

Employment & Labor Law Updates for 2018

Seminar for PWA Insurance Services

Presented By: Treaver K. Hodson

Palmer Kazanjian
Palmer Kazanjian Wohl Hodson LLP Attorneys

Employment and Labor Law Updates for 2018

- Wage and Hour Updates
- Employment Discrimination and Prohibited Harassment
- Leaves of Absence
- Disciplinary Action and Termination of Employment
- Employment Classification: Independent Contractors and Exempt Employees
- Arbitration
- Recent NLRB Decisions

Wage and Hour Updates

California Minimum Wage Increase

On April 4, 2016, Governor Brown signed **SB 3,** which incrementally increases minimum wage to $15/hour by the year 2023.

EFFECTIVE DATE	EMPLOYERS WITH LESS THAN 25 EMPLOYEES	EMPLOYERS WITH 26+ EMPLOYEES
January 1, 2017	$10.00/hour	$10.50/hour
January 1, 2018	$10.50/hour	$11.00/hour
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	

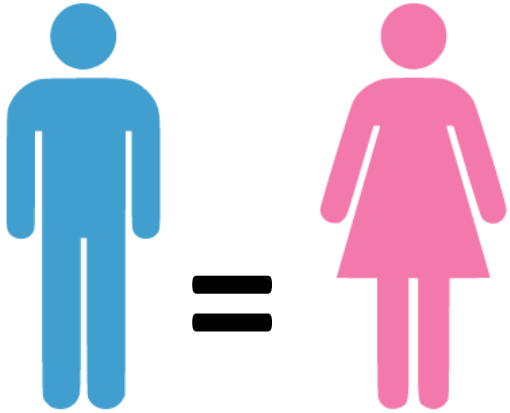
Wage Discrimination

On October 6, 2015, Governor Brown signed SB 358, which amended the Equal Pay Act.

- Required equal pay for **work of comparable character** and <u>eliminated</u> the same establishment requirement.
- Clarified the affirmative defense to mean "***bona fide*** factors other than sex."
- Prohibited retaliation or discrimination against employees who **disclose, discuss, or inquire** about their own or co-workers' wages for the purpose of enforcing their rights under the Act.

A.B. 1676 (Effective January 1, 2017):

Prior salary, by itself, may not be used as a bona fide factor to justify a disparity in pay among similarly situated men and women.



Wage Discrimination (AB 46)

The new law extends the Fair Pay Act protections to public employers by defining "employer" to include public and private employers.

Prohibition on Salary History Inquiries

AB 168: Prohibits all employers, regardless of size, both public and private, from relying on "salary history information" as a factor in determining whether to offer employment and what salary to offer to an applicant.

<u>The bill does not prohibit an applicant from voluntarily disclosing salary history or stating salary needs</u>. An employer is permitted to use such information for salary consideration.

PAGA Paystub Claims Do Not Require Intent or Injury

California paystub penalty plaintiffs must generally show they suffered an injury caused by the employer's knowing and intentional failure to provide an adequate paystub. Lab. Code Sec. 226(e)(1).

In ***Lopez v. Friant.*, 2017 WL 2451126**, the Court of Appeal held that a plaintiff filing suit for paystub penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA) does not have to prove he or she suffered injury because of the employer's knowing and intentional failure to provide a compliant wage statement.

California's "Day of Rest" Rule

In ***Mendoza v. Nordstrom, Inc*. Case No. S224611 (May 8, 2017)**, the California Supreme Court clarified California's so-called "day of rest" rule, which guarantees employees "one day's rest therefrom in seven," prohibits employers from "causing" its employees to work more than six days in seven, and exempts employees when, inter alia, the total hours of employment do not exceed 30 hours in any week or six hours in any one day.

Take Home Points

- ✓ "causing" equates to "anything other than absolute neutrality"
- ✓ The exemption for employees who work no more than 30 hours in any week and six hours in "any" one day does not apply unless the employee works 6 hours or less on <u>every day of a given workweek</u>
- ✓ "Seven days" is to be calculated on a per workweek basis and not a rolling seven consecutive day basis

Exception to the Going and Coming Rule

The "Going and Coming" Rule: Employee driver who negligently (or tortuously) causes a traffic accident during a normal commute to and from work is not within the scope of employment and is not liable to pay for the innocent other driver's injuries or damages. *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301, and *Ducey v. Argo Sales Co*. (1979) 25 Cal.3d 707, 722.

Special Errand Exception: An exception to the rule applies if, during the commute, an employee runs an errand for the employer. CACI No. 3725; *Tognazzini v. San Luis Coastal Unified School Dist*. (2001) 86 Cal.App.4th 1053, 1057; *Felix v. Asai* (1987) 192 Cal.App.3d 926, 931.

***Morales-Simental v. Genentech, Inc., 2017 WL 4700383 (Cal. Ct. App. 2017)*:** The Court of Appeal held that a plaintiff-employee in charge of his own department at his place of employment cannot order himself to return to work to invoke the special errand exception to the going-and-coming rule.

Employment Discrimination and Prohibited Harassment

Ban On Criminal Background History Inquiries

AB 1008

AB 1008 amends the Fair Employment and Housing Act ("FEHA") to make it an unlawful employment practice for employers with five or more employees to:

- include on any application for employment any question that seeks the disclosure of an applicant's conviction history;

- inquire into or consider an applicant's conviction history before the applicant receives a conditional offer of employment; and

- consider, distribute, or disseminate information related to arrests that did not result in convictions, convictions resulting in diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated.

Ban On Criminal Background History Inquiries

Exemptions

- Positions for which government agencies are required by law to check conviction history;
- Positions with criminal justice agencies; farm labor contractors; and
- Positions for which the employer is required by federal, state, or local law to check criminal history or to restrict employment based on criminal history.

Immigration Enforcement in the Workplace

AB 450

AB 450 is designed to protect immigrant employees from workplace raids. The new law will bar public and private employers, and anyone acting on their behalf, from voluntarily consenting to permit an immigration enforcement agent to enter nonpublic areas of a workplace, except if the agent provides a judicial warrant or as otherwise required by federal law. Subject to exceptions required by federal law, AB 450 prohibits employers from allowing immigration enforcement agents to:

- enter any nonpublic areas of a work place, absent a judicial warrant, or
- access, review, or obtain employee records, without a subpoena or court order.

National Origin Discrimination

SB 1001

This law protects CA applicants and employees by making it illegal to:

(1) request more or different documentation than is required under federal law;

(2) refuse to honor documents that reasonably appear genuine;

(3) refuse to honor documents or work authorization based on specific status or term that accompanies an applicant's authorization to work;

(4) attempt to re-verify or reinvestigate an employee's authorization to work

Employer Tips:

- ✓ Employers should update their Equal Employment Opportunities policy to ensure compliance with this new law
- ✓ Employers should also train Human Resources and management personnel to ensure that company hiring practices comply with the new laws

Anti-Harassment Training

SB 396

The Fair Employment Housing Act requires employers with 50 or more employees to provide two hours of sexual harassment education and training to supervisory and managerial employees, every two years.

SB 396, in an effort to further prevent sexual harassment, will require that anti-harassment training also include a component on harassment based on gender identity, gender expression, and sexual orientation. This training must include:

- practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation and
- must be presented by trainers or educators with knowledge and expertise in these areas.

The new law further requires employers with five or more employees to post a new workplace notice, to be developed by the DFEH, regarding transgender rights.

Employer Responsibility for Sexual Assault by Trespasser Against Hotel Employee

In ***M.F. v. Pac. Pearl Hotel Mgmt. LLC*, 16 Cal. App. 5th 693, 224 Cal. Rptr. 3d 542 (Ct. App. 2017), review filed (Dec. 5, 2017),** the Court of Appeal held that the Fair Employment and Housing Act (FEHA) protects an employee from sexual harassment at the hands of a nonemployee when an employer knows, or should have known, of the conduct and failed to take immediate and appropriate corrective action.

Leaves of Absence

Medical Leaves of Absence

Family Medical Leave Act (FMLA)

Employers with at least 50 employees must provide qualifying employees with up to 12 weeks (26 weeks in certain instances) of unpaid leave for the birth or placement of a child for adoption, or to care for the serious health condition of the employee or the employee's close family member. **29 U.S.C. § 2611(4)(A)(i).**

California Family Rights Act (CFRA)

Almost identical to FMLA, except pregnancy and military caregiver leave are not provided under CFRA. **Cal.Gov.Code §12945.2(c)(2).**

Medical Leaves of Absence (Cont'd)

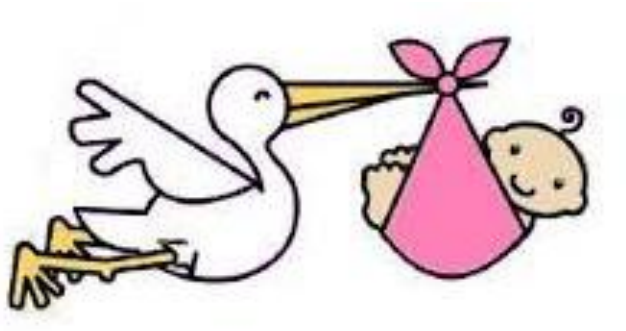
Americans with Disabilities Act (ADA)

Employers with at least 15 employees must provide reasonable accommodations to employees with disabilities that require such accommodations due to their disabilities. **42 USC §12111(5)(A)**.

Fair Employment and Housing Act (FEHA)

Employers with at least 5 employees must reasonably accommodate employees with a known physical or mental disability, unless doing so would place an undue hardship on the employer. **West's Ann.Cal.Gov.Code § 12940(m).**

Medical Leaves of Absence (Cont'd)



Pregnancy Disability Leave (PDL)

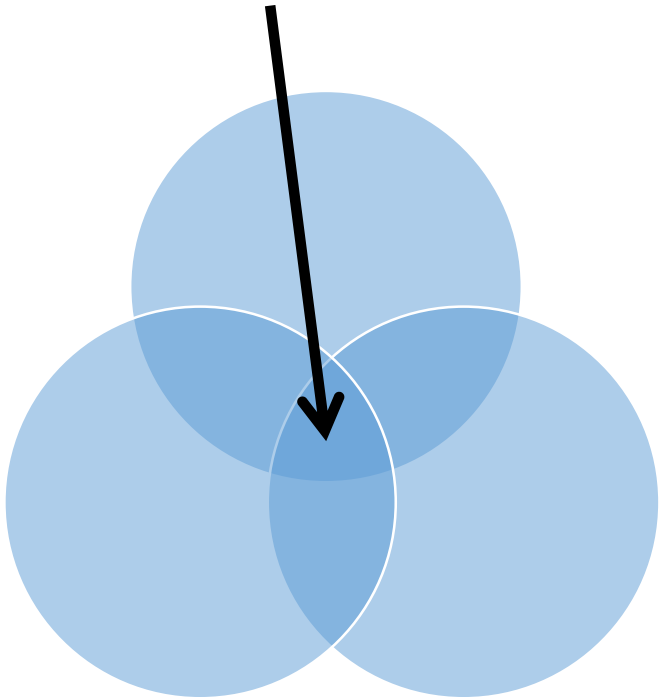
Employers with at least 5 employees must provide up to 4 months of unpaid leave per pregnancy to employees disabled by pregnancy, childbirth, or a related medical condition. **Cal. Gov't Code § 12945**.

Workers' Compensation Leave

Employers will provide leave to employees temporarily or totally disabled due to a work related illness or injury. The duration of the leave will depend upon the rate of recovery and the business needs of the Company. **Cal.Lab.Code § 3300.**

How do the Medical Leaves Interact?

Focus on whether the leaves run concurrently



For Example:

- PDL runs concurrently with FMLA, but not CFRA, which means an employee disabled by pregnancy may be entitled to up to 7 months of leave.
- Leave under workers' comp, ADA, or FEHA may be in addition to any leave provided under FMLA/CFRA.
  - But may also be the only leave required for employers with fewer than 50 employees.

Sick Leave

Sick Leave

Employers must provide at least 3 days or 24 hours of paid leave for employees suffering from illness or injury. The leave may also be used to attend to the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member. **Cal. Lab.Code §246**.

Benefit Leaves

Vacation/PTO

An employer may provide time off for an employee to use however he or she wishes. Vacation pay accrues as it is earned, and cannot be forfeited, even upon termination of employment. ***Suastez v. Plastic Dress Up* (1982) 31 Cal.3d 774; Cal.Lab. Code. § 227.3.**

Bereavement Leave

Employers may provide time off for bereavement upon the death of a close relative.

Other Protected Leaves Required for All Employers

Military Leave

Leave must be provided to employees on active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty and for examinations to determine fitness for any such duty. **38 U.S.C.A. § 4312.**

Attending Child's School Discipline

Employers must provide employees with children time off as necessary to attend disciplinary conferences. **Cal.Lab.Code § 230.7.**

Other Protected Leaves Required for All Employers

Time off for Voting

If employees do not have sufficient time to vote before or after work, employers must provide time off to vote. The first two hours of leave must be paid, but any additional time can be unpaid. **Cal.Elections Code § 14000.**

Time off for Jury and Witness Duties

Employers must provide leave as necessary to attend jury duty or perform witness duties. **Cal.Lab.Code § 230; 28 U.S.C.§ 1861.**

Domestic Violence Leave

Domestic Violence Leave

Employers with at least 25 employees must provide leave as necessary to seek medical attention for injuries caused by domestic violence, sexual assault, or stalking. It also applies to employees who need leave to care for family members who have been victims of these crimes. **Cal.Lab.Code § 230.1.**

New Parental Leave Law

SB 63 requires small businesses to provide parental leave. The New Parent Leave Act amends the California Family Rights Act ("CFRA") to allow employees who work for an employer with 20 or more employees, within a 75 mile radius, to take 12 weeks of unpaid leave for new child bonding purposes. The new law applies to both private and public employers. The law applies to employees with more than 12 months of service with the employer, who have at least 1,250 hours of service with the employer during the previous 12-month period, and who work at a company in which the employer employs at least 20 employees within 75 miles.

SB 63

Requires employers to provide the employee with a **guarantee** of reinstatement to the same or comparable position following the leave.

How does the New Parental Leave Law Interact with other Medical Leaves?

The new law does not affect an employee's right under California law to take up to four months of leave for pregnancy-related disability, in addition to the 12 weeks of parental leave. Also, the new law does not apply to employees who are already subject to the FMLA and CFRA.

Disciplinary Action and Termination of Employment

Whistleblower Retaliation Protections

SB 306

SB 306 authorizes the Labor Commissioner's office, with or without receiving a complaint, to investigate an employer when it suspects retaliation or discrimination:

- during the course of adjudicating a wage claim,
- during a field inspection concerning labor standards, or
- in instances of suspected immigration-related threats.

Discipline & Termination: At-will employment in general

- Under California law, absent evidence of an agreement to the contrary, there is a statutory presumption of at-will employment (**Labor Code § 2922**)
- Even though California is an employment-at-will state, employers and employees may limit their otherwise at-will relationship by contract, either expressly or impliedly (***Guz v. Bechtel*, 24 Cal. 4th 317 (2000)**)

Discipline & Termination: Preventing loss of at-will employment status

Scenario:

Will was hired by Intec Corp. Over the next seven years, Will received a series of salary increases, promotions, bonuses, awards and superior performance evaluations. Will's boss made repeated oral assurances of job security so long as her job performance remained adequate. Employment documents did not expressly state that Will's employment was at-will. The company also maintained a written "termination guidelines" policy that set forth express grounds for discharge and a mandatory seven-step pre-termination procedure. Then, about a month after his most recent promotion, he was terminated. Will filed a claim against the company, alleging that he had been fired in breach of her employment contract. **How is the court likely to rule?**

Discipline & Termination: Lessons

Lessons:

- ✓ Progressive discipline policies may have the unintended consequence of creating an expectation that improvement of performance guarantees continued employment

- ✓ Oral assurances of job security and consistent promotions during performance reviews in conjunction with promotions imply that employment status is not at-will

- ✓ To ensure that the employment at-will status is maintained, employers in California should:
  - Ensure that employment documents , including the company handbook, offer letter, disciplinary policies and procedures contain disclaimer that an employee is at-will
  - Properly train supervisors and managers to ensure that employment practices do not negate the disclaimer

Discipline and Termination: Prohibitions

Under California law, an at-will employee may not be terminated on the basis of:

- Age (40 and above)
- Ancestry
- Color
- Disability
- Gender, gender identity, or gender expression
- Marital status
- Medical condition
- Military or veteran status
- National origin
- Race
- Religion
- Sex
- Sexual orientation

Discipline and Termination: Prohibitions

Under California law, an at-will employee may not retaliate against an employee for:

- Protesting in-house reporting or outside whistle blowing against
  - Discrimination
  - Harassment
  - Wage and hour violations
  - Unsafe work conditions
  - Rest break and meal time violations

- Filing administrative complaints with state or federal agencies
- Filing a workers' compensation claim
- Taking time off for protected leaves

Discipline and Termination

Recommended Practices:

- ✓ Proper documentation of disciplinary action and performance
- ✓ Consistent application of policies
- ✓ Maintain standard of conduct policies
- ✓ Limit risk by executing a waiver and release of claims/severance agreement

Break Time!

Employment Classification: Independent Contractors

Independent Contractor Classification

Under California law, various tests apply to determine whether an individual is an employee or an independent contractor for purposes of:

- Worker's Compensation-Regulated by DLSE and DWC
- Unemployment insurance benefits-Regulated by EDD
- Wage and hour laws-Regulated by DLSE
- Protection under FEHA-Regulation by DFEH

Independent Contractor Classification

Wrongfully classifying workers as independent contractors instead of employees can subject companies to legal liability for:

- Failure to pay minimum wages or overtime
- Unpaid taxes and unemployment insurance payments
- Failure to provide benefits
- Violations of anti-discrimination laws that protect only employees
- Penalties and fines, in cases of willful misclassification

Workers Compensation Test

Presumption of employee status for occupations requiring contractor's license is overcome if the individual:

- **Has the right to control manner and means of performance**
- Is customarily engaged in independent business
- Has bona fide independent contractor status and status is not a subterfuge to avoid employee status based on the following cumulative factors:

  - ✓ IC controls time and place
  - ✓ IC is licensed under the Business and Professions Code
  - ✓ Intention of the parties
  - ✓ IC represents oneself as having own business
  - ✓ IC is paid on basis of project completion and not by time spent on work
  - ✓ IC invests substantially in own business, supplies tools used in the work, and hires employees
  - ✓ IC performs work not ordinarily in the course of principle's work
  - ✓ Parties have an agreement that relationship is not terminable at-will by principal

(Cal. Lab. Code § 2750.5 (a)-(c))

Unemployment Insurance

Unemployment Insurance

- For unemployment insurance benefit purposes, the most important factor is the existence of **employer control** **(Cal. Code Regs. tit. 22 § 4304-1)**

- Company's right to discharge at will constitutes strong evidence of employer's right to control **(Cal. Code Regs. tit. 22 § 4304-1)**

- Other factors (similar to factors used for Workers' Compensation Test) are also considered **(Cal. Code Regs. tit. 22, § 4304-1)**

Wage and Hour Laws-California

The DLSE applies the Multi-Factor or "Economic Realities" test adopted by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341 at pp. 349, 354 :

- Whether engaged in business distinct from that of principal
- Whether work is part of the regular business of principal
- Whether principal supplies tools
- Level of skill required, type of work
- Duration of work
- Method of payment
- Understanding by the parties
- Right to control the work (DLSE maintains that control remains an important factor but is not to be applied in isolation)

FEHA (Harassment Protection)

FEHA (Harassment Protection)

The totality of the circumstances test is applied with particular emphasis placed on the amount of control the principal exercises over the individual and how the work is done **(*Bradley v. Calif. Dep't of Corr. and Rehab.,* 158 Cal. App. 4th 1612, 1626 (2008))**

An Independent Contractor is a person who:

- Has the right to control the performance of the contract and discretion as to the manner of performance
- Is customarily engaged in an independently established business
- Has control over the time and place of work performed, supplies the tools and instrumentalities
- Has particular skills that are not used in the course of employer's (principal's) work

(Cal. Gov't Code § 12940(j)(5)

Taxicab Driver—Employee or Independent Contractor?

In Linton v. DeSoto Cab Co., the Court of Appeal held that despite the employment disclaimer in the Lease Agreement and the fact that the plaintiff had a significant amount of control over his job, there was still strong evidence of an employment relationship. ***Linton v. DeSoto Cab Co. 15 Cal.App.5th 1208, 1209.***

●The Court explained that the labels used by the parties were not dispositive and the degree of freedom permitted to a worker does not automatically lead to the conclusion that the worker is an independent contractor. The key issue is the control retained by the employer.

●The plaintiff presented "strong evidence of an employment relationship", including that: (1) defendant terminated the parties' relationship based on a single passenger complaint without investigation, (2) defendant monitored Linton's driving by video review, (3) defendant required Linton's social security number and maintained his personal information, (4) Linton was required to return the taxicab on request and his vehicle could be leased to another driver if he was late, and (5) Linton did not represent himself as an independent business and could not drive a taxicab independent of defendant or for another taxicab company.

Arbitration

Arbitration in Employment

Federal Arbitration Act (FAA) is an act of Congress that provides for judicial facilitation of private dispute resolution. Arbitration provides an alternate method of resolving a dispute than filing a lawsuit and going to court

- Provides a more efficient means of resolving disputes than formal litigation.
- Often less costly than litigation because the process is faster
- The rules of evidence and procedure are simplified leading to a shorter "discovery" period
- If the arbitration decision is binding, there is limited opportunity to appeal, making the award final
- Arbitration proceedings are held privately. Parties may in most cases agree to keep the terms of the final resolution confidential and also the proceedings.

The Enforceability of Class Claim Waivers in an Arbitration Agreement

Ernst & Young LLP v. Morris (No. 16-300):

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This "concerted action waiver" required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere. The lower court granted the Company's motion to dismiss and compel arbitration. On appeal, the Ninth Circuit reversed and remanded the case, holding that the agreement violated the employee's rights to engage in concerted activity under the National Labor Relations Act.

The U.S. Supreme Court has granted certiorari in **National Labor Relations Board v. Murphy Oil USA (No. 16-307), Epic Systems Corp. v. Lewis (No. 16-285),** and **Ernst & Young LLP v. Morris (No. 16-300),** consolidating them for oral argument.

Issue before the U.S. Supreme Court: Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PAGA Representative Actions and Arbitration

PAGA Claims Cannot Be Waived

A complete waiver of PAGA claims is prohibited (*Iskanian v. CLS Transp. Los Angeles, LLC* and *Sakkab v. Luxotica Retail N. Am. Inc*.).

Federal Law: PAGA claims MAY be arbitrated pursuant to a pre-dispute arbitration agreement

Both the *Iskanian* and *Sakkab* decisions contemplate that an individual employee may pursue a PAGA claim in arbitration. (*Valdez v. Terminix International company LLC*).

California Law: PAGA claims MAY NOT be arbitrated pursuant to a pre-dispute arbitration agreement

California courts have held that an employer may not rely on a pre-dispute agreement requiring arbitration in a PAGA case. (*Bentacourt v. Prudential Overall Supply*)

Collective Bargaining Agreements and Arbitration

Employee waiver of the right to bring statutory violations in a judicial forum

- For statutory violations, there must be a "clear and unmistakable" waiver of the right to bring certain statutory claims in a judicial forum. Such statutory claims must be explicitly incorporated into the arbitration agreement in order for an employee to be compelled to arbitrate such claims
- Absent express language in the arbitration establishing parties' intent to arbitrate class claims, only individual claims may be arbitrated. Silence on the issue may not be construed as a agreement to class arbitration

(*Cortez v. Doty Bros. Equip. Co.*, 15 Cal. App. 5th 1, 15, 222 (Ct. App. 2017), as modified (Sept. 6, 2017), review denied (Nov. 29, 2017))

Lesson:

✓ California employers should examine their arbitration agreements to ensure all commonly asserted statutory claims within the scope of arbitration are clearly and explicitly stated in the Collective Bargaining Agreement.

Defendant's Strategic Delay to Compel Arbitration Backfires

In ***Sprunk v. Prisma LLC*, No. B268755 (2nd Dist. Div. 1 Aug. 23, 2017)**, the Court of Appeal held that a defendant who chose to wait for class certification prior to seeking arbitration essentially waived the right to arbitrate. In this case, all putative class members had signed the arbitration agreements. Notably, in a situation where not all class members have signed the arbitration agreement, filing of the motion to compel arbitration may be delayed until after certification (*Sky Sports, Inc. v. Superior Court*, 201 Cal.App.4th 1363 (2011)).

Lesson:

- ✓ This case illustrates the importance of filing a motion to compel arbitration within a reasonable timeframe.

Recent NLRB Decisions

"At-Will" Policies and Collective Bargaining Agreements

- In *T-Mobile USA, Inc.*, the National Labor Relations Board determined that the employer did not violate either Sections 8(a)(5) or (1) (independently) by issuing and maintaining its employee handbook, which included at-will and attendance policies that were allegedly inconsistent with the parties' collective bargaining agreement.

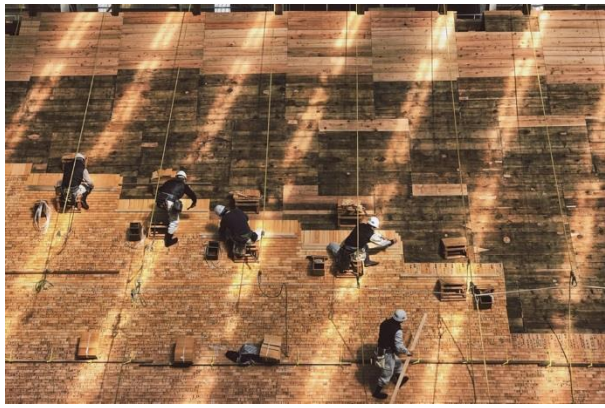
- However, the Board found that the employer violated the Act by refusing to bargain with the union over a successor collective-bargaining agreement.
- The Board noted that an employer with evidence that a union lost majority status must either withdraw recognition from the union completely, or if the employer chooses to file an RM petition, it remains obligated to continue bargaining while the petition is processed. ***T-Mobile USA, Inc.*, 365 NLRB No. 23 (February 2, 2017).**

Customer Information

- In *Macy's, Inc.*, the NLRB determined that an employer's rule restricting employees from disclosing customer information from the employer's confidential records did not violate the National Labor Relations Act (NLRA).
- Since the rules were limited to information contained in the confidential files of the employer, they were lawful. The Board stated that while employees generally have a Section 7 right to appeal to their employer's customers for support in a labor dispute, the disputed rules did not restrict such appeals. ***Macy's, Inc.*, 365 NLRB No. 116 (August 14, 2017).**

Union Harassment is Not Permitted

- The *Pro Works Contracting, Inc*., the NLRB granted the General Counsel's Motion for Default Judgment based on the Respondent's failure to comply with the terms of a settlement agreement.
- The NLRB found that the Respondent violated Section 8(a)(1) of the Act by: interrogating two employees; coercing an employee by ripping up a union representative's business card and telling the employee not to have union materials at the workplace; directing an employee to report the union activities of other employees; threatening to terminate an employee because of the employee's union activities; threatening to isolate an employee by giving the employee work assignments away from others because of the employee's union activities; and requiring employees who were wearing clothing with the Union's insignia to wear vests over such clothing.
- The NLRB also found that the Respondent violated Section 8(a)(3) and (1) by reassigning two employees to more onerous jobs because they joined or assisted the Union and engaged in concerted activities and discouraging employees from engaging in these activities.
- The NLRB ordered the Respondent to comply with the unmet provisions of the settlement agreement by posting and mailing the remedial notice, and reading the remedial notice to employees. ***Pro Works Contracting, Inc.*, 365 NLRB No. 150 (December 13, 2017).**



Arbitration Agreements

- In *Dish Network LLC*, the NLRB found that the employer violated Section 8(a)(1) of the Act by maintaining an Arbitration Agreement that employees would reasonably construe to prohibit accessing the Board's processes.
- The NLRB specifically noted that the Agreement did not in any way qualify the requirement that all disputes arising out employment be resolved in arbitration.
- The Agreement's confidentiality provision independently violated Section 8(a)(1) because it prohibited employees from discussing "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards," which are terms and conditions of employment.
- Thus, under the NLRA, employees have a right to discuss arbitration proceedings with coworkers. ***Dish Network LLC*, 365 NLRB No. 47 (April 13, 2017).**

Questions???