualification issues will not adversely affect other employers.
  - Effective for plan years after December 31, 2020.

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Congress passes SECURE Act

- Post-death required minimum distributions for IRAs and defined contribution plans limited to 10 years.
  - Under prior rules, distributions could be stretched out over the life expectancy of most beneficiaries.
  - Under new rules, lifetime stretch-out will be available only for:
    - Surviving spouses
    - Minor children until attainment of age of majority
    - Disabled and chronically ill individuals
    - Individuals less than 10 years younger than the participant (e.g. sibling)
  - Complex issues where trusts have been designated as plan beneficiaries.
  - Effective for decedents dying after December 31, 2019 (2021 for governmental and certain collectively bargained plans).

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Congress passes SECURE Act

- Required beginning date for lifetime minimum distributions increased from age 70-1/2 to 72 effective for individuals turning 70-1/2 after December 31, 2019.
- Penalty-free early withdrawals up to $5,000 allowed up to one year after birth or adoption of child effective for distributions after December 31, 2019.
- Part-time employees who work at least 500 hours in three consecutive 12-month periods must be allowed to participate in 401(k) plans effective for plan years beginning after December 31, 2020.
- Parking tax on tax-exempt organizations repealed retroactive to date of enactment.
- Plan amendments not due until end of 2022 plan year.

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DOL proposes new electronic disclosure rules

- Applicable only to retirement plans, not health plans.
- Would allow all disclosure documents to be emailed or made accessible on a web site regardless of whether the employee has access to computer system at work or whether employee has consented to electronic distribution.
- Participants will have to provide plan sponsors with an email address or mobile phone number if the employer does not assign an email address to the participant.
- Participants would be notified by email that the information is available online including instructions for how to access the disclosures and their right to receive a paper copy.
- Regulations will not be effective until issued in final form which has not happened yet.

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Individual Coverage Health Reimbursement Arrangements (ICHRAs)

- Health reimbursement arrangements (HRAs) may be used to pay for individual health insurance if the enrollees substantiate enrollment for each month covered by the HRA.
- An ICHRA may be offered to a class of employees if that class of employees is not eligible for a traditional group health plan:
  - Full-time or part-time employees
  - Employees who are paid on a salaried or hourly basis
  - Employees whose primary site of employment is in the same insurance rating area
  - Seasonal employees
  - Collectively bargained employees
  - Employees who have not satisfied a waiting period for coverage
  - Non-resident aliens with no U.S.-based income
  - Temporary employees hired through staffing companies

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Individual Coverage Health Reimbursement Arrangements (ICHRAs)

- No employee can be offered a choice between an ICHRA and a traditional group health plan.
- A plan sponsor that offers an ICHRA to a class of employees must generally offer the ICHRA on the same terms (both the same amount and same terms and conditions) to all employees within the class of employees.
- Notice and substantiation requirements apply.
- Complex rules to determine if ICHRA contribution is sufficient to satisfy ACA employer mandate.
- Effective January 1, 2020.

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IMMIGRATION

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"Buy American, Hire American"

- Executive Order – Directs USCIS to implement rulemaking, policy memoranda, and operational changes to create higher wages and employment rates for U.S. workers - "**rigorously enforcing immigration laws**"
- **Practical Implications:**
  - Very slow processing times – processing times have increased by 91% between FY2014 and FY2018
  - Increased Requests for Evidence ("RFEs")
  - Stricter adjudication standards
  - Lengthy documentation requirements
  - Issues at POE/Airports

Impact on Work Visas and Green Cards

- **H-1B Visa –** Primary focus – USCIS to advance policies to grant H-1B visas to "most-skilled" **or** highest-paid.
- **Visa Extensions** – Policy Memo - Rescission of guidance granting deference to prior visa petition determinations
- **TN Status (NAFTA/USMCA) –** Restrictions on definitions of professional occupations
- **Employment / U.S. Workers** – increased focus on L-1A, O-1 and E-2 visa petitions
- **Green Card Petitions** – Processing times have doubled, and continue to increase with **Employment-Based Application Interviews**.

Proposed Filing Fee Increases / Premium Processing Changes

- **H-1B Visa –** Fees will increase by 22% from $460 to $560
- **L-1 Visa –** Fees will increase by 77% from $460 to $815
- **O Visa Fees**– Fees will increase by 55% from $460 to $715
- **TN Status (NAFTA/USMCA) –** Fees will increase by 53% from $460 to $705
- **I-907 Premium Processing**
  - Fees will remain the same at $1,440 per filing
  - However, the processing time is proposed to change from 15 **calendar** days to 15 **business** days

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H-1B Cap Registration

- USCIS has announced that FY2021 H-1B petitions will be first be submitted via online registration
- The new H-1B registration requirement requires employers seeking to file H-1B Cap cases to first register online to enter the H-1B lottery
- After registering, employers must pay $10 per H-1B petition submitted in the registration
- Registration will be open from March 1 – 20, 2020 with lottery selection to be held between March 20 - March 31, 2020
- If an H-1B petition is selected in the lottery, the full H-1B petition must then be submitted within approximately ninety (90) days of selection

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Fraud Investigations, Travel Restrictions, and Enforcement

- **Site Inspections** – USCIS plans to double the number of fraud-investigation worksite inspections in 2018
- **I-9 Audits** – Expected to increase, in effort to increase worksite enforcement and encourage E-Verify
- **State Department Emails –** In connection with visa applications at consulates.
- **Travel Ban(s) –** Blocks visitors and certain immigrants from Iran, Libya, Somalia, Syria, Yemen and North Korea. No existing visas/green cards will be revoked. Upheld by SCOTUS.

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Questions?

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Thank You