Labor & Employment News

February-June 2014

1317923.1 Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall, Twenty-Second Floor
Sacramento, California 95814

Telephone: 916.441.2430
Facsimile: 916.442.6664
www.wilkefleury.com

Table of Contents

1. 2014 Legislative Update (Samson R. Elsbernd) ..... **Vol. 17, No. 1 (Feb 2014)**

2. Wrongful Termination: Employers may be liable for wages even after former employees find new jobs (Branden M. Clary) ..... **Vol. 17, No. 2 (Mar 2014)**

3. Employers cannot remove PAGA actions to federal court (Bianca S. Watts) ..... **Vol. 17, No. 3 (Apr 2014)**

4. Employers may be liable for constructive discharge based on failing to reimburse necessary work expenditures (Samson R. Elsbernd) ..... **Vol. 17, No. 4 (May 2014)**

5. Arbitration agreements can be enforced even though employers reserve the right to alter or terminate them (Samson R. Elsbernd) ..... **Vol. 17, No. 5 (June 2014)**

Wilke Fleury

Feb 2014

Labor & Employment News

Vol. 17, No. 1

2014 Legislative Update

By: Samson R. Elsbernd*
selsbernd@wilkefleury.com

The State legislature was busy this past year, particularly in the area of employment law. Employers will want to be aware of the changes to make sure they do not have an un-happy year. Here is a synopsis of some of the notable changes:

EMPLOYEE WAGES

AB 10 - Minimum Wage Increase

Under existing law, the minimum wage for all industries is no less than $8.00 per hour.

AB 10 will increase the minimum wage to no less than $9.00 per hour on or after July 1, 2014. The minimum wage will increase again to no less than $10.00 per hour on or after January 1, 2016.

Employers should also reexamine the wages of their exempt employees in light of the minimum wage increase to ensure they still qualify for an exemption.

AB 442 - Minimum Wage Violations

Under existing law, employers who fail to pay the minimum wage to their employees face a citation by the Labor Commissioner consisting of a civil penalty and restitution.

AB 442 expands existing law to also subject the employer to a citation by the Labor Commissioner for liquidated damages, in addition to a civil penalty and restitution. Recovered wages and liquidated damages will be payable to the employee.

AB 390 -Withholding's from Wages

Existing law criminalizes the failure to make agreed-upon payments to health and welfare funds, pension funds, or specified benefit plans. AB 390 expands existing law to criminalize the failure to remit state, local or federal withholding's from employee wages.

Wilke Fleury

Feb 2014

Labor & Employment News

Vol. 17, No. 1

TIME OFF AND LEAVE

SB 770 - Paid Family Leave

Under existing law, paid family leave wage replacement benefits are available for employees who take leave to care for a seriously ill child, spouse, parent, or domestic partner.

SB 770 allows employees to receive paid family leave wage replacement benefits to care for a seriously ill grandparent, grandchild, sibling, or parent-in-law.

SB 400 - Stalking Victims

Existing law provides certain protections to employees who are victims of domestic violence or sexual assault, including prohibiting employers from taking adverse action against such victims who take time off from work related to the domestic violence or sexual assault as long as the employee complies with certain conditions.

SB 400 extends the protections in existing law to victims of stalking. It also prohibits employers who learn of an employee's status as a victim of domestic violence, sexual assault, or stalking from discharging or retaliating against the employee because of their status as victim, and requires employers to provide reasonable accommodations to such employees (e.g., implement safety measures).

SB 288 - Victim's Rights

Under existing law, employers are prohibited from discharging or discriminating against employees who take time off to serve on a jury, to appear as a witness if they are victims of crime, or to take time off to obtain relief if they are victims of domestic violence or sexual assault.

SB 288 extends the protections of existing law by prohibiting employers from discharging or discriminating against employees who are "victims," as defined in the law, and take time off upon the victim's request to appear in any proceeding affecting their rights as a victim.

DISCRIMINATION

AB 556 & 292 - FEHA

Under existing law, the Fair Employment and Housing Act (FEHA) prohibits discrimination and harassment in employment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.

Wilke Fleury

Feb 2014 **Labor & Employment News** *Vol. 17, No. 1*

AB 556 expands the protected classes under FEHA to include military and veteran status. (Employers may inquire into military or veteran status in order to award a veteran's preference under the law.)

SB 292 clarifies that sexual harassment does not have to be motivated by sexual desire.

SB 530 - Judicially Dismissed or Sealed Convictions

Under existing law, employers are generally prohibited from asking applicants or employees for information about an arrest or detention not resulting in a conviction, or from seeking information about a referral or participation in a pre- or post-trial diversion program.

SB 530 extends the protections to generally prohibit employers from asking applicants or employees for information about convictions that have been judicially dismissed or ordered sealed.

AB 263 -Employee Protected Conduct

Under existing law, employers are prohibited from firing or discriminating against an employee or applicant who has engaged in protected conduct.

AB 263 expands existing law to prohibit retaliation or adverse action against an employee or applicant who has engaged in protected conduct, and expands protected conduct to include a written or oral complaint that the employee was underpaid wages.

ENFORCEMENT OF VIOLATIONS

AB 1386 - Liens on Employer Property

Under existing law, the Labor Commissioner hears employee complaints in administrative proceedings that may result in final orders. Existing law then provides a process for turning final administrative orders into judgment liens with the same force and effect as civil court judgments.

AB 1386 provides an alternative procedure to judgment liens that allows the Labor Commissioner to turn final administrative orders into liens that may be recorded in any county where the employer has property, and remain in place for 10 years, unless sooner satisfied or released.

Wilke Fleury

Feb 2014

Labor & Employment News

Vol. 17, No. 1

SB 462 - Attorney Fees and Costs

Under existing law, a court must award reasonable attorney's fees and costs to the prevailing party in any action for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions if any party requests attorney's fees and costs upon the initiation of the action.

SB 462 amends the law to only allow attorney's fees and costs to a non-employee prevailing party (e.g., an employer) if the court finds the employee brought the action in bad faith.

1317923.1 Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall, Twenty-Second Floor
Sacramento, California 95814

Telephone: 916.441.2430
Facsimile: 916.442.6664
www.wilkefleury.com

Wilke Fleury

March 2014

Labor & Employment News

Vol. 17, No. 2

Wrongful Termination: Employers may be liable for wages even after former employees find new jobs.

By: Branden M. Clary
bclary@wilkefleury.com

Employers often seek to reduce an employee's damages in a wrongful termination case by the amount by which the employee mitigated, or could have mitigated, his or her damages. Before the employee's earnings from the replacement job will be applied in mitigation, employers must be able to prove that the replacement job was comparable to the employee's lost job. This means that wages from the replacement job will not be used to reduce the employee's lost wages in a wrongful termination lawsuit when the employee's new job is different or inferior.

In Villacorta v. Cemex Cement, Inc., 221 Cal.App.4th 1425, (2013), Cemex Cement, Inc. ("Cemex") laid off Alfredo Villacorta ("Villacorta") and hundreds of other employees. Villacorta sued Cemex for wrongful termination. Villacorta alleged he was terminated based on his race (Filipino). Villacorta found a new job eight months later. However, the job was not local. His commute to the new job was approximately four to six hours round-trip depending on traffic, so Villacorta rented a room closer to his new employment and only returned home to his family on the weekends. Villacorta prevailed in his wrongful termination lawsuit against Cemex approximately three years after his termination, and was awarded three years of salary (approximately $198,000) instead of eight months of salary (approximately $42,000) as damages. The Court of Appeal upheld the award because the replacement job was inferior in that Villacorta was not able to see his family during the workweek and had to pay for two residences - one for his family and one for himself - during the week.

In today's tough economy and job market, layoffs, reductions in force, and terminations may be necessary and comparable replacement work might not be readily available to former employees. This case serves as a reminder to ensure that layoffs, reductions in force, and terminations are handled properly and are well documented. Employers should remember that they cannot rely on different or inferior re-employment to mitigate wrongful termination damages, and might consider offering severance packages for higher risk terminations.

DID YOU KNOW...

Same sex heterosexual employees CAN sexually harass each other. Sexual motivation or interest is not a prerequisite to sexual harassment under the Fair Employment and Housing Act (FEHA). Heterosexual employees may be subjected to harassment because of sex if attacks on their heterosexual identity are used as a weapon of harassment at work. (e.g. harassing conduct insinuating straight employees are gay). Taylor v. Nabors Drilling USA, LP, 222 Cal.App.4th 1228 (2014).

Wilke Fleury

Apr 2014

Labor & Employment News

Vol. 17, No. 3

Employers cannot remove PAGA actions to federal court

By: Bianca S. Watts
bwatts@wilkefleury.com

The California Labor Code Private Attorneys General Act of 2004 ("PAGA") does not provide a basis for employers to remove PAGA actions from state to federal court. PAGA allows employees to bring claims on behalf of the State of California against their employers. PAGA claims seek statutory penalties for violations of the California Labor Code, such as overtime and meal and rest period violations. Under PAGA, employees can bring the action on their own behalf and on behalf of other aggrieved employees and recover twenty-five percent of the statutory penalties, in addition to attorneys' fees and costs. (The State retains seventy-five percent of the statutory penalties.)

In Baumann v. Chase Inv. Services Corp., 2014 WL 983587 (9th Cir., March 13, 2014, 12-55644), Baumann sued his employer in California state court under PAGA based on statutory violations for withheld overtime pay. Baumann did not assert any federal claims. However, Baumann's employer removed the action to federal court based on the federal Class Action Fairness Act of 2005 ("CAFA"), which confers original jurisdiction in federal courts for certain class actions. Baumann's employer argued that the PAGA claims were a class action under CAFA. The district court found removal to federal court was proper. The Ninth Circuit Court of Appeal reversed. The Court of Appeal held that the district court did not have original jurisdiction over Baumann's removed PAGA suit under CAFA. The Court of Appeal determined that PAGA actions are not sufficiently similar to federal class actions because they are not claims for class relief. Rather, they are enforcement actions "filed on behalf of and for the benefit of the state." Accordingly, CAFA did not provide a basis for federal jurisdiction of the PAGA lawsuit.

When employers are served with a lawsuit by their employees, one of the first considerations for defending that lawsuit will be deciding venue for the action in state or federal court. Employees generally file employment actions in State court. Employers oftentimes prefer to defend employment lawsuits in federal court. Federal courts have stricter pleading requirements, expedited discovery schedules, and may even be considered more employer friendly. Employers need to establish a grounds for federal jurisdiction in order to remove a state action to federal court. PAGA will not provide grounds for removing an action from state to federal court. But, a federal court may allow a PAGA action to proceed in federal court if the federal court has other grounds for establishing federal jurisdiction.

DID YOU KNOW...

Employees have one year from the date of an allegedly wrongful act to file a complaint with the Department of Fair Employment and Housing under the Fair Employment and Housing Act (FEHA). Parties to a contract can agree to shorten statutes of limitation as long as the shortened period is reasonable, BUT employers probably cannot shorten the FEHA statute of limitations. Ellis v. U.S. Security Associates, 14 Cal. Daily Op. Serv. 3098 (Cal. Ct. App., Mar. 20, 2014) (six-month period not enforceable).

Wilke Fleury

May 2014

Labor & Employment News

Vol. 17, No. 4

Employers may be liable for constructive discharge based on failing to reimburse necessary work expenditures

By: Samson R. Elsbernd
selsbernd@wilkefleury.com

Employees who resign sometimes sue their employer for constructive discharge. An employee is constructively discharged under California law when the employer intentionally creates or knowingly permits working conditions that are so intolerable that a reasonable person in the employee's position would have been forced to resign. The conditions must be so objectively bad that the employee's only reasonable option is to resign or quit. This situation may arise when employers fail to reimburse non-exempt employees for necessary work expenditures.

In Vasquez v. Franklin Management Real Estate Fund, Inc., 222 Cal.App.4th 819 (2013), Vasquez drove his personal vehicle as part of his job and earned $10 per hour. Vasquez resigned after his employer failed to reimburse him for vehicle expenses (e.g., gasoline and maintenance), and sued his employer for constructive discharge. Vasquez alleged he was unable to meet basic living expenses and effectively earned less than the state minimum wage because he had to apply his wages towards his vehicle expenses. Vasquez also alleged that he repeatedly asked for reimbursement from his supervisors, and that his supervisors were aware of his financial situation. The court of appeal allowed Vasquez to proceed with his claim because a reasonable trier of fact could find that an employee had no option but to resign when an employer passes on its operating expenses to a low wage worker by failing to reimburse the employee for the expenses.

Employers should be mindful that they are statutorily obligated to reimburse employees for necessary work expenditures. Failing to reimburse employees for expenses the employer should have covered will not generally be sufficient to pursue a constructive discharge claim. However, it may when the employee's hourly wage is close to the minimum wage. **(The minimum wage will increase from $8.00 per hour to $9.00 per hour beginning July 1, 2014.)** More commonly, employees will seek recovery of unreimbursed expenses by filing a claim with the Labor Commissioner. Awards for reimbursement carry 10% interest.

DID YOU KNOW...

When an employee takes leave under the Family and Medical Leave Act (FMLA), employers must return the employee to work after receiving a certification from the employee's health care provider that the employee is able to work. But, employers may require a fitness for duty exam thereafter if they have reason to question the health care provider's opinion. White v. County of Los Angeles (Cal. Ct. App., Apr 15, 2014) 22 Wage and Hour Cas.2d (BNA) 676.

Wilke Fleury

June 2014

Labor & Employment News

Vol. 17, No. 5

Arbitration agreements can be enforced even though employers reserve the right to alter or terminate them

By Samson R. Elsbernd
selsbernd@wilkefleury.com

Arbitration agreements are commonplace in California employment relationships. As with employee handbooks, employers may attempt to reserve the right to modify their arbitration agreements with employees. The reservation of this right may be unilateral, meaning that the employer can modify or terminate the agreement but the employee cannot change his or her mind about the agreement. Such modification clauses are not illusory because the law implies a promise by the employer to exercise its right in good faith and pursuant to fair dealings, and hence, these modification clauses may be enforced.

In Casas v. Carmax Auto Superstores California, LLC, 224 Cal.App.4th 1233 (2014), an employee sued his employer and the employer moved to compel arbitration pursuant to an arbitration agreement. The trial court refused to enforce the arbitration agreement based on the employer's unilateral modification clause. The court of appeal reversed. In upholding the employer's modification clause, the court of appeal noted that the arbitration agreement was separate from (and not lost within) an employee handbook and required notice to the employees by a date certain each year of any modifications. However, the court of appeal would not enforce a provision of the arbitration agreement applying the agreement in effect at the time the employer received the claim. Instead, the arbitration agreement in effect at the time the claim arose applied, notwithstanding any subsequent modification to the arbitration agreement by the employer after the claim arose. Nevertheless, the employer's arbitration agreement contained a savings clause to modify the provision to comply with the law, so the employer's modification clause could be enforced.

California employers have some authority now for unilaterally reserving the right to modify or terminate their arbitration agreements with employees. Employers should make sure their arbitration agreements are not lost within other employment documents, and should include a savings clause to modify any arbitration provisions that conflict with the law to conform to the law. Employers should also consider providing advance notice to employees, though the failure alone to provide advance notice will not make the agreement illusory since employers must exercise their right to modify in good faith and pursuant to fair dealings with employees.

DID YOU KNOW...

Employees who are terminated for failing to fulfill important functions of their position cannot demonstrate that their employer's reasons were untrue or pretexutal based simply on after-acquired evidence years after the termination that the employer was not damaged by their failure to perform. Serri v. Santa Clara University, 14 Cal. Daily Op. Serv. 5922 (Cal. Ct. App., May 28, 2014) (discrimination claim on motion for summary judgment).