A Year In Review: Notable Cases And New Laws For California Employers in 2016

by Gilbert J. Tsai

Every year in California, new laws, judicial interpretations of law, and administrative decisions create new and expanded legal obligations for employers. Employers in California will face additional hurdles in 2016, from California's equal pay law amendments to the NLRB's expansion of the definition of joint employers under the National Labor Relations Act. This article briefly summarizes the most notable labor and employment bills and decisions in California this year.

I. New and Amended California Statutes for 2016

Governor Jerry Brown signed numerous bills that will impact California employers in 2016. The most notable new bills are summarized below. These new and amended laws became effective January 1, 2016, unless otherwise noted.

Discrimination, Harassment, Retaliation, and Other Employment Prohibitions

Labor Code §§ 98.6, 1102.5, 2810.3, and 6310 – Retaliation Protections for Family Members

AB 1509 extends whistleblower protections to family members of whistleblowers. The bill prohibits employers from discharging, or in any manner, discriminating, retaliating, or taking adverse action against any employee who is a family member of a person who engaged in, or was perceived to engage in, protected activity. The bill also amends Labor Code section 2810.3 (which imposes joint liability on client employers for employees supplied by a labor contractor) to exclude from the law client employers that use Public Utilities Commission-permitted third party household good carriers, as specified.

Government Code § 12940 – FEHA Amendment Prohibiting Retaliation for Requesting Religious or Disability Accommodation

AB 987 amends Section 12940 of the California Government Code to clarify that a request for reasonable accommodation based on religion or disability constitutes protected activity, overturning a contrary holding in *Rope v. Auto-Chlor Sys. of Washington, Inc*., 220 Cal. App. 4th 635 (2013). The Fair

Employment and Housing Act (FEHA) now expressly prohibits retaliation and discrimination against a person for requesting an accommodation, regardless of whether the request is granted.

Civil Code §§ 51 – 51.3 – New Protected Classes Added to Unruh Civil Rights Act: Citizenship, Language, and Immigration Status

Pursuant to the Unruh Civil Rights Act (California Civil Code sections 51 through 51.3), all individuals are entitled to full and equal accommodations in all business establishments regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. **SB 600** extends these protections by prohibiting discrimination in business establishments based on citizenship, primary language, or immigration status.

Labor Code § 2814 – Employers Prohibited from Using E-Verify for Purposes Not Specified Under Federal Law

AB 622 adds Labor Code section 2814, which prohibits an employer from using E-Verify to check the employment authorization status of an employee or applicant, except as required by federal law or as a condition of receiving federal funds. AB 622 also requires employers who use E-Verify to provide the affected employee or applicant with all relevant notices issued by the Social Security Administration or the U.S. Department of Homeland Security. Violations of this section result in a penalty of $10,000 per violation.

Labor Code §§ 233 and 230.8 – Expanded Protection for School Activity Leave and Sick Leave

SB 579 amends Labor Code section 233 (the "Kin Care" law) to correlate with the definition of “family member” specified in California’s Paid Sick Leave law (the Healthy Workplaces, Healthy Families Act of 2014). The bill also expands coverage of California’s school activities leave (Family School Partnership Act, codified at Labor Code section 230.8) to include day care facilities and cover child care provider emergencies, and the time spent finding, enrolling, or re-enrolling a child in a school or day care. Employees who are stepparents, foster parents, or are standing *in loco parentis* to a child are also protected under the school activities leave.

Labor Code §§ 3733 and 4756 – Workers’ Compensation Benefits Regardless of Citizenship or Immigration Status

SB 623 adds sections 3733 and 4756 to the California Labor Code, to extend workers’ compensation benefits to workers regardless of their citizenship or immigration status. Existing law has established two funds for workers’ compensation coverage for employees who work for illegally uninsured employers: the Uninsured Employers Benefit Trust Fund (UEBTF) and the Subsequent Injuries Benefit Trust Fund (SIBTF). SB 623 clarifies that benefits received under UEBTF and SIBTF extend to all workers, regardless of citizenship or immigration status.

Code of Civil Procedure § 706.050 – Wage Garnishment Restrictions Modified

SB 501, effective July 1, 2016, amends section 706.050 of the California Code of Civil Procedure, which sets parameters for a judgment creditor’s ability to garnish a debtor’s wages to satisfy a court judgment. As amended, the law will reduce the maximum of disposable earnings subject to garnishment. Under the new law, the maximum amount of disposable earnings of an individual judgment debtor for any workweek that will be subject to levy under an earnings withholding order must not exceed the lesser of (1) 25% of the

individual's disposable earnings for that week, or (2) 50% of the amount by which the individual's disposable earnings for that week exceed 40 times the state minimum wage in effect at the time the earnings are payable.

Labor Code §§ 2500 - 2522 – Employment Protections for Grocery Workers Upon Change in Control

AB 359 adds Labor Code sections 2500 through 2522 to require a "successor grocery store employer" to retain the current grocery workers for 90 days after a grocery store changes owners. During the 90-day period, the new employer may only fire employees for cause. After that period is over, the new employer must consider offering continued employment to the employees. **AB 897** excludes from the definition of "grocery establishment" a retail store that has ceased operations for six months or more.

Independent Contractor or Employee?

Labor Code § 2750.8 – Amnesty for Converting Independent Contractor Drayage Drivers to Employees

AB 621 adds Labor Code section 2750.8 to establish the Motor Carrier Employer Amnesty Program. Under the new law, a motor carrier performing drayage services (*i.e.* the transportation of goods over a short distance) may be relieved of liability for penalties associated with misclassification of commercial drivers as independent contractors. Relief from liability is available when the motor carrier enters into a settlement agreement with the Labor Commissioner before January 1, 2017, whereby the motor carrier agrees to convert all of its commercial drivers to employees and the settlement agreement contains prescribed components (*e.g.*, an agreement by the motor carrier to pay all wages, benefits, and taxes owed, if any). The law also sets forth eligibility and application requirements.

Labor Code § 2754 – Mandated Employee Status for Professional Sports Cheerleaders

AB 202 adds Labor Code section 2754, which requires California-based professional major and minor league baseball basketball, football, ice hockey, and soccer teams to classify and treat their cheerleaders as employees, not independent contractors. A cheerleader is defined as "an individual who performed acrobatics, dance, or gymnastics exercises on a recurring basis," and excludes cheerleaders utilized one time per calendar year.

California Paid Sick Leave Act Recap and Amendments

Labor Code §§ 245 – 249 - Healthy Workplaces, Healthy Families Act of 2014

AB 1522, effective January 1, 2015, set forth the Healthy Workplaces, Healthy Families Act of 2014, more commonly known as California's paid sick leave law. The law is codified at sections 245 through 249 of the California Labor Code. **AB 304**, effective July 13, 2015, amended certain provisions of the Healthy Workplaces, Healthy Families Act that AB 1522 had not clearly explained. AB 304 amended the law as follows:

- Eligibility: An employee must work 30 days for the same employer within a year of commencing employment to be entitled to paid sick leave.
- Use of sick leave: The amendment clarified that employers can limit use of paid sick leave to 24 hours (or 3 days) per "year," meaning employee's year of employment, calendar year, or any continuous 12-month period.

- Use of up-front allotment: Employers who use the front-loading method can provide this amount of leave at the beginning of each calendar year, each year of employment, or any other 12-month period. The allotment need not be available to new hires until the 120th day of employment.
- Unlimited PTO policies: Employers with an unlimited paid sick leave or paid time off policy may satisfy the wage statement reporting requirement by indicating that the employee's available time is "unlimited."
- Alternative accrual: Employers can use an accrual method different from the one hour for every 30 hours worked formula provided (i) the accrual is on a regular basis (e.g., each week, month, or pay period), and (ii) the accrual rate results in employees having no less than 24 hours of accrued sick leave (or paid time off) by the 120th calendar day of employment, every calendar year, or 12-month period.
- Calculating sick pay: Employers may calculate sick leave pay for non-exempt employees by using the 90-day look-back approach (dividing the employee's total wages (not including overtime) by the total hours worked in the full pay periods of the prior 90 days of employment) or by using the "weighted average" method.
- Safe harbor for pre-existing plans: Employers with paid sick leave or paid time off plans that were in existence before January 1, 2015, are entitled to maintain such plans under certain circumstances specified in the amendment.
- Reinstatement rights: Under pre-existing law, employers must reinstate accrued but unused sick leave to employees who are terminated and rehired within one year. The amendment clarifies that employees need not reinstate any accrued sick leave that was paid out at the time of termination.

California Fair Pay Act

Labor Code § 1197.5 – California Fair Pay Act

SB 358 amends Labor Code section 1197.5, to remedy sex discrimination in compensation. The amended law prohibits employers from paying employees at a wage rate less than that paid to employees of the opposite sex for doing "substantially similar work" when viewed as a composite of skill, effort, and responsibility across all of the employer's various locations. When an employer insists on having a wage differential, the employer must affirmatively demonstrate that the differential is based entirely and reasonably on one or more specific factors (*e.g.,* a seniority system, a merit system, a system that measures earnings by quantity or quality of production, etc.), or a bona fide factor other than sex. The employer must further demonstrate that the chosen factor is applied reasonably, and that the factors relied upon account for the *entire* differential. The bill also contains an anti-retaliation provision, provides a private right of action, and increases employers' recordkeeping requirement from 2 years to 3 years.

Federal and California Wage and Hour Developments

Labor Code §§ 558, 1197, and 1197.1 – Expanded Enforcement of Employee Claims by the Labor Commissioner

AB 970 amends Labor Code sections 558, 1197, and 1197.1, to permit the Labor Commissioner to enforce local laws regarding overtime and minimum wage provisions. AB 970 also allows the Labor Commissioner to issue citations and penalties for such violations as long as the local entity (*e.g.*, San Francisco's Office of Labor Standards Enforcement) has not already cited the employer for the same violation. The Labor Commissioner is also authorized to issue citations and penalties to employers who violate the expense reimbursement provision of Labor Code section 2802.

SB 588 institutes various changes and additions to the Labor Code relating to the Labor Commissioner's enforcement authority. Among other provisions, SB 588 authorizes the Labor Commissioner to file a lien on the employer's property in California for unpaid wages, and other compensation, penalties, and interest owed to an employee.

Labor Code § 226.2 – Piece-Rate Compensation

AB 1513 adds section 226.2 to the Labor Code, which requires employers to pay piece-rate employees for all periods of "nonproductive" time separately from and in addition to their piece-rate compensation. "Nonproductive" time is all working time where the employer is not providing the employee with piece-rate work (*e.g.*, rest and recovery periods, significant idle time, etc.), but does not include unpaid meal breaks.

Employers are required to pay the following rates:

- For rest and recovery time: an average hourly rate that is determined by dividing the employee's total compensation for the workweek (not including compensation for rest and recovery periods and overtime premiums) by the total hours worked during the workweek (not including rest and recovery periods). This is essentially a weighted hourly average.
- For other nonproductive time: a rate that is no less than the minimum wage. Employers who pay an hourly rate for all hours worked in addition to piece-rate wages do not need to pay amounts in addition to that hourly rate for the other nonproductive time.

Employers must specify the following information on a piece-rate employee's itemized wage statement: (1) the total hours of compensable rest and recovery periods; (2) the rate of compensation paid for those periods; and (3) the gross wages paid for those periods during the pay period.

Labor Code § 516 – Waiver of Second Meal Periods for Health Care Employees

SB 327, effective October 5, 2015, amends Labor Code section 516 to clarify that health care employees may voluntarily waive one of the two meal periods that they earn on shifts that exceed 12 hours. The waiver must be documented in a written agreement signed by both the employee and the employer.

Labor Code §§ 2699, *et seq.* – Right to Cure Certain Non-compliant Information on Itemized Wage Statements (Amendments to PAGA)

AB 1506, effective October 2, 2015, amends California's Private Attorneys General Act ("PAGA") (codified at Labor Code sections 2699, 2699.3, and 2699.5) to provide employers with a limited right to cure certain wage statement violations (*i.e.* violations of Labor Code section 226(a)) before an employee may sue under PAGA. Specifically, an employer has 33 days from the postmarked date of an employee's required notice to California's Labor & Workplace Development Agency (LWDA) to cure violations of the requirement to include certain information on wage statements, including the name and address of the employer's legal entity, and the inclusive dates of the pay period. Employers may cure these defects by providing each affected employee with a fully compliant wage statement for each pay period for the three-year period prior to the date of the written notice. An employer may avail itself of this provision only once for the same violation of the statute during each 12-month period.

II. Significant California and Federal Cases in 2015

California and federal courts issued a variety of decisions in 2015 which will impact the duties and

obligations of California employers.

A. Discrimination, Retaliation, and Other Employment Prohibitions

*EEOC v. Abercrombie & Fitch Stores, Inc.,*135 S.Ct. 2028 (2015)

In *EEOC v. Abercrombie & Fitch Stores, Inc.,* the Equal Employment Opportunity Commission (“EEOC”) sued Abercrombie & Fitch on an employee’s behalf claiming that Abercrombie’s refusal to hire the employee violated Title VII of the Civil Rights Act of 1964 (“Title VII”). The United States Supreme Court held that “an employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” Rather, in order to prevail on a religious accommodation case, a job applicant only needs to show that his or her need for a religious accommodation was a motivating factor in the employer’s decision not to hire the employee, not that the employer had actual knowledge of the need for a religious accommodation.

Teamsters Local Union No. 117 v. Washington Dep’t of Corrections, 789 F.3d 979 (9th Cir. 2015)

In *Teamsters Local Union No. 117 v. Washington Department of Corrections,* the Washington Department of Corrections ("DOC") designated 110 positions for female corrections officers in an attempt to overcome a lack of female correctional officers and prevent any future lawsuits stemming from abuse by male correctional officers. The union filed suit on behalf of the male guards claiming that designating these positions for female officers amounted to sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The Ninth Circuit held that sex was a bona-fide occupational qualification for the designated female-only positions. In reaching this conclusion, the Ninth Circuit reasoned that the DOC's decision to make these specific positions female only, was the product of a reasoned decision-making process, based on available information and expertise as the DOC hired experts, consulted with other states, reviewed relevant case law, documented and investigated sexual misconduct allegations, and sought advice from the Human Rights Commission prior to introducing gender-based staffing requirements.

France v. Johnson, 795 F.3d 1170 (9th Cir. 2015)

In *France v. Johnson,* a border patrol agent sued the Department of Homeland Security for discrimination under the Age Discrimination in Employment Act ("ADEA") alleging that he was not promoted because of his age. In a failure-to-promote case under the ADEA, a plaintiff can establish a *prima facie* case of discrimination in violation of the ADEA by producing evidence that he or she was (1) at least forty years old; (2) qualified for the promotion for which an application was submitted; (3) denied the promotion; and (4) the promotion was given to a substantially younger person. The Ninth Circuit held than an average age difference of less than 10 years between a plaintiff and the individuals promoted in lieu of a plaintiff creates a rebuttable presumption that the difference was insubstantial. A plaintiff who is not ten years or more older than his or her replacements can rebut the presumption by producing additional evidence to show that the employer considered his or her age to be significant. Ultimately, the Ninth Circuit concluded that the plaintiff established a *prima facie* case of age discrimination and, although the Department of Homeland Security established a legitimate business reason for rejecting the plaintiff for promotion, the plaintiff raised a genuine dispute of material fact as to pretext by introducing evidence that one of his superiors made discriminatory statements and repeatedly raised the issue of retirement with him before making the decision not to promote him.

Richey v. AutoNation, Inc., 60 Cal. 4th 909 (2015)

In *Richey v. AutoNation, Inc.,* the plaintiff went on medical leave under the California Family Rights Act and the federal Family and Medical Leave Act. During his leave, the plaintiff opened a restaurant and was working at his restaurant in violation of the company's policy on outside employment. The plaintiff was ultimately terminated for this policy violation and filed suit alleging racial discrimination, harassment, retaliation under the California Family Rights Act, and failure to reinstate after taking approved CRFA leave. The Defendant compelled arbitration and the arbitrator found that AutoNation was allowed to terminate the plaintiff if it had an "honest belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment." The plaintiff sought to vacate the arbitrator's award, but the California Supreme Court held that even if the arbitrator committed legal error by adopting the honest belief defense, and even if such error could serve as the basis for reversing the arbitrator's award, the plaintiff failed to show that the error was prejudicial because plaintiff's firing was based on a clear violation of company policy – a legally sound basis for upholding the arbitrator's award.

B. Interactive Process and Reasonable Accommodation Updates

Higgins-Williams v. Sutter Medical Foundation, 237 Cal.App.4th 78 (2015)

In *Higgins-Williams v. Sutter Medical Foundation,* the plaintiff complained to her employer, Sutter, that she suffered stress from interactions with her supervisor and Sutter's HR department. Her physician placed her on leave and stated that she could return to work without limitation if she could work in another department under a different supervisor. After several months of leave, Sutter terminated Higgins-Williams because she did not provide any information as to when she could return to work and whether additional leave as an accommodation would affect her return to work. Higgins-Williams sued alleging disability discrimination, violation of California Family Medical Rights Act, and wrongful termination. The trial court granted Sutter's motion for summary judgment and the Court of Appeal affirmed holding that "an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA."

Young v. United Parcel Service, 135 S.Ct. 1338 (2015)

In *Young v. United Parcel Service,* the plaintiff, a UPS driver, was given work restrictions by her doctor, while pregnant, that prohibited her from lifting heavy packages. The plaintiff asked for a "light duty" assignment, but UPS denied her request even though it provided light duty assignments to other employees who were temporarily unable to perform their jobs. The U.S. Supreme Court held that a pregnant employee can establish a *prima facie* case of disparate treatment discrimination under the Pregnancy Disability Act by showing that (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." Once the plaintiff establishes a *prima facie* case, the employer has the opportunity to justify its decision by relying on "legitimate, nondiscriminatory" reasons for denying the accommodation. If the employer makes that showing, the plaintiff may show that the justifications amount to pretext. The Court explained that the fact that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers could give rise to an inference of intentional discrimination and thus create a genuine issue of material fact as to pretext.

Nealy v. City of Santa Monica, 234 Cal.App.4th 359 (2015)

In *Nealy v. City of Santa Monica,* the plaintiff, a solid waste equipment operator, sustained a knee injury at work that ultimately resulted in knee surgery. Following the initial injury, he had additional knee surgeries

and suffered a back injury which required him to be placed on leave and return to work with restrictions on multiple occasions. Each time the plaintiff returned to work, an accommodations committee reviewed his medical restrictions with the plaintiff and his representative, to discuss his position and ability to perform the functions of his position. After a series of accommodations, the city ultimately concluded that the plaintiff could not perform the essential functions of his position and it could not provide an accommodation. The plaintiff filed suit alleging that the city failed to provide a reasonable accommodation and failed to engage in the interactive process. The Court of Appeal affirmed the trial court's grant of summary judgment in favor of the city, reasoning that the elimination of an essential function from a position is not a reasonable accommodation, and that an employer is not required to provide indefinite leave until a comparable position becomes available.

C. Independent Contractor or Employee?

Noe v. Superior Court, 237 Cal.App.4th 316 (2015)

In *Noe v. Superior Court,* several food and beverage workers filed suit against AEG, Levy Premium foods and Canvas Corporation for failure to pay minimum wage and willful misclassification as independent contractors. AEG contracted with Levy to manage the food and beverages at California entertainment venues. Levy contracted with Canvas to provide laborers who sold food and beverages at AEG venues. The California Court of Appeal ruled that any co-employer who is aware that a co-employer has willfully misclassified their joint employees, and who fails to remedy the misclassification, is liable for engaging in the willful misclassification of an individual in violation of Labor Code section 226.8.

Garcia v. Seacon Logix, Inc., 238 Cal.App.4th 1476 (2015)

In *Garcia v. Seacon Logix, Inc.* the plaintiffs – truck drivers who transported cargo for Seacon – filed suit under California Labor Code section 2802 to recover lease and insurance payments for their trucks that were deducted from their paychecks. The drivers were obligated to lease their trucks from Seacon rather than another company, required to arrive at work at specified times, required to call if they were going to be late, had little control over their routes and assignments, could be terminated at will, and could not work for any other company. Accordingly, the California Court of Appeal held that the drivers were employees because there was substantial evidence that Seacon controlled the manner and means of the drivers' work, and that secondary factors such as the right to discharge at will and the provision of the instrumentalities, tools, and place of work proved that the drivers were employees and not independent contractors.

D. Federal and California Wage and Hour Developments

*Balestrieri v. Menlo Park Fire Prot. Dist.,*800 F.3d 1094 (9th Cir. 2015)

In *Balestrieri v. Menlo Park Fire Protection District,* the plaintiffs were firefighters who occasionally worked shifts at visiting stations and picked up their protective gear from their home station prior to reporting to a visiting station. The firefighters filed suit under the Fair Labor Standards Act for time spent retrieving their protective gear. The Court held that the firefighters were not entitled to compensation for time spent moving their gear to and from temporary work assignments because doing so was not "integral and indispensable" to the firefighters' principal activities of preventing, controlling, and extinguishing fires or responding to emergency situations.

Mendiola v. CPS Sec. Solutions, Inc., 60 Cal.4th 833 (2015)

In *Mendiola v. CPS Security Solutions,* security guards employed by CPS Security Solutions filed a wage and hour class action alleging CPS failed to pay them for all their on-call hours. The security guards lived on the job site and were scheduled for 16 hour or 24 hour shifts. Eight of the 16 or 24 hours were classified as "on-call" time, and the security guards were not paid for these hours unless they were actually required to perform work. While on-call, the security guards were required to remain within a 30 minute radius of the job site and be available by pager, phone or radio. The California Supreme Court held that "on-call hours constituted compensable hours worked" and that CPS "could not exclude 'sleep time' from plaintiffs' 24 hour shifts..." In reaching this conclusion the Court evaluated, "(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time."

Augustus v. ABM Security Services, Inc., 233 Cal. App. 4th 1065 (2014) (as modified January 29, 2015)

In *Augustus v. ABM Security Services,* security guard plaintiffs filed a class action against their employer for, among other things, failure to provide rest breaks, alleging that ABM failed to relieve security guards of all duties during breaks. ABM had a uniform policy that required security guards to remain on call during rest breaks, required its security guards to keep their radios and pagers on during rest breaks, and to respond to tenants when needs arise or an emergency situation occurs. The California Court of Appeal held that while California law prohibits employers from requiring employees to work during rest breaks, it does not require employees to relieve employees of all duty during rest breaks.

This case is currently pending review before the California Supreme Court.

Frlekin et al. v. Apple, Inc., 2015 WL 6851424 (N.D. Cal. 2015)

In *Frlekin v. Apple, Inc., the* plaintiffs brought suit against their employer, Apple, Inc. for alleged unpaid time spent undergoing security screenings (bag checks). The Northern District held that the plaintiffs were not "subject to the control" of Apple during the screenings because the plaintiffs could choose to avoid the activity. While the Court found that Apple did restrain the employees' actions during bag checks because they required employees to stand in line for the security screening once they were ready to leave the store with a bag, the Court did not find that the plaintiffs had no choice to avoid the activity because the employee could choose not to bring a bag to work and avoid the screening altogether. The District Court also found that the plaintiffs were not "suffered or permitted" to work during the time they were awaiting security screenings because time spent waiting was not "work" as it had no relationship to plaintiffs' job duties and the plaintiffs merely waited passively while checks were conducted.

The plaintiffs have appealed the District Court's rulling.

Safeway, Inc. v. Superior Court (Esparza), 238 Cal.App.4th 1138 (2015)

In *Safeway, Inc. v. Superior Court,* employees asserted putative class claims against their employer for violations of the California Labor Code and Unfair Competition Law. The plaintiffs alleged that the employer had a policy of never paying premium wages for missed meal periods when required. The Court of Appeal affirmed the trial court's grant of class certification of plaintiff's UCL claim holding that the employees' evidence was sufficient to support class certification. The Court reasoned that the employees were not required to show that all class members accrued premium wages, but only that on a system-wide basis, the

employers denied the class members the benefits provided by Labor Code section 226.7.

Alberts v. Aurora Behavioral Health Care, 241 Cal.App.4th 388 (2015)

In *Alberts v. Aurora Behavioral Health Care,* former nurses of two psychiatric hospitals filed a class action against the operator of the hospitals alleging, among other things, that the hospitals failed to provide meal and rest periods and forced them to work off the clock. The plaintiffs alleged that the hospitals had a facially invalid meal and rest break policy, and a practice of understaffing its hospitals and forcing its nurses to remain on duty in lieu of taking breaks. The Court of Appeal held that the mere existence of a facially legal policy will not defeat class certification when there is substantial evidence that the hospital had a practice of not providing meal and rest breaks. The Court also found that whether the hospitals' "system governing rest and meal breaks — which applie[d] to all putative class members — [complied] with California law," was a common question amenable to class certification.

Navarro v. Encino Motorcars, LLC, 780 F.3d 1267 (9th Cir. 2015)

In *Navarro v. Encino Motorcars, LLC,* the plaintiffs worked as service advisors at a car dealership greeting customers, evaluating service needs, and suggesting services. The plaintiffs sued their employer for overtime wages under the Fair Labor Standards Act (“FLSA”). The FLSA exempts “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” from the overtime requirements. The Ninth Circuit held that service advisors did not fall under the FLSA’s exemption for automobile salesmen, partsmen, and mechanics because the exemption is limited to “salesman” who sell vehicles and partsmen and mechanics who service vehicles.

On January 16, 2016, the United States Supreme Court granted the petition for writ of *certiorari* to review the Ninth Circuit's ruling.

III. Significant National Labor Relations Board Decisions and Trends in 2015

Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015)

In *Browning-Ferris Industries of California, Inc.,* employees of Leadpoint, Inc., a staffing agency, were assigned to work at one of Browning-Ferris' recycling facilities. A union petitioned to represent these employees, naming both Leadpoint and Browning Ferris as employers. The National Labor Relations Board expanded the joint employer standard and held that a company is a joint employer if it exercises "indirect control" over working conditions or if it has "reserved authority" to exercise such control. The NLRB departured from the old standard that an entity had to exercise *actual* control over employees in order to be a joint employer. This departure resulted in the NLRB concluding that Browning-Ferris was a joint employer and was therefore obligated to negotiate with the union over the terms and conditions of employment for Leadpoint's employees.

Pacific Bell Telephone Co. 362 NLRB No. 105 (June 2, 2015)

In *Pacific Bell Telephone Co.,* Pacific Bell forbade its premise techs who install and repair phones inside customer homes and business from wearing buttons, pins, and stickers on their company-brand apparel. As part of a union campaign, Pacific Bell's employees began wearing buttons that stated, WTF ("where's the fairness") and FTW ("fight to win"). Pacific Bell argued that the buttons were so vulgar and offensive that they no longer constituted protected speech. The NLRB disagreed and held that the buttons were not so vulgar that they forfeited legal protection, and that the employer failed to demonstrate any special

circumstances that would overcome the employees' right to wear union insignia.

Pier Sixty, LLC, 362 NLRB No. 59 (Mar. 31, 2015)

In *Pier Sixty, LLC,* two employees engaged in an exchange on Facebook about their plans to disrupt the workplace and flaunt employer policies and procedures and were terminated. The NLRB found that the employees' comments were not egregious enough to lose the protection of the Act because "vulgar is rife in [Pier Sixty's] workplace" and the Facebook posts were simply the employees protesting rude and demanding treatment by managers.

Continued Scrutiny of Employee Handbooks and Policies

The NLRB is continuing to police handbooks and other policies that it believes could "chill" employee rights under federal labor law. Specifically, the National Labor Relations Act gives employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The NLRB's Office of the General Counsel has taken the position that even if an employer does not draft its policies with the intent to prohibit protected activity, and even if a work rule does not explicitly prohibit or address protected activity, the policies may be unlawful if employees could "reasonably construe" the rule to prohibit such activity. On March 18, 2015, the General Counsel issued a Memorandum with the stated purpose of helping employers to review their handbooks. The Memorandum reviews numerous categories of employer rules/policies and provides examples of permissible and impermissible rules in those areas, including: confidential information; employee misconduct; third party communications; employee use of logos, copyrights and trademarks; employee use of photography and recording devices; restrictions on employees leaving work; and conflicts of interest. This Memorandum is available online at https://www.nlrb.gov/reports-guidance/general-counsel-memos.

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