Annual Labor & Employment Law Update

December 10, 2019

Presented by Best Best & Krieger LLP

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New Legislation

THE NEW BILLS

AB5 – USE OF CONTRACTORS

The new *ABC* test under AB5:

Presumption that worker is an employee, unless:

A- The contractor is **free from the control and direction** of the agency.

B- The contractor performs work **outside the usual course** of the agency's business.

C- The contractor is **customarily engaged in the trade**.

*Need to satisfy all three

COMPARE - *Borello* factors:

1 - Contractor uses his or her own tools and workspace

2 - Contractor is a skilled specialist without need of supervision

3 - Contractor is involved in distinct business

4 - The relationship with Contractor is finite (not ongoing)

5 - Contractor is paid by invoice rather than payroll

6 - Work is not agency's usual business

7 - Business views worker as Contractor

*No single factor controlling

AB5 – EXCEPTIONS

AB5 generally exempts the following occupations from the ABC test:

1. Licensed insurance professionals.
2. Physicians, surgeons, dentists, etc.
3. Lawyers, architects, engineers, private investigators, and accountants.
4. Securities brokers and investment advisors.
5. Direct salespersons.
6. Commercial fishermen

NOTABLE Exceptions

AB9 – FEHA Statute of Limitation

AB9 extends the time period for filing a discrimination or harassment claim under the *Fair Employment & Housing Act*:

- Increased from one year to three years from the date of violation.
- Will not revive claims that otherwise are already lapsed, but will provide extended life once effective as of January 1, 2020.
- Charges filed under *Unruh, Ralph (hate crimes), or Bane Acts (threats, intimidation)* will remain subject to a one-year time limit.

AB25 – AMENDMENT TO THE CONSUMER PRIVACY ACT

<u>The *California Consumer Privacy Act (CCPA)* becomes effective January 1, 2020:</u>

- Grants consumers right to know, access, and request deletion of their data.
- AB25 clarifies rights apply to employees, contractors, emergency contacts, and dependents/spouses of employees.
- AB25 delays the obligation to inform consumer as to categories of information to be collected until January 1, 2021.

AB51 – Prohibition Against Mandatory Arbitration Agreements

AB51 pushes greater restrictions on employment-based Arbitration Agreements:

- Prohibits employers from *requiring* employees waive any right, forum, or procedure for a violation of FEHA or the Labor Code.
- Prohibits threats, retaliation, or discrimination against employees who refuse to waive such right, forum, or procedure.
- Prohibits Arbitration Agreement that require affirmative action to "opt out" in order to preserve employee rights.
- Does not invalidate Arbitration Agreements governed by the *Federal Arbitration Act.*

AB547 – JANITORIAL INDUSTRY HARASSMENT TRAINING

AB547 addresses harassment training for the janitorial industry:

- Existing law provides janitorial workers protections, including biennial sexual violence and harassment training.
- AB547 requires the state to convene a training advisory committee to identify qualified trainers for in-person training for janitorial employees.
- AB547 requires the state to post qualified training organizations to post information on Division of Labor Standards Enforcement website by January 1, 2021.

AB673 – WAGE-AND-HOUR PENALTIES

AB673 expands employee rights to collect penalties for an employer's failure to timely pay wages:

- AB673 clarifies that employee may recover penalties under Section 210 of the Labor Code at Labor Commissioner or via a PAGA claim (though not both).
- Effective January 1, 2020.

AB749 – BANS “NO REHIRE” CLAUSES IN SETTLEMENTS

AB749 make it against public policy to preclude rehire by employer or affiliated companies as part of a settlement agreement:

- Historically, employers want to ensure no claims of discrimination in refusal to consider for rehire and include provisions asserting “no rehire” in resolution of claims.
- AB749 prohibits and invalidates all such provisions that can be interpreted to prevent workers from obtaining employment with settling employer or affiliated companies.
- Effective as of January 1, 2020 per newly created Section 1002.5 of the California Code of Civil Procedure.

AB1223 – EXPANDED LEAVE FOR ORGAN DONORS

<u>AB1223 expands existing leave entitlement for organ donors:</u>

- Previous law mandates that employers with 15 or more employees provide up to 30 days of *paid* leave to organ donors in any one-year period.
- Effective January 1, 2020, AB1223 will provide an *additional* 30 days of *unpaid* leave be made available to organ donors in any one-year period.

AB1805 – OSHA REPORT

AB1805 refines the test for reporting "serious injury or illness" to CalOSHA:

- Historically, employers must report to CalOSHA when (1) hospital for 24 hours; (2) suffering loss of member of body; or (3) permanent disfigurement.
- AB1805 eliminates the 24-hour hospital requirement, but clarifies that hospital stay must be for "other than medical observation or diagnostic testing."
- AB1805 also expressly includes loss of eye in definition of "loss of member."
- Effective January 1, 2020.

SB30 – DOMESTIC PARTNERSHIP EXPANSION

<u>SB30 expands the current definition of “Domestic Partner” in California:</u>

- Current law allows Domestic Partners but requires the couple to be same-sex or over 62 years in age.
- Effective January 1, 2020, SB30 removes these restrictions.

SB142 – LACTATION ACCOMMODATIONS

SB142 expands lactation accommodation requirements:

- Current law requires reasonable time to express milk for infant without loss of pay, unless undue hardship. Employers must “make reasonable efforts” to provide a private location, other than a restroom, near the work area.
- SB142 sets out parameters of acceptable spaces: (1) shielded from view; (2) free from intrusion; (3) close to work area; (4) safe, clean and free from hazmat; (5) place to sit and surface for pump; (6) access to electricity; and (7) sink and refrigerator or cooler near.
- SB142 requires employer to adopt a “lactation accommodation” policy.
- SB142 also requires new buildings and those undergoing significant improvements to build in “lactation spaces” for employees with set parameters.

SB188 –DISCRIMINATION BASED ON NATURAL HAIR

SB188 prohibits discrimination on the basis of natural hair:

- SB188, also known as the *CROWN Act* (Create a Respectful and Open Workplace for Natural Hair) notes that prohibition on natural hair styles has a disparate impact on black individuals.
- SB188 expands the definition of “race” under the FEHA to include “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.”
- Effective January 1, 2020.

SB688 – UNPAID WAGES

SB688 expands the enforcement ability of the California Labor Commissioner:

- Previously, the Labor Commissioner could only enforce actions for violations alleging unpaid minimum wages.
- SB688 amends Labor Code section 1197.1 to allow enforcement where the employer has contractually promised to pay more than minimum wage but failed to pay.
- Effective January 1, 2020.

SB778 – DEADLINE FOR ANTI-HARASSMENT TRAINING

SB778 extends the deadline for California employers to come into compliance with anti-harassment training requirements:

- Recall that under last year's law, employers with 5 or more employees must provide at least two hours of training for supervisors and one hour of training for non-supervisors by January 2020.
- SB778 extends the deadline to comply to January 1, 2021 and clarifies that an employer who has provided training in 2019 is compliant for two years.

PENDING NEW REGULATION: PRE-EMPLOYMENT INQUIRIES

Pending before the Fair Employment & Housing Council are regulations affecting pre-employment inquiries:

- Prohibiting terms in advertisements that deter older workers, such as “college student” or “digital native,” except where a bona fide occupational requirement.
- Prohibiting pre-employment inquiries that may directly or indirectly divulge age, such as age, date of birth, or graduation dates, except where a bona fide occupational requirement.
- Prohibiting electronic or web-based applications that exclude candidates on blanket assessments of schedule availability without regard to need for accommodation on basis of religion, disability, or medical condition.

Wage & Hour Update

MINIMUM WAGE/OT EXEMPTION INCREASES

- Fair Wage Act of 2016:
  - $13.00 as of Jan. 2020 (26+)
  - $14.00 as of Jan. 2021 (26+)
  - Trend to $15 by 2022 (26+)
  - Several “Off Ramp” Provisions
- White Collar Exemption, Salary Req.:
  - FLSA – New DOL salary threshold rule ($35,568/yr)
  - California
    - $54,080/yr as of Jan. 2020 (26+)
    - $58,240/yr as of Jan. 2021 (26+)

NEW FLSA OVERTIME RULES RAISE SALARY THRESHOLDS

On September 24, 2019, the DOL issued new rules affecting the salary cutoffs for both “white collar” (EAP) and “highly compensated” (HCE) employees. The new rules take effect on January 1, 2020, and impact FLSA overtime exemptions in four principal ways:

1) The minimum weekly salary threshold is now set at $684 per week ($35,568 annualized) under the EAP test;
2) Certain nondiscretionary bonuses and incentive payments may be counted toward up to 10% of the minimum EAP salary amount;
3) The minimum annual salary threshold is now set at $107,432 under the HCE test; and,
4) The DOL will update the salary threshold amounts every four years.

ON-CALL EMPLOYEES REQUIRED TO TELEPHONE WORK SITE BEFORE START OF SHIFT ENTITLED TO REPORTING TIME PAY

Ward v. Tilly's, Inc. (2019) 31 Cal. App. 5th 1167

- IWC Order 7-2001 (Wage Order 7) requires a mercantile industry employer to pay reporting time pay to a non-exempt employee who is required to, and does, report for work but is not put to work or is furnished less than half his/her normally schedule day's work.
- Tilly's sales employees were required to contact stores two hours before the start of "on-call" shifts to learn whether they needed to work the shifts.
- Ward worked as a sales clerk in a Tilly's store. She filed a class action claiming Tilly's on-call scheduling system violated the reporting pay requirements of Wage Order 7.

ON-CALL EMPLOYEES REQUIRED TO TELEPHONE WORK SITE BEFORE START OF SHIFT ENTITLED TO REPORTING TIME PAY (cont'd)

Ward v. Tilly's, Inc. (2019) 31 Cal. App. 5th 1167

- Trial court ruled Tilly's did not owe reporting time pay under Wage Order 7 because sales clerks did not *physically appear* at their assigned stores before the start of their scheduled shifts. Ward appealed.
- Held:
  - The appellate court reversed.
  - "Reporting for work" means presenting oneself *as ordered* – whether by appearing at a job site, logging onto a computer remotely, or phoning in before the start of a shift.
  - Tilly's advance call-in requirement triggered the reporting time pay provisions of Wage Order 7.

PAGA DOES NOT PERMIT RECOVERY OF UNPAID WAGES FOR OVERTIME VIOLATIONS UNDER LABOR CODE SECTION 558

ZB, N.A. v. Superior Court (2019) 8 Cal. 5th 175

- Ward worked for Bank as an hourly employee. Ward signed Bank's employee handbook mandating binding arbitration to resolve any legal controversy or claim arising out of her employment and waiving the right to bring arbitration claims against Bank as a class action.

- PAGA empowers California employees to bring suit in court on behalf of themselves and other aggrieved employees to recover civil penalties previously recoverable only by the Labor Commissioner.

- Under California law, pre-dispute agreements waiving an employee's right to bring PAGA claims are unenforceable.

PAGA DOES NOT PERMIT RECOVERY OF UNPAID WAGES FOR OVERTIME VIOLATIONS UNDER LABOR CODE SECTION 558 (cont'd)

ZB, N.A. v. Superior Court (2019) 8 Cal. 5th 175

- Ward sued Bank alleging failure to pay overtime and minimum wages, along with other State wage law violations. Ward's lawsuit included a PAGA claim based on California Labor Code section 558 (Section 558). Section 558 gives the Labor Commissioner authority to issue overtime violation citations for "a *civil penalty* as follows:

  (1) For any initial violation, [$50] for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*.

  (2) For each subsequent violation, [$100] for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*." Ward argued Section 558 made the underpaid overtime wages of all affected Bank employees a component of the civil penalties recoverable under PAGA. Bank argued the underpaid wages referenced in Section 558 were not civil penalties at all and that Ward was limited to an individual arbitration of her claim for underpaid wages.

- Ward argued Section 558 made the underpaid overtime wages of all affected Bank employees a component of the civil penalties recoverable under PAGA. Bank argued the underpaid wages referenced in Section 558 were not civil penalties at all and that Ward was limited to an individual arbitration of her claim for underpaid wages.

PAGA DOES NOT PERMIT RECOVERY OF UNPAID WAGES FOR OVERTIME VIOLATIONS UNDER LABOR CODE SECTION 558 (cont'd)

ZB, N.A. v. Superior Court (2019) 8 Cal. 5th 175

- The lower court ordered the parties to arbitrate the Section 558 claim as a class action for the unpaid wages of *all* aggrieved Bank employees. Bank appealed.
- California Supreme Court disagreed with the lower court and held:
  - The amount referenced in Section 558 for unpaid wages was not a civil penalty recoverable through a PAGA action.
  - The underpaid wages component in Section 558 functions as compensatory relief for employees *in addition to* civil penalties.
  - Ward was not entitled to pursue a claim for underpaid wages on behalf of other Bank employees under Section 558.

MCDONALD'S NOT A JOINT EMPLOYER FOR CALIFORNIA IWC ORDER LIABILITY

Salazar v. McDonald's Corp., No. 17-15673 (9th Cir. 2019)

- Plaintiffs were employees at various McDonald's franchises.
- McDonald's required local franchisees to use McDonald's computer systems to operate their restaurants – including a system for employee scheduling, timekeeping, and determining overtime pay. McDonald's also required managers to train at its "Hamburger University" and required all employees to wear standard uniforms.
- Local franchisees interviewed and hired new employees, trained non-managerial employees, set employee wages, paid employees from the franchisees' own bank accounts, set work schedules, monitored time entries, and exercised hiring, firing and disciplinary authority over the employees. McDonald's did not perform any of those functions.
- Plaintiffs sued the franchise owners *and* McDonald's claiming both were liable as joint employers for alleged meal/rest break and overtime violations under California IWC orders.

MCDONALD'S NOT A JOINT EMPLOYER FOR CALIFORNIA IWC ORDER LIABILITY (cont'd)

Salazar v. McDonald's Corp., No. 17-15673 (9th Cir. 2019)

Held:

- McDonald's was not a joint employer because it did not exert direct or indirect control over the employees' hiring, firing, wages, hours and working conditions.
- McDonald's involvement with the franchisees' workers was simply incidental to McDonald's efforts to maintain its brand standards.
- McDonald's was not responsible for preventing IWC wage order violations by the franchisees, even though the franchisees used McDonald's computer systems, because there was no employer-employee relationship between McDonald's and the franchisees' workers.

Harassment, Discrimination, Retaliation

Jimenez v. USCM, Inc.
41 Cal.App.5th 189 (2019)

- USCM contracts with staffing company Ameritemps to supply temporary employees; Plaintiff Jimenez was placed at USCM by Ameritemps
- Jimenez's salary was paid by Ameritemps; Ameritemps tracked her time with a time clock it provided; and Ameritemps had the ultimate right to terminate her employment
- Jimenez was supervised on a daily basis by a USCM employee; she was subject to USCM's employee handbook (including for disciplinary purposes); and USCM could terminate her services in the same manner as it terminated services of its direct employees
- Bottom line: The day-to-day work experience for temporary and direct employees at USCM was virtually identical.

Jimenez v. USCM, Inc.
41 Cal.App.5th 189 (2019)

- Jimenez was investigated by USCM as a result of bullying complaints made against her, and she was issued a warning.
    - During the investigation Jimenez raised allegations of harassment against a co-workers, first to USMC and then to Ameritemps.
    - Investigation concludes the allegations could not be corroborated, so no disciplinary action was taken.
- USCM subsequently terminates Jimenez's services, and then Ameritemps terminates her employment.
- Jimenez files suit against USCM and her co-worker, alleging various FEHA claims.
    - Ameritemps was originally named as a defendant, but was dismissed.
- Jury concludes that Jimenez that was not an employee of USCM, which defeats all of Jimenez's claims.

Jimenez v. USCM, Inc.
41 Cal.App.5th 189 (2019)

- The Court of Appeal reversed the judgment in favor of USCM.
- A contracting employer's status as employer must be considered individually, and not in relation to that of the direct employer.
    - While FEHA requires a claimant to demonstrate, as a threshold matter, an employment relationship with her alleged employer, the relationship need not be direct.
    - Rather, the employment relationship must show the employer's exercise of direction and control over the employee, i.e.,
        - whether the employee must obey instructions from the employer, and
        - whether the employer had a right to terminate the employee's services at any time.

Jimenez v. USCM, Inc.
41 Cal.App.5th 189 (2019)

- Although USCM did not hire Jimenez, pay her, provide her benefits, or track her time, undisputed evidence demonstrated that it nonetheless exercised considerable direction and control of the terms, conditions, and privileges of her employment.
- The appropriate inquiry was whether USCM terminated Jimenez' services from USCM (which USCM did), and not whether USCM terminated Jimenez' employment with Ameritemps (which USCM did not do).

Gupta v. Trustees of the CSU 40 Cal.App.5th 510 (2019)

- Plaintiff Rashmi Gupta, an American woman of Indian national origin and ancestry, was hired by San Francisco State University (SFSU) in 2006 as a "tenure track assistant professor" in the School of Social Work, College of Health and Social Sciences.
- In November 2009, Gupta and several other women of color in the School of Social Work met with the SFSU Provost and College Dean Don Taylorto discuss "faculty concerns" relating to "abuse of power and authority, excessive micromanagement, bullying, and the creation of a hostile work environment."

Gupta v. Trustees of the CSU 40 Cal.App.5th 510 (2019) (cont'd)

- Two months later, Gupta receives a fourth-year review that was critical of her performance in all three areas used to evaluate tenure, despite the fact that she received positive reviews the year prior.
- Gupta sends emails to a colleague complaining that her workplace was hostile towards women of color and that Taylor was among those responsible.
- At a March 2010 faculty meeting, Taylor became enraged at Gupta for sending the emails and told her, "I'm going to get even with you."
- Taylor denies Gupta's request for early tenure the following year, and thereafter consistently recommends against granting her tenure.

Gupta v. Trustees of the CSU 40 Cal.App.5th 510 (2019) (cont'd)

- While Gupta was denied tenure, SFSU granted tenure to another professor in the School of Social Work – Dr. J.H. – whose "Student Evaluation of Teaching Effectiveness" (SETE) scores were far lower than Gupta's and who had not met the minimum publication requirements.
    - Gupta, in contrast, had more than double the requirements for publication, in addition to the enthusiastic support of her students and colleagues.
- In June 2014, SFSU terminated Gupta's employment.
- Gupta sues SFSU for discrimination and retaliation.
- Jury verdict in favor of Gupta, finding that SFSU had retaliated against Gupta in denying her tenure and terminating her employment

Gupta v. Trustees of the CSU 40 Cal.App.5th 510 (2019) (cont'd)

- SFSU appeal argument:
  - Trial court erred in allowing Gupta to prevent evidence of a "comparator professors," without requiring Gupta to establish that her qualifications were "clearly superior" to comparator and by refusing to give a special jury instruction regarding comparator evidence.
- Court of Appeal affirms judgment in favor of Gupta.
  - Evidence supported the trial court's finding that Dr. J.H. and Gupta were similarly situated in all relevant respects.
  - Gupta was not required to show she was "clearly superior" to Dr. J.H. before presenting evidence regarding Dr. J.H.
  - For comparator evidence to be admissible at trial, all that is required is for the more favorably treated comparator to be "similarly situated" to the plaintiff "in all relevant respects."

EEOC v. Global Horizons
915 F.3d 631 (9th Cir. 2019)

- Global Horizons contracted with Growers to find and provide temporary orchard workers admitted to US as guest workers
- Two workers filed EEOC charges against Growers and Global Horizons alleging poor and unsafe working conditions based on their race and national origin (Thai)
- EEOC sued both Growers and GH under Title VII – "joint employer" issue

EEOC v. Global Horizons
915 F.3d 631 (9th Cir. 2019) *(cont'd)*

- Trial court granted Growers' motion to dismiss- their orchard-related matters distinct from non-orchard issues (housing, feeding, transportation & pay issues controlled by GH)
- 9th Circuit reversed - EEOC's pleading established joint employer liability based on common law agency test

Huerta v. Kava Holdings, Inc.
29 Cal.App.5th 74 (2018)

- Two restaurant workers sued; jury found for defendant on FEHA claims for harassment/ discrimination
- Court found action was not "frivolous" but awarded $50k based on defendant's CCP §998 offer
- REVERSED: Effective 1/1/2019, §998 offer doesn't apply to defense motion for fees and costs unless suit is determined to be "frivolous, unreasonable or groundless"

Ortiz v. Dameron Hosp. Assn. (2019) 37 Cal.App.5th 568

- Nancy Ortiz sued Dameron Hospital Assn. and her former supervisor (Alvarez) for national origin (Filipinio) and age discrimination and harassment
- The trial court granted defendants' motions for summary judgment because Ortiz could not make a prima facie showing of discrimination or harassment
  - Discrimination - because she cannot show that she suffered an adverse employment action
  - Harassment – because she cannot show that any of the complained of conduct was based on her national origin or age.
- Ortiz appealed and the Court of Appeals reversed

Ortiz v. Dameron Hosp. Assn. (2019) 37 Cal.App.5th 568 (cont'd)

Discrimination - 1: Constructive Discharge

- Despite Ortiz's resignation, Ortiz presented evidence that Alvarez intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of Ortiz's resignation that Ortiz was effectively forced to resign (i.e., constructive discharge)
    - Ortiz was not required to show that the Hospital knew of Alvarez's conduct in order to establish constrictive termination.

Ortiz v. Dameron Hosp. Assn. (2019) 37 Cal.App.5th 568 (cont'd)

Discrimination - 2: Alvarez acted with a discriminatory motive based on Ortiz's national origin/age

- Alvarez repeatedly criticized the employees' accents and supposed poor English language skills
  - Discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination.
- Alvarez also made several comments about age.
  - Because Alvarez is a supervisory employee, her discriminatory motive is imputed to the employer.

Ortiz v. Dameron Hosp. Assn. (2019) 37 Cal.App.5th 568 (cont'd)

- Harassment: Sufficient evidence
- Alvarez's constant criticism of the unit coordinators' accents and assumption that they could not speak English and did not know what they were doing.
- Alvarez transferred her to a unit where she had little experience and provided her with no training knowing that she would fail, falsely accused her of sleeping on the job, and told her she would likely be fired.
    - Alvarez's statements to others about Ortiz provided circumstantial evidence upon which to infer that Alvarez acted based upon Ortiz's national origin and/or age.

Disability Discrimination and Medical Leaves

Glynn v. Super. Ct. (11/13/19) (CA 2/4 B296735)

- A mistaken application of a valid employer policy may result in disability discrimination liability under FEHA
- The employee had sufficiently communicated to his employer that he believed the way he was treated (i.e. ignored and not accommodated for his alleged disability) was discriminatory and that the employer could not state a legitimate nondiscriminatory reason for the plaintiff's termination

Valtierra v. Medtronic Inc. (9th Cir. 2019) 934 F.3d 1089

- A terminated employee claimed that his obesity was a disability under the ADA and that his termination was illegal discrimination
- The District Court found that the employee could not prove that his obesity was caused by an underlying medical condition and therefore was not a protected disability
- The Ninth Circuit Court of Appeals did not decide whether obesity is a protected disability, concluding instead that there was no causal connection between his obesity and his termination which was for a valid reason

Valtierra v. Medtronic Inc. (cont'd)

- The Seventh Circuit Court of Appeals found that an obese job applicant could not prove a case of ADA discrimination based on the potential employer's concerns over possible future health conditions related to the applicant's obesity when the applicant was presently healthy with only a potential to become disabled
- Under California law both decisions might have a different outcome because obesity may be a disability if there is a physiological cause or if the employer regards the obesity as a disability

Garcia v. Salvation Army
(9th Cir. 2019) 918 F.3d 997

- Ann Garcia worked as a social services coordinator for the Salvation Army
- She decided to “leave the church,” but still continued her employment
- Tensions increased with her supervisor
- The situation worsened when a customer lodged a complaint against Garcia

Garcia v. Salvation Army (cont'd)

- Garcia commenced a leave of absence
- After she exhausted FMLA/CFRA, the employer extended her leave as an accommodation under the ADA
- When her doctor released her to return to full duty, she failed to return to work
- The Salvation Army terminated her employment

Garcia v. Salvation Army (cont'd)

- Garcia sued for ADA-related theories.
- On appeal, summary judgment for the employer was affirmed.
- **Held**: There is no obligation to provide a reasonable accommodation or engage in the interactive process once an employee is released to full duty.

Ross v. County of Riverside (2019) 36 Cal.App.5th 580

- Christopher Ross worked for the County of Riverside as a deputy district attorney
- In 2013, he told his supervisor he might be "seriously ill with a neurogenerative disease."
- He requested accommodations, including a reduced caseload and transfer to a different unit
- He took time off for testing at an out-of-state clinic

Ross v. County of Riverside (cont'd)

- The employer placed him on leave and requested a fitness for duty examination
- The employer also requested medical documentation of his condition as part of the interactive process
- When the employee did not produce the requested information, the County ordered him to return to work. The employee refused, claiming constructive termination

Ross v. County of Riverside (cont'd)

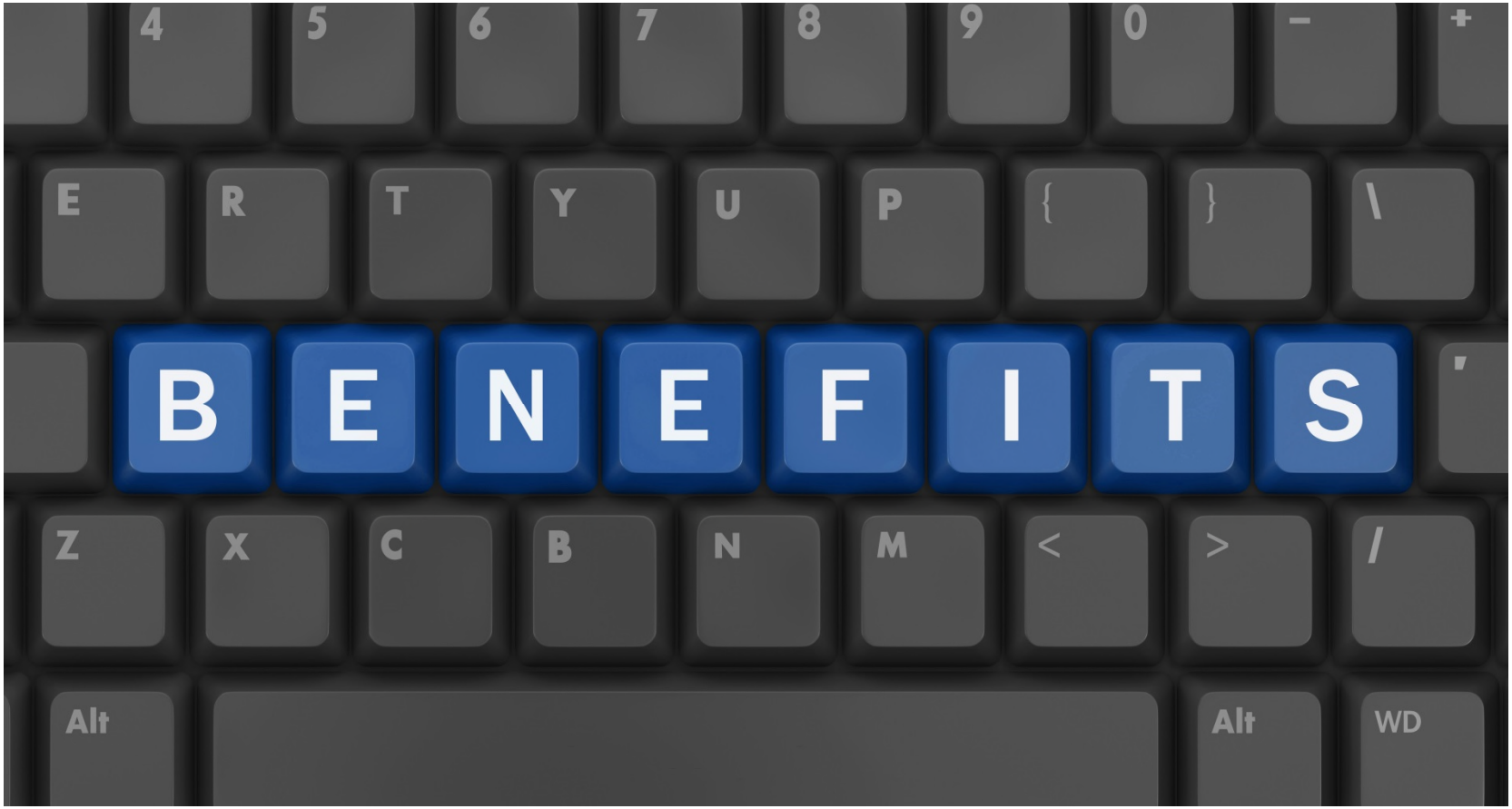
- The employee sued for disability-related theories. The trial court granted summary judgment for the employer, but the Court of Appeal reversed.
- **Held**: Question of fact existed as to whether the employee had, or was perceived to have, a qualifying disability

Department of Labor
Opinion Letter, March 14, 2019

- DOL issued an opinion letter addressing whether an employer can delay designating paid leave under FMLA
- **Answer**: No – if a FMLA-eligible employee communicates a need to take leave for a FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave

Department of Labor
Opinion Letter, Sept. 10, 2019

- In this letter, the DOL confirmed that, even if an MOU/collective bargaining agreement allows employees the right to delay receipt of FMLA, the employer is still obligated to designate the leave.
- Once aware of FMLA-qualifying leave, the employer must designate it.



Tax and Benefits Update

Overview

- Affordable Care Act Penalties
- AB 5/*Dynamex* vs. Common Law Test
- Constructive Receipt Doctrine
- Assignment of Income Doctrine

Affordable Care Act Penalties

- § 4980H penalties are being assessed
- **§ 4980H(a)**
  - Applicable large employer fails to offer minimum essential coverage to at least 95% of its full-time employees and their dependents; and
  - At least one full-time employee receives a premium tax credit

Affordable Care Act Penalties

- § 4980H(a)
  - 2016: $2,160
  - 2017: $2,260
  - 2018: $2,320
  - 2019: $2,500

- *Example* – ALE with 100 FTEs fails to offer MEC. One FTC receives a premium tax credit. $250,000 penalty.

Affordable Care Act Penalties

- **§ 4980H(b)**
  - Offered minimum essential coverage to at least 95% of its full-time employees (and their dependents); and
  - At least one full-time employee was allowed a premium tax credit because the coverage was unaffordable, did not provide minimum value, or the employee was not offered coverage.

Affordable Care Act Penalties

- § 4980H(b)
  - 2016: $3,240
  - 2017: $3,390
  - 2018: $3,480
  - 2019: $3,750

- *Example* – ALE with 100 FTEs offers MEC. One FTC receives a premium tax credit. $3,750 penalty.

Affordable Care Act Penalties

- Forms 1094-C and 1095-C
  - Accurate
  - On time

- Penalty notices

Common Law Employee Test

- AB 5/*Dynamex*
- Common law employee test
  - Behavioral
  - Financial
  - Type of Relationship

Common Law Employee Test

- Behavioral Control
  - Type of instructions given
  - Degree of instruction
  - Evaluation systems
  - Training

Common Law Employee Test

- Financial Control
  - Significant investment
  - Unreimbursed expenses
  - Opportunity for profit or loss
  - Services available to the market
  - Method of payment

Common Law Employee Test

- Type of Relationship
  - Written contracts
  - Employee benefits
  - Permanency of the relationship
  - Services provided as key activity of the business

Constructive Receipt Doctrine

- Income must be included when actually or constructively received.
  - Income is constructively received if it is credited to your account, set aside, or otherwise made available to you.
  - Income is not constructively received if there are substantial restrictions or limitations on your control of receipt.

Constructive Receipt Doctrine

- *Example* – Employer allows employees to cash-out vacation time upon election at any time during the year.

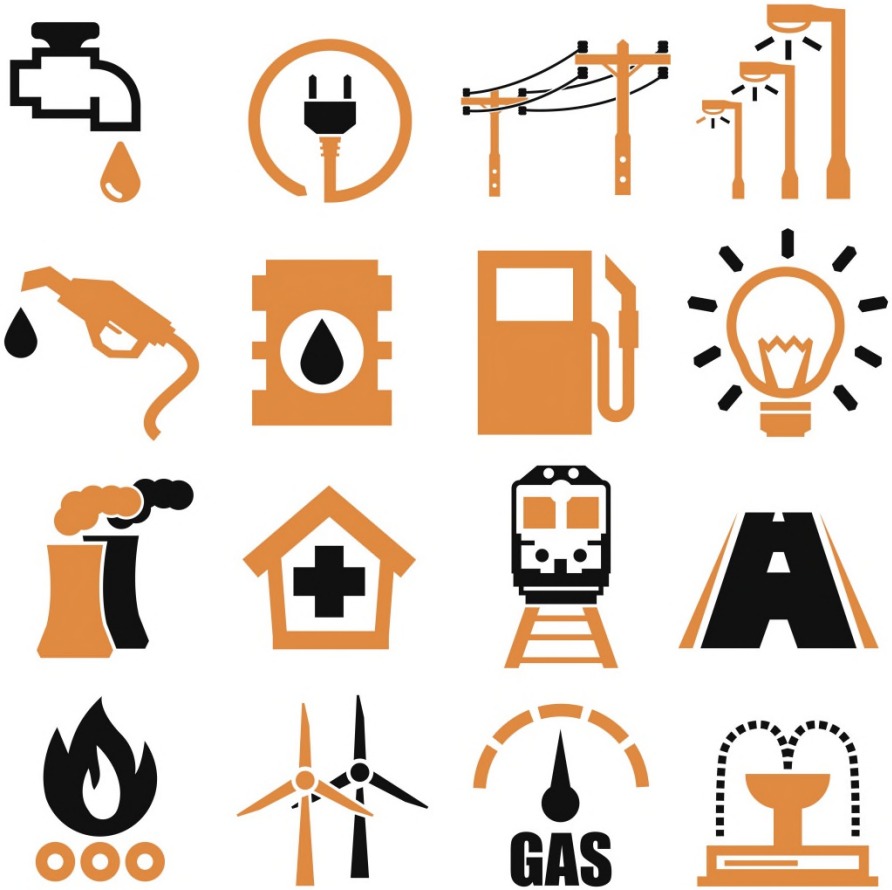
  Constructive receipt

- *Example* – Employer allows employees to make an irrevocable election on or before December 31 to cash out leave that will accrue in the following year.

  Substantial limitation

Assignment of Income Doctrine

- The individual who earns income is liable for the tax.
- *Example* – Leave donation that does not meet the requirements of a bona fide employer-sponsored medical leave sharing plan and/or a qualified employer-sponsored major disaster leave sharing plan.



Public Agency

Hernandez v. City of San Jose (9th Cir. 2018) 897 F.3d 1125

- Rally attendees sued San Jose Police Department alleging violation of due process rights
  - Police officers directed attendees through a single exit into a crowd of “violent counter-protesters”
  - City claimed qualified immunity for officers’ actions
- Qualified immunity protects government officials from civil lawsuits as long as their conduct does not violate “clearly established” rights that a reasonable person would have known about
  - Exception: if the officers place a person in more danger than the person would have experienced otherwise
- Ninth Circuit permitted rally attendees to proceed with lawsuit because found that officers were aware that rallies previously drew violent crowds, observed violence, and directed attendees through counter protestors

Conger v. County of Los Angeles (2019) 36 Cal.App.5th 262

- Conger was promoted to lieutenant pending a six month probationary period
- Then received notice that he was under investigation for actions taken before he was promoted, relieved of duty, placed on administrative leave and ultimately released from his probationary position
- Conger requested an appeal hearing pursuant to POBRA, but his request was denied internally, so Conger sued
- Held that Conger was not entitled to a hearing because he was released from the lieutenant position before the promotionary period and returned to his prior rank
  - No vested property interest in the lieutenant position
  - Also determined that Conger was not entitled to an administrative appeal because no further punitive action would result

Greisen v. Hanken
(9th Cir. 2019) 925 F.3d 1097

- Police chief discussed concerns about City's budgeting practices/ City Manager with Council members and others at City
- City Manager in turn initiated investigations into police chief, suspended him, informed the press of the investigations and eventually chief was terminated
- Former police chief sued alleging violation of his First Amendment rights
- Ninth Circuit held that former chief had provided sufficient detail about his speech to establish that it substantially involved a matter of public concern and that he was speaking as a private citizen, not public employee
    - Also determined that former City Manager was not entitled to qualified immunity

Walnut Creek Police Officers Association v. City of Walnut Creek (2019) 33 Cal.App.5th 940

- Senate Bill 1421 allows the public to obtain certain peace officer personnel records by making a PRA request
    - These include those relating to a peace officer who shoots a firearm at a person; a peace officer's use of force that results in death or great injury; or a sustained finding that a peace officer either sexually assaulted another or was dishonest
- California Court of Appeal found that under SB 1421, members of the public can request certain peace officer personnel records created before January 1, 2019
    - "Although the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law — a request for records maintained by an agency — necessarily occurs after the law's effective date."
- It was the date the record was requested, not the date it was created, that matters for purposes of SB 1421's application

Contra Costa County Fire Protection District (2019) PERB Decision No. 2632

- Contra Costa Fire Protection District granted longevity differential to all management, exempt and unrepresented employees
    - Refused union's proposal to give same benefit to represented employees with same qualifications
- Union filed unfair practice charge alleging that the District interfered with union and employee rights and discriminated against members based on protected activity
- PERB determined that District had violated the MMBA when it granted unrepresented employees a longevity differential but denied same benefits to represented employees
    - Found that this bargaining conduct was discriminatory and interfered even though no bad faith was alleged
- PERB ordered District to grant longevity benefit to represented employees with retroactive date (same time it was granted to unrepresented employees) plus interest

San Bernardino Community College District (2018) PERB Decision No. 2599

- District received reports that Community Service Officer leaving his assigned patrol area, so placed GPS on his car and confirmed that he was
- CSO's supervisor placed him in a room, asked him questions based on his whereabouts and asked him to provide a written statement
  - CSO asked for union representative
- PERB held that employee has the right to a union representative before submitting a written statement as part of an investigatory interview
  - CSO was entitled to representative before he was relieved of duty

County of Kern & Kern County Hospital Authority
(2019) PERB Decision No. 2659

- County/Hospital Authority contracted with private company to provide administrative, managerial and operatives services at its clinics at additional locations
    - These services were historically/traditionally performed by union represented employees and County did not give notice of this change
- Union argued that County violated the MMBA by subcontracting out these medical services
- PERB's general rule for subcontracting out decision within scope of bargaining:
    - a material portion of the employer's concerns underlying their subcontracting decision were amenable to bargaining,
    - the employer decided to use subcontracted employees to perform substantially the same types of job duties that bargaining unit employees perform, or
    - the employer unilaterally altered the status quo by adopting a new interpretation of the parties' MOU.
- PERB determined that all 3 criterion had been met when County made decision to subcontract out work

Thank you for attending.