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September 2018 California Employment Law Notes

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California Employment Law Update

- Civil Rights
- Civil Procedure
- Labor & Employment
- Litigation / Trial Practice

- California

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We invite you to review our newly-posted September 2018 California Employment Law Notes, a comprehensive review of the latest and most significant developments in California employment law.

Employer Must Obtain Written Authorization To Conduct Background Check

Connor v. First Student, Inc., 2018 WL 3966434 (Cal. S. Ct. 2018)

Eileen Connor worked as a school bus driver for Laidlaw Education Services, a company that was later acquired by First Student. First Student retained a consumer reporting agency to conduct background checks on its employees. The background reports elicited information about the employees, including their criminal records, sex offender registry status, address history, driving records and employment history. Connor asserts in this class action lawsuit that First Student violated the California Investigative Consumer Reporting Agencies Act ("ICRAA") (Civ. Code § 1786, *et seq.*) because it failed to provide the appropriate statutory notice and did not obtain her written authorization to conduct the background check. First Student asserted that ICRAA is unconstitutionally vague because the statute overlaps with the California Consumer Credit Reporting Agencies Act ("CCRAA") (Civ. Code § 1785.1, *et seq.*) (relating exclusively to credit checks). The California Supreme Court

held that any partial overlap between the two statutes does not render one superfluous or unconstitutionally vague. Therefore, because First Student conducted a background check that reported on Connor's "character, general reputation, personal characteristics, or mode of living," it was an investigative consumer report subject to the stricter notice and authorization requirements of ICRAA. *See also* *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166 (9th Cir. 2018) (procedural violation of FCRA that did not result in harm or a material risk of harm is not actionable).

Some Of California's "Sanctuary State" Employer Obligations Are Struck Down

United States v. California, 314 F. Supp. 3d 1077 (E.D. Cal. 2018)

United States District Judge John A. Mendez issued an order enjoining California from enforcing parts of the California Immigration Workers Protection Act (Assembly Bill 450), a new state law that restricts private employers from cooperating with federal immigration enforcement. Among other things, the law imposes fines on private employers of up to $10,000 per violation if they "voluntarily consent" to giving federal immigration authorities access to nonpublic areas of a "place of labor" and/or to employee records, and it mandates that the employer insist that the authorities obtain a judicial warrant or subpoena before such information would be turned over. Cal. Gov't Code §§ 7285.1 and 7285.2. The court sided with the U.S. Department of Justice in finding that several provisions of AB 450 discriminate against private employers who cooperate with the federal government. In his Order, Judge Mendez concluded that "these fines inflict a burden on those employers who acquiesce in a federal investigation but not on those who do not." Thus, the court found that "a law which imposes monetary penalties on an employer solely because the employer voluntarily consents to federal immigration enforcement's entry into nonpublic areas of their place of business or access to their employment records impermissibly discriminates against those who choose to deal with the federal government."

The court also struck down a provision of the law limiting an employer's ability to re-verify an employee's employment eligibility unless otherwise required by federal law on the ground that it "frustrates the system of accountability that Congress designed." Cal. Lab. Code § 1019.2. The court left standing an employer obligation to warn employees in writing of an imminent inspection of I-9 forms by federal immigration authorities. Cal. Lab. Code § 90.2(a)(1). This decision means that private sector employers may no longer be prosecuted for: (i) consenting to a federal immigration enforcement agent's request to enter nonpublic areas in the workplace; (ii) granting federal immigration enforcement agents access to employee records; or (iii) re-verifying an employee's eligibility to work in the United States.

No-Employment Provision In Settlement Agreement Is An Unenforceable Restraint

Golden v. California Emergency Physicians Med. Group, 896 F.3d 1018 (9th Cir. 2018)

Donald Golden, M.D. is an emergency-room doctor formerly affiliated with the California Emergency Physicians Medical Group ("CEP"), a large consortium of over 1,000 physicians that manages or staffs many emergency rooms in California and other western states. Dr. Golden sued CEP for various claims, including racial discrimination. Prior to trial, the parties settled the case and announced the terms orally in open court. Pursuant to the settlement, Dr. Golden received, among other things, a substantial monetary sum and agreed to waive any and all rights to employment with CEP or any facility that CEP may own or with which it may contract in the future. Dr. Golden later refused to execute the written agreement confirming the settlement and sought to have it set aside. The magistrate judge and the district court disregarded Dr. Golden's objections and ordered that he be compelled to sign the settlement agreement. Dr. Golden appealed, asserting that the no-employment provision in the settlement agreement was unlawful under Cal. Business & Professions Code § 16600 (which invalidates "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business...").

The Ninth Circuit previously reversed the judgment of the district court and remanded the case for further proceedings in order to determine "in the first instance whether the no-employment provision constitutes a restraint of a substantial character to Dr. Golden's medical practice." On remand, the district court again ordered Dr. Golden to sign the settlement agreement after concluding that the no-employment provision was not an illegal restraint. In this opinion, the Ninth Circuit again reversed the lower court, holding that the no-employment provision substantially restrained Dr. Golden's lawful profession, trade or business in violation of Section 16600 to the extent it prevents him from working for employers that have contracts with CEP and to the extent it permits CEP to terminate him from existing employment in facilities that are not owned by CEP. However, the provision is enforceable to the extent it bars him from working at facilities that are owned or operated by CEP. Nevertheless, the Court held that "because the parties do not dispute that [the no-employment provision] is material to the settlement agreement, the entire agreement is void."

Court Affirms $500,000 Jury Award To Employee Who Stutters

Caldera v. California Department of Corr. & Rehab., 25 Cal. App. 5th 31 (2018)

Augustine Caldera is a correctional officer at a state prison who stutters when he speaks. Caldera alleged that the prison's employees, including a supervisor, "mocked and mimicked" his stutter at least a dozen times over a period of two years. Caldera sued the CDCR for disability harassment, failure to prevent harassment and related claims, and a jury awarded Caldera $500,000 in emotional distress damages. The trial court found the damage award to be excessive and granted the employer's motion for a new trial solely as to that issue. Both parties appealed, and the Court of Appeal in this opinion reversed the trial court's new trial order but otherwise affirmed the $500,000 judgment in Caldera's favor on the ground that the harassment was sufficiently severe or pervasive to support the judgment.

Member Of Tribe Could Proceed With Whistleblower Suit

The Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States Dep't of the

Interior, 2018 WL 3978542 (9th Cir. 2018)

Ken St. Marks, a member of the Chippewa Cree Tribe, informed the United States Department of the Interior (the "Department") that he believed members of the Tribe's governing body were misusing federal stimulus funds that were awarded to the Tribe pursuant to the American Recovery and Reinvestment Act (the "Act"). To safeguard these funds, Congress enacted robust whistleblower protection for employees of any non-federal entity receiving funds under the Act. After analyzing the evidence, the Department determined the Tribe had engaged in a prohibited reprisal against St. Marks for his whistleblower activities and awarded him $650,000 in back pay, costs and fees. In this opinion, the Ninth Circuit denied the Tribe's petition for review of the Department's order, holding that St. Marks performed services on behalf of the Tribe as chairman of its Business Committee and he was, therefore, an employee within the meaning of the Act. The Court further held that the Department's order did not infringe the Tribe's sovereignty or powers of self-governance and that the Tribe's removal of St. Marks as chairman of the Business Committee was retaliatory.

Professional Golf Caddies May Be Required To Wear Bibs Containing Advertisements

Professional golf caddies sued the PGA Tour, contending they should not be compelled to wear bibs featuring advertising sold by the Tour and local hosts of the PGA tournaments. The caddies allege contract, quasi-contract, publicity and unfair competition claims under California law, a false endorsement claim under the Lanham Act and antitrust claims under the Sherman Act. The district court dismissed all of the caddies' claims with prejudice, which the Ninth Circuit affirmed along with issuing an order remanding the case to allow the district court to reconsider whether to grant the caddies leave to amend their federal antitrust and California unfair competition claims. The Ninth Circuit further held that the district court properly concluded that the caddies had consented to wearing the bibs and that they did not do so under economic duress.

Employee May Recover For Breach Of Contract, But Not For "Theft Of Labor"

Lacagnina v. Comprehend Sys. Inc., 25 Cal. App. 5th 955 (2018)

David Lacagnina sued his former employer for fraud, breach of contract, breach of the implied covenant of good faith and fair dealing and "theft of labor by false pretenses" in violation of Cal. Pen. Code §§ 484 and 496. The jury awarded $556,446 in damages, including $226,446 in damages for fraud and $75,000 for emotional distress. The trial court granted the employer's motion for judgment notwithstanding the verdict on the fraud claim on the ground that Lacagnina was not damaged by the alleged fraud and entered an amended judgment in his favor in the amount of $225,000. The trial court also dismissed Lacagnina's "theft of labor" claim. The Court of Appeal affirmed dismissal of this "novel" claim because he received a contractually agreed-upon salary and had a dispute with his employer about the amount of commissions and other compensation due to him on

termination. The Court noted that "if every plaintiff in an employment or contract dispute could also seek treble damages and attorneys' fees [pursuant to Cal. Pen. Code § 496] on the ground that the defendant received 'stolen property,' such claims would become the rule rather than the exception." *See also* *Padda v. Superior Court*, 25 Cal. App. 5th 25 (2018) (trial court abused its discretion in denying employees' request for a trial continuance based upon the illness of their expert witness).

Attorneys Were Not Liable For Breach Of Confidential Settlement Agreement

Monster Energy Co. v. Schechter, 26 Cal. App. 5th 54 (2018)

The attorneys for two individuals who had sued Monster Energy Company signed and approved as to "content and form" a confidential settlement agreement between the individuals and Monster. During an interview with a reporter for lawyersandsettlements.com, one of the plaintiffs' attorneys disclosed information that was subject to the confidentiality provision of the settlement agreement. Monster sued the attorneys for breach of contract and related claims. The attorneys responded with an anti-SLAPP motion based upon the fact that they were not parties to the settlement agreement. The trial court disagreed and denied the attorneys' motion, but the Court of Appeal reversed, holding that the attorneys were not parties to the settlement agreement even though they had signed and approved it as to "content and form." The Court noted "it seems easy enough, however, to draft a settlement agreement that explicitly makes the attorneys parties (even if only to the confidentiality provision) and explicitly requires them to sign as such." *See also* *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 2018 WL 4137013 (Cal. S. Ct. 2018) (law firm's advance-waiver of conflicts provision was not effective because the firm failed to disclose a known conflict with a current client).

Injured Employee Who Was Denied Prescription Drug Is Limited To Workers' Comp Benefits

King v. CompPartners, Inc., 2018 WL 4017874 (Cal. S. Ct. 2018)

Two physician-utilization reviewers acting on behalf of Kirk King's employer determined that a treatment that had been recommended for King (an employee who had suffered an injury covered by workers' compensation) was not "medically necessary" and decertified the prescription without providing for a weaning regimen. Upon being denied the prescription, King suffered a series of four seizures as a result. King and his wife sued the doctors and the utilization review company (CompPartners) for negligence and related claims. The defendants filed a demurrer in response, contending that the Workers' Compensation Act ("WCA") provided the exclusive remedy for King and his wife and that in any case the doctors did not owe a duty of care to King. The trial court agreed and sustained the demurrer without leave to amend. The Court of Appeal affirmed, but determined that the Kings should have an opportunity to amend their complaint to allege more facts about the duty of care owed to them by the physicians. The California Supreme Court affirmed the dismissal based upon the exclusivity of remedy of the WCA but also held that the Kings should not be permitted to amend their complaint to attempt to state a failure-

to-warn claim. *See also* *Tripplett v. WCAB*, 25 Cal. App. 5th 556 (2018) (former Indianapolis Colts professional football player was not hired in or significantly connected to California and so was not entitled to WCAB benefits); *California Dep't of Indus. Relations v. California Occupational Safety & Health Appeals*, 26 Cal. App. 5th 93 (2018) (heat illness prevention standards may apply to interior of non-air-conditioned buses).

Homeowner Could Be Liable For Tree Trimmer's Injuries

Jones v. Sorenson, 25 Cal. App. 5th 933 (2018)

Homeowner Danita Sorenson hired a gardener ("Odette Miranda dba Designs by Leo") to work on her property, and Miranda hired Mary E. Jones to help. Jones was injured when she fell from a ladder while trimming a tree that was at least 15 feet tall. Jones sued Sorenson, claiming the work required a license but Miranda was not licensed and Miranda's negligence caused her fall. Jones further alleged that Sorenson was the employer of both Miranda and Jones. Although the trial court dismissed Jones's claim on the ground that Miranda was in essence a licensed "nurseryperson," the Court of Appeal reversed and held that Sorenson was potentially liable because a "nurseryperson" refers to a licensed operator of a nursery, which Miranda was not. Since Sorenson hired Miranda (an unlicensed contractor), she has potential liability for Jones's injuries as her employer.

FLSA's De Minimis Doctrine Does Not Apply To California "Off-The-Clock" Claims

Troester v. Starbucks Corp., 5 Cal. 5th 829 (2018)

In this opinion, the California Supreme Court answered a legal question from the United States Court of Appeals for the Ninth Circuit: "Does the federal Fair Labor Standards Act's de minimis doctrine…apply to claims for unpaid wages under California Labor Code sections 510, 1194 and 1197?" The California Supreme Court answered the question as follows: "We hold that the relevant wage order and statutes do not permit application of the de minimis rule on the facts given to us by the Ninth Circuit, where the employer required the employee to work 'off the clock' several minutes per shift." *See also* *Rangel v. PLS Check Cashers of Cal., Inc.*, 2018 WL 3892987 (Cal. Ct. App. 2018) (employee's putative FLSA collective action was barred by a state class action settlement that released all claims on which her FLSA action was predicated).

Taco Bell Did Not Deny Meal Breaks By Providing Employee Discounts For Meals Eaten On Premises

Rodriguez v. Taco Bell Corp., 896 F.3d 952 (9th Cir. 2018)

In this putative class action, employees challenged a special offer that Taco Bell provided to its employees: They could receive discounted meals and complimentary soft drinks so long as they ate the discounted meals on the premises of the restaurant. On behalf of the putative class, Bernardina Rodriguez claimed the

employees should have been paid a premium rate for the time spent on the employer's premises eating the discounted meals because employees were under sufficient employer control during that time that they were not relieved of all duties as required by the applicable wage order. The Ninth Circuit affirmed the district court's order in favor of Taco Bell after concluding the employer had relieved its employees of all duties during their meal break period and had exercised no control over their activities subject only to the restriction that if they purchased a discounted meal, they had to eat it in the restaurant. The Court also rejected the employees' claim that the discount value of the meal should have been added to the regular rate of pay for purposes of calculating overtime. *See also* *Ehret v. WinCo Foods, LLC*, 26 Cal. App. 5th 1 (2018) (collective bargaining agreement waived in a "clear and unmistakable" manner employees' right to a meal break when they worked between five and six hours).

Employer's Future Attorneys' Fees Should Be Considered In Connection With CAFA Amount-In-Controversy Requirement

Fritsch v. Swift Transp. Co. of Ariz., LLC, 899 F.3d 785 (9th Cir. 2018)

At issue in this case is whether the district court erred in remanding an action to state court that had been removed to federal court under the Class Action Fairness Act ("CAFA") on the ground that the defendant failed to prove that CAFA's $5 million amount-in-controversy requirement had been satisfied. The Ninth Circuit reversed the district court's remand order on the ground that the district court had failed to take into account future attorneys' fees that the employer might recover under a contract or statute. On remand, the defendant retains the burden to prove the amount of future attorneys' fees by a preponderance of the evidence. *See also* *King v. Great Am. Chicken Corp.*2018 WL 4231847 (9th Cir. 2018) (CAFA-removed action was erroneously remanded to state court based upon parties' stipulation that "at least two-thirds of the putative class members had last-known addresses in California"); *McCray v. Marriott Hotel Servs., Inc.*, 2018 WL 4167147 (9th Cir. 2018) (district court should have remanded action to state court that was removed to federal court on the basis of LMRA Section 301 preemption on the ground that the lawsuit did not require substantial analysis of the plaintiff's union's collective bargaining agreement).

$80.00 Error On Final Check Results In Six-Figure Judgment In Favor Of Employee

Nishiki v. Danko Meredith, APC, 25 Cal. App. 5th 883 (2018)

Taryn Nishiki worked as office manager and paralegal for a law firm before resigning her employment via email on Friday, November 14, 2014. At the time of her resignation, Nishiki was owed $2,880.31 for her accrued but unused vacation time. On Tuesday, November 18, 2014, the firm mailed Nishiki a handwritten check that contained an inconsistency: The amount of the check as written in numerals was "$2,880.31," but the amount as spelled in words was "Two thousand eight hundred and 31/100" – which was $80 short. Eight days later, Nishiki informed the firm she

could not deposit the check because of the inconsistency between the numerical and written amounts. On Friday, December 5, 2014, the firm mailed Nishiki a corrected check in the amount of $2,880.31. Nishiki filed a complaint with the labor commissioner seeking, among other things, waiting time penalties in the amount of $7,500 (for 30 days at the rate of $250 per day). The hearing officer granted Nishiki 17 days of waiting time penalties x $250 per day = $4,250.

The employer appealed the award to the superior court and after a trial de novo, the superior court awarded Nishiki the $4,250 in waiting time penalties plus $86,160 in attorneys' fees. The Court of Appeal in this opinion reduced the number of waiting-time penalty days from 17 to nine (the period between when the firm had notice of the error on the check and the date on which it sent the corrected check), but otherwise affirmed the lower court *and* determined that Nishiki was entitled to the additional attorneys' fees she incurred for the appeal. *See also* *Burkes v. Robertson*, 2018 WL 3974399 (Cal. Ct. App. 2018) (employer's failure to file a timely request for waiver of undertaking due to indigency deprived trial court of jurisdiction to hear appeal of $81,565.34 labor commissioner award to employee).

Change In Retirees' Health Benefits Did Not Constitute Age Discrimination, But May Be A Breach Of Contract

Harris v. County of Orange, 2018 WL 4211161 (9th Cir. 2018)

This case arises from a restructuring of two benefit plans that the County of Orange provides to its retirees. The retirees allege they have an implied contractual right to receive the benefits provided to them throughout their retirement. Although the district court dismissed the retirees' breach of contract claim, the Ninth Circuit reversed, holding that the retirees had alleged sufficient facts to establish an implied contractual right to the continued benefits. However, the Ninth Circuit affirmed dismissal of the retirees' claim of age discrimination, holding that the county may treat retirees as a group differently than employees as a group, taking into account that the cost of providing medical benefits to the retiree group is higher because the retirees are on average older than the employees. *See also* *Moen v. The Regents of the Univ. of Cal.*, 25 Cal. App. 5th 845 (2018) (trial court erroneously decertified class of retired employees who alleged breach of contract associated with a change in their health benefits).

Class Action Dismissed For Failure To Bring Lawsuit To Trial Within Five Years

Martinez v. Landry's Rest., Inc., 2018 WL 4091279 (Cal. Ct. App. 2018)

The trial court dismissed this putative class action due to plaintiffs' failure to bring it to trial within five years as required by the Code of Civil Procedure. The Court of Appeal affirmed, holding that the trial court did not abuse its discretion by failing to exclude from its calculation of the five-year period the following periods: 319 days during which a writ petition was pending; 169 days between the notice of remand following removal of the case to federal court and the Ninth Circuit's order affirming the remand; and a nine-month period between the court's order granting plaintiffs'

motion to compel production of electronically stored information and full compliance with that order.

Employer Of Piece-Rate Employees May Assert Safe-Harbor Defense

Jackpot Harvesting Co. v. Superior Court, 26 Cal. App. 5th 125 (2018)

Labor Code Section 226.2, which became effective Jan. 1, 2016, addresses the manner in which piece-rate employees are to be compensated for rest and recovery periods and other non-productive time on the job ("rest/NP time"). The Court of Appeal held that an employer complying with the statute's "safe harbor" provision by paying its employees previously unpaid rest/NP time accrued between July 1, 2012 and December 31, 2015 has an affirmative defense against any employee claims for rest/NP time accruing prior to December 31, 2015 (including claims accruing prior to July 1, 2012).