Breakout Sessions – Series 1

GOLDEN DAYS

TOP 10 CALIFORNIA DEVELOPMENTS

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Key Legislative, Regulatory, and Case Law Developments

2018 Key Legislative Developments

1. SB 3: California Minimum Wage
   - In 2016, California approved a progressive increase in the minimum wage that would grow over a period of five (5) years.
   - The third minimum wage increase became effective January 1, 2019.
   - Employers with twenty-six (26) or more employees are required to pay their employees a minimum of $12.00 per hour.
   - Note that many municipalities (e.g., Los Angeles, San Francisco, San Jose) have their own (higher) minimum wage requirements. (See Appendix A for a chart.)
   - Additional increase ($13.00 per hour) coming: January 1, 2020.

   **What should you do now?** Employers should make sure that their employees’ wages meet and/or exceed the current minimum wage, as well as make any necessary preparations for further increases in 2020 and 2021.

2. SB 826: Female Members of Boards of Directors
   - SB 826 adds Section 301.3 to the California Corporations Code and requires that publicly-held corporations appoint female directors to their board of directors.
   - By the end of 2019, covered corporations must include at least one (1) female on their boards of directors.
   - By the end of 2021, a covered corporation:
     - with five (5) or more directors on its board must include at least two (2) female directors; and,
     - with six (6) or more directors on their boards must include at least three (3) female directors.
   - Covered corporations may increase the number of directors (i.e., create a new board position) in order to facilitate compliance.
   - Covered corporations may be fined as much as $100,000 for their first violation and up to $300,000 for any subsequent violation.

   **What should you do now?** First, assess whether your company is a covered corporation under SB 826. Assuming your company is a covered corporation, assess whether the board is complaint as is, or what changes can be made to ensure compliance by the end of the year.
3. **AB 1976: Lactation Location Cannot be a Bathroom**

- AB 1976 amends California Labor Code 1031, which requires that employers provide lactating employees with breaks and rooms (other than a toilet stall) to express breast milk.

- AB 1976 requires that employers must provide rooms (other than a bathroom) to express breast milk.

- An employer may comply with SB 1976 by providing a “temporary lactation location” if the employer is unable to provide a permanent location due to operational, financial, or space limitations.

- The temporary location must still be private, free from intrusions when in use, and not used for other purposes when in use.

- AB 1976 allows for a narrow “undue hardship” exception to these requirements.

**What should you do now?** Explore your workplaces to determine whether a location already exists to simply designate a lactation room. If not, assess the changes that would need to be made in order to create a permanent or temporary lactation location.

4. **AB 2282: Clarifications Regarding the Ban on Prior Salary History Inquiries**

- AB 2282 amends California Labor Code 432.3 and attempts to clarify the statute.

- California Labor Code 432.3 prohibits employers from relying on salary history in determining whether to offer employment to an applicant or deciding what salary to offer an applicant. It also requires employers to provide an applicant with the position’s pay scale if the applicant so requests.

- An “applicant” is defined as, “an individual who is seeking employment with the employer.” AB 2282 clarifies that an existing employee who applies internally for a position is not an “applicant” for purposes of the statute.

- AB 2282 also defines a “pay scale” as a “salary or hourly wage range.”

- AB 2282 also defines a “reasonable request” for a pay scale as, “a request after an applicant has completed an initial interview with the employer.”

- AB 2282 expressly permits employers to ask about salary expectations, at which time an applicant may voluntarily disclose his or her salary.

**What should you do now?** Review your company’s hiring process and interview questions to ensure compliance. Be prepared to respond to such “reasonable requests” from “applicants” for a “pay scale” for each position you are interviewing for, and/or consider conducting regular audits to obtain/update this information.
5. **SB 1252: Right to Copy and Inspect Payroll Records**

- SB 1252 amends California Labor Code Section 226, under which employers must afford current and former employees the right to inspect certain payroll related records.
- SB 1252 states that that employees have a right to “receive a copy” of the records.
- SB 1252 states that an employer must provide a copy of the records upon request, rather than requiring the employee to make a copy.
- SB 1252 leaves in place the employer’s right to charge the employee “the actual cost of reproduction.”

**What should you do now?** Because most employers already are capable of providing a copy of personnel and pay records, there are no immediate actions that need to be taken to ensure compliance. However, remain prepared to comply with requests to make copies of payroll related records.

6. **SB 1412: Clarifications Regarding the Exceptions to “Ban the Box” Limitations**

- SB 1412 amends California Labor Code section 432.7, which limits the information an employer may ask a job applicant about his or her criminal activity.
- Generally, an employer may not ask a job applicant to disclose information concerning:
  - arrests that did not result in a conviction, referrals to retrial or post-trial diversion programs,
  - or convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law,
  - unless an exception applies.
- SB 1412 limits exceptions to this rule to where the employer is required under state or federal law to inquire into “particular convictions” (specific categories of criminal offenses or criminal conduct), or where the employer is prohibited from hiring an individual with a particular conviction.
- SB 1412 also clarifies that, in cases where the exception applies, the employer may inquire about convictions that have been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, but not juvenile convictions.

**What should you do now?** Determine whether your company has any positions which require you to inquire into a particular category of criminal offenses or criminal conduct, or prohibit you from hiring an individual with a particular conviction. Then, determine whether your hiring practices are compliant.
7. SB 1343: Expanded Mandatory Sexual Harassment Training Requirements

- SB 1343 amends the California Fair Employment and Housing Act by expanding both:
  - which employers must provide supervisor sexual harassment training; and,
  - to whom they must provide it.

- Under current law, employers with fifty (50) or more employees must provide at least two (2) hours of sexual harassment training to supervisors, every two (2) years or within six (6) months of an employee becoming a supervisor.

- SB 1343 expands that mandate to employers with five (5) or more employees.

- SB 1343 provides that covered employers must also now provide at least one (1) hour of training to nonsupervisory employees as well.

- Employers must complete this training by January 1, 2020.

**What should you do now?** Begin revising sexual harassment training schedules now in order to ensure compliance by January 1, 2020. Access the California Department of Fair Employment and Housing’s (DFEH) publicly available two (2) and one (1) hour harassment prevention training videos and written materials in various languages.

8. SB 1300: “Omnibus” Sexual Harassment Bill

- SB 1300 prohibits (in exchange for a raise or bonus, or as a condition of employment or continued employment) an employer from requiring the execution of a release of a FEHA claim or the signing of a non-disparagement or non-disclosure agreement related to unlawful acts in the workplace, including sexual harassment.

- SB 1300 provides that an employer may be liable for unlawful harassment of non-employees (e.g., applicants, unpaid interns, volunteers, or contractors), if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

- SB 1300 rejects two (2) notable federal court decisions:
  - *Harris v. Forklift Systems*, 510 U.S. 17 (1993): SB 1300 instead holds that, under FEHA, it suffices to prove that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to “make it more difficult to do the job.”
  - *Brooks v. City of San Mateo*, 229 F.3d 917 (2000): SB 1300 instead confirms that a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment harassment if the harassing conduct has unreasonably interfered with the plaintiff’s work performance, or created an intimidating, hostile, or offensive working environment.
• SB 1300 explicitly rejects the “stray remarks doctrine” and provides that a discriminatory remark, even if not made directly, or in the context of an employment decision, or uttered by a non-decision maker, should not be applied in sexual harassment cases.

**What should you do now?** As always, remain vigilant of potential instances of sexual harassment committed by employees. As California law prohibiting sexual harassment becomes more stringent, be prepared to take both corrective and preventative action to avoid sexual harassment litigation.

9. **SB 224: Expanded Sexual Harassment Liability**

• SB 224 expands California Civil Code Section 51.9’s reach to individuals who may not be employers, but hold themselves “out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party.”

• SB 224 specifically includes investors, elected officials, lobbyists, directors, and producers as persons covered by the statute.

• SB 224 also provides that the DFEH is authorized to investigate these non-employer relationships.

**What should you do now?** Remain vigilant of potential instances of sexual harassment and situations which may create risk for sexual harassment. Be aware of the new potential for liability and create policies which specifically denounce this form of harassment.

10. **AB 2770: New Defamation Protections for Sexual Harassment Complaints**

• AB 2770 amends Section 47 of the Civil Code to add three (3) types of communications regarding sexual harassment that are now considered “privileged” communications—meaning they cannot be used as a basis for defamation claim—unless they are made with malice.

• Specifically, AB 2770 protects:
  
  o Reports of sexual harassment made by an employee to his or her employer based on credible evidence and without malice;
  
  o Communications made without malice regarding the sexual harassment allegations between the employer and “interested persons” (e.g., witnesses or victims); and,
  
  o Non-malicious statement made to a prospective employer as to whether a decision to rehire, or not, would be based on a determination that the former employee engaged in sexual harassment.

• AB 2770 allows employers of an alleged harasser to warn any potential employer about the individual’s conduct “without the threat of a defamation lawsuit.”
• AB 2770 does not address communications regarding other forms of harassment, such as harassment based on race, religion, national origin, age, etc.

**What should you do now?** Proceed with caution. Although AB 2770 creates additional protection for employers, employers are encouraged to consult with legal counsel before disclosing information about a former employee because it is not yet clear how much detail former employers can disclose in responding to a reference check.

11. **AB 3109: Targeting Provisions Precluding Sexual Harassment-Related Testimony**

• AB 3109 creates new Civil Code Section 1670.11 that will render void and unenforceable any provision entered into on or after January 1, 2019, that precludes the right of a victim of sexual harassment to testify in a legal proceeding regarding criminal conduct or sexual harassment on the part of the other contracting party.

• AB 3109 applies to testimony in an administrative, legislative, or judicial proceeding, so long as the person’s testimony was required or requested by the court, administrative agency, or legislative body.

• AB 3109 was developed to further bolster the right to freely speak, write, and publish his or her sentiments on all subjects.

**What should you do now?** Review any existing agreements entered into after January 1, 2019, to ensure that they do not contain any language prohibiting testifying in a legal proceeding regarding criminal conduct or sexual harassment. Carefully remove prohibited language from any pending or form agreements for possible use in the future.

12. **SB 820: Confidentiality Limits for Sexual Harassment Settlement Agreements**

• SB 820 voids any provision entered into on or after January 1, 2019, in a settlement agreement that restricts disclosure of factual information related to claims of sexual assault or harassment or discrimination, including retaliation for reporting sexual harassment or discrimination.

• SB 820 provides that a provision in a settlement agreement that prevents the disclosure of factual information relating to a sexual harassment legal action is prohibited, “unless a claimant requests the inclusion of such a provision.”

• SB 820 expressly does not limit the parties’ ability to require the settlement amount to remain private.

**What should you do now?** Thoroughly review any “standard” agreements (e.g., severance agreements, settlement agreements) to ensure that they do not contain any language prohibiting the disclosure of factual information related to claims of sexual assault or harassment or discrimination.
2018 Key Regulatory Developments

1. DFEH New National Origin Regulations

- On July 1, 2018, DFEH regulations expanding the scope of national origin protections became effective.

- The definition of “national origin” now includes, but is not limited to an individual’s or ancestor’s actual or perceived:
  - Physical, cultural, or linguistic characteristics associated with a national origin group;
  - Marriage to or association with persons of a national origin group;
  - Tribal affiliation;
  - Membership in or association with organization identified with or seeking to promote the interests of a national origin group; and,
  - Name that is associated with a national origin group.

- “English-only” rules will not be allowed unless:
  - Justified by business necessity;
  - Narrowly tailored; and,
  - The employer has effectively notified its employees of the circumstances and time when the restriction is required, and the consequences for violation of the restrictions.
  - “English-only” rules are never valid during an employee’s non-work time (e.g., breaks, lunch, unpaid employer sponsored events, etc.).

- Discrimination based on accent is unlawful unless the accent interferes materially with the applicant’s ability to perform the job.

- Discrimination based on English proficiency may be unlawful unless it is justified by business necessity.

- Discovery into and discrimination based on immigration status is unlawful, unless necessary to comply with federal immigration law.

What should you do now? Train hiring staff to be aware of the new regulations and to be sensitive to the kinds of questions they ask regarding national origin. Assess whether any positions at your company reasonably require English proficiency.
2018 Case Law Developments

   - **Facts:** Augustine Caldera worked as a correctional officer in a state prison. Caldera is an individual with a speech impediment that causes him to stutter or stammer. Over a period of about two (2) years, Caldera was mocked or mimicked at least a dozen times, including by his supervisor (Sergeant James Grove), and in front of other employees. The jury found the harassment to be both severe and pervasive and awarded Caldera $500,000 in noneconomic damages.
   - **Holding:** The Court of Appeal found that the jury’s award was appropriate because the “totality of the circumstances” indicated that the harassing conduct was severe. Although neither plaintiff nor his witnesses could remember exactly how many times plaintiff was mocked or when exactly he was subject to any mocking, the court found that the employer’s culture supported the jury’s finding that the harassing conduct was also pervasive.
   - **Practical Implications:** This case underscores the importance of being proactive to workplace concerns, and that harassment training (without follow up) is not enough to avoid an adverse jury verdict, and that California jurors and courts will not tolerate disrespectful/harassing conduct by supervisors in the workplace.

   - **Facts:** Jessica Ayon was struck by a vehicle while the operator of the vehicle was speaking to a co-worker on a hands-free cell phone. Ayon filed a personal injury suit against the driver of the vehicle, and the driver’s employer, Esquire Deposition Solutions, claiming that Esquire was vicariously liable because the driver had been performing work duties when her injury occurred. The driver claimed that she and her co-worker were talking about their families.
   - **Holding:** The court held that the employer was not liable because Ayon did not have sufficient evidence to establish that driver had been lying about performing work duties when the crash occurred.
   - **Practical Implications:** This case exemplifies the potential dangers of vicarious liability. The employer barely escaped liability for an accident which occurred off its premises and while the employee was “off the clock.” Employers should take this as a warning and clearly identify the manner in which employees may perform work duties off their premises.

3. **Nunies v. HIE Holdings, Inc.,** 908 F.3d 428 (9th Cir. 2018).
   - **Facts:** Herman Nunies was a delivery driver who injured his shoulder and wanted to be transferred to a less-physical position. The employer approved his request for transfer until it learned that Nunies wanted the transfer because of his injury and forced him to resign instead. Nunies sued his employer under the Americans with Disabilities Act (ADA) and state law, alleging disability discrimination.
• **Holding:** Regardless of whether Nunies could show that he was actually disabled under statute, the employer may have “regarded him as disabled” and discriminated against him on that basis.

• **Practical Implications:** This case demonstrates the potential risk created by the ADA’s protection where an employer regards an employee as disabled. Although Nunies’ injury may have been transitory or minor, and therefore not a protected disability, the court focused on whether the employer could have subjectively believed that Nunies was disabled.


- **Facts:** AMN Healthcare, Inc., which was a recruiter for temporary nursing workers, sued its former employees for breach of contract and misappropriation of confidential information after they left and joined their competitor Aya Healthcare Services, Inc., in violation of a signed non-solicitation agreement. Aya counterclaimed that the employees’ non-solicitation agreement was an unenforceable restraint.

- **Holding:** The court held that AMN’s employee non-solicitation agreement was unenforceable because it clearly restrained the travelling nurse recruiters from practicing their chosen specialty.

- **Practical Implications:** This case left uncertain the ongoing viability of employee non-solicitation provisions under California law. Employers that would like to have non-solicitation provisions in employment agreements should examine their current agreements and consider whether to revise them containing less restrictive terms.


- **Facts:** Samantha Martinez, a sandwich-maker and cashier, sued her employer, Eatlite for various claims including employment discrimination in violation of public policy and, gender and pregnancy discrimination. The employer made a § 998 offer of settlement ($12,001 and was silent as to whether this amount included attorneys’ fees and costs), which Martinez ignored and took the case to trial. The jury found in favor of Martinez ($11,490) and the trial court granted her motion for attorneys’ fees and costs because the employer’s § 998 offer did not indicate whether it included attorneys’ fees and costs.

- **Holding:** The court held that the lower court should have compared the jury’s award plus pre-offer costs and fees with the § 998 offer plus pre-offer costs and fees, despite the § 998 offer having been silent on the costs and fees.

- **Practical Implications:** This case indicates the importance of careful drafting where calculations of cost are dispositive. Employers should inspect, and encourage their counsel to inspect, § 998 offers for any potential ambiguities regarding cost calculations and be sure to include language that the offer includes pre-offer costs and fees.

- **Facts:** Delivery drivers working for Dynamex, a package and document delivery company, claimed that they were misclassified as independent contractors rather than employees.

- **Holding:** A worker is properly considered an independent contractor only if the company hiring the worker establishes all of the following: (A) the worker is free from the control and direction of the hiring company “in connection with the performance of the work, both under the contract for the performance of the work and in fact”; (B) “the worker performs work that is outside the usual course of the hiring company’s business”; and (C) the worker is “customarily engaged in an independently established trade, occupation, or business of the same nature” as the work performed for the hiring entity.

- **Practical Implications:** The takeaway for employers is that, under the “ABC test”, the worker must satisfy all three (3) of the criteria to be properly classified as an “independent contractor.” Companies that engage workers as “independent contractors” to perform services should evaluate whether they can satisfy the “ABC test.”
APPENDIX A

The chart below summarizes California local minimum wage increases scheduled for 2019.

<table>
<thead>
<tr>
<th>California City or County</th>
<th>Effective Date of Increase</th>
<th>2018 Rate</th>
<th>2019 Rate</th>
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<tr>
<td>Belmont</td>
<td>January 1, 2019</td>
<td>$12.50</td>
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<tr>
<td>Berkeley</td>
<td>July 1, 2019</td>
<td>$15.00</td>
<td>TBA; est. $15.65</td>
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<td>Cupertino</td>
<td>January 1, 2019</td>
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<td></td>
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<td>$15.00 (55 or fewer employees)</td>
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<td>July 1, 2019</td>
<td>$14.64 (hotels)</td>
<td>TBA</td>
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<td></td>
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<td>$14.37 (airport/convention center)</td>
<td>TBA</td>
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<td>$13.50</td>
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<td>Los Angeles (City)</td>
<td>July 1, 2019</td>
<td>$13.25 (26 or more employees)</td>
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<td>$13.25</td>
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<tr>
<td>Location</td>
<td>Date/Effective Date</td>
<td>Minimum Wage (26 or more employees)</td>
<td>Minimum Wage (25 or fewer employees)</td>
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<tr>
<td>Los Angeles County (unincorporated areas)</td>
<td>July 1, 2019</td>
<td>$13.25</td>
<td>$12.00</td>
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<td>Malibu</td>
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<td>$13.25</td>
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<td>$14.25 (pending council approval)</td>
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<td>Minimum Wage (With Qualifying HealthCare Benefits)</td>
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<td>January 1, 2019</td>
<td>$13.41</td>
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<td>January 1, 2019</td>
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<td>San Francisco</td>
<td>July 1, 2019</td>
<td>$15.00</td>
<td>TBA; est. $15.65</td>
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<td>San Jose</td>
<td>January 1, 2019</td>
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<td>$13.00</td>
<td>$14.00</td>
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Discrimination and Harassment in the #MeToo Era: Complying With California’s Web of Prevention Requirements

(1) The California Fair Employment and Housing Act’s Duty to Prevent Discrimination and Harassment

California’s Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for employers and other covered entities to “fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” FEHA regulations provide that employers have an “affirmative duty” to take reasonable steps to prevent and promptly correct discriminatory or harassing conduct. California’s FEHA requires employers to take discrete steps to meet this mandate. These include:

- Implementation of a written harassment, discrimination, and retaliation prevention policy that meets specific requirements set forth in FEHA regulations;
- Distribution of a pre-printed sexual harassment information sheet prepared by the State of California; and,
- For employers with five or more employees, mandatory training as required by FEHA and its regulations.

(2) Required Written Harassment, Discrimination, and Retaliation Prevention Policies—California Fair Employment and Housing Act (FEHA) Regulations

FEHA regulations require employers to develop and distribute written harassment, discrimination, and retaliation prevention policies that meet specific content requirements.

California policies must meet the following requirements:

✓ The policy must be in writing.

✓ The policy must list all current protected categories covered by FEHA. This requirement precludes employers from listing examples of protected categories, followed by a “catch all” provision incorporating unspecified protected categories (e.g., “... and any other category protected by law”). Multi-state employers may be required to incorporate a California addendum to discrimination, harassment, and retaliation prevention policies stating each of the following California protected categories: (1) race; (2) religion/religious creed; (3) color; (4) national origin; (5) ancestry; (6) physical disability; (7) mental disability; (8) medical condition; (9) genetic information; (10) marital status; (11) sex (including pregnancy, childbirth, breastfeeding, and related medical conditions); (12) gender; (13) gender identity; (14) gender expression; (15) age; (16) sexual orientation; and (17) military and veteran status, etc.

✓ The policy must indicate that the law prohibits certain persons from engaging in conduct prohibited by FEHA. The individuals that must be specified include coworkers, third parties (e.g., independent contractors, customers, vendors, members of the public, etc.), and supervisors and managers with whom the employee comes into contact.
The policy creates a complaint process that ensures minimum complaint-handling safeguards are met. The policy must create a complaint process to ensure that complaints receive: (1) an employer’s designation of confidentiality to the extent possible; (2) a timely response; (3) impartial and timely investigations by qualified personnel; (4) documentation and tracking for reasonable progress; (5) appropriate options for remedial actions and resolutions; and (6) timely closures.

The policy provides a complaint mechanism that does not require employees to complain directly to an immediate supervisor. Employers may not require employees to complain about prohibited conduct to an immediate supervisor without providing other alternatives, as specified below.

The policy provides a complaint mechanism that offers certain alternatives for employees to make complaints. The complaint process must provide at least one of the following alternatives, other than an immediate supervisor, for employees to complain about prohibited conduct: (1) direct communication, either orally or in writing, with a designated company representative, such as a HR manager, EEO officer, or other supervisor; and/or, (2) a complaint hotline; and/or, (3) access to an ombudsperson; and/or, (4) identification of the California Department of Fair Employment and Housing (DFEH) and the United States Equal Employment Opportunity Commission (EEOC). The EEOC and DFEH are administrative agencies charged with the investigation and enforcement of federal and state anti-discrimination, harassment, and retaliation laws.

The policy instructs supervisors to report complaints of misconduct to a designated company representative such as a HR manager. The requirement is designed to facilitate the internal resolution of employee complaints.

The policy indicates that when employer receives allegations of misconduct it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected. 

The policy states that confidentiality will be kept by the employer to the extent possible. The policy may not indicate that the investigation will be completely confidential. The employer’s duty to investigate complaints of discrimination, harassment, and retaliation will ordinarily preclude a guarantee of absolute confidentiality.

The policy indicates that if at the end of the investigation misconduct is found, appropriate remedial measures will be taken.

The policy makes clear that employees will not be retaliated against as a result of making a complaint or participating in any workplace investigation.

Distribution Requirements

California FEHA regulations provide five options for employers to disseminate discrimination, harassment, and retaliation prevention policies. These are:

Printing and providing a copy to all employees with an acknowledgment form for employees to sign and return.
Sending the policy via email with an acknowledgment form for employees to sign and return.

Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies.

Any other method that ensures employees receive and understand the policies.

(3) **Employer Duty to Distribute California State Anti-Harassment Pamphlet**

- FEHA provides that “every employer shall act to ensure a workplace free of sexual harassment” by distributing an “information sheet” to employees on sexual harassment prepared by DFEH.

- Employers can obtain the required information sheet from DFEH. The pamphlet is available at [www.dfeh.ca.gov](http://www.dfeh.ca.gov) (Form 185). The employer is required to distribute the information sheet to its employees by delivering it “in a manner that ensures distribution to each employee.” By way of example, the statute provides that delivery may be done by including the information sheet with the employee’s pay.

- The pamphlet distribution requirement applies to all employers, regardless of size. The requirement is in addition to any other prevention efforts taken under California Government Code Section 12940(k), which requires employers to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

- FEHA provides that employers need not distribute the required information sheet if the employer provides “equivalent information” that contains certain minimum content, including “legal remedies” available to employees through DFEH. Since most employer policies and other information distributed to employees do not contain such information, pamphlet distribution is recommended.

(4) **Employer Duty to Conduct Anti-Harassment Training**

- FEHA has traditionally required employers with 50 or more employees “to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees.” Covered employers were required to provide such training to supervisory employees at least once every two years, and to “all new supervisory employees within six months of their assumption of a supervisory position.” Independent contractors are counted toward the minimum employee coverage requirement as are individuals who work or reside outside of California. Supervisors located outside of the state of California are exempt from the training law. Businesses that expand to meet the employee threshold must provide training to supervisors within six months of their eligibility and thereafter biennially. A supervisory employee who has received training required by FEHA within the prior two years from a “current, a prior, an alternate, or a joint employer,” need not satisfy the two-hour training requirement provided that the current employer (1) gives the individual a copy of the employer’s anti-harassment policy; (2) requires the individual to read the policy; (3) obtains an acknowledgment of receipt of the policy; and, (4) does this within six months of the supervisor assuming his or her supervisory role.
Beginning January 1, 2019, FEHA requires employers that employ five or more employees, including temporary or seasonal employees, to provide at least one hour of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020. The new law requires that the training occur once every two years.

Required Training Content

- FEHA strictly regulates the content of required training. Training content continues to evolve. Required training on the topic of “abusive conduct” was added in 2015. Required training on the additional topics of gender identity, gender expression, and sexual orientation were added beginning in 2018. Accordingly, it is recommended that employers carefully monitor amendments to state training requirements in order to update their training programs to comply with the Act.

- Traditionally, FEHA has required training, without limitation, on the following topics:
  - A definition of unlawful sexual harassment under California’s FEHA and federal Title VII of the Civil Rights Act of 1964. The training may, but is not required to include: (1) a definition of and training about other forms of harassment covered by FEHA; and (2) a discussion of how harassment of an employee can cover more than one basis of discrimination;
  - A review of the definition of “abusive conduct” under FEHA with examples, including an explanation of the negative effects of abusive conduct on the victim and workplace, and the negative impact on productivity and morale for employers;
  - A review of the definition of the terms “gender identity,” “gender expression,” and “sexual orientation” with examples;
  - Emphasis that a single act will not constitute abusive conduct, unless the act is especially severe or egregious;
  - Statutory provisions and case law principles regarding the prohibition and prevention of unlawful sexual harassment, discrimination, and retaliation in employment;
  - Types of conduct that constitute sexual harassment;
  - Legal remedies available for sexual harassment in civil actions, including potential employer and individual exposure;
  - Supervisors’ obligation to report sexual harassment, discrimination, and retaliation that they become aware of;
  - Strategies to prevent sexual harassment in the workplace;
  - Limited confidentiality of the complaint process;
  - Resources for victims of unlawful harassment, such as to whom they should report alleged sexual harassment;
- Steps necessary to take appropriate remedial measures to correct harassing behavior;
- The employer’s obligation to conduct an effective workplace investigation of a harassment complaint;
- What to do if the supervisor is personally accused of harassment;
- Essential elements of an anti-harassment policy; and
- How to utilize an anti-harassment policy if a harassment complaint is filed.

Training Must Include Distribution and Acknowledgment of Harassment Policy

- As part of the training, the employer's anti-harassment policy or a sample policy must be provided to supervisory employees attending training. Even if a sample policy is used, the employer is required to:
  - Give each supervisor a copy of the employer’s anti-harassment policy;
  - Require each supervisor to read the employer’s policy; and
  - Require each supervisor to acknowledge receipt of the employer’s policy.

Training Format

- The content of classroom and online seminar training programs must be created and taught by a trainer as defined in FEHA regulations. The training can take the form of classroom training. E-learning programs must be created by a trainer and an instructional designer who has expertise in current instructional best practices. An e-learning program must provide a link to a trainer who can answer a trainee’s questions within two business days. Other types of technology (e.g., audio, video, computer) may be used in conjunction with classroom, online, and e-learning programs.

Required Trainer Qualifications

- FEHA regulations set for specific experience and qualification requirements for persons conducting required anti-harassment training. Individuals authorized to conduct training include attorneys and others meeting certain minimum experience requirements. In addition, the training must be conducted by trainers or educators with knowledge and expertise about the subjects of the training. According to the regulations, to be a trainer or educator providing required training, a person must have the training and experience to train supervisors on:
  - What constitutes unlawful harassment, discrimination, and retaliation under the FEHA and federal law;
  - What steps to take when harassing behavior occurs in the workplace;
  - How to report harassment complaints;
How to respond to a harassment complaint;

The employer’s obligation to conduct a workplace investigation of a harassment complaint;

What constitutes retaliation and how to prevent it;

Essential components of an anti-harassment policy; and

The effect of harassment on harassed employees, co-workers, harassers, and employers.

(5) **Prohibition on Employer Limitations on Pay Disclosure – California Labor Code Section 1197.5**

- Effective January 1, 2016, California’s Fair Pay Act provided that an “employer shall not prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section.” Prior to enactment of the Fair Pay Act, the California Labor Code already prohibited employers from requiring an employee to refrain from disclosing the amount of his or her wages under Labor Code Section 232. However, the Fair Pay Act expressly makes it unlawful for employers to prohibit an employee from discussing or inquiring about the wages of others.

(6) **New Anti-Harassment Legislation Effective January 1, 2019**

**SB 1343 – Requires More Sexual Harassment Training**

- SB 1343 requires employers that employ five or more employees, including temporary or seasonal employees, to provide at least one hour of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020. The new law requires that the training occur once every two years. DFEH is charged with developing or obtaining one-hour and two-hour online training courses and to post them on its website.

**SB 820 – Prohibits Non-disclosure Provisions in Sex Harassment and Discrimination Settlement Agreements**

- SB 820 prohibits a provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, harassment, or discrimination based on sex, or an action of retaliation for reporting sex harassment or sex discrimination. Such provisions in agreements entered into after January 1, 2019 are void as a matter of law and against public policy. The statute creates an exception for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included in the settlement agreement at the request of the claimant.
SB 826 – Requires Women on Board of Directors

- SB 826 requires no later than the end of 2019, a domestic general corporation or a foreign corporation that is publicly held whose principal executive offices are located in California have a minimum of one female on its board of directors. By close of 2021, two female directors are required if the corporation has five directors and three female directors are required if the corporation has six or more directors.

AB 3109 – Prohibits Waivers of the Right of Petition or Free Speech

- AB 3109 provides that a provision in a contract or settlement agreement is void and unenforceable if it waives a party’s right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

SB 224 – Broadens Those Liable for Sexual Harassment

- SB 224 amends Civil Code Section 51.9 and provides that a person is liable for sexual harassment where there is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. The following relationships are included: physician, psychotherapist, dentist, attorney, holder of a master’s degree in social work, real estate agent, real estate appraiser, investor, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, escrow loan officer, executor, trustee, administrator, landlord or property manager, teacher, elected official, lobbyist, director or producer, or a relationship that is substantially similar to any of the foregoing. The statute also makes it an unlawful practice to deny or aid, incite, or conspire in the denial of rights of persons related to sexual harassment actions.

SB 1300 – Adds Further Changes to Sexual Harassment and Discrimination Laws

- SB 1300 prohibits an employer in exchange for a raise or bonus, or as a condition of employment or continued employment from (1) requiring the execution of a release of a claim or right under FEHA; or (2) from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. The statute provides that an agreement or document in violation of either of these prohibitions is contrary to public policy and unenforceable.

- SB 1300 also provides that an employer may be responsible for the acts of nonemployees with respect to harassment based on any protected class. The statute also authorizes an employer to provide bystander intervention training to its employees, which includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. SB 1300 further provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.
(7) Government Code Sections 12950 and 12950.1 – New Harassment Training Requirements

- Prior to the addition of Government Code Section 12950.1, employers with 50 or more employees were required to provide two hours of sexual harassment training for supervisors every two years.

- Government Code Section 12950.1 expands the subjects that the mandatory training must include to cover gender identity, gender expression, and sexual orientation. This portion of the training should be presented by trainers with knowledge and expertise in these areas.

- Government Code Section 12950(a)(2) requires employers to display a poster regarding transgender rights prepared by DFEH.

What should you do now? Employers that are covered under this law should be prepared to revise their mandatory bi-annual supervisor training to include these new required topics. Additionally, covered employers should make sure to display the new poster developed by DFEH regarding transgender rights in a prominent and accessible location at the workplace.

(8) Labor Code Section 432.3 – Salary History Information

- California employers are prohibited from seeking salary history information regarding a job applicant, either by directly asking the applicant or by researching through a third party or any other channel.

- An employer may only consider salary information provided voluntarily, with no prompting by an applicant to determine that applicant’s salary. Salary information cannot be used to determine whether the applicant should be offered employment, even when it is provided voluntarily.

- Upon reasonable request from an applicant, an employer must provide the pay scale for a particular position.

- Labor Code Section 432.3 was further amended on July 18, 2018. The amendment provides that for purposes of Section 432.3, “pay scale” means a salary or hourly wage range, “reasonable request” means a request made after an applicant has completed an initial interview with the employer, and “applicant” means an individual who is seeking employment with the employer and is not currently employed with the employer in any capacity or position. Additionally, the amendment provides that an employer may ask an applicant about his or her salary expectation for the position being applied for.

What should you do now? Employers should ensure that they are not requesting prior compensation information as part of the hiring process, and develop a pay scale for each position, so that the information is available upon reasonable request from an applicant.
Darting Ahead: California Supreme Court Adopts New Formula for Flat Sum Bonuses

March 23, 2018

For decades, many employers across California relied upon established federal law governing the calculation of overtime compensation on bonuses. Under federal law, the same set of rules apply to flat sum bonuses (i.e., set bonus amounts that cannot increase with additional productivity or employee effort) and other bonuses.

That all changed earlier this month when the Supreme Court of California decided Albardo v. Dart Container Corporation of California. The decision transforms the method for calculating overtime under California law when employees receive flat sum bonuses. The court's decision represents a significant development for employers that pay bonuses and will likely require employers operating in California using flat sum bonuses to revise their pay practices.

Background

Under California law, when an individual receives a nondiscretionary bonus, the bonus payment must be included in the employee’s “regular rate of pay” for purposes of calculating overtime. The question in Albardo was how this calculation should be made with respect to flat sum bonuses. The flat sum bonus at issue was a $55 attendance bonus that employees received when they worked weekend shifts.

The California Division of Labor Standards Enforcement (DLSE) has long taken the position that California requires a special, more expensive overtime calculation for flat sum bonuses. According to the DLSE, to protect against dilution as employees work more overtime, flat sum bonuses are to be divided only by straight-time hours and then multiplied by one and one-half (or two in the case of double time) to determine overtime premiums on these bonuses. By contrast, the DLSE opined that increases in overtime work or production (for example, a $5 bonus for every 100 widgets made) could instead be divided by all total hours worked and multiplied by one and one-half (or one in the case of double time) to determine the overtime premium owed.

Federal law, derived from the Fair Labor Standards Act, does not have any unique formula for flat sum bonuses. And until this ruling, the DLSE's position on flat sum bonuses was never actually endorsed by a California court. In fact, the court of appeal in Albardo rejected the DLSE's position and applied federal law to flat sum bonuses. As a result, many employers relied on federal law to calculate overtime when employees received these bonus payments, using the larger divisor of total hours worked and thus resulting in smaller overtime payments relative to those under the DLSE's formula.

The California Supreme Court's Ruling

The law has changed. The California Supreme Court unanimously reversed the court of appeals ruling and adopted the DLSE's rule on flat sum bonuses. Although the court did not believe it was bound by the DLSE's guidance, the court nevertheless found the DLSE's reasoning persuasive. The court reasoned that using the DLSE formula to calculate overtime on flat sum bonuses furthers California's public policy of discouraging overtime work. Because flat sum bonuses do not increase with more hours worked, the court concluded that to allow employers to divide by total hours worked in calculating overtime would encourage employers to assign more overtime. In such a case, the more overtime an employer assigns, the larger the divisor would be and the less value the bonus would have relative to each hour worked.

The rule adopted by the supreme court requires employers, in calculating overtime when employees receive flat sum bonuses, to divide the bonus only by straight-time (i.e., non-overtime) hours to determine overtime compensation on the bonus. The net arithmetic effect
is that the formula adopted by the California Supreme Court results in a payment of more
than three times as much overtime compensation on the bonus as the federal law formula.

Implications for Employers

The Alvarado ruling has far-reaching implications for employers that provide bonus or
incentive payments in California.

For any employer that pays a flat sum bonus, the decision likely means that the employer
will need to revise its pay policies immediately to comply with the California Supreme
Court’s ruling. At the very least, employers that pay bonuses should consider evaluating their
payment policies and calculations to determine if they remain lawful after Alvarado.

In addition to policy revisions, the ruling has significant implications for employer wage-
and-hour liability. Importantly, the California Supreme Court rejected the argument that its
formula should only have prospective effect. Its formula will therefore apply retroactively to
flat sum bonus payments. This means that if an employer previously relied on the federal
formula, its past flat sum bonus payments were likely unlawful.

The effect is not simply that employees who received such bonuses were underpaid. On top
of the underpayment, employers could be subject to significant penalties. In addition to
unpaid wages, employees in wage-and-hour lawsuits typically seek derivative penalties such
as wage statement penalties ($50/$100 per pay period), waiting time penalties (up to 30 days
of wages), and civil penalties under the Private Attorneys General Act (PAGA) ($200/$2,500
per pay period per violation). Given these potential penalties, even a small underpayment
could give rise to fee-shifting exposure that exponentially increases liability.

Moreover, there are many types of flat sum bonuses that are common across industries. They
range from attendance bonuses like those at issue in Alvarado to safety bonuses, project-
completion bonuses, referral bonuses, job retention bonuses, on-call stipends, and bonuses
for earning a degree or technical certification. Therefore, the decision could arguably impact
many bonus payments made for a variety of purposes across a broad array of industries.

Finally, the ruling will likely lead to significant administrative challenges for employers—an
issue that employers may want to consider. Employers that pay flat sum bonuses like an
attendance bonus but also make other incentive payments like commissions will have to
work with their payroll providers to ensure that two different formulas are applied to the
different payments. Since the flat sum rule is unique to California, it will also result in
employers with multisite operations having two different calculations for the exact same
type of bonus payment, depending on the state. Employers may want to have these

Silver Linings?

For employers, there were not many positives to take away from the Alvarado ruling. But,
there were a few potentially helpful comments hidden within the supreme court’s ruling.

First, the court confirmed prior law finding that informal positions taken by the DLSE in its
enforcement manual are effectively “underground regulations” and not subject to deference.
Of course, that does not mean the California Supreme Court will refuse to follow DLSE
opinions. After all, it adopted the DLSE’s rule in Alvarado. However, this statement is helpful
in confirming that the DLSE’s published but informal opinions will not be given binding
defence by courts.

Second, in a footnote, the court explicitly limited its decision to flat sum bonuses
“comparable to the attendance bonus at issue” in the case. The court noted that “other types
of nonhourly compensation, such as a production or piecework bonus or a commission, may
increase in size in rough proportion to the number of hours worked” and thus might
warrant a different analysis. Therefore, the court did not explicitly extend Alvarado to other
types of bonuses but instead left ambiguity as the scope of its decision. Employers may be
able to rely on this footnote in distinguishing other bonuses from Dart’s attendance bonus.
For example, the Alvarado court reasoned that a flat sum attendance bonus could encourage
an employer to assign more overtime, given that the bonus does not increase as more hours
are worked. On the other hand, flat sum referral bonuses may be included in the regular rate
of pay, depending on the conditions. However, a referral bonus has no conceivable
connection to hours worked and certainly does not encourage an employer to assign
overtime. Employers may be able to capitalize on these distinctions and narrow the potential
scope of the supreme court’s ruling. Only time will tell how this strategy plays out.
Third, in a concurrence opinion, Chief Justice Cantil-Sakauye noted that the DLSE could have avoided “uncertainty” over the prior law had an interpretative regulation on this subject been promulgated through formal rulemaking. The DLSE’s flat sum bonus interpretation was only present in the agency’s enforcement manual, and because it was not subject to any rulemaking procedure, it had no binding effect. The chief justice characterized this uncertainty as regrettable. Although these words do not change the result of Alvarado, they may prove helpful in defending future litigation based on bonus payments. Certain penalties under California law, like waiting time penalties, require a showing of willfulness. Others, such as civil penalties under PAGA, are subject to reduction in the court’s discretion. Given the uncertainty over the law and the existence of federal law supporting a completely different flat sum bonus calculation, employers may be able to use the concurrence to argue against imposition of these penalties.

We suspect that Alvarado will give rise to a flood of litigation in the coming months. As this litigation develops, hopefully courts will shed light on these lingering questions. In the meantime, employers should consider carefully evaluating their bonus payments to ensure compliance with the supreme court’s decision and working with payroll in updating their flat sum bonus formulas.

Jesse C. Ferrentino co-authored an amicus brief filed in this case on behalf of California Employment Law Council and Employers Group.
California Court of Appeal Identifies Triggers for Reporting Time Pay Obligation

February 12, 2019

In a ruling that will have a significant impact on the retail and restaurant industries, among others in California, the California Court of Appeal ruled that a retail employer's call-in scheduling policy—in which employees were required to call the employer in advance of a shift to find out if they needed to show up for work—triggered the reporting time pay obligation set forth in the California Industrial Welfare Commission's (IWC) Wages Orders. In [Tilly's v. Bax](https://www.ogletreedeakins.com/labor-law-update/tillys-v-bax), issued on February 4, 2019, the Court of Appeal significantly broadened the scope of California's reporting time pay requirement and expanded the types of circumstances in which it will be found to apply.

**Background**

The lawsuit against Tilly's stemmed from a policy implemented by the clothing retailer in which employees were scheduled for two different types of shifts: (1) regular shifts, in which employees were guaranteed work; and (2) "on-call" or "call-in" shifts, in which employees worked only if they were told to do so a few hours before a shift's start time. The issue before the Court of Appeal was based on a pleadings motion, so all facts alleged in the complaint were presumed to be true; no facts regarding Tilly's actual policy, or the way it played out with employees in practice, were before the court. As alleged in the complaint, Tilly's utilized three types of on-call shifts:

1. A regular shift followed by an on-call shift (e.g., a regular shift from 10:00 a.m. to 2:00 p.m., followed by an on-call shift from 2:00 p.m. to 4:00 p.m.).

2. An on-call shift followed by a regular shift (e.g., an on-call shift from 12:00 p.m. to 2:00 p.m., followed by a regular shift from 2:00 p.m. to 4:00 p.m.).

3. A stand-alone on-call shift, with no regular shift that same day (e.g., the employee is required to call in at 10:00 a.m. to find out whether he or she needs to work an on-call shift from noon to 4:00 p.m.).

For Type 1 of the on-call shifts, employees were told during their regular shifts whether they would need to work the on-call shift. For Types 2 and 3, employees were required to call the store two hours before the shift start time (or by 9:00 p.m. the previous night, if the shift started before 10:00 a.m.) to find out whether they needed to work the on-call shift.

Employees who failed to call in, called in late, or refused to work their on-call shifts were subject to formal discipline and could be terminated after three occurrences.

Tilly's did not pay employees for the time they spent calling in, or for on-call shifts that they were not required to work.

Based on this policy, in 2015, a former Tilly's sales clerk, Skylar Ward, filed a putative class action lawsuit in Los Angeles Superior Court claiming that she and other Tilly's employees were owed reporting time pay under Section 5 of IWC Wage Order No. 7 for those instances when they called in for on-call shifts but were not asked to work.

The issue before the Court of Appeal focused on the meaning of the phrase "report for work" as used in the regulation, and the history and purpose of the Wage Order.

**Reporting Time Pay Regulation and Prior Case Law**

The IWC Wage Orders that are applicable to nearly all industries and workers in California require employers to pay "reporting time pay" at an employee's regular rate of pay for "each weekday 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 amount of reporting time pay owed to an employee in such circumstances is "half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4)
hours." Historically, the reporting time pay regulation was intended to protect employees from inequitable overstaffing by employers—in other words, to protect those employees who showed up to work at the employer’s direction, but who were sent home because there was not enough work for them to do. The reporting time pay regulation has been part of the IWC Wage Orders since 1943, and the aspects of the regulation at issue in the lawsuit have remained largely unchanged since their inception.

Despite the fact that reporting time pay has been part of the Wage Orders for more than 75 years, it has been subject to very little interpretation by courts or agencies, and it is not frequently litigated.

Leading up to the Tilly’s case, federal trial courts in California had split on the meaning of “report for work.” In a case in 2014, a judge in the Central District of California held that call-in shifts similar to the ones at issue in Tilly’s did not trigger reporting time pay, finding that reporting for work sufficient to trigger the requirement to pay reporting time pay necessitated actually showing up at the workplace ready to work. Similarly, in 2017, a court in the Eastern District of California found that reporting time pay was owed only when employees “were required to physically report to work and not ... when they performed work via telephone.” However, in two other cases, the Eastern and Southern Districts of California held, without much or any analysis, that making a phone call was sufficient to constitute reporting for work. One of those cases is now on appeal to the Ninth Circuit, under the name Herrera v. Zuminz, Inc., Case No. 18-15135; the matter has been briefed and oral argument was heard on February 4, 2019.

The Court of Appeal’s Decision

In a 2-4 decision, the Court of Appeal ruled that Tilly’s on-call scheduling requirements did, in fact, trigger the obligation to pay reporting time pay for instances when employees had to call in to find out if they were needed to work and were told not to come in. The court first evaluated the plain language of the phrase “report for work” as used in the regulation, finding that the text of the regulation itself was not determinative of its meaning and that dictionary definitions were not helpful, as some definitions seem to require physical presence and some do not.

The court therefore turned to other interpretive tools—namely, the history and purpose of the regulation. The majority found that neither the history nor the purpose of the reporting time pay regulation necessitated a finding that physical presence was required to trigger reporting time pay. In essence, and unapologetically, the majority adopted the broadest, most employee-protective interpretation of the regulation, finding that on-call shifts of the type alleged in the complaint presented “precisely the kind of abuse that reporting time pay was designed to discourage.” Notably, the majority found—without much substantive explanation—that had the IWC been confronted with the issue of call-in shifts at the time the regulation was drafted, it would have determined, as the majority did, that the call-in shifts triggered reporting time pay, essentially because the “remedial costs” allegedly imposed on employees who are assigned such shifts, limited employee’s ability to earn income from other sources, pursue educational opportunities, care for dependents, and enjoy leisure time.

Based on this conclusion, the majority announced the following new standard:

“[W]e conclude, contrary to the trial court, that an employee need not necessarily physically appear at the workplace to “report for work.” Instead, “reporting for work” within the meaning of the wage order is best understood as presence oneself as directed. “Report for work,” in other words, does not have a single meaning, but instead is defined by the party who directs the manner in which the employee is to present himself or herself for work—that is, by the employer.

As thus interpreted, the reporting time pay requirement operates as follows. If an employer directs employees to present themselves for work by physically appearing at the workplace at the shift’s start, then the reporting time requirement is triggered by the employee’s appearance at the job site. But if the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client’s job site, or by setting out on a trucking route, then the employer “reports for work” by doing those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact.

Importantly, the court expressly did not decide whether the newly announced standard would apply retroactively or only prospectively, nor did it decide whether there was some amount of time in advance of a shift that employees could call in without triggering
In a lengthy dissent, Justice Egron found that reporting time pay requires employees to be physically present at the worksite, ready to work. In so finding, he identified several deficiencies in the majority's reasoning, including that it is the job of the legislature, not the courts, to address the hardship employees face due to call-in shifts.

Key Takeaways

This decision is a substantial departure from the decades-long interpretation of reporting time pay as being owed only when employees physically report to the worksite. Any companies utilizing call-in or on-call scheduling policies in California may want to carefully consider their use in light of this ruling. It is important to note that the court declined to determine exactly how much advance notice employees must give to avoid reporting time pay obligations, but it did suggest that it would take into account whether an employer was avoiding the financial consequences of over- or understaffing by limiting employees' ability to take advantage of other work, educational, dependent care, or recreational opportunities.

Although the decision does not, on its face, go further than the facts alleged before it, its interpretation of the phrase "report to work" has the potential to have much broader application in California, including with regard to newer technologies that are now more regularly being used by employers.
Golden Days—Top 10 California Developments

Presenters
Candace Gomez Harrison (Orange County)
Douglas J. Farmer (San Francisco)

Moderator
Christopher W. Olmsted (San Diego)

New Legislation
#10 – New Mandatory Training Requirements

What’s New:

Smaller Businesses
Employers with 5 or more employees must provide 2 hours of training to supervisors

Large and Small Businesses
1 hour of training to non-supervisors

Also:
– First round completed by 1/1/20 then every 2 years
– DFEH to develop online courses

#9 – Severance, Arbitration, and Other Employee Agreements

- Effective January 1, 2019
- Nullifies any waiver of right to testify about alleged harassment or criminal conduct
- For example, allows for subpoena to testify or written request from agency or legislature
- Applies to arbitration agreements
- Separate legislation addressing settlement agreements
#8 – Harassment Claims Now Very Difficult to Dismiss

- Harassment claims are “rarely” amenable to summary judgment
- Single incident of harassment enough to raise a triable issue
- Broadens liability for 3rd party harassment
- Encourages “bystander” training

#7 – Expanded Sexual Harassment Liability for Third Parties

- Amendments to Civil Code and FEHA to include liability for workplace harassment between people who don’t work directly for one another, but have a working relationship
- Looks for a power imbalance between people in business to determine whether the rule applies
#6 – New Lactation Accommodation Requirements

- Employers must make reasonable efforts to provide a room or location, that is not a bathroom, in close proximity to the employee’s work area, for lactation.
  - Former law permitted lactation location to be in the bathroom (but not bathroom stall).
  - A temporary lactation location is authorized if certain conditions are met.
  - There is a narrow undue hardship exemption.

#5 – New Salary History and Equal Pay Rules

- Amends Labor Code sections created by prior pay equity legislation
- Current law:
  - Prohibits questions about salary history, unless volunteered
  - California employers must provide “applicants” with the “pay scale” for a position upon “reasonable request.”
#5 – New Salary History and Equal Pay Rules

Amended law:

- Who is an “applicant”?
  Someone seeking employment, not an internal applicant

- What is “pay scale”?
  A salary or hourly wage range

- When do I need to disclose the pay scale?
  Upon request, after an initial job interview

Amended law:

- I can’t ask about salary history, but can I ask about salary expectations?
  Yes.

- Can I consider a current employee’s existing salary when making a compensation decision?
  Yes.
  But: any wage differential must be based on legitimate business criteria.
Significant Court Decisions

#4 – New Rules for Calculating “Flat Sum” Bonuses

Alvarado v. Dart Container Corp. of California
4 Cal. 5th 542 (2018)
#4 – New Rules for Calculating “Flat Sum” Bonuses

- Most bonuses must be factored into the employee’s “regular rate of pay” for purposes of calculating overtime compensation.
- Exceptions:
  - Discretionary bonuses
  - Gifts
  - Certain referral bonuses
  - Certain contributions to employee welfare plans, profit-sharing plans, thrift savings plans

#4 – New Rules for Calculating “Flat Sum” Bonuses

- Flat-sum bonus: A bonus that does not increase in amount for increased production or for each hour of work
  - Examples:
    - Retention bonus
    - Attendance bonus
    - Safety bonus
    - Project completion bonus
    - Referral bonus
    - On-call stipend
    - Education bonus
#4 – New Rules for Calculating “Flat Sum” Bonuses

- **Old rule**: If the bonus covers one weekly pay period: *The amount of the bonus is added to all other earnings of the employee, and divided by total hours worked during that period, including overtime.* That gives you the adjusted regular rate of pay, which is then used to calculate overtime pay.

- **Old rule**: If the bonus is measured over a longer period of time: Once the bonus is known, it is apportioned back over the period during which it was earned. *The employee receives one-half of the hourly rate of pay allocable to the bonus for each workweek, multiplied by the number of overtime hours during that week.*

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# Example of old rule (and current rule for “production” bonuses):

- Joey receives a $100 bonus for working for meeting certain production benchmarks. He works 50 hours (10 overtime, 40 straight-time):
  - $100 / 50 total hours = $2.00 regular rate adjustment
  - $2.00 x 0.5 x 10 overtime hours = $10.00 overtime adjustment
### #4 – New Rules for Calculating “Flat Sum” Bonuses

- **New Rule**: Requires employers, in calculating overtime when employees receive flat-sum bonuses, to divide the bonus only by straight-time (i.e., non-overtime) hours.
- Same example: Joey receives a $100 attendance bonus for a week in which he worked 50 hours.

<table>
<thead>
<tr>
<th>Federal Law</th>
<th>Formula under Alvarado</th>
</tr>
</thead>
<tbody>
<tr>
<td>$100 / 50 total hours = $2.00 regular rate adjustment</td>
<td>$100 / 40 total hours = $2.50 regular rate adjustment</td>
</tr>
<tr>
<td>$2.00 x 0.5 x 10 OT hours = $10.00 OT adjustment</td>
<td>$2.50 x 1.5 x 10 OT hours = $37.50 OT adjustment</td>
</tr>
</tbody>
</table>

- Results in a payment of more than three times as much overtime compensation as federal formula!

### Practical Implications
- Revise pay plans
- Retroactive application? Yikes!
- Administrative burdens
- Talk to your payroll company!

### Are There Silver Linings?
- DLSE “Rules”
- Tips on avoiding future penalties?
#3 – Payment for Small Increments of Work Time

*Troester v. Starbucks Corp.*
5 Cal. 5th 829 (2018)

Is an employer obligated to pay for small increments of time worked off the clock?

**Federal law: No,** disregard time as “*de minimis*” depending on:
- The practical difficulty the employer would encounter in recording additional time;
- The total amount of compensable time; and,
- The regularity of the additional work.

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#3 – Payment for Small Increments of Work Time

**What did the court rule?**

California does not follow the “*de minimis*” test – possible rare exceptions.

Ordinarily, duty to pay for off-the-clock work that occurs on a daily basis and lasts several minutes per day.
#2 – Reporting Time Pay

What is reporting time pay?

- California wage orders mandate minimum “reporting time pay” when employee is required to report to work, but is furnished less than ½ the usual or scheduled hours.
  - Also, owed when called back to work a second time in a workday.

#3 – Payment for Small Increments of Work Time

Best Practices to Avoid Claims:

- Review pre-shift and post-shift work activities and ensure time is recorded.
- Improve the timekeeping and payroll practices to ensure employees getting paid for all time.
- Beware of time rounding, “auto-deduct” meal period practices, “auto-population” of daily work schedules, etc.
- Train managers and employees.
#2 – Reporting Time Pay

**Rationale for reporting time pay:**
- Protect employees from “abusive” ineffectual overstaffing by employers

**Common scenarios:**
- Employee reports to work but turned away
- Employee works a scheduled shift, but fewer than ½ scheduled/usual hours
- Called in on unscheduled day, but for less than ½ usual shift hours
- Required to return to work after ending shift
#2 – Reporting Time Pay

**What is owed?**
- Minimum of ½ the usual or scheduled hours, but:
  - Minimum of 2 hours owed
  - Maximum of 4 hours owed
  - Call backs: 2 hours minimum

**What rate of pay?**
- Employee’s “regular rate of pay”

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**Ward v. Tilly’s, Inc.** *(Feb. 2019)*
- “On call scheduling”: Retail store employees instructed to call in 2 hours before shift; told whether to report to duty or not.
- Court: Calling is “reporting to work” and reporting time pay is owed.
#2 – Reporting Time Pay

**Practical Solutions**

- Pay the two-hour premium to a designated stand-by group
- Allow employees to voluntarily call in, or proactively call out to find volunteers
- Paid stand-by
- Scheduling employees, but then calling them off shortly before starting time could be a problematic solution

#1 – California’s New Independent Contractor Test

*Dynamex Operations West, Inc. v. Superior Court of Los Angeles*
#1 – California’s New Independent Contractor Test

- **Facts:** Delivery drivers sued Dynamex, a package and document delivery company, alleging they were misclassified as independent contractors, and that Dynamex violated (a) Wage Order No. 9 (transportation industry) and (b) Labor Code sections.

- **Issue:** What standard applies in determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders?

- **Held:** When determining whether a worker was employed under a wage order, the **hiring entity** must prove **each factor** in the ABC test.

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**Prong A:** The worker is free from the **control and direction** of the hirer in connection with the performance of the work, both **under the contract** and **in fact**; and,

**Prong B:** The worker performs **work that is outside of the usual course** of the hiring entity’s business;

Note on Prong B: One important factor will be what the hiring entity says about itself:

#1 – California’s New Independent Contractor Test

**Prong C:** The worker is customarily engaged in independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

- Has the worker *actually* established own business?
- Advertising, business cards, business licenses, invoices

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#1 – California’s New Independent Contractor Test

- Changes analysis of determining whether someone is an independent contractor.
- Tougher because *each* prong can be dispositive, whereas other tests allow factors to be weighed.
- Note: the tests for FLSA, IRC, CA EDD, and CA WC have not changed.
#1 – California’s New Independent Contractor Test

- Does the B prong of the ABC test (“suffer or permit to work” standard) effectively end independent contractor status in California (unless you are a plumber or electrician)?
- Does *Dynamex* affect joint employer questions?

**Steps for Compliance:**

- Audit independent contractor relationships to determine where there might be a weakness under *Dynamex*.
- Review any agreements between Company and independent contractors and potentially revise.
- Determine how critical the independent contractors are for business (and whether it makes business sense to convert to employees).
- How are other companies addressing the issue in your industry?
Questions?

Golden Days—Top 10 California Developments

Presenters
Candace Gomez Harrison (Orange County)
Douglas J. Farmer (San Francisco)

Moderator
Christopher W. Olmsted (San Diego)