California Grain & Feed Association

Presented by
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OVERVIEW OF TOPICS

I. Legislative Update

II. Jury Verdicts and Important Takeaways

III. Notable Employment Law Cases

IV. Brinker: Rest and Meal Periods

V. Hot Topic & Practical Knowledge for HR
I. Legislative Update
California Legislative Makeup

2013

- 2012 Election cycle resulted in a major boost for Democrats
- Supermajority in both the Assembly and the Senate for the first time since 1883
- Power to approve new taxed and get constitutional amendments on the ballot without a republican vote
SB1186: Disability Access

Effective September 19, 2012
- Under certain circumstances can reduce potential damages for Disability access violation from minimum $4,000.00 to as little as $1,000.00 if violations are corrected quickly
- Also bars lawyers from issuing pre-lawsuit demands for money and regulates complaints involving construction related violations
Amends Labor Code section to require temporary services employers to provide itemized information concerning the rate of pay and total hours worked for each assignment (with the exception of security services companies).
SB863: Workers’ Compensation Reform

Effective January 1, 2013

• Reduces workers’ compensation costs for California business while increasing benefits to employees injured on the job.
• Estimated to save California businesses $1 billion.
• Creates an independent review process for medical treatment and billing disputes, fee schedules for home health care, language interpretation, and fees for current and future lien filings.
• Shortens the timeline for approval of treatment from 24 months down to 3 months.
• Limits the role of chiropractors, so they cannot serve as a workers’ primary care doctor after hitting 24 visits in a year.
AB1844: Social Media Privacy

Should you ask an employee for their social media password

• This bill prohibits employers from demanding user names and passwords from employees and job applicants.

• This bill would also prohibit an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates these provisions.
AB1964: Religious Dress and Grooming Practice

Effective January 1, 2013

• Bill provides clarity regarding religious dress to ensure that all religions receive equal protection under the law and that employees are not put in a position where they cannot perform their job functions because of their religious belief and dress.

• Outlaws employer discrimination against an employee or job applicant based on their religious clothing or hairstyle.
AB2674: Employee Inspection of Personnel Records

• Amends California Labor Code § 1198.5 effective January 1, 2013

• Law clarifies that inspection rights apply to both current employees and former employees.

• Requires employers to maintain personnel records (including records relating to an employee’s performance and to any grievance concerning the employee) for at least 3 years after separation.

• Allows the employer to redact the name of any non-supervisory employees referenced in the records and makes clear that the employer is not required to make personnel records available, pursuant to Section 1198.5, during the pendency of a lawsuit.

• Finally, the new law establishes that if an employer fails to comply with inspection and copying requests under Section 1198.5, either the employee/former employee or Labor Commissioner may collect a penalty of $750.
SB1255: Penalties for Wage Statement Violations

Employers must provide the following:

- wages
- deductions
- the name and address of the employer
- the employee name
- I.D. number, or
- the last 4 digits of their SSN
- total hours worked, applicable hourly rate (or piece rate), deductions
Deferred Action of Childhood Arrivals

Obama signed an executive order that went into effect on August 15, 2012 which allows approximately 1.7 million children of undocumented immigrants to become eligible to apply for the temporary right to work and to go to school in this country without fear of being deported.

The federal government will no longer deport undocumented immigrants under the age of 31 who came to this country as children if they arrived prior to turning 16 years old, have lived in this country for at least five (5) years, and have no criminal history.
Healthcare

Businesses of all size MUST understand the requirements this new law imposes

- Companies must have insurance or pay a fine
- Provides tax credits for companies with fewer than 25 employees
- Companies that have 50 or more employees and do not have insurance will be penalized
California Health Benefit Exchange

The California Health Benefit Exchange will go into effect beginning in 2014, and is geared towards creating a new insurance marketplace in which individuals and small businesses will be able to purchase competitively priced health plans using federal tax subsidies and credits.
II. JURY VERDICTS & IMPORTANT TAKEWAYS
Bad Conduct and Public Safety Concerns Drive Large Verdicts

- Two Sacramento and Yolo County jury verdicts demonstrate how egregious employer conduct, combined with public safety concerns result in juries willing to award huge damage figures.

- Another case demonstrates that where the facts make the jury angry, a large verdict is likely.
Chopourian v. Catholic Healthcare West

Plaintiff was terminated from her position as a surgical physician’s assistant in the cardiovascular surgery unit of Mercy General Hospital only one week after making complaints of sexual harassment and notifying hospital officials about lapses in patient care.

Jury verdict for Plaintiff:
$167,730,488.00.

Clearly the jury was trying to send a strong message regarding the importance of safety and unlawful working environments.
Daniel Webb v. Ramos Oil Co.

After working for the Defendant for 13 years, Plaintiff was terminated from his position as a gasoline delivery truck driver on the grounds that he refused to report to work.

The Plaintiff was able to demonstrate that he refused to report to work to drive because of serious weather conditions.

Jury verdict for Plaintiff: $6,241,655.00.

Again, a compelling display of safety concerns appealed to the jury along with grounds for unlawful termination.
**Medro Johnson v. Sears Home Improvement**

Johnson was terminated after submitting a detailed report regarding racial harassment and assault by a co-worker at a company barbeque.

Sears did not investigate, terminate, or discipline the harasser who was a top salesman for Sears. Instead, Johnson was terminated

During trial defense counsel deposed Johnson’s young son regarding the use of the “N” word at home, which angered the jury.

Verdict for Plaintiff: $5,183,773.00.
Fair investigations generally include the following...

Use of a trained, uninvolved investigator who will ask relevant, factual questions of both sides,

Maintain confidentiality insofar as possible,

Provide the accused ample opportunity to present his position, and

Carefully consider the evidence presented by both parties as well as any percipient witnesses.
III. NOTABLE EMPLOYMENT LAW CASES
“Me Too” Evidence

_Pantoja v. Anton_

Allows Plaintiffs in sexual harassment cases to introduce evidence that the harasser also harassed other people regardless of whether the Plaintiff was present for the harassment or even an employee at the time it occurred.

This law allows Plaintiffs to use character evidence to show that an individual is a harasser and make the allegation that therefore their own harassment is substantiated.
Takeaway: Retaining a employee in your company with a history of harassment can come back to bite you.
“Cat’s Paw” Theory: Straub v. Proctor Hospital

An employer can be held liable when a biased supervisor influences a higher ranking supervisor who takes adverse action against a Plaintiff without knowledge of any unlawful bias.

**Takeaway:** Before terminating an employee make sure they have not made any complaints that may raise red flags later.
The decision concerned the anti-retaliation provisions of the Fair Labor Standards Act (FLSA) that prohibit discrimination against an employee because they have filed a complaint related to the provisions of the FLSA.

The Court also held that the complaint must be sufficiently clear and detailed for a reasonable employer to understand it as an assertion of the rights protected by the FLSA.
**Takeaway:** Don’t ignore employee complaints regarding time keeping, meal and rest breaks, overtime compensation, donning and doffing, and other wage and hour concerns.
IV. BRINKER: MEAL & REST PERIODS
Why Should I Pay Close Attention to Rest and Meal Period Compliance?

Any employer, and especially large employers, are prime targets for wage and hour class actions which require that you prove compliance with workplace polices, practices and records.
Brinker Restaurant Corp. v. Superior Court (Hohnbaum),

Regarding whether an employer need only “provide” each required meal period or whether the employer must “ensure” that eligible employees take the meal period and perform no work during meal periods, the Brinker rule is clear that the employer must “relinquish control” over the employee and their activities.
A Prudent Employer Should Put in Place A Policy Which Includes These Elements:

First, every employer should have a clear statement of the policy in their employee handbook that a new-hire signs.

Second, the employer should ensure that managers and employees alike are properly trained in the meal period policy and its practical implications.

Third, the employer should establish a monitoring process to empower managers to oversee and document compliance with the policy.
Must Employers “Ensure” That Employees Take Meal Breaks?

Provide:
Relief from all duties
30 minutes uninterrupted
Freedom from employer control
Freedom to leave the premises
Meal Periods Per California Wage Order No. 8:

After a Five (5) Hour Work Period > Entitled to a thirty (30) minute unpaid meal period

After ten (10) Hours of Work > Entitled to a second thirty (30) minute unpaid meal period
What Is Wrong With This Schedule?

6:00 a.m.: Work Begins
8:00-8:10: Rest Break
11:30-12:00: Meal Break
2:00-2:10: Rest Break
4:00: Work Ends
ANSWER:
The meal break is too late because it is after the 5th hour.
Wage Order No. 8
Employees may waive their second meal period if:

They have taken their first thirty (30) minute meal period within five (5) hours of starting work

AND

They will work no more than twelve (12) hours. Employees must sign a written waiver each day.
What is Wrong With This Schedule?
6:00 a.m.: Work Begins

8:00-8:10: Rest Break

11:00-11:30 Meal Break (Waived)

1:00-1:10: Rest Break

2:00-2:30 Meal Break (Waived)

5:00: Work Ends

Employees may only waive their second meal break if they have taken their first meal break.
**What is an On-Duty Meal Period and When May I Provide It?**

Only when the nature of the job prevents an employee from being relieved of all duty,

AND

There is a written agreement between employer and employee that is revocable by the employee at any time.

The on-duty meal period should be counted as hours worked.
### Rest Periods: Provide as Follows:

<table>
<thead>
<tr>
<th>Total Hours Worked</th>
<th>Number of Required Ten (10) Minute Rest Periods</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 3 ½ hours</td>
<td>None</td>
</tr>
<tr>
<td>3 ½ - 6 hours</td>
<td>one (1) ten (10) min. break</td>
</tr>
<tr>
<td>6 - 10 hours</td>
<td>two (2) ten (10) min. breaks</td>
</tr>
<tr>
<td>10 - 14 hours</td>
<td>three (3) ten (10) min. breaks</td>
</tr>
<tr>
<td>14 - 18 hours</td>
<td>four (4) ten (10) min. breaks</td>
</tr>
<tr>
<td>18 - 22 hours</td>
<td>five (5) ten (10) min breaks</td>
</tr>
</tbody>
</table>
What Is Wrong With This Schedule?

6:00 a.m.: Work Begins
8:00-8:10: Rest Break
11:00-11:30: Meal Break
1:00-1:10: Rest Break
2:00-2:30: Meal Break
4:30: Work Ends
ANSWER:

This is a 10 ½ hour long shift. When an employee works over ten (10) hours, they are entitled to three (3) rest breaks and two (2) meal breaks.
V. HOT TOPICS & PRACTICAL KNOWLEDGE FOR HR
Tools, Equipment, and Uniforms

When tools, equipment, or uniforms are necessary to perform the job, or to keep the employee safe, you must provide and maintain them.

Absent documented gross negligence or willful misconduct on the part of the employee in damaging the tool, the employer has no right to deduct from the employees pay check.
**So How Do I Deal With Employees Who Routinely Lose or Damage Equipment?**

Create a policy explaining that employees are subject to discipline if they lose or damage tools and equipment.

Enforce this policy by writing up employees who violate its terms.
Medical Marijuana and Employment

Drug testing of current employees is allowed only in limited situations

- If performing the job is “safety sensitive,” for example the job requires extreme caution, the handling of drugs or a firearms, or access to extremely sensitive information;

- If your employer reasonably believes that your job performance is suffering because you are abusing drugs;

- If you are injured on the job, and your employer needs to determine whether it is excused from paying workers’ compensation because substance abuse, rather than working conditions, caused your injury; or

- If your employer requires employees who have completed or are participating in drug rehabilitation programs to take random drug tests to ensure they are no longer use illegal drugs.

- An employer may give a drug test to any applicant provided that all applicants are subjected to the same test.
What if an employee tests positive for marijuana and has a medical marijuana prescription card?

May I terminate their employment?

Yes!!!

In California the card/medical use does not protect the employee’s use of marijuana.
Do I have to engage in the interactive process and accommodate an employee who has a medical marijuana prescription card to treat their disability?

NO!!!

However...

While current drug use (a positive test) is not a protected disability, employers in California with 25 or more employees, must accommodate employees who volunteer to enter into drug or alcohol rehabilitation, so long as it does not impose an undue hardship on the employer. Thus, you must accommodate employees who are undergoing drug treatment.
Practical Knowledge: Sexual Harassment

Under federal and California law, an employer is legally responsible to a victimized employee for sexual harassment by a supervisor with authority over that employee in two instances:

When the harassment leads to a tangible employment action

When there has been no tangible employment action

Further, Supervisors can be held personally liable for engaging in sexual harassment.
Practical Knowledge: Protected Activities

California and Federal law are clear that discipline can never be based on race, color, religion, national origin, age, gender, and possibly other factors. Further, an employer cannot discipline an employee in retaliation for whistleblowing, union activities, or other protected activities.

Protected activities include filing complains for unlawful harassment or discrimination, or refusing to cooperate with the management's investigation of a claim filed by another employee.
Practical Knowledge: Progressive Discipline

Discipline issues that are ignored by a supervisor can grow, and lead to employees loosing respect for their management’s leadership. Make the punishment fit the crime. Start with light warnings for first offenders and progress to termination only for repeated or serious violations. Remember to give the employee opportunities for reform and redemption.
Workplace Investigations: Guidelines

*Treat all complaints seriously!* Don’t blow off the complaint without conducting an investigation.

*Investigate immediately.* The closer in time the investigation, the more likely it will be considered a proper investigation.

Generally, an employer should designate a specific employee to receive complaints. This employee should be trained on how to conduct investigations, and should be uninvolved with the underlying complaint. An alternate employee should be designated should a conflict arise.
Questions?

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