LABOR AND EMPLOYMENT LAW 2014: A YEAR-END REVIEW

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I. NEW LAWS AND REGULATIONS

A. Federal

President Obama Signs Executive Orders to Ensure Federal Contractor Compliance with Labor Laws. On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Order, Executive Order 13673, which obligates prospective federal contractors and subcontractors seeking contracts estimated to exceed $500,000 to disclose violations of specified federal labor laws, and equivalent state laws, occurring within the preceding three (3) years. The self-reported violations will be considered in determining whether a prospective contractor has "a satisfactory record of integrity and business ethics." Once a contract is awarded, the contractor remains obligated to report its own labor law violations and those of its covered subcontractors every six (6) months. Additionally, the Executive Order further mandates that contractors and subcontractors provide each of their non-exempt employees, every pay period, with a written document identifying the employee's hours worked, overtime hours, pay and any additions to or deductions from their wages. Finally, under the Executive Order, contractors and subcontractors with contracts valued in excess of $1 million are prohibited from entering pre-dispute agreements with employees or independent contractors to arbitrate claims arising under Title VII, or any tort relating to sexual assault or harassment. The Executive Order exempts arbitration provisions in collective bargaining agreements and those entered into before the contractor submitted its bid for the federal contract. Although the Executive Order became effective upon issue, the White House has stated that it will be "be implemented on new contracts in stages, on a prioritized basis, during 2016."

President Obama Extends Discrimination Protection to LGBT Employees of Federal Contractors. Executive Order 11246, which prohibits discriminatory hiring and employment practices by federal contractors, has long prohibited discrimination on the basis of race, color, religion, sex, or national origin. This Executive Order expands the protected categories to include sexual orientation and gender identity. The Department of Labor recently released rules implementing this change. The Executive Order will apply to all contracts entered into following the effective date of these rules, likely in the first half of 2015.

OFCCP Updates Audit Scheduling Letter for Affirmative Action and Nondiscrimination Compliance. Effective October 1, 2014, the Office of Federal Contract Compliance Programs (OFCCP) has revised its audit scheduling letter and accompanying itemized list of information sought from federal contractors as part of the agency's audit process. Of note, the revised audit scheduling letter makes clear that employers who are more than six month into an affirmative action program are only required to provide information for their current plans. However, a contractor may provide more than six months of information, if such a disclosure would place the contractor's plan in a better light. Also, the new audit letter is intended to lower average response times for contractors by allowing certain information to be aggregated. While contractors were often late with audit response information previously, without penalty, the OFCCP has signaled that this streamlining comes with a higher expectation that contractors will comply with deadlines.

B. California

California Minimum Wage Increased on July 1, 2014. On July 1, 2014, California's minimum wage for non-exempt employees increased to $9.00 per hour. The minimum wage further increases on July 1, 2016, to $10.00 per hour. These increases also affect exempt "administrative," "executive," and "professional" employees in California, because in order to maintain their overtime exemptions, these employees must be paid a monthly salary that is at least equivalent to twice the minimum wage (i.e., currently at least $37,440 per year, increasing on July 1, 2016 to at least $41,600 per year). Employers also should be sure to post the current minimum wage order reflecting the July 1, 2014, increased minimum wage.

California Employers Must Add "Abusive Conduct" Education During Supervisors' Sexual Harassment Prevention Training. AB 2053, adding Section 12950.1 of the Government Code, became effective January 1, 2015. Existing law already required employers with fifty (50) or more employees to provide at least two (2) hours of sexual harassment prevention training to supervisors every two (2) years. Under the new law, this supervisor training also must include education on preventing "abusive conduct," which is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." According to the statute, abusive conduct may include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." However, "a single act shall not constitute abusive conduct, unless especially severe and egregious." While it does not appear that AB 2053 was intended to expand the definition of unlawful harassment or to make "abusive conduct" *per se* unlawful, at a minimum it might well be interpreted as establishing a new standard of care, the violation of which might support a claim for intentional or negligent infliction of emotional distress.

New Law Makes It Easier to Pursue Claims Against Employers That Use Contracted or Leased Employees. AB 1897, effective January 1, 2015, adds Section 2810.3 to the Labor Code. This new law makes "client employers" *jointly liable* with "labor contractors" for the payment of wages and the failure to obtain valid workers' compensation coverage. A "client employer" is defined as any business entity "that obtains or is provided workers to perform labor within its usual course of business from a labor contractor." The definition exempts small business entities with fewer than twenty-five (25) workers (counting both regular employees and leased workers) or with five (5) or fewer leased workers at a given time. A "labor contractor" is broadly defined as any entity that supplies workers to perform labor, and would include employee leasing and temporary services agencies. However, this definition excludes labor unions, apprenticeship programs, hiring halls that supply labor pursuant to a collective bargaining agreement, and motion picture industry payroll services companies. As the new law defines "wages" to include "all sums payable to an employee or the state based upon any failure to pay wages," it appears that joint liability extends to all Labor Code penalties associated with a failure to pay wages.

Significantly, the application of AB 1897 is limited to supplied workers who perform the "regular and customary" work of the client employer, which is "performed within or upon the premises or worksite of the client employer." Thus, contracted labor that is engaged to perform manufacturing work at a manufacturing company would be included. However, workers contracted to perform work outside the client's "regular and customary" work, such as installing a new computer system or painting the building, would likely be excluded.

While AB 1897 extends liability to client employers, it allows the client employer and contractor to negotiate indemnification provisions, pursuant to which the client employer may recoup any loss suffered from the labor contractor. However, client employer liability may not be waived by the contracted or leased worker, nor entirely assigned to the labor contractor. Moreover, a client employer may not shift to the labor contractor any legal duties or liabilities arising under California's occupational safety and health laws with respect to the supplied workers.

California Employers Required to Provide Paid Sick Leave. AB 1522 provides that nearly all California employees will accrue some paid sick leave each year. Under the new law, Labor Code Section 245 *et seq*., employees who work in California for thirty (30) or more days a year (on or after January 1, 2015) will be eligible on July 1, 2015, to begin accruing at least one (1) hour of sick leave for every thirty (30) hours worked. Employees will be entitled to use their accrued sick leave beginning on their 90th day of employment (after January 1, 2015). The new law gives employers the authority to limit the use of paid sick leave to twenty-four (24) hours each year and to limit an employee's total accrual to forty-eight (48) hours. An employee's unused, accrued sick leave will carry over to the following year, although employers will not be required to pay out accrued but unused sick leave upon termination.

Employers with existing paid sick leave or paid time off ("PTO") policies may already satisfy the new law's requirements, provided that their existing policy satisfies the accrual, carryover, and use requirements of the statute. Moreover, in lieu of accrual and carry over requirements, an employer may comply with the new law by providing employees with all twenty-four (24) hours of sick leave at the beginning of each year of employment.

Accrued leave must be made available for use in connection with: (1) the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member (which is defined broadly to include a child or legal ward, parent, parent-in-law, parent of one's registered domestic partner, spouse. registered domestic partner, grandparent, grandchild, and a sibling), and (2) time off for an employee who is the victim of domestic violence, sexual assault, or stalking. Excluded from coverage are most providers of in-home supportive services, flight deck or cabin crew members of air carriers subject to the Railway Labor Act, and some employees working under a collective bargaining agreement (CBA).

AB 1522 imposes a new posting obligation and also requires employers to include information about their sick leave policies on the wage notices provided to employees in accordance with Labor Code Section 2810.5. In addition, employers must provide employees, each pay period, with written notices setting forth the amount of paid sick leave (or equivalent PTO) available; such information may be provided either on the employees' itemized wage statements (Labor Code Section 226) or in a separate writing. Employers who violate this law may be subject to penalties of up to $4,000 per employee. In addition, the Labor Commissioner may impose upon a non-complying employer a $50 per day enforcement charge for each affected employee, plus additional penalties for violation of the posting requirement.

Legislature Extends FEHA Protections to Unpaid Interns and Volunteers. The California Fair Employment and Housing Act (FEHA) protects employees, and prospective employees, from harassment or discrimination on the basis of race, sex, gender, gender identity, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, age, sexual orientation, or military or veteran status. AB 1443 extends these FEHA protections to participants in unpaid intern programs, apprenticeship programs, and other temporary unpaid work experience programs. These new protections will apply to all aspects of the intern experience, including intern selection, training, assignment, and termination. Moreover, AB 1443 also extends the FEHA's protections with respect to harassment to volunteers.

Law Permits $10,000 Retaliation Penalty to be Paid to Aggrieved Employees. Labor Code Section 98.6 previously provided that an employer that discriminated against an employee for exercising rights protected under the Labor Code could be subject to a $10,000 civil penalty per employee, per violation. Such penalties could be collected in an action brought by the state or by an aggrieved person under the Private Attorney General Act (whereby 75% of the penalty would go to the state.) AB 2751 amends Section 98.6, so that the $10,000 civil penalty may be recovered by an aggrieved employee.

Immigration-related Amendments to the Labor Code. Labor Code Section 1024.6 prohibits an employer from taking adverse action against an employee for updating his/her personal information. AB 2751 narrows Section 1024.6 so that its prohibition extends only to discrimination or retaliation based on an employee's "lawful" change of name, social security number, or federal employment authorization document. AB 2751 also broadens the scope of an "unfair immigration-related practice" as defined in Labor Code Section 1019 to include threatening to file a "false report or complaint with any state or federal agency."

II. Discrimination and Retaliation Law

A. Federal

Supreme Court Extends Coverage of Sarbanes-Oxley Whistleblower Protection to Employees of Private Contractors. In *Lawson v. FMR, LLC*, 134 S. Ct. 1158 (2014), the U.S. Supreme Court held that whistleblowing protections found in the Sarbanes-Oxley Act apply not only to employees of publicly traded companies, but also to employees of their private contractors and sub-contractors. FMR managed a series of Fidelity mutual funds that were organized as public companies. FMR contracted with privately held companies to handle day-to-day operations of these funds. The claimants were former employees of these contractors who alleged that they blew the whistle on alleged fraud relating to the administration of the mutual funds and were fired for doing so. FMR claimed that its employees were not protected by Sarbanes-Oxley because that law applies only to employees of public companies. The Supreme Court disagreed, interpreting the term "employee" broadly and noting the purpose of the Sarbanes-Oxley Act-- to avoid another "Enron debacle."

Male Prison Guards May Proceed on Sex Discrimination Claims. In *Ambat v. San Francisco*, 757 F.3d 1017 (2014), the Ninth Circuit held that male prison guards could proceed on a claim of sex discrimination arising from a policy prohibiting them from supervising female prisoners. The Sheriff's Department instituted its policy after a number of reported sexual assaults of female prisoners by male guards. Reversing the district court's dismissal, the Ninth Circuit held that the Sheriff's Department had failed to demonstrate that being a female was a "bona fide occupational qualification" for guarding female inmates. The Ninth Circuit determined that the policy was not the product of a "reasoned decision-making process, based on available information and experience," nor had the Department sufficiently explored less discriminatory alternatives. In sum, while the court found the sexual assault statistics "deeply troubling," the Sheriff's Department failed to show that "all or nearly all male deputies were likely to engage in sexual misconduct with female inmates."

Eighth Circuit Finds Healthcare Costs May Act as Impermissible Proxy for Age Discrimination. In *Tramp v. Associated Underwriters, Inc.*, 2014 U.S. App. LEXIS 19097, the plaintiff sued her employer for age and disability discrimination. Her evidence included emails between the employer and its healthcare suppliers discussing premium costs and the shedding of the company's "oldest and sickest employees." In addition, the employer tried to convince the plaintiff and other eligible employees to opt out of the employer healthcare program and

instead enroll in Medicare. The Eighth Circuit found that "health care costs could be a proxy for age in the sense that if the employer supposes a correlation between the two factors and acts accordingly, it engages in age discrimination."

Fourth Circuit Finds Age Discrimination in Retirement Benefit Plan Contribution Rates. In *EEOC v. Baltimore County*, 747 F.3d 267 (2014), at issue was a retirement plan established by Baltimore County, Maryland, in 1965, which provided benefits for all employees starting at age 65. Under the plan, the percentage of employees' base pay contributed to the plan varied based on the number of years until retirement, causing employees who were closer to age 65 to pay a higher percentage. In the intervening years, the county expanded the plan's coverage and created service-based retirement eligibility, whereby an employee was eligible to retire after only 20 years of service, even if she or he was not yet age 65. However, the county did not change the policy of requiring different contribution based upon the age of the employee. The Fourth Circuit affirmed the district court's finding of liability, holding that the policy facially discriminated on the basis of age. For example, the court noted that if a 20-year-old and a 40-year-old enrolled in the plan at the same time, and both chose to retire after 20 years of service, the older employee would have contributed a significantly larger percentage of his annual salary to the plan based solely upon his age.

District Court Affirms Potential "Cat's-Paw" Discrimination Liability in News Anchor Termination. In *Burlington v. News Corp.*, 2014 U.S. Dist. LEXIS 150964, a federal district court in Pennsylvania found that an employer could be liable on a "Cat's Paw" theory, even if the person with discriminatory animus was not a supervisor. The "Cat's Paw" theory applies where a member of a protected class is subject to an adverse employment action by a supervisor who is not motivated by discriminatory animus, but is influenced by another person who is so motivated. Burlington, a white news anchor, used the n-word in a production meeting in connection with a story on the use of that word in society. Although the anchor was suspended and was required to issue an apology and attend counseling, an African American news anchor believed the station's response was insufficient and pressured the station manager to terminate Burlington. Burlington sued, alleging that he was fired because of his race, because the complaining news anchor believed that only African-Americans were permitted to use the offensive word. News Corp. moved to dismiss on grounds that the complaining news anchor did not have the ability to fire Burlington and Burlington did not allege that the news director who terminated Burlington, a white male, was motivated by discriminatory animus. Rejecting the argument that Cat's Paw liability is limited to cases where a biased supervisor influences the decision of another, the district court held that Cat's Paw liability also may be established where a non-supervisory employee performed an act motivated by discriminatory animus, the act was intended to precipitate an adverse employment action, the act proximately caused an adverse employment action, and the employer was negligent or should have known of the discriminatory motive of the coworker.

Severance Agreements Under Attack by the EEOC. Two recent lawsuits filed by the EEOC underscore its intent to continue, and even expand, its attack on severance agreements. The EEOC has long taken the position that releases signed by employees only may preclude the filing of private lawsuits by the employee and may not waive the employee's right to file administrative charges with the EEOC or participate in an EEOC investigation, hearing, or proceeding. The courts also have consistently held that the right to file charges with the EEOC and assist in its enforcement efforts is non-waivable.

In *EEOC v. CVS Pharmacy, Inc.*, 2014 U.S. Dist. LEXIS 142937, the severance agreement prohibited the terminated employee from initiating or filing a complaint or proceeding regarding any released claim. The agreement did not provide a specific carve out for EEOC charges, but did carve out "any claim that the Employee cannot lawfully waive" and the right for the employee to participate with any "appropriate federal, state or local government agency enforcing discrimination laws." The EEOC argued that the failure to explicitly authorize the filing of EEOC complaints would have a chilling effect on employee rights. While the case was dismissed on procedural grounds, the EEOC is appealing and maintains that the CVS release language is unlawful.

In *EEOC v. CollegeAmerica Denver Inc.*, 2014 U.S. Dist. LEXIS 167055, the severance agreement at issue precluded the former employee from "contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica." The district court dismissed the EEOC's claim regarding the release language after the employer assured the court that it would not attempt to impede administrative actions by former employees in the future.

EEOC Reaches First California GINA Settlement. In November 2014, the Equal Employment Opportunity Commission (EEOC) reached a nearly $200,000 settlement with three agriculture production companies for violations of the Genetic Information Nondiscrimination Act ("GINA"). GINA is a 2008 federal law that prevents employers collecting or using employees' and applicants' genetic information. The EEOC complaint alleged that the employers had required job applicants to answer medical history and other genetic questions then screened applicants based on their responses.

B. California

Franchisor Not Vicariously Liable for Supervisor's Sexual Harassment Absent Requisite Level of Control. In *Patterson v. Domino's Pizza*, 60 Cal. 4th 474 (2014), an employee sued her employer (a Domino's franchisee), her supervisor, and Domino's Pizza (the franchisor) for alleged sexual harassment. The plaintiff claimed that because the franchisee was the "agent" of the franchisor, the franchisor could be held vicariously liable for the alleged misconduct. The California Supreme Court, in a 4-3 ruling, held that the franchisor was not vicariously liable, stating that a franchisor "becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

Federal Law Not a Complete Bar to State Protections for Undocumented Workers In *Salas v. Sierra Chemical Co.,* 59 Cal. 4th 407 (2014), the California Supreme Court held that employee protections and remedies under state law apply to all individuals, regardless of immigration status. In 2007, plaintiff sued his former employer under California's FEHA, alleging that the employer failed to reasonably accommodate his physical disability and refused to rehire him in retaliation for his having filed a workers' compensation claim. Based upon its discovery that the former employee had used another person's Social Security number, the employer sought to dismiss the action based on the doctrines of after-acquired evidence and unclean hands. The Court held that while these doctrines did not bar the claims, the plaintiff would only be eligible to seek damages arising prior to the employer's discovery of the employee's wrongdoing.

Employee's Demand Letter Unrelated to Wrongful Termination Claims Constitutes Extortion. In *Stenehjem v. Sareen*, 226 Cal. App. 4th 1405 (2014), a former employee threatened to sue an employer for defamation and wrongful termination. After the employer refused to accept the employee's settlement proposal, the employee sent the employer an e-mail threatening to report the employer to the federal government for alleged false billing and fraud, allegations unrelated to the former employee's threatened claims. When the former employee filed suit, the employer countersued for extortion. While the employee argued that his threatening e-mail was a legitimate settlement offer, the appellate court concluded that the pre-litigation e-mail demand, when considered in the context in which the demand was made, constituted extortion.

California Court of Appeal Reaffirms Expanded Protections for Whistleblowers. In *Diego v. Pilgrim United Church of Christ*, 2014 Cal. App. LEXIS 1058, plaintiff, who worked as the assistant director of a preschool, claimed that she was terminated because of the preschool's mistaken belief that she had filed a complaint with the California Department of Social Services, which in fact had been filed by another employee. The trial court dismissed the lawsuit, finding that the law did not protect employees who are "merely believed to have engaged in protected activity." The Court of Appeals reversed, holding that Labor Code section 1102.5(b), which prohibits retaliation against an employee for disclosing alleged violations of law to a governmental agency, also prohibits retaliation where the employer mistakenly believes that the employee disclosed a violation. Notably, since this incident, section 1102.5 was amended to specifically include employees whom "the employer believes" disclosed information to a government agency.

III. WAGE AND HOUR

A. Federal

Supreme Court Questions FLSA De Minimus Doctrine. In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), the Court held that time spent "donning and doffing" protective gear qualifies as "changing clothes" under section 203(o) of the FLSA, which allows the parties to a collective bargaining agreement ("CBA") to decide whether time spent changing clothes at the beginning and end of each workday is compensable. In this case, the CBA provided that changing into certain protective gear was non-compensable, but the plaintiffs claimed that protective gear was outside the scope of "changing clothes" and so ineligible for the exception in section 203(o). In a unanimous decision, the Supreme Court rejected the employees proposed distinction between protective gear and clothing, holding that protective clothing was included in the exception to section 203(o).

However, it is the Supreme Court's discussion on the *de minimus* doctrine that is concerning. Federal courts adopted the FLSA *de minimus* rule to avoid having judges parse scant minutes of work time from longer periods of non-work time. In this case, the lower court held that, where an employee spent 20 minutes putting on protective gear (which was properly non-compensable), the time spent putting on glasses and earplugs (which otherwise would be compensable) was too small and therefore the entire time was deemed non-compensable. However, the Supreme Court found the doctrine inapplicable and intimated that it should not be applied to the FLSA at all. As the Court stated, the FLSA, a law designed to make sure employees are paid for time worked, "*is all about trifles* . . . there is no more reason to *disregard* the minute or so necessary to put on [glasses and earplugs] than there is to *regard* the minute or so necessary to put on a snood." The fact that the Court went out of its way to question the *de minimus* doctrine's application to the FLSA is cause for concern.

Supreme Court Rules Time Spent in Security Screenings Not Compensable Under Federal Law. In *Integrity Staffing Solutions v. Busk,* 2014 U.S. LEXIS 829, Integrity required its hourly warehouse workers to go through a daily security screening before exiting the warehouse. Former employees filed a class action against the

company alleging that they were entitled to compensation for the twenty-five (25) minutes they spent going through those screenings. Under the FLSA, employers are exempted from liability for claims based on "activities which are preliminary to or postliminary to the performance of the principal activities that an employee is hired to perform." Reversing the Ninth Circuit, the Supreme Court unanimously held that the screenings were not "integral and indispensable" to the employees' duties retrieving products from shelves or packaging them for shipment. Accordingly, time spent waiting to go through security screenings was not compensable time under the FLSA.

Ninth Circuit Finds Drivers to Be Employees Not Independent Contractors. In *Alexander v. FedEx Ground Package System,* 765 F.3d 981 (2014), the Ninth Circuit, applying California law, found that FedEx improperly classified its delivery drivers as independent contractors. In particular, the Court found that the label placed on the relationship was not dispositive and that FedEx's policies and procedures "unambiguously" allowed it to exercise a great deal of control over the manner in which its drivers performed their jobs. For example, FedEx imposed strict uniform and grooming standards, required that the drivers' vehicles be branded and maintained in a specific way, and exercised a substantial control over the times its drivers could work and how and when the drivers delivered their packages.

In a similar case, *Ruiz v. Affinity Logistics Corp.,* 754 F.3d 1093 (2014), the Ninth Circuit also found a group of furniture delivery drivers to be employees rather than independent contractors. Again, it was determined that the company exercised considerable control over the drivers and the performance of their work.

Unpaid Intern Class Action Lawsuits Generate Large Recoveries. Traditionally created to allow students to gain experience and potential entry into competitive fields, a recent surge of wage and hour claims are causing employers to reconsider unpaid intern programs. Following last year's "Black Swan" decision of a federal district court in New York, *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (2013), and the Department of Labor's clarification of FLSA intern regulations, a number of prominent employers faced class action lawsuits in 2014. The plaintiffs generally claim that interns perform the work of regular employees and should be paid minimum and overtime wages. Settlements in district court cases in New York have included NBC Universal ($6.4 million), Conde Nast ($5.8 million), and Elite Modeling ($450,000 for 100 interns).

B. California

Employers Must Pay for Employees' Work-Related Personal Cell Phone Use. In *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137 (2014), the California Court of Appeal held that employers must reimburse a reasonable percentage of their employees' cell phone bills if the employer requires them to use their personal cell phones for work-related calls. California Labor Code Section 2802 requires an employer to indemnify his or her employee "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." The Court held that this reimbursement requirement exists regardless of whether the employees have cell phone plans with limited or unlimited minutes or whether they changed their cell phone plans to accommodate work-related usage. Instead, according to the Court of Appeal, reimbursement for work-related usage is always required because the employer otherwise would be improperly passing its operating expenses onto the employee. Furthermore, although there may be individual differences in cell phone plans and usage, such damages calculations should not necessarily impede class certification.

IV. CLASS ACTIONS/PAGA

A. Federal

Ninth Circuit Holds No Federal Subject Matter Jurisdiction of California PAGA Claims. In *Baumann v. Chase Investment Services*, 747 F.3d 1117 (2014), the Ninth Circuit held that the federal Class Action Fairness Act (CAFA) does not allow claims under the California Private Attorneys General Act of 2004 (PAGA) to be litigated in federal court. Under CAFA, a party may bring a state class action claim into federal court if the total amount in controversy exceeds $5,000,000, the class contains at least 100 members, and any class member is from a state different from the defendant. The Ninth Circuit conceded that the plaintiff met all of these criteria; however, the court held that a PAGA claim, which is brought by a private citizen on behalf of the state, is not a "class action" within the meaning of CAFA.

B. California

Supreme Court Rules That Class Action Waivers in Employment Arbitration Agreements Are Generally Enforceable, but Such Waivers Do Not Bar PAGA Claims. In the highly-anticipated *Iskanian v. CLS Transportation*, 59 Cal.4th 348 (2014), the California Supreme Court held that class action waivers in employment arbitration agreements are enforceable, but an employee's right to bring a representative action under PAGA cannot be waived.

Iskanian brought a class action and a PAGA representative action against his employer alleging various unpaid wage claims. The employer asserted that all of Iskanian's claims were subject to individual (not classwide) arbitration pursuant to his arbitration agreement that expressly waived his right to class proceedings and representative PAGA actions. The issue before the *Iskanian* Court was whether the Federal Arbitration Act (FAA), as recently interpreted by the United States Supreme Court in *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), preempted California law on the topic. The existing California rule – established in *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007) – generally prohibited the enforcement of collective action waivers in employment arbitration agreements.

Concepcion held that class action waivers in *consumer* contracts are enforceable, and that classwide arbitration interferes with the fundamental attributes of arbitration (informal, efficient, and streamlined proceedings). Thus, the *Concepcion* Court held that customers could not force classwide arbitration of consumer claims where classwide arbitration is prohibited in the arbitration agreement. In *Iskanian*, the California Supreme Court held that class action waivers in *employment* arbitration agreements governed by the FAA *are* enforceable, even in situations where an individual action would be an ineffective means for pursuing statutory employment claims.

However, the California Supreme Court did not apply this reasoning to representative PAGA actions to recover civil fines on behalf of the state. The Court found that, despite the *Concepcion* decision, PAGA waivers are contrary to public policy and unenforceable as a matter of California law. The FAA does not preempt this rule because the FAA was intended to apply only to *private* disputes, not to PAGA disputes which are brought on behalf of the public.

Availability of Class Arbitration Is a Gateway Dispute Properly Decided by the Court, Not the Arbitrator. In *Garden Fresh Restaurant Corp. v. Superior Court*, 231 Cal. App. 4th 678 (2014), the Court of Appeal held that the question of whether a binding arbitration agreement governed by the FAA contemplates class/representative arbitration rather than individual arbitration is a matter to be decided by the courts, not the

arbitrator, *unless* the parties "clearly and unmistakably provide[d] otherwise." In particular, the *Garden Fresh* Court ruled that class/representative arbitration was significantly different from individual arbitration, thereby making it a gateway dispute. Class arbitration, for example, loses the confidentiality, speed, lower cost, and increased efficiency that encourage parties to enter into arbitration agreements. Class arbitration also combines high stakes of class actions with the absence of judicial review found in arbitration.

California Appellate Court Recertifies Class of Rite Aid Employees Claiming Violation of the Suitable Seating Requirement. In *Hall v. Rite Aid Corp.*, 226 Cal. App. 4th 278 (2014), a cashier alleged that Rite Aid violated Wage Order 14 by not providing seats for cashiers. That Wage Order provides, "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The predominant issue was whether this claim was properly filed as a class action. Rite Aid contended that because each employee's circumstances were different, class certification should be denied. Nevertheless, the Court of Appeal approved certification of the class, holding that the issue of liability could be resolved on a classwide basis, even if individual damage calculations would be required.

California Supreme Court Finds Class Certification Violated Due Process. In *Duran v. U.S. Bank National Association,* 59 Cal.4th 1 (2014), a class of bank officers brought a class action to challenge their classification as "outside salespersons," which applies to employees who spend more than 50 percent of the workday engaged in sales activities outside the office. The trial court certified a class of 260 individuals and extrapolated a classwide finding of liability from a random sample of only 20 plaintiffs. The trial court did not allow defendant to introduce evidence pertaining to any of the class members outside of the random sample, and based on the limited sample, found that all of the class members had been misclassified, and awarded $15 million. The Court of Appeal unanimously reversed and the California Supreme Court agreed, holding that the trial court's exclusion of all evidence about class members outside of the sample group violated the bank's due process rights.

Questions of Independent Contractor Misclassification Are Susceptible to Proof on a Classwide Basis. In *Ayala v. Antelope Valley Newspapers Inc.,* 59 Cal.4th 533 (2014), plaintiffs worked as newspaper carriers for Antelope Valley Newspapers, Inc. (AVN). Plaintiffs filed a class action lawsuit alleging that AVN incorrectly classified them as independent contractors. The trial court found there were numerous variations in how the carriers performed their jobs and denied class certification.. The California Supreme Court held that the trial court's denial of class certification was an abuse of discretion. The Court stated that "[w]hether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." The critical inquiry is "not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." The Court found that the defendant's form employment contract was a significant indicator that common issues predominated. Because all of the carriers signed a similar contract, there was a common way to show the extent of the hirer's "right to control" the carriers, and therefore the case was amenable to class certification.

California Court of Appeal Reverses Certification Denial in Misclassification Case. In *Martinez v. Joe's Crab Shack,* 231 Cal. App. 4th 362 (2014), salaried restaurant managers alleged that they were misclassified as exempt and were entitled to overtime pay. According to plaintiffs, they performed non-exempt tasks, such as cooking, serving, bussing, hosting, stocking, and bartending. The trial court denied plaintiffs' motion for class certification because they were unable to estimate the number of hours they had spent on exempt vs. nonexempt tasks and because they admitted that the amount of time they spent on a given task varied from day to day. The Court of Appeal reversed, finding that significant common issues were present, including that defendant operated a chain of restaurants governed by the same policies and procedures, exempt employees

were expected to work a minimum of 50 hours per week, and there was a finite list of tasks performed by managerial employees demonstrating that their jobs were highly standardized. Evidence of company-wide policies and procedures alone can support class certification, even if the individual experiences of the potential class members vary.

V. National Labor Relations Board ("NLRB") Developments

NLRB Reaffirms Controversial D.R. Horton Decision. Recently, the NLRB issued its decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), in which it found that an employer's mandatory employee arbitration agreement, which included a class action waiver, violated its employees' NLRA Section 7 rights. Notwithstanding the enforceability of such waivers under the FAA, the NLRB reasoned that the right to bring a class action is "protected concerted activity" under the NLRA.

Murphy Oil is noteworthy because the NLRB continued to follow its controversial decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), which has been widely rejected and criticized by the federal courts. The *Murphy Oil* majority responded directly to criticism by the federal courts, stating:

> In sum, we have carefully considered, and fully addressed, the views of both the Federal appellate courts that have rejected *D. R. Horton* and the views of our dissenting colleagues. We have no illusions that our decision today will be the last word on the subject, but we believe that *D. R. Horton* was correctly decided, and we adhere to it.

Murphy Oil USA, 361 NLRB No. 72, at 18.

NLRB Reverses Course and Creates Presumptive Right for Employees to Use Employers' Email Systems for Union Organizing and Other Protected Converted Activity. In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the National Labor Relations Board (NLRB) held that employees who are given access to employer e-mail systems for work purposes are now presumptively permitted to use those systems for certain union organizing and other concerted activities during non-working time. This decision reverses the Board's 2007 decision in *Register Guard*, 351 NLRB 1110 (2007), calling its earlier decision "clearly incorrect."

Section 7 of the National Labor Relations Act protects the right of employees to engage in union and other "concerted" activities for "mutual aid or protection." In *Register Guard*, the NLRB balanced employers' property rights with employees' Section 7 rights and held that an employer may ban non-work uses of company email, provided the prohibition is not applied to discriminate against union activity (e.g., permitting employees to use email to solicit on behalf of other causes, but not unions). The *Register Guard* decision treated employer email systems in a manner akin to other employer property, including telephones and bulletin boards, where non-work related uses have historically been lawfully prohibited.

In *Purple Communications,* the NLRB stated that *Register Guard* overvalued employer property rights when weighing them against the communication rights of employees. According to the Board, unlike telephone systems and bulletin boards, non-work use of an email system does not add costs to the employer, nor prevent concurrent work use. Purporting to advance the law into the 21st century, the NLRB noted that while face-to-face communication was the standard for employee communication in the 1970s, email is now the primary form of work communication. This central role makes employer email systems "uniquely appropriate" for self-organization and employee discussion of the

terms and conditions of employment. Thus, the Board held that it is presumptively invalid for an employer to prevent an employee, who is already given access to an employer email system, to be prevented from sending "protected" union and other concerted activity communications during non-working time, unless special circumstances are present.

As is often the case, the Board's decision was split on partisan lines. In their separate dissents, the two Republican members of the Board foreshadowed a number of problems with this new rule: (1) in order to enforce an email policy, the new rule will require employers to determine which emails qualify as "protected" activity, in essence encouraging employers to engage in the surveillance of employees' union activities; (2) the new rule will require expensive litigation on the meaning of "special circumstances" in the digital realm; (3) forcing employers to subsidize speech that they do not necessarily support violates employers' property and First Amendment rights; and most troubling, (4) while compliant employees may send protected emails only during times when they are not working, those messages may well be received and read by employees who are on the clock, meaning the employer will often be forced to subsidize the time spent reading these messages, which will negatively affect productivity and efficiency.

Employer Committed Unfair Labor Practice by Discharging Off-Duty Employee for Swearing in Front of Customers During Unionization Drive. A Starbucks barista who was involved in a unionization campaign entered the store with other employees to protest the store's prohibition on employees wearing union pins while working. An off-duty manager from another Starbucks store confronted the employee and a loud confrontation ensued. During this altercation, the employee shouted "You can go fu** yourself, if you want to fu** me up , go ahead, I'm here!" When the barista was terminated for this outburst in front of customers, the memorandum of discharge unfortunately mentioned both insubordination and the employee's strong support for the union as reasons the employee was ineligible for rehire.

In *Starbucks Corp.*, 360 NLRB No. 134 (2014), the NLRB found that Starbucks violated the NLRA because Starbucks failed to show that the employee would have been fired even without participating in the unionization effort. Key factors for the NLRB majority were: (1) employees with similar outbursts, but without union involvement, had not been fired; (2) the off-duty manager who instigated the confrontation also used profanity, and was not disciplined in any way; (3) the employer failed to identify the decision makers and make them available at the hearing; and (4) the employer presented an exaggerated version of events and history of prior warnings that properly led the ALJ to infer that the firing was motivated by union animus.

Insubordination Provides Sufficient Basis for Social Media Firing. In *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014), the NLRB unanimously held that employee comments on Facebook that qualified as "pervasive advocacy of insubordination" were a sufficient basis for rescinding offers to rehire the employees to work at a high school teen center. The Board found that the employees' lengthy Facebook exchange contained several statements advocating insubordination that could not be explained away as a joke or hyperbole, such as: "Let's do some cool shit, and let them figure out the money"; "field trips all the time to wherever the fu** we want!"; "teach the kids to graffiti up the walls"; and "Let's fu** it up."

The Board reasoned that rescinding the rehire offers was appropriate because waiting for the employees to act on these specific plans was a risk no reasonable employer would take. However, the Board was careful to distinguish between the statements of insubordination and the "employees' use of profanity or disparaging characterizations" of management, which could be protected speech.

Employee speech in social media forums is a developing area for the NLRB. The key issue is whether the employee's comments are objectively related to "concerted activity for the purpose of mutual aid of protection." The NLRB's recent decisions begin to show the outline of permissible social media speech by employees:

Impermissible speech restrictions:

- An employee handbook that requires employees to show "courtesy" or "respect" to the company, or that prevents all "insubordination" without any limiting or defining language;
- Preventing employees from discussing tips or wages with other employees (which is separately unlawful in California);
- Firing an employee for clicking the Facebook "like" button for a post that was critical of management and the employer's tax withholding error;
- Firing an employee for a profanity laced outburst complaining about meal and rest breaks and below minimum wage payments; and
- Punishing the speech of an individual who seeks to induce group action or who actually presents a group complaint.

Permissible speech restrictions:

- Firing an employee for a Facebook outburst directed at a supervisor related solely to an individual grievance, rather than working conditions of employees generally;
- Refusal to rehire employees whose discussion crosses the line into "pervasive advocacy of insubordination" to the employer's business;
- Firing a car salesman for posting a joke picture concerning a car accident at the car dealership located across the street, but also owned by his employer;
- Firing an employee for objectively menacing, threatening, physically aggressive, or belligerent behavior; and
- Firing an employee for vitriolic attacks solely on the quality of the employer's product.

However, since the Board's position on the permissible vs. impermissible speech restrictions is very much a work in progress, please consult counsel before taking discipline against or discharging an employee for speech or social media comments.

Employee's Report to Another Employee That Second Employee Was Going to Be Fired Is Protected Concerted Activity. In *Food Services of America*, 360 NLRB No. 123 (2014), the NLRB found the firing of an employee for harassment was improper because the conduct in question was protected concerted activity. The employer hired employee Aparicio on the recommendation of its then current employee Rubio. The employer became dissatisfied with Aparicio's performance and berated Rubio for recommending her. Rubio relayed these messages to Aparicio repeatedly, causing Aparicio to begin looking for another job and causing her job performance to suffer further. Rubio legitimately believed Aparicio would be fired, but tried to use this information to turn Aparicio against their supervisor whom Rubio thought "exhibited some national origin bias." When Aparicio was questioned about her job performance, she showed their supervisor instant messages from Rubio about Aparicio's allegedly pending termination. The employer then fired Rubio on the theory that her conversations with Aparicio were harassment and vindictive against her supervisor.

The NLRB found that Rubio's warnings to Aparicio about her pending termination qualified as concerted activity for mutual aid of protection. The Board cited precedent finding warnings to protect a co-worker's job are inherently concerted activity. For the statements to lose protection under the NLRA, the employer has to prove that they were "maliciously untrue." The employer here failed to meet this standard because it proved at most that the warnings were inaccurate, but not that they were knowingly false. Moreover, Aparicio never complained to Rubio or management in a way that would take the comments outside the protection of the Act. Because the employer could not provide a reason for discharge independent of these warnings, the Board ordered Rubio reinstated with back pay.

NLRB Narrows the Definition of "Solicitation." In *ConAgra Foods, Inc.,* 361 NLRB No. 113 (2014), the NLRB held that a pro-union employee does not "solicit" union support by notifying other employees that she placed union authorization cards in their lockers during work time. The employer, ConAgra Foods Inc., had a legal no-solicitation policy that prohibited solicitation of all kinds during working time. During non-working time, the pro-union employee asked two other employees to sign union authorization cards, and had received a key to their lockers. Later, during working time, in passing each other the pro-union employee told the other employees that she had delivered the signed union cards to their lockers. This conversation caused the employees to stop working for a few seconds. The employer nonetheless issued them a verbal warning, contending that doing so was a neutral application of its valid no-solicitation policy.

The NLRB majority held that union speech does not qualify as solicitation unless an employee is asking for support or is presented with a union card to sign. The Board reasoned that solicitation may lawfully be prohibited in a non-discriminatory way to encourage employee productivity and attention to work. However, where the communication merely amounts to union information, rather than solicitation, the concern for productivity is minimal. Here, the employees had already been solicited in compliance with the no-solicitation policy during non-working time. The Board accordingly ruled against the employer for its verbal warning, and enjoined future overbroad application of the no-solicitation policy.

NLRB Changes Arbitration Deferral Standard. Dividing on partisan lines, the NLRB overruled a 30-year-old precedent and lessened Board deference to arbitration awards. The new standard will give the Board greater discretion to ignore arbitration awards to protect employee rights under the NLRA. The Board announced the new rule in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014).

The former standard provided that the Board should defer to an arbitration award where (1) the contractual issue under a collective bargaining agreement is "factually parallel" to an unfair labor practice presented to the Board, (2) the arbitrator is presented with the facts relevant to resolve the issue and (3) the arbiter's award is not "clearly repugnant" to the NLRA.

Under the new standard, the Board will defer to an arbitration award only if "(1) the arbitrator was explicitly authorized to decide the NLRA unfair labor practice issue; (2) the arbitrator considered that issue, or was prevented from doing so by the party opposing the award; and (3) Board law reasonably permits the award."

NLRB Proposes New Streamlined Union Election Rules. On December 15, 2014, the National Labor Relations Board issued a final rule amending its regulations concerning union representation elections. The Board's stated purpose is to remove barriers to the resolution of union representation issues, increase transparency and uniformity across its regional offices, eliminate unnecessary litigation, and modernize the Board's representation election procedures.

On the other hand, these new rules, often referred to as the "ambush election" rules, significantly change the process that employers are required to follow when a union representation election petition is filed with the Board. While the NLRB insists that the new rules will streamline the union election process, employers should be wary of their practical effects. The rules are scheduled to go into effect on April 14, 2015, although the U.S. Chamber of Commerce has filed a lawsuit in Washington, DC, seeking to have the rules vacated.

The rules make the following significant changes to the election process:

- Permit parties to file petitions for election electronically with the NLRB's regional office and require the petitioner to file any evidence (e.g., showing of interest – signed union cards) with the petition rather than 48 hours after its filing;
- Require employers to include, in addition to the names and addresses of employees in the proposed bargaining unit, their telephone numbers, email addresses, work locations, and shifts and classifications;
- Require employers to serve the eligibility list on all other parties electronically at the same time it is filed with the regional office, and shorten the time the employer must do so from seven days after receiving the petition to two days;
- Require that, in most cases, the pre-election hearing begin seven (7) days after filing the petition;
- Require employers to provide a "Statement of Position," including a list of all individuals employed by the employer in the petitioned-for unit, no later than the hearing date (within seven days after petition-filing, assuming notice of hearing was served on that date). The Statement of Position must set forth the employer's position on any issues relating to the petition that the employer intends to raise at hearing (e.g., appropriateness of the bargaining unit). Failure of the employer to raise an issue in its timely filed Statement of Position will constitute a waiver of the employer's right to contest that issue;
- Eliminate employers' rights to request that the NLRB review decisions of the Regional Director regarding the representation petition before the election, and limit the Board's post-election review; and
- Limit the issues that may be litigated before the election (including who is eligible to vote) and the evidence that can be introduced during the representation hearing. In particular, if the employer is disputing 20% or less of the total number of employees in the proposed bargaining unit, there probably will be no hearing conducted, and the notice of election will be issued on the date of the noticed hearing, leaving challenged ballots as the potential way to resolve inappropriately included employees.

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2014 EMPLOYERS' LEGAL UPDATE

February 2015

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