Proskauer

California Employment Law Notes

November 2015

Newly Enacted California Statutes

Paid Sick Leave Law Is Amended

The amendments to the law include a clarification as to who is a covered worker; alternative accrual and payment methods; and a grandfather clause protecting employers that already provided paid sick leave prior to January 1, 2015 (AB 304).

E-Verify Use Is Restricted

This law expands the definition of an "unlawful employment practice" to prohibit an employer or any other person or entity from using the E-Verify system at a time or in a manner not required by a specified federal law or not authorized by a federal agency memorandum of understanding to check the employment authorization status of an existing employee or an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds. The law also requires an employer that uses the E-Verify system to provide to the affected employee any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case or any tentative nonconfirmation notice. There is a $10,000 penalty for each violation (AB 622).

Grocery Workers Protections Clarified

This law amends newly enacted AB 359 to provide that "grocery establishment" as defined in the new protections for grocery workers affected by a change in control does not include an establishment that has ceased operations for six months or more (AB 897).

Labor Commissioner's Enforcement Capabilities Expanded

This law authorizes the Labor Commissioner to investigate and enforce local overtime and minimum wage laws and to issue citations and penalties for violations, except when the local entity has already cited the employer for the same violation. The law also authorizes the Labor Commissioner to issue citations and penalties to employers that violate the expense reimbursement provisions of Labor Code Section 2802 (SB 970).

PAGA Cure Period Provided

This law, which became effective immediately, amends the Private Attorneys General Act ("PAGA") to provide an employer with the right to cure a violation of the requirement that an employer provides its employees with the inclusive dates of the pay period and the name and address of the employer before an employee may bring a civil action under PAGA. An employer can utilize this cure provision only once in a 12-month period. The law also provides a cure period to an employer that has not received notice of such a wage statement violation (AB 1506).

Retaliation Against Family Members Of Whistleblowers Prohibited

This law prohibits employers from retaliating against an employee who is a family member of an employee who has or is perceived to have engaged in protected conduct or made a protected complaint (such as whistleblowing). Additionally, the law excludes certain entities, such as certain household goods carriers, from the imposition of joint liability on client employers for all workers supplied by a labor contractor (AB 1509).

Piece-Rate Compensation Requirements Changed

This law requires employers to pay piece-rate employees for rest and recovery periods and "other nonproductive time" at or above specified minimum hourly rates, separately from any piece-rate compensation. It also defines "other nonproductive time" as time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis. Additionally, employers must specify the following on a piece-rate employee's itemized wage statement: the total hours of compensable rest and recovery periods, the rate of compensation paid for those periods, and the gross wages paid for those periods during the pay period (AB 1513).

Meal Period Waiver Rules For Health Care Employees Clarified

This law clarifies that special meal period waiver rules for employees in the health care industry remain in force, despite the uncertainty caused by a recent court of appeal opinion (SB 327).

Gender-Based “Fair Pay Act” Enacted

This law amends Labor Code § 1197.5 (SB 358):

Broader Prohibition of Gender Wage Differentials Enacted

Currently, Section 1197.5 prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work. The amendment revises this prohibition, instead prohibiting an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex for “substantially similar work.” “Substantially similar work” is determined by analyzing a composite of skill, effort, and responsibility, while considering whether the work is being performed under similar working conditions. SB 358 does not require such “substantially similar work” to be “in the same establishment” of the employer as previously required by Section 1197.5.

Employer Required To Demonstrate Exemptions

Section 1197.5 automatically exempted certain gender wage differentials related to payments based on a seniority system, a merit system, quantity or quality of production, or any bona fide factor other than sex. SB 358 amends Section 1197.5 to require that an employer must affirmatively demonstrate that: (i) a wage differential is based on a seniority system, a merit system, quantity or quality of production, or any bona fide factor other than sex; (ii) each factor relied upon is applied reasonably; and (iii) these factors account for the entire wage differential.

Anti-Retaliation Protections Introduced

SB 358 added a provision to Section 1197.5 that prohibits an employer from discharging, discriminating or retaliating against an employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this legislation. This new provision authorizes an employee to disclose the employee's own wages, discuss the wages of others, inquire about another employee's wages, or aid or encourage other employees to exercise their rights under this legislation. If an employee is discharged, discriminated or retaliated against in the terms and conditions of his or her employment because the employee engaged in any such protected conduct, the employee may seek reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer as well as other appropriate equitable relief.

Recordkeeping Duration Lengthened

SB 358 also increases the duration of recordkeeping requirements of wages, wage rates, job classifications, and other terms and conditions of employment from two years to three years.

Wage Garnishment Restrictions Modified

This law reduces the prohibited amount of an employee's weekly earnings subject to levy under an earnings withholding order from exceeding the lesser of: (i) 25% of the employee's weekly earnings or (ii) 50% of the amount by which the employee's earnings for the week exceed 40 times the minimum wage (SB 501).

School Activity And Sick Leave Protections Expanded

This law provides additional circumstances under which employees may take school activities leave. California school activities leave now includes the addressing of a child care provider emergency, a school emergency, finding, enrolling, and reenrolling a child in a school or with a child care provider. The pool of eligible employees is expanded to include employees who are stepparents, foster parents or stand in loco parentis to a child. The law also requires employers to permit employees to use sick leave for the purposes specified in the Healthy Workplaces, Healthy Families Act of 2014 and prohibits an employer from denying or retaliating against such employee for using sick leave for such purposes (SB 579).

Labor Commissioner Enforcement Authority Broadened, Liability For Managing Agents Expanded

This law expands the Labor Commissioner's authority with regard to the enforcement of judgments. For example, the law authorizes the Labor Commissioner to issue a lien on an employer's property for amounts owed to an employee, such as unpaid wages, and other compensation, penalties, and interest. The law also provides that an owner, director, officer or managing agent of the employer may be held personally liable for violations of any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission (SB 588).

New Protected Classes Added To Unruh Civil Rights Act

This law expands the protections of the Unruh Civil Rights Act by prohibiting discrimination by business establishments based on citizenship, primary language, or immigration status (SB 600).

New Case Law

EEOC Is Entitled To More Information From Employer In Connection With Sex Discrimination Case

EEOC v. McLane Co., 2015 WL 6457965 (9th Cir. 2015)

Damiana Ochoa filed a charge with the EEOC alleging sex discrimination (based on pregnancy) in violation of Title VII, when, after she tried to return to her job following maternity leave, her employer (McLane Co.) informed her that she could not come back to the position she had held for eight years as a cigarette selector unless she passed a physical strength test. Ochoa took the test three times but failed to pass and, as a result, her employment was terminated. McLane disclosed that it administers the test to all new applicants and to employees returning from a leave longer that lasts longer than 30 days. Although McLane voluntarily provided general information about the test and the individuals who had been required to take it (gender, job class, reason for taking the test and the score received), it refused to disclose "pedigree information" for each test taker (name, social security number, last known address, telephone number and the reasons why particular employees were terminated after taking the test). In this EEOC subpoena enforcement action, the district court refused to compel production of the pedigree information, but the United States Court of Appeals for the Ninth Circuit reversed that order in this opinion. The Ninth Circuit also vacated the district court's order denying enforcement of the subpoena's request for reasons for termination of employees who took the test and ordered consideration by the district court of whether requiring production of such information would in fact be unduly burdensome. *See also CVS Pharmacy, Inc. v. Superior Court*, 2015 WL 6119412 (Cal. Ct. App. 2015) (trial court abused its discretion by ordering employer to disclose names and contact information of current and former employees to plaintiff who lacked standing to lead class challenging automatic termination policy for employees who failed to work any hours for 45 consecutive days).

LAPD Requirement That Training Costs Be Reimbursed Violates Labor Code

In re Acknowledgement Cases, 239 Cal. App. 4th 1498 (2015)

The City of Los Angeles requires all newly hired police officers to attend and graduate from the Los Angeles Police Academy. After the city realized that many officers who graduated from the academy were leaving within a few years to join other law enforcement agencies, the city enacted Los Angeles Administrative Code § 4.1700, which requires that any police officer hired by the LAPD to reimburse the city a prorated portion of the cost of training at the academy if he or she voluntarily leaves the LAPD to work for another law enforcement agency after serving fewer than 60 months with the LAPD. In this coordinated action involving 43 former LAPD officers, the Court of Appeal held that Section 4.1700 violates Labor Code §§ 2802 and 2804 (which require an employer to indemnify employees for all necessary expenditures or losses incurred in direct consequence of the discharge of their duties).

Court Affirms $118,000 Verdict In Favor Of Fired Employee Who Reported A Crime To The Police

Cardenas v. M. Fanaian, D.D.S., Inc., 240 Cal. App. 4th 1167 (2015)

Rosa Lee Cardenas was terminated from her employment as a dental hygienist after she made a report to the police department that a coworker may have stolen her wedding ring at her workplace. Cardenas sued her employer (Dr. Fanaian) on the grounds that she was retaliated against in violation of Labor Code § 1102.5 (forbidding an employer from retaliating against an employee who has reported a violation of the law to a law enforcement agency) and was wrongfully terminated in violation of public policy. The jury found in favor of Cardenas and awarded her approximately $118,000 in damages. The Court of Appeal affirmed the judgment in favor of Cardenas on the ground that a Section 1102.5 claim does not require proof of a violation of a fundamental public policy and need not involve violations of law arising out of the employer's business activities. *See also Nosal-Tabor v. Sharp Chula Vista Med. Ctr.*, 239 Cal. App. 4th 1224 (2015) (nurse could proceed with whistleblower case arising from termination after she complained about and refused to perform nurse-led testing that may have violated the law).

Terminated Actress Was Not Required To Exhaust Administrative Remedies Before Suing For Retaliation

Sheridan v. Touchstone Television Prods., LLC, 2015 WL 6153287 (Cal. Ct. App. 2015)

Nicollette Sheridan sued Touchstone after her contract on *Desperate Housewives* was not renewed, alleging that her termination was in retaliation for her complaint about a battery allegedly committed by show creator Marc Cherry. The trial court sustained Touchstone's demurrer to the complaint on the ground that Sheridan had failed to exhaust her administrative remedies by first filing a claim with the Labor Commissioner. The Court of Appeal reversed, holding that the trial court's reliance upon a now depublished opinion and a statutory framework that has since been amended (Labor Code §§ 98.7(g) and 244 – now expressly stating that administrative remedies need *not* be exhausted) was misplaced. Accordingly, the reversal was dismissed and the trial court was ordered to vacate its order sustaining Touchstone's demurrer and to enter a new order overruling the demurrer to the complaint.

Employees Who Allegedly Breached Employer's Computer Use Policies Did Not Violate CFAA

SunPower Corp. v. SunEdison, Inc., 2015 WL 5316333 (N.D. Cal. 2015)

Three former employees of SunPower were sued for allegedly breaching SunPower's computer use policies by accessing files while they were still employed by SunPower that they allegedly later provided to their new employer (SunEdison). SunPower alleged that defendants violated the federal Computer Fraud and Abuse Act (the "CFAA") by breaching its computer policies when they connected USB drives to SunPower's network and copied and stored SunPower's files onto these devices. The district court granted defendants' motion to dismiss the CFAA claim, holding that the CFAA is "an anti-hacking statute, not a misappropriation statute."

Trial Court Improperly Failed To Certify Class Action For Unpaid Overtime

Alberts v. Aurora Behavioral Health Care, 2015 WL 6121981 (Cal. Ct. App. 2015)

Valerie Alberts and others, formerly employed as members of the nursing staff at two acute care psychiatric hospitals owned and operated by Aurora, claimed that Aurora's uniform practices and de facto policies routinely denied nursing staff employees their meal and rest periods and overtime payments. Plaintiffs sought class certification on behalf of approximately 1,053 putative class members. The trial court denied class certification on the ground that plaintiffs' motion relied too heavily "on anecdotal evidence to prove the existence of a systematic violation of overtime and break laws." The Court of Appeal reversed, holding that there is substantial evidence of understaffing that resulted in a denial of breaks to the class. The Court further held that reversal was required with respect to the overtime and off-the-clock compensation claims. As for the meal and rest break claims, the Court determined it was unclear from the record whether common issues predominated over individual ones. The Court remanded the remaining claims regarding certification of subclasses for waiting time penalties and inaccurate itemized wage statements for further consideration regarding predominance and manageability. *See also Tellez v. Rich Voss Trucking, Inc.*, 240 Cal. App. 4th 1052 (2015) (denial of class certification reversed in absence of trial court's explanation for same).

Employer And Employee Were Each Prevailing Parties On Different Claims

Sharif v. Mehusa, Inc., 2015 WL 5969679 (Cal. Ct. App. 2015)

Mahta Sharif sued her former employer (Mehusa) for unpaid overtime, unpaid wages and violation of California's Equal Pay Act ("EPA"). While Sharif prevailed on her EPA claim, Mehusa prevailed on the overtime and wage claims. Sharif sought reimbursement of her attorney's fees pursuant to Labor Code § 1197.5(g), and Mehusa sought reimbursement of its attorney's fees pursuant to Labor Code § 218.5. The trial court offset the attorney's fees awards for a net award to Sharif in the amount of $3,709. The Court of Appeal affirmed, holding that where there are two fee-shifting statutes in separate causes of action, there can be a prevailing party for one cause of action and a different prevailing party for the other. *See also Royal Pac. Funding Corp. v. Arneson*, 239 Cal. App. 4th 1275 (2015) (former employee was "successful" on employer's appeal from award in employee's favor and was entitled to recover her attorney's fees pursuant to Labor Code § 98.2(c) despite employer's withdrawal of its appeal).

Court Affirms Dismissal Of PAGA Claims For Inadequate Notice But Orders Certification Of Class Action

Alcantar v. Hobart Serv., 800 F.3d 1047 (9th Cir. 2015)

Joséluis Alcantar filed this action against his employer to represent a putative class of service technicians for the time spent commuting in the employer's service vehicles from their homes to their jobsites and then back again. Alcantar also alleged failure to provide the technicians with meal and rest breaks. The district court denied class certification and granted partial summary judgment to Hobart. The United States Court of Appeals for the Ninth Circuit reversed in part, holding that the district court improperly reached the merits of Alcantar's claims in denying class certification rather than focusing on whether the questions presented in connection with the commute-time claims were common to the class. However, the Court affirmed denial of certification of the meal-and-rest break class claims, holding that the putative class failed under Fed. R. Civ. P. 23(b)(3) because questions as to why the service technicians missed their meal and rest breaks varied.

The Court reversed the partial summary judgment that had been entered in favor of Hobart on the commute-time claims on the ground that Alcantar had raised a genuine dispute of material fact as to whether the technicians are as a practical matter required to commute in the employer's vehicles. Finally, the Court affirmed dismissal of the Private Attorneys General Act ("PAGA") claims on the ground that Alcantar's written notice of his PAGA claim did not contain sufficient facts to comply with the statute's notice requirement. *See also Sakkab v. Luxottica Retail N. Am., Inc.*, 2015 WL 5667912 (9th Cir. 2015) (Ninth Circuit follows *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), barring waiver of PAGA claims); *Miranda v. Anderson Enter., Inc.*, 2015 WL 6081934 (Cal. Ct. App. 2015) (same).

Firefighters Are Not Entitled To Overtime For Time Spent Taking Gear To Temporary Duty Stations

Balestrieri v. Menlo Park Fire Prot. Dist., 800 F.3d 1094 (9th Cir. 2015)

Firefighters and emergency medical personnel sued the Menlo Park Fire Protection District, claiming that two of the district's policies violate the Fair Labor Standards Act ("FLSA"). In their first claim, the employees claimed they were entitled to overtime for taking their gear to temporary duty stations. In the second, they claimed the district's system of paying them cash in lieu of unused leave time violates the FLSA. The district court granted summary judgment in favor of the district, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that under the authority of *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014), loading up "turnout gear" to report to a shift at a visiting station is not "integral and indispensable" to their firefighting activity. The Court affirmed dismissal of the challenge to the annual sick leave buyback on the ground that it is not an attendance bonus and should not be counted in the regular rate.

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