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— *Labor & Employment Law* —
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Labor and Employment Law Update

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- The U.S. Department of Labor issued an "Administrator's Interpretation" aimed at curbing the misclassification of employees as independent contractors.

California's Sick Leave Law

Effective July 1, 2015, the Paid Sick Leave Law affects all employers regardless of size or industry, with exceptions for companies with unionized employees, home health care workers and certain airline employees. Employers, who must comply with the new law and its reporting requirements, should do the following if they have not done so already:

- Review any existing sick leave policy to confirm that it complies with the new law.
- Analyze and make decisions about how the company will offer and track sick leave benefits.
  - Determine whether leave benefits will be provided lump sum or will the benefits accrue over time?
  - If the accrual method is chosen, will the company limit the accrual to 24 hours/3 days, or allow some larger number of hours/days of sick leave per year?

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- Will leave benefits be included in an existing Vacation/Paid Time Off policy, or will a separate sick leave bank be created?

If the leave benefits are included in an existing Paid Time Off policy, the employer will have to pay any unused Paid Time Off at the end of employment. However, if the sick leave bank is kept separate from existing vacation/paid time off banks, which does create another bank of time to keep track of, the law does not require payment of any unused leave at the end of employment.

- Do you want to impose a 90-day waiting period on use of the sick leave?
- How will you give notice of the company's sick leave policy?
- How will you give notice of the employee's usage every pay period, as required by law?

The new law creates a rebuttable presumption of retaliation where an employer denies the use of sick days or takes adverse action within 30 days of an employee having made a complaint under the new law.

- Therefore, companies must train management so that they are careful not to create a basis for retaliation,

Paid sick leave may be used for the employee or a family member "for the diagnosis, care or treatment of an existing health condition or preventive care."

- Employers may only ask for doctor's notes when the employee uses a certain number of days in a row or the employer has a reasonable basis for believing the employee is not using their sick leave for a legitimate purpose.

DISCRIMINATION

Rite Aid Hit For $8.7 Million Jury Verdict Including $5 Million In Punitive Damages

A California jury found Rite Aid liable for $3.7 million in lost wages, plus another $5 million in punitive damages for Robert Leggins, a former Rite Aid manager, who sustained a neck injury during a robbery of the store he was managing. Despite the fact that Leggins's neck injury required multiple surgeries, his supervisors forced him to perform hard manual labor, mocked him for his injury, and often accused him of faking his injury to avoid tasks involving manual labor. Leggins alleged race discrimination in addition to disability discrimination, as he alleged he had endured a stream of race-related insults, including a manager telling him that "all black people do is complain," when he asked the district manager for a transfer to a smaller store to accommodate his neck injury. While the jury did not find for Leggins on his race discrimination complaint, it did find that management's actions and Rite Aid's systematic efforts to terminate him over the course of two-years of written warnings, did amount to compensable disability discrimination.

Ex-Rite Aid Employee Claims $8.7M Win In Discrimination Row, Law360 (July 21, 2015), Kat Greene.

RETALIATION / DEFAMATION

Kaiser Doctor Settles For An Undisclosed Amount Prior To Reaching Punitive Damages Phase After Jury Verdict Awarded Him $1.75 Million

Plaintiff, Dr. Wascher, sued his former employer for retaliation against his patient advocacy. Plaintiff contended that he attempted to raise three primary patient care concerns: (1) lack of timely access to surgery for cancer patients; (2) general surgeons doing complex cancer cases they were not qualified to perform; and (3) that there was no comprehensive cancer care program at Kaiser Orange County. Dr. Wascher claimed he was defamed and was not allowed to become partner at SCPMG. Defendants denied they had treated him unfairly and claimed that the defamation occurred during the course of a confidential HR investigation where those who were interviewed were asked their opinion about Dr. Wascher. The jury awarded Wascher $1.75 Million and found malice. The case then settled for an undisclosed amount prior to reaching the punitive damages phase.

Wascher, M.D. v. Southern California Permanente Medal Group, Los Angeles Daily Journal, Verdicts and Settlements (July 31, 2015) Orange County Superior Court, Case Number: 30-2011-00523323.

WAGE AND HOUR

California Passes Precedential Law Mandating Minimum Wage for Professional Cheerleaders

Governor Brown signed a bill into law that requires professional football and basketball teams to classify their cheerleaders as employees and pay them at least minimum wage. California is the first state to pass this type of law, which requires not only minimum wage for the cheerleaders, but also that they be paid for the time they spend representing the teams whether it is at the games or some other non-game day event.

You may remember the landmark case against the Raiders, which settled for $1.25 million, and covered 90 cheerleaders who had been paid a paltry $1,250 for working a full season, amounting to less than $5 per hour for all time spent rehearsing, performing and appearing at special events.

Cheerleaders Score As Calif. Gov. OKs 1st-of-Kind Wage Bill, Law360 (July 16, 2015), Benjamin Horney.

FLSA

The U.S. Department of Labor (DOL) issued guidance aimed at curbing the misclassification of employees as independent contractors. The DOL's "administrator's interpretation" stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL pointed out how employees improperly labeled as independent contractors may miss out on many legal requirements such as minimum wage and overtime pay. In the interpretation the DOL stated that the main question is whether the worker is genuinely in business for herself, and thus an independent contractor, or if the worker is economically dependent on the employer, which would most likely require the worker to be classified as an employee. The DOL then discussed the six economic realities factors that must be addressed in order determine the proper classification of the worker as employee or independent contractor. The factors are intended to serve as a road map for determining economic dependence or independence, and no single factor, such as the degree of the employer's control or whether the work performed is integral to the business, is to be given too much weight.

Most Workers Employees Under FLSA, DOL Guidance Says, Law360 (July 15, 2015), Ben James.

NLRB

Circuit Court Relies Upon Common Sense To Arrive At Holding

The D.C. Circuit Court held that AT&T did not commit an unfair labor practice when it barred its employees who interacted with customers from wearing white shirts with black letters that said "Inmate#" on the front and "Prisoner of AT$T" on the back with vertical stripes above and below the lettering. The Court found that AT&T's decision "seems reasonable" and stated it is common sense that "No company, at least one that is interested in keeping its customers, wants its employees walking into people's homes wearing shirts that say 'inmate' and 'prisoner.'" The union had distributed the shirts to members as part of a campaign to put pressure on AT&T during contract negotiations. When hundreds of employees wore the shirts to work, their supervisors ordered all employees who worked in public or entered customers' homes to remove the shirts. One-day suspensions were issued to the 183 employees who refused, and the union filed an unfair labor practice complaint. AT&T argued that the "special circumstances" doctrine allowed it to ban the shirts because the shirts could alarm or confuse customers who might make them think that the employees actually were convicts, which could harm its relationship with customers or its public image. The NLRB, however, found the ban to be an unfair labor violation, stating that customers would not confuse the shirts for prison uniforms. AT&T successfully argued that the test was whether or not it was reasonable for the company to believe the shirts might hurt its public image.

Locking Up AT&T 'Prisoner' Shirts Just Makes Sense: DC Circ., Law360 (July 10, 2015), Margaret Harding.

Request for Police to Issue Criminal Citations to Picketers Is Not Unfair Labor Practice

The D.C. Circuit Court held that the Venetian Casino's request for police to issue citations to demonstrators was not an unfair labor practice, because the Court deemed it protected First Amendment speech. The Court overturned the decision of the National Labor Relations Board, which had found that the casino's actions amounted to an unfair labor practice. The circuit court held that the Noerr-Pennington doctrine immunizes employers from liability for conduct that would otherwise violate the National Labor Relations Act, when that conduct constitutes a direct petition to government, which is protected by the First Amendment.

Call to Ticket Union Protesters is Protected, DC Circ. Rules, Law360 (July 10, 2015), Kelly Knaub.

IN THE TRENCHES

$15 Million Wage-and-Hour Class Action Settlement Paid by Verizon California

The class alleged Verizon failed to provide accurate wage statements, because it failed to list the beginning date of the period and it failed to list the hourly rates and hours worked during the period. As a result employees were not paid the correct double time rate and might not have been paid the overtime to which they were entitled. The parties settled for $15 million.

Hector Banda v. Verizon California Inc., Los Angeles Daily Journal, Verdicts and Settlements (July 31, 2015) Los Angeles Superior Court, Case Numbers: BC434587, BC 442358.

$8.75 Million Wage-and-Hour Settlement Paid By Temporary Employment Agency

The class alleged that manpower Inc. a temporary employment agency violated California Labor Law by failing to furnish accurate wage statements and by failing to pay timely all wages due to employees who received their wages by mail.

Vera Willner v. Manpower, Inc., Los Angeles Daily Journal, Verdicts and Settlements (July 24, 2015) U.S. District Court for the Northern District of California, Case Number: 3:11-cv-02846-JST

$3.25 Million Wage-and-Hour Settlement Paid By Continental Airlines

Benjamin Castro, on behalf of all similarly situated employees, alleged Continental failed to provide accurate itemized wage statements identifying all required information. The parties settled for $3.25 Million.

Benjamin Castro v. Continental Airlines Inc., Los Angeles Daily Journal, Verdicts and Settlements (July 24, 2015) U.S. District Court for the Central District of California, Case Number: 2:14-cv-00169-SVW-AGR.

$2.25 Million Wage-and-Hour Settlement Paid By REI

A class of hourly, non-exempt workers, has settled with their employer REI for $2.25 million. The class alleged that REI failed to pay all wages owed to them. They alleged failure to pay for all hours worked, including failure to pay for overtime compensation, minimum wages for work done off the clock, and meal and rest periods. The class of approximately 5,000 members will share in the settlement.

REI, without admitting liability, agreed to non-monetary relief under the settlement by making policy changes, including agreeing to remind store management to make sure that post-shift security checks are conducted quickly and efficiently.

Macias v. Recreational Equipment Inc., Los Angeles Daily Journal, Verdicts and Settlements (July 2, 2015) U.S. District Court for the Northern District of California, Case Number: 5:14-cv-00300-PSG

$1 Million Wage and Hour Settlement For Class of 2,400 Janitors

A group of janitors who worked for Ross Dress for Less stores alleged that the retailer and its janitorial contractor USM Services Inc. violated CA Labor Law by entering into inadequately funded agreements with subcontractors resulting in unpaid minimum wage and overtime wages. With no admission of wrongdoing by Ross or USM, the parties settled and the 2,400 janitors will share in $1,000,000 to be funded by USM.

Federico Vilchiz Vasquez v. USM Inc., Los Angeles Daily Journal, Verdicts and Settlements (July 10, 2015) U.S. District Court for the Northern District of California, Case Number: 3:13-cv-05449-JD

As always, please do not hesitate to contact any of our attorneys if you have any questions or comments.

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