NORTON ROSE FULBRIGHT

California employment update

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Speakers

Josh Henderson, Partner

Josh is an Employment and Labor partner in San Francisco and Los Angeles. He represents employers in a variety of industries in a broad range of employment and labor litigation and counseling.

Josh has practiced management-side labor relations law for nearly 25 years. Clients look to him for advice in navigating the ebbs and flows of this highly-regulated area of the law. His practice includes NLRB litigation; collective bargaining; due diligence in connection with corporate mergers and acquisitions; arbitrations, strikes and secondary boycotts, union elections, and related litigation. Also, through his national workplace safety and health practice, he provides strategic and practical advice on compliance with workplace safety regulations and defends employers in OSHA litigation in California and across the United States.

Speakers

Ryan McCoy, Partner

Ryan practices in the firm's Los Angeles office in the areas of wage and hour class actions, discrimination, wrongful termination, and retaliation, as well as commercial litigation and complex insurance coverage. Mr. McCoy represents clients in transportation, construction, warehousing and order fulfilment, retail, insurance, and health care. He has an active arbitration practice and has defended multiple arbitrations before the American Arbitration Association as well as significant appellate experience before the California Courts of Appeal.

Wage and Hour

Clarke v. AMN Services LLC, dba Nursechoice (9th Cir. Feb. 8, 2021)

- Effect of non-wage benefits on the regular rate of pay for employees under the Fair Labor Standards Act and California Labor Code
  - Employer: Per diem is expense reimbursement
  - Employees: Per diem should be included in regular rate of pay to determine OT rate
- Court looks to actual pay practice, not to characterization under Company policy
- Determines that per diem was compensation for work

Ward v. United Airlines, Inc. (9th Cir. Feb. 2, 2021)

- Wage statement requirement under Labor Code Section 226
- Court extends requirement to employees in interstate transportation
- Pilots and flight attendants who reside or are based in California must receive compliant wage statements, even if they do not perform majority of their work in California

Donohue v. AMN Services, LLC (CA Supreme Court, February 25, 2021)

- The California Supreme Court addressed two important issues: 1) the application of rounding policies to meal periods, and 2) the burden of proof in determining whether a shortened or missed meal period was the result of the employer or the employee's action.
- The employer's rounding policy, when applied to meal periods, could result in the employee taking a lunch of less than 30 minutes but not receiving a meal period penalty. Similarly, an employee who took their lunch after the fifth hour, but within the rounding period, would have their lunch start time rounded to start before the fifth hour ended, again with no meal period penalty paid.
  - The Court unanimously held "employers cannot engage in the practice of rounding time punches – that is, adjusting the hours that an employee has actually worked to the nearest preset time increment – in the meal period context."
  - In so holding, the Court also stated, "[a]s technology continues to evolve, the practical advantages of rounding policies may diminish further."

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Donohue v. AMN Services, LLC (CA Supreme Court, February 25, 2021) continued

- In Brinker Restaurant Corp. v. Superior Court, the California Supreme Court held that an "employer is not obligated to police meal breaks and ensure no work thereafter is performed." An employer satisfies its obligation to provide a meal period "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break."
  - But practically speaking, if the timecard shows an employee took a shortened meal period, how is a court to determine whether the meal period was shortened due to the employer, or due to an employee's personal choice?
  - In Donohue, the Court held that the "time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations." The employer can rebut this presumption by presenting evidence of payment of meal period premiums or that the employee was provided their compliant meal period but chose to voluntarily work through their meal period.

Arbitration

Alvarez v. Altamed Health Services Corp. (CA Court of Appeals, February 4, 2021)

- Second District Court of Appeal held that an arbitration agreement's appellate arbitral review provision was substantively unconscionable because it favored the employer
- While the provision in question provided that either party could seek appellate review of an initial arbitration award by a second arbitrator, in practice, only the employer was likely do so, thus "unilaterally adding costs and time to the arbitration proceeding by seeking this review and thereby maximizing the employer's status as the better resourced party"
- However, the appellate arbitral review provision was severable as the employee failed to establish any other instance of substantive unconscionability
- The Court rejected employee's arguments that the employer's failure to provide a Spanish translation of the arbitration agreement (where the employee preferred, but did not require the translation) and failure to attached the AAA rules (absent a challenge to a specific AAA rule) were substantively unconscionable

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Zoller v. GCA Advisors (Ninth Circuit Court of Appeals, April 14, 2021)

- Ninth Circuit reversed a district court's order denying GCA Advisors motion to compel its former employee to arbitrate her statutory employment and civil rights claims
- Reaffirmed the requirement that an employee knowingly waive judicial determination of their Title VII and state analog claims
- While the arbitration agreement at issue did not explicitly reference statutory claims, the Ninth Circuit determined it was enforceable based on its "clear language encompassing employment disputes and evidence that Zoller knowingly waived her right to a judicial forum to resolve her statutory claims"

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Wilson-Davis v. SSP America, Inc. (CA Court of Appeals, April 9, 2021)

- Who decides whether claims should go to arbitration?
- Court unifies approach to commercial and labor arbitration agreements
- Must specifically delegate authority to arbitrator or court will decide
- Statutory wage-hour claims subject to arbitration only if “clear and unmistakable” waiver

California Legislative Developments

Recently-Enacted Legislation Affecting Employers

- COVID-19 Supplemental Sick Pay through September 30, 2021
- SB 93: Certain employers must offer vacant positions to qualified employees laid off because of COVID-19
  - Applies to larger hotels (50+ guest rooms), private clubs, event centers, airport hospitality services, and providers of janitorial, maintenance, and security services to office, retail, or “other commercial buildings”

Pending Employment-Related Legislative Proposals

- SB 606: Expands Cal/OSHA authority, including “enterprise-wide” citations and “egregious employer” findings
- SB 331: Expands restrictions on non-disparagement clauses in settlement agreements
- AB 701: Establishes statewide standards to minimize worker injuries and requiring large warehouses to be transparent about their work quotas

Pending Employment-Related Legislative Proposals continued

- AB 1003: Would make the intentional theft of wages in an amount greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees, by an employer in any consecutive 12-month period punishable as grand theft
  - Pass in the Assembly Public Safety Committee on a 6 to 0 vote
- AB 257: Would establish a statewide Fast Food Sector Council that includes workers, state agencies, and industry representatives
  - The council would be responsible for reviewing and creating health, safety, and employment standards in the fast food restaurant industry
  - Passed by the Assembly Labor Committee on a 5 to 2 vote

Pending Employment-Related Legislative Proposals continued

- AB 995: Would expand California's sick leave law to guarantee employees get at least five paid sick days a year and would be able to accrue 10 paid sick days
  - Currently employees get a minimum 3 paid sick days a year and employees can accrue 6 paid sick days
  - Approved in the Assembly Labor Committee with a 5 to 2 vote
- AB 1074: Following the termination of a service contract, AB 1074 would require new hotel service contractors to retain the existing workforce for a period of at least 60 days
  - Passed in the Assembly Labor Committee on a 5 to 2 vote
- AB 123: Paid Family Leave with full income replacement
  - Currently, the PFL program provides a cash benefit set at 60% of "base period" wages for up to 6 weeks for those above poverty level income and 70% for those with below poverty level income
  - AB 123 would Increases the wage replacement rate for PFL claims to 90% of employee's highest quarterly earnings in the past 18 months
  - Unanimously approved by the Assembly Insurance Committee

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NLRB Developments: Keeping an Eye on Federal Labor Law

NLRB Developments

- New NLRB majority as early as this Fall
- More aggressive prosecution by General Counsel
- Expect Board to revisit several employer-friendly Trump Board decisions

Examples: Confidentiality of Investigative Interviews

- *Banner Estrella* (2015): Case-by-case proof of need for confidentiality
- *Apogee Retail* (2019): Confidentiality rules limited to duration of investigation are generally lawful
- *Alcoa Corp.* (2021): Instruction to keep interview confidential is lawful, but Chairman McFerran's dissent signals changes ahead

Examples: Employee Resource Groups

- Section 8(a)(2) makes it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”
- Unlawful employer domination can also take the form of “dealing with” employee groups
- *T-Mobile*: NLRB finds employer interaction with employee organization not 8(a)(2) violation; but DC Circuit reverses and remands for clarification of “dealing with” standard

Example: Section 7 Right to Protest Unsafe Work Environment

- Trump Board's narrow interpretation of "protected, concerted" activity for "mutual aid or protection"
- Acting GC Memo (March 31, 2021): Will develop cases that utilize exceptions to narrow interpretation
- Expect more "inherently concerted" activity based on discussions of workplace life, including workplace safety and racial discrimination

Protecting the Right to Organize Act

- Most expansive overhaul of federal labor law in 75 years
- Eliminates captive audience speeches during election campaign
- Requires mediation for first collective bargaining agreement
- Expands right to strike and secondary boycott activity
- End of the Senate filibuster?

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Questions

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