2024 EMPLOYMENT LAW Conference

Off to work we go!

California Employment Law

Legislative and Case Law Update

Fisher Phillips

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10 COMMON MISTAKES OF FREQUENTLY SUED EMPLOYERS

1. Misunderstanding of the implications of “at-will” employment.
2. Failure to properly and timely document performance/disciplinary issues.
3. Retaliation: taking an adverse employment action (e.g. termination) in “close temporal proximity” to a protected action (e.g. complaint, protected LOA).
4. Failure to properly assess risk prior to a termination.
5. Failure to properly administer leaves of absence.
6. Failure to take all reasonable steps to prevent and respond to workplace harassment.
7. Failure to engage in the interactive process/offer an accommodation when appropriate.
8. Failure to update the employee handbook/workplace policies.
9. Improper classification of employees as exempt or workers as an “independent contractor”.
10. Failure to properly manage meal and rest breaks-issue premium pay when appropriate.

California Legislative Update

General Legislative Update

- 34 brand new legislators
- Busiest legislative year since the COVID-19 pandemic.
- ***2,632 bills introduced in 2023 (most in 17 years!)***
- First year of a two-year session (some bills may carry over into next year).

California's PAGA Reform

Highlights (more in-depth discussion during our breakout session):

1. **Significant Reduction Of Possible Penalties.**

- applying a $100 per pay period penalty for all violations subject to various reductions including, but not limited, to the following:
  - If prior to receiving a records request from the employee or an administrative complaint filed with the California Labor Workforce Development Agency (LWDA), the employer takes "all reasonable steps" to be in compliance with the Labor Code sections identified in the request/complaint, the civil penalty that may be recovered shall be "no more than 15%" of the $100 penalty.
  - If, after receiving a PAGA lawsuit, commence reasonable steps to comply with the law, the legislation provides for a limitation of "no more than 30%" to proposed penalties when an employee has taken "all reasonable steps to prospectively be in compliance with the law" upon receipt of the lawsuit.
- These penalty limitations do not apply to matters where the LWDA notice was filed prior to June 19, 2024.

California's PAGA Reform

Highlights (more in-depth discussion during our breakout session):

2. Additional Ability to Cure.
3. Increased Standing Requirements.
4. Ability of Court to Limit Scope of PAGA representative group.
5. No derivative penalties.
6. Penalties split got from 75%/25% to 65%/35%.

SB 616 – Paid Sick Days

- Increases paid sick days from three to **five** days (40 hours)
- Increases the accrual cap from 48 hours or six days to 80 hours or 10 days
- Employers that use an alternative accrual method must ensure employees accrue 24 hours by the 120th day of the accrual year, and 40 hours by the 200th day of the accrual year

SB 848 – Leave for Reproductive Loss

- A “reproductive loss event” means a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction
- These terms are further defined in the law
- Applies to private employers with 5 or more employees or public employers of any size
- Allows employees to take up to 5 days of leave for a “reproductive loss event”
- An employee is anyone who has been employed for 30 days

SB 553 – Workplace Violence

- Adopts a workplace violence prevention standard applicable to general industries (7/1/2024)
- Cal/OSHA Standards Board has been working on a general industry standard since 2017
- Requires employers to adopt workplace violence prevention plans and comply with recordkeeping and training requirements

SB 553 – Workplace Violence

- Requires employers to develop and maintain written prevention plans tailored to their specific workplaces
- Mandates annual employee training
- Employers are required to record specific information in a “violent incident log” about every incident, response, and the investigation performed and maintain records for at least five years

SB 553 – Workplace Violence

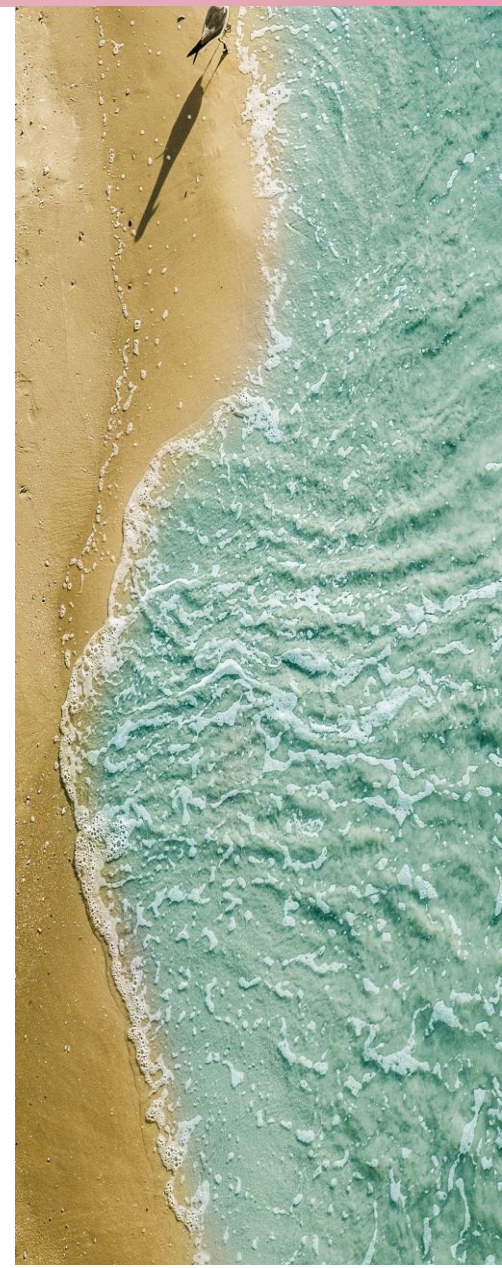
- Beginning July 1, 2024, all California employers will be required to “establish, implement and maintain” a workplace violence prevention plan in accordance with Labor Code section 6401.9.
- Plan must be:
  - In writing
  - Easily accessible at all times to all employees, authorized representatives, and representatives
  - In effect at all times and in all work areas
  - Specific to the hazards and corrective measures for each work area and operation
- Plan may be a stand-alone section of employer’s injury and illness prevention program or may be a separate document.

What is Workplace Violence?

- Any act of violence or threat of violence that occurs in a place of employment including:
  - Threat or use of physical force against employee that results in, or has high likelihood of resulting in, injury, psychological trauma, or stress, regardless of whether employee sustains an injury
  - Incident involving a threat or use of firearm or other dangerous weapon, including the use of common objects as weapons, regardless of whether the employee sustains an injury
- Workplace violence does not include lawful acts of self-defense or defense of others

Fisher Phillips Compliance Resources

- WVPP Written Plan, including the following:
  - Compliance checklist
  - Violent incident log
  - Investigation report
  - Workplace violence hazard assessment checklist
  - Inspection checklist
  - Notices to union and multi-employer sites
- WVPP Training Program
- Add-On Services:
  - Security assessments
  - Active shooter training
  - On-site training
- If you have questions or need more info, please email WVPplans@fisherphillips.com



AB 1228 – Fast Food Workers

- Last-minute deal to avoid costly referendum over last year's legislation (AB 257)
- Labor gets $20 minimum wage effective 4/1/2024 and referendum pulled from ballot
- Fast food industry gets no joint liability and a watered-down Fast Food Council

AB 1228 – Fast Food Workers

- “Fast food restaurant” is a limited-service restaurant in the state that is part of a national fast food chain.
- A “national fast food chain” means a set of limited-service restaurants consisting of more than 60 establishments nationally.
- Share a common brand or are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service.

SB 476 – Food Handler Cards

- Employers must pay the employee for any cost associated with obtaining a food handler card
- The new law makes employers responsible for the following:
  - The time required for the employee to complete the training;
  - The cost of testing; and
  - Any other costs required for the completion of the certification program
- Employers must relieve employees from all other work duties during training and examination and compensate employees at their regular rate of pay

SB 497 – Retaliation Presumption

- This new law is known as the Equal Pay and Anti-Retaliation Protection Act.
- Amends Labor Code Section 98.6 (Complaint re Wages), 1102.5 (Whistleblower) and 1197.5 (Equal Pay).
- Creates a rebuttable presumption of retaliation if an employee is disciplined or discharged within ninety (90) days of the employee exercising their rights under the labor code sections above.
- Can see back wages, emotional distress, attorneys fees.
- In addition, provides the potential for a fine of up to $10,000 per employee for each violation.

AB 594 – Local Enforcement of Employment Laws

- Expands ability of local “public prosecutors” to prosecute civil or criminal actions for violations of the Labor Code
- This extends their authority to most of the Labor Code (other than workers’ compensation and Cal/OSHA
- Also provides that arbitration agreements have no effect on local public enforcement
- State budget allocated $18 million for local enforcement of labor laws, so we could see increased use of this authority

New Cannabis Laws Effective 1/1/2024

- AB 2188 (passed in 2022) – Prohibits discrimination based on off-the-job cannabis use and tests which show nonpsychoactive THC metabolites
- SB 700 – Prohibits pre-employment inquiries into prior cannabis use

AB 2188 – What is It, What is Changing?

- Off the job, and away from the workplace. Both elements must be met.
- “Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace.”

SB 700 – Later Companion to AB 2188

- Prohibits pre-employment inquiries into an applicant's prior use of cannabis; and
- Information about cannabis use obtained from a person's criminal history cannot be used to discriminate against a person in hiring, termination, or any term or condition of employment
- Added to FEHA just like AB 2188

SB 700 Considerations

- Remove any questions from application regarding prior cannabis use
- Train hiring managers not to inquire about cannabis use and how to respond when someone discloses cannabis use or a medical cannabis card
- Carefully handle convictions relating to cannabis use, distribution, etc.

AB 636 – Wage Theft Prevention Act Notice

- Requires notice of any federal or state disaster declaration that affects health and safety (applies to all employers under Wage Theft Prevention Act notice)
- Requires H-2A visa employers to provide a notice of basic employment-related information

California's New Indoor Heat Illness Standard

- The new rules kick in when the indoor temperature reaches 82 degrees. If the temperature exceeds that, then required measures can include the following:
  - Written Prevention Program: You must establish, implement, and maintain a written Indoor Heat Illness Prevention Program that includes procedures for accessing water, close observation, and cool-down areas – as well as emergency response measures.
  - Training: You'll need to provide "effective training" to employees and supervisors on heat illness topics.

California's New Indoor Heat Illness Standard

- The new rules kick in when the indoor temperature reaches 82 degrees. If the temperature exceeds that, then required measures can include the following:
  - Cool-Down Areas: You must provide access to cool-down areas which must be maintained at a temperature below 82 degrees, blocked from direct sunlight, and shielded from other high radiant heat sources.
  - Additional Rest Periods: You'll have to "allow and encourage" employees to take preventive cool-down rest periods – and monitor employees taking such rest periods for symptoms of heat-related illness.
  - Observation Obligation: Finally, you will need to closely observe new employees during a 14-day acclimation period, as well as employees working during a heat wave where no effective engineering controls are in use.

California Case Law Update

Adolph v. Uber Technologies

Facts

- Plaintiff signed arbitration agreement with a "PAGA waiver"
- Trial court and Court of Appeal ruled PAGA claims are not subject to arbitration and PAGA waivers are unenforceable
- The Supreme Court held in Viking Rivers that PAGA permits a plaintiff to maintain non-individual PAGA claims only if they also maintain an individual claim in the same action

Adolph v. Uber Technologies

Issue

- Who has standing under PAGA after the Viking Rivers decision?

Adolph v. Uber Technologies

Result

- Held PAGA plaintiffs do not lose standing to pursue non-individual PAGA claims if their individual PAGA claim is compelled to arbitration
  - However, a finding by the arbitrator that the individual plaintiff was not an "aggrieved employee" would result in the loss of standing for the non-individual action
- Established clear framework for how PAGA actions will function:
  - Arbitrate, stay, then dismiss if the plaintiff loses
  - The stay is left to the court's discretion

Adolph v. Uber Technologies

Takeaways

- Employers will likely still have to face the prospect of non-individual PAGA lawsuits, even if individual PAGA claims are sent to arbitration
- Review your arbitration agreement to ensure it comports with both Viking River and Adolph v. Uber Technologies
- Nov. 2024 ballot measure “California Fair Pay and Employer Accountability Act of 2024” may eliminate PAGA and replace it with increased DLSE enforcement

Naranjo v. Spectrum Security Services, Inc.

Facts

- Former employee brought class action alleging employer failed to provide premium pay for each day they failed to provide employees legally compliant meal breaks
- CA Supreme Court determined premium pay for missed breaks are wages subject to the Labor Code's timely payment and reporting requirements and can support waiting time and wage statement penalties if conditions are met
- Case remanded to the Court of Appeal to determine if waiting time penalties were applicable in this case

Naranjo v. Spectrum Security Services, Inc.

Issues

1. Was the trial court wrong to find that the employer had not acted "willfully" in failing to timely pay employees premium pay?

2. Was the employer's failure to report missed-break premium pay on wage statements "knowing and intentional"?

Naranjo v. Spectrum Security Services, Inc.

Result

- Standard for "willfulness" under section 203 is akin to "knowing and intentional" under section 226, allowing for a "good faith" defense to apply to both
- Held the employer demonstrated a good faith belief it was not violating the law when it did not include premiums on the wage statements
  - Reversed trial court's award of penalties under section 226 as the omission of the premium pay on employees' wage statements did not meet the criteria for "knowing and intentional"

Naranjo v. Spectrum Security Services, Inc.

Takeaways:

- An employer's "good faith dispute" can prevent the employee from collecting penalties and attorney's fees for "willful" or "knowing and intentional" violations under:
  - Section 226 (pay statement penalty) and
  - Section 203 (waiting time penalty)

Camp v. Home Depot USA, Inc (pending)

Facts

- Plaintiff alleged employer's policy of rounding to the nearest quarter hour resulted in unpaid wages (470 minutes of total work time over the course of 4+ years due to the rounding policy)
- Trial court granted summary judgment for the employer finding the rounding policy neutral under the See's Candy precedent
- Court of Appeal reversed claiming rounding policies do not compensate employees for all time worked
- California Supreme Court asked to decide the validity of rounding policies under See's Candy

Camp v. Home Depot USA, Inc (pending)

- **Pending CA Supreme Court review**
  - Need to watch to what extent CA Supreme Court revisits or narrows rounding policies
  - Technology may render rounding no longer viable
- ***Woodworth v. Loma Linda Univ. Med. Ctr. (Review Granted pending Camp)***
  - Departed from See's Candy precedent
  - Held that rounding policy that rounded time punches to the nearest tenth of an hour, while neutral, was impermissible
  - Held that when an employer "can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for 'all the time' worked"

Camp v. Home Depot USA, Inc (pending)

Takeaways

- Consider ending use of a rounding policy
- Switch to a practice of paying for time based on the actual punches
- Ensure employees are paid for “all hours worked”

Starbucks Corp. v. McKinney

- The Supreme Court sided with Starbucks in a case where the Labor Board tried to force the company to temporarily reinstate workers who were fired for hosting media interviews afterhours in a closed store.
- Starbucks said it fired the employees for violating valid company policies - but the National Labor Relations Board convinced a lower court to reinstate the employees while a legal battle ensued over whether they were actually fired for engaging in union organizing activities.
- The coffee chain argued the lower court applied an incorrect standard in evaluating the Board's request, which ultimately made it easier for the workers to be reinstated despite evidence they were fired for valid reasons.
- Siding with Starbucks, the Supreme Court said courts must use a traditional, more stringent test to review such requests from the NLRB, not the lenient standard pushed by the Board.
- Under this standard, the Board is required to show more:
    1. it is likely to succeed on the merits;
    2. it will likely suffer irreparable harm without preliminary relief;
    3. the balance of the equities tips in its favor;
    4. and an injunction is in the public interest.

Trends And Other Developments

Proposed Legislation to Limit Use of AI in the Workplace

Includes: **AB 2930** would impose compliance requirements for entities that use AI as a substantial factor in making defined "consequential decisions," such as employee hiring or pay, educational assessment, access to financial services, and health care decisions.

Proposed "Right to Disconnect" Legislation

AB 2751 authored by Assembly member Matt Haney, would "require a public or private employer to establish a workplace policy that provides employees the right to disconnect from communications from the employer during nonworking hours" unless certain exceptions are met.

Los Angeles Fair Workplace Ordinance (Predictive Scheduling Trend)

Retail employers will be required to provide employees with “written notice” of their work schedules at least fourteen (14) calendar days in advance by either posting the schedule in a “conspicuous and accessible location” where notices are “customarily posted” or by transmitting the schedule electronically or “another manner reasonably calculated to provide actual notice.” I

If an employer changes an employee’s schedule under certain circumstances, the employee is entitled to pay premiums. Employers must pay employees for an additional hour of pay at their regulate rate for each change to employees’ date, time, or location of work from the posted work schedule that does not result in a loss of time to the employee or does not result in more than fifteen minutes of additional work time.

FTC Ban on Non-Compete Agreements

The FTC has adopted a final rule that will prohibit employers from entering into most new non-competes and also prevents employers from enforcing existing non-competes in all but a few circumstances, such as against a limited class of senior executives.

The new rule is slated to take effect September 4, 2024, but there could be legal challenges.

DOL's New Overtime Law

The standard salary threshold for "white collar" exemptions for years has been $684 a week ($35,568 annualized). Effective July 1, 2024, the Department of Labor's (DOL's) new rule raises the rate first to $844 a week ($43,888 annualized), then on January 1, 2025, to $1,128 (or $58,656 a year).

Additionally, the threshold for the "highly compensated employee" (HCE) exemption will rise, first to $132,964 on July 1, 2024, then to $151,164 on January 1, 2025 – which is a bigger increase than the DOL initially proposed and is a significant increase from the current $107,432.

California's salary threshold for exempt employees as of January 1, 2024, is $66,560.00.

DOL'S New Independent Contractor Rule

Federal: The DOL's new rule related to independent contractor classification under the FLSA, effective Mar. 11, 2024, overturns the 2021 rule and codifies the "economic realities" test as the definitive analysis for classifying workers under the FLSA. The rule provides six factors to determine the degree of a worker's economic dependence on an employer with no clear bright line rules and no single factor being dispositive. To complicate matters, the rule refers to unenumerated "additional factors" that may be considered to account for all relevant facts "regardless of whether those facts fit within one of the six enumerated factors."

California Law: "ABC" Test.

Pregnant Workers' Fairness Act

On June 18, 2024, the Pregnant Workers Fairness Act (PWFA) requires a covered employer to provide a "reasonable accommodation" to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

The PWFA applies only to accommodations. Other laws that the EEOC enforces make it illegal to fire or otherwise discriminate against employees or applicants on the basis of pregnancy, childbirth, or related medical conditions.

The PWFA does not replace federal, state, or local laws that are **more protective** of workers (used here to mean job applicants and employees) affected by pregnancy, childbirth, or related medical conditions. More than 30 states and cities have laws that require employers to provide accommodations for pregnant workers.

New EEOC Guidance on Workplace Harassment

The U.S. Equal Employment Opportunity Commission (EEOC) published final guidance on harassment in the workplace, "Enforcement Guidance on Harassment in the Workplace." According to the EEOC. "By providing this resource on the legal standards and employer liability applicable to harassment claims under the federal employment discrimination laws enforced by the EEOC, the guidance will help people feel safe on the job and assist employers in creating respectful workplaces."

The guidance serves as a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues.

The new guidance updates, consolidates, and replaces the agency's five guidance documents issued between 1987 and 1999, and serves as a single, unified agency resource on EEOC-enforced workplace harassment law. It reflects the Commission's consideration of the public input that it received after the guidance was posted for public comment in fall 2023.

NLRB Decision Impacting Dress Code Policies

The National Labor Relations Board just ruled that a national retailer must allow customer-facing employees who want to write “Black Lives Matter” on their uniforms to do so – and may have opened Pandora ’s Box when it comes to allowing the public display of political and social causes in the workplace. The February 21, 2024, decision applies to both unionized and non-unionized companies, so all employers need to review this important development.

QUESTIONS?

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