Reminder: Beginning January 1, 2015, Under the New Paid Sick Leave Law, Employers Must Revise Wage Theft Protection Act Notices for Non-Exempt Employees and Comply with the Posting Requirement

In late December, the Division of Labor Standards Enforcement (DLSE) issued both a poster, as well as responses to Frequently Asked Questions (FAQs). You can view both here: http://www.dir.ca.gov/dlse/ab1522.html

Importantly, although the accrual and use portions of the new California Paid Sick Leave law are not effective until July 1, 2015, the DLSE has concluded the portion of the new law amending Labor Code section 2810.5 (the Wage Theft Protection Act) to include additional notice requirements regarding paid sick leave also took effect on January 1, 2015.

Under the revised section, at the time of hire or any time information changes (within 7 days of the change), employers are required to provide non-exempt employees written notice regarding rates of pay, etc., and now must (under the new law) include language informing employees of the following:

> An employee may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates against them for doing so.

The law also states that the notice must also include "any other information the Labor Commissioner deems material and necessary."

Under Labor Code section 2810.5 subsection (1), employers may provide this notice "in the language the employer normally uses to communicate employment-related information" to employees. The revised statute also states that the Labor Commissioner will prepare a template, which is now available here: http://www.dir.ca.gov/dlse/Publications/LC_2810.5_Notice_(Revised-11_2014).pdf

The Labor Commissioner's template form sheds light on what other information the Labor Commissioner deems "material and necessary" for purposes of the notice. For example, the template notice provides more detailed information than is explicitly specified in the statute regarding how much sick leave the employee can accrue and what constitutes retaliation under the new law.

It also requires employers to check a box regarding how it will implement accrual under the new paid sick leave law. Specifically, employers are required to choose from one of the following options and then must include the chosen option within its section 2810.5 notice:

1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave;
2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246;
3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period; or
4. An explanation why the employee is exempt from paid sick leave protection under Labor Code section 245.5. For example, they are covered by a valid Collective Bargaining Agreement (which must meet several requirements), or the employee is employed by the state a municipality or a "political subdivision" of the state.

The DLSE's FAQs clarify that, as before, this notice need not be provided to CBA-covered employees excluded under Labor Code section 22810.5, nor meant this be provided to employees exempt from overtime, even though most exempt employees are entitled to Paid Sick Leave under the new law.

However the FAQs are somewhat vague on whether this new notice must be provided to any nonexempt employees hired after January 1, 2015, or also to previously-hired non-exempt employees. While we believe the more reasonable interpretation is that employers need only provide these notices to non-exempt employees hired after January 1, 2015, or to present non-exempt employees within seven days of any change in the notice's provisions, some employers may elect to provide the new notice to all non-exempt employees. go to both new hires and existing, non-exempt employees. Although it is not included within the Labor Commissioner's template, to avoid employee confusion, we also advise either stating that the policy under which accrual will occur is an "existing" policy. Or, if there was no previous policy, that sick leave accrual does not begin until July 1, 2015, and employees are only eligible to begin using their accrued sick time beginning on the 90th day of employment.

Of course, if the employer decides to implement accrual differently any time before July 1, 2015, or after, they need only revise the notice and disseminate it to non-exempt employees as required by the law.

Moving ahead, employers should ensure they have posted the appropriate information and provided the appropriate notice. Additionally, because the DLSE continues to update its website on the new law, but often with very little fanfare, we recommend checking its website regularly.

Internal Revenue Service Issues New Standard Mileage Rates for 2015

Beginning on Jan. 1, 2015, the standard mileage rates for the use of a car, van, pickup or panel truck will be:

- 57.5 cents per mile for business miles driven, up from 56 cents in 2014
- 23 cents per mile driven for medical or moving purposes, down half a cent from 2014
- 14 cents per mile driven in service of charitable organizations

The standard mileage rate for business is based on an annual study of the fixed and variable costs of operating an automobile including depreciation, insurance, repairs, tires, maintenance, gas and oil. The rate for medical and moving purposes is based on the variable costs, such as gas and oil. The charitable rate is set by law.

FEDERAL JUDICIAL DEVELOPMENTS

United States Supreme Court Rules Time Spent In Security Screening is Not Compensable Under Federal Law

Hourly employees on assignment in Amazon.com warehouses in Nevada sued their employer alleging they were not compensated for all hours worked under the FLSA. The employees' duties included locating and packing inventory for delivery to customers. Before leaving the warehouse each day, employees went through security screening designed to prevent theft. The employees estimated this screening took approximately 25 minutes each workday. Citing the Portal-to-Portal act of 1947, the United States Supreme Court determined the employees were not entitled to compensation for the security screening.

The Court held that employees need only be compensated for activities before and after work that are an "integral" and "indispensable" part of the employees' "principal activities" meaning, "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." Since the employer did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products, and since the employer could have "eliminated the screenings altogether" the screenings were not "an intrinsic element" of the employees' work. Therefore under the FLSA, security screening time was not compensable.

(*Integrity Staffing Solutions v. Busk* (U.S. 2014) 190 L. Ed. 2d 410)

Judge Vacates Department of Labor Regulation Barring Third-Party Employers from the FLSA Companionship and Domestic Services Exemption

Monthly Employment Law Instructions & Update

A Judge in the District of Columbia struck down portions of the U.S. Department of Labor's (DOL) regulation applicable to third-party employers, which would have excluded them from the companionship and domestic services exemption to the FLSA's overtime and minimum wage requirements. In granting the employee's motion for summary judgment and vacating a portion of the regulation, the court stated that the language of the exemption is "quite clear" and that, "[t]here is no explicit -- or implicit -- delegation of authority to the [DOL] to parse groups of employees based on the nature of their employer who otherwise fall within" the definitions of an employee who provides companionship or live-in domestic services.

The court further stated, "Congress included the exemptions for a reason, and the Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke* not only does not empower the [DOL] to gut them, it does not grant the [DOL] judicial cover for what can only be characterized as a wholesale arrogation of Congress's authority in this area!" As a result of the court's order, the new rule's exclusion of third-party employers from the companionship and live-in employee exemption provisions of the FLSA will no longer take effect on January 1, 2015, as previously scheduled. However, other aspects of the rule affecting the paperwork and definitional requirements of both the companionship and live-in exemptions are also being challenged in the ongoing lawsuit, but have not yet been addressed by the court. The DOL has declared that it will not enforce the new rule until July 1, 2015, but the court's recent ruling could impact any private enforcement actions.

(*Home Care Association of America v. Weil* (D.C. Cir. 2014) No. 14-cv-967)

Termination For Misconduct Discovered After Investigation Not Pretextual or Discriminatory

An employee with a long history of oral and written reprimands, including for verbal altercations with co-workers, damage to the employer's property, threats of violence against co-workers, and constant complaints about management and the employer sued for retaliation and disability discrimination. The employee complained that noise from one of the trucks he operated caused his hearing to deteriorate. As an accommodation, the employee asked to be excused from operating that vehicle. Since operation of the vehicle was an essential function of his job, the employer instead suggested the employee wear hearing protection. Shortly after this exchange with the employer, the employee was involved in a verbal altercation with a co-worker when the co-worker asked the employee to remove his hearing protection briefly so they could discuss a work related matter.

The employer placed the employee on administrative leave and launched an investigation into his behavior. The investigation revealed the extent of past threats to co-workers, including threats of placing a bomb under a car, and threatening to shoot his supervisor's children in the kneecaps. The investigation also revealed that the employee spent excessive amounts of time on personal business while on employer time, with co-workers reporting he would sometimes spend up to three hours of work time on his cell phone running his side ADA "consulting" business. During work hours, he would also approach disabled individuals and solicit them to file lawsuits. As part of the investigation, the employer sent the employee for a fitness-for-duty examination. The doctor conducting the exam concluded employee was fit for duty and was not a danger to himself or others. Nevertheless, the employer fired the employee for four reasons: nonperformance of duties due to excessive phone calls, intimidation of co-workers by threats of violence, conducting and soliciting personal business on work time, and disparaging remarks about his supervisors and the employer.

The lower court granted the employer's motion for summary judgment dismissing employee's retaliation and disability discrimination claims, finding the employee failed to produce any evidence that the employer's stated reasons for terminating him were pretextual . The employee argued that the fact that the employer had tolerated employee's bad behavior for so many years without firing him demonstrated that termination was in retaliation for his complaints and request for accommodation. The ninth circuit rejected that argument, finding no evidence that the employer knew the extent of employee's behavior before conducting the thorough investigation. The employee also argued that since he was cleared by the fitness-for-duty doctor to return to work, his termination must be pretextual. The ninth circuit also rejected that argument, finding that the employee was terminated for threats of violence he had already made against co-workers, not because the employer believed the employee was a future threat. Additionally, the ninth circuit

observed that his threats of violence against co-workers were not the only reason the employee was terminated, and that he failed to produce any evidence demonstrating that any of the other three reasons provided by the employer for the termination were pretextual.

(*Curley v. City of North Las Vegas* (9th Cir. 2014) 772 F.3d 629)

CALIFORNIA JUDICIAL DEVELOPMENTS

Whistle Blower Retaliation Requires Disclosure Based on Reasonable Suspicions of Unlawful Activity

An employee alleged she was terminated in retaliation for reporting concerns to her employer about her supervisor. The employee asserted a wrongful termination claim premised upon Labor Code section 1102.5(b), which states that an employer may not retaliate against an employee for disclosing information the employee has reasonable cause to believe discloses unlawful activity. The trial court dismissed the complaint on demurrer, finding the employee had not alleged reasonable suspicions of unlawful activity. The appellate court reversed, on one narrow basis.

The employee alleged that two disclosures amounted to reasonable suspicions of unlawful activity. First, she alleged she complained that her supervisor was living on the employer's property rent-free and used a company credit card to furnish his apartment. This disclosure was based on a reasonable suspicion the supervisor was embezzling from the company and evading tax laws. The court analyzed California's embezzlement statute, and determined the employee did not have a reasonable suspicion the supervisor had embezzled from the company because she did not allege he had lacked authority to use the company provided credit card or that his expenditure exceeded his authority. The court also rejected the employee's tax fraud theory, finding the employee never put the employer on notice that her supervisor was evading taxes by not declaring his compensation to the IRS.

The employee also alleged she had complained her supervisor was receiving a kick-back for placing university tenants with a private landlord. The employee alleged a reasonable suspicion the supervisor was engaging in bribery. The court analyzed California's bribery statute and determined that by disclosing the alleged kick-back scheme, she had disclosed reasonable suspicions of unlawful activity. The appellate court concluded that the kick-back scheme implicated the public policy identified in Labor Code section 1102.5 because she disclosed a potentially on-going crime and section 1102.5 expresses a broad public policy interest in encouraging whistle-blowers to report unlawful activity without fear of retaliation.

(*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337)

Employers May be Liable for Retaliating Not Only Against Actual Whistleblowers But Also Employees Who are Perceived to be Whistleblowers

An assistant preschool director sued for wrongful termination in violation of public policy alleging she was terminated as a result of the director's mistaken belief that she complained to the Community Care Licensing Division of the California Department of Social Services (Licensing), which resulted in an unannounced inspection of the preschool.

The trial court granted summary judgment in favor of the employer on the basis that the termination did not violate public policy because the employee did not in fact lodge a complaint with the Licensing agency. The court of appeal disagreed and reversed on the wrongful termination claim, which was based on the public policy delineated in Labor Code section 1102.5, subdivision (b). This section precludes an employer from retaliating against an employee for disclosing a violation of state regulations to a governmental agency. The court of appeal concluded, because the public policy behind section 1102.5 was to encourage workplace whistleblowers to report unlawful acts without fear of retaliation, the public policy argument applied equally to employees terminated because they were perceived to be whistleblowers and those who were actual whistleblowers. It made no difference in this case that the employee did not report any unlawful acts to a government agency as long as she could prove she was terminated because her employer believed she made such a complaint.

(*Diego v. Pilgrim United Church of Christ* (2014) 2014 Cal. App. LEXIS 1058)

Court Holds Misclassification Class Should Be Certified Despite Defenses to Individual Claims

Several employees brought a class action alleging managers and assistant managers were misclassified as exempt employees. The court of appeals held that the employees were typical of the class, and adequate representatives. The theory of class liability was that the classifying of managerial employees as exempt violated overtime wage laws was, "by nature a common question eminently suited to class treatment." Although this theory could lead to individual questions, the court found that considering the employer's realistic expectations and overall job requirements meant these issues were, "likely to prove susceptible to common proof." The court of appeals also held that in such actions courts must analyze these common questions, rather than focusing on whether a particular employee was engaged in an exempt or non-exempt task at a given time. Statistical sampling may prove helpful in analyzing these common questions, provided that the use of such sampling "accords the employer an opportunity to prove its affirmative defenses." The court of appeal closed by stating that class relief, " remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof." And indicated trial courts should focus on the policies and practices of the employer and the effect those policies and practices have on the putative class, as well as narrowing the class if appropriate, to provide an efficient and effective means of resolving such claims.

(*Martinez v. Joe's Crab Shack* (2014) 221 Cal.App.4th 1148)

The Court, Not the Arbitrator, Should Decide Whether an Arbitration Agreement Permits Arbitration of Class or Representative Claims

A former employee sued her employer for unlawful competition, unpaid overtime, inaccurate wage statements, and unpaid termination wages. The employee attempted to proceed on both a class basis and a representative basis under California's Private Attorney General Act (PAGA). The employer filed a petition to compel arbitration of the employee's individual claims, and to dismiss or stay the class and representative claims pending the outcome of arbitration. In response to the petition, the employee argued that the question of whether the parties' agreements contemplate class and representative arbitration was a matter for the arbitrator to decide.

The trial court granted the employer's petition to compel arbitration, but left it to the arbitrator to decide whether the arbitration agreements allowed for class and representative arbitration. The employer filed a petition for a writ of mandate. The court of appeal concluded that the availability of class or representative arbitration is a question of arbitrability, and is therefore a "gateway issue" for the court—not the arbitrator—to decide, if the arbitration provision is silent on the matter. The court explained that the benefits of bilateral arbitration, such as lower costs, greater efficiency and speed, and confidentiality, are less assured in a class or representative arbitration. Moreover, if the arbitrator were to decide the significant question of whether arbitration could proceed on class or representative claims, the arbitrator's decision would be unreviewable. Therefore, the court of appeal directed the trial court to vacate the portion of its order referring the entire matter to the arbitrator, and to determine whether the parties' arbitration agreements contemplate class and representative arbitration.

The court of appeal declined to reach any issue regarding the impact of the California Supreme Court's decision in Iskanian v. CLS Transportation Los Angeles, LLC, which held that a waiver of PAGA representative claims in an arbitration agreement is unenforceable. The court left this issue for the trial court to resolve.

(*Garden Fresh Restaurant Corp. v. Superior Court* (2014) 2014 Cal. App. LEXIS 1043

Trial Court Order Vacating Arbitrator's "Clause Construction Award" Was Not An Appealable Final Arbitration Award on the Merits of the Parties' Dispute

Monthly Employment Law Instructions & Update

An employer terminated an employee who was a resident property manager. The employee filed suit alleging individual claims, as well as claims under the Private Attorney General Act (PAGA) for wrongful termination and related wage and hour violations. Later, she filed a class action against related entities, alleging similar individual and class-wide employment and Labor Code claims. In both suits, the defendants compelled arbitration. The trial court granted the petitions to compel arbitration as to the employee's individual claims only, noting that the arbitration agreement was silent on the issue of class arbitration. The court also stayed the remaining action, pending completion of the arbitration.

The individual claims against all defendants proceeded to arbitration. After initial briefing, the arbitrator issued a "clause construction award" in which she concluded the agreement permitted arbitration of class and representative claims. Defendants then filed a petition in the individual action to vacate the award, arguing that the arbitrator exceeded her powers by deciding the issue of whether the parties agreed to arbitrate class or representative claims. The trial court decided that once it had ruled on the issue of class and representative arbitration, the arbitrator lost authority to do so, thereby vacating the clause construction award. The employee appealed.

After a detailed discussion of the application of the Federal Arbitration Act and the American Arbitration Association rules, the appellate court held that the appeal was not appropriate and reversed the trial court's order. The court held that the FAA did not preempt California procedural law, and that although an order vacating a final arbitration award is appealable under Code of Civil Procedure section 1294, subdivision (c), the order from which the employee appealed vacated a "clause construction award" that did not resolve the entire arbitration. Instead, the arbitrator's award determined only, as a threshold matter, that the employee's class and representative claims were subject to arbitration. The clause construction award did not rule on the merits of those claims, and so the court decided that the order from which the employee appealed did not vacate a final arbitration award and was not appealable.

(*Judge v. Nijar Realty, Inc.* (2014) __ Cal.App.3d __, No. B248533.)