Office 909-997-8162

It is great day to be a California employer!

July brought a bunch of new exciting changes to California employers, the days of waiting for major change until January 1, are over. I can see you all just jumping for joy! So let's get right to it. You can easily follow the links below to review which ever new law or recent case decision you would like to better understand.

If you have hourly employees who stay after they have clocked out, to lock up the store or other minimal chores you are going to want to read A Starbucks tale. AB2770 changes how you as an employer can give references with immunity, and who can't wait to read the legislatures explanation of salary questions, what you can and cannot ask. And for those of you who round up in your time clocks please follow this link to learn about a recent decision that will affect you and your business.

A Starbucks Tale - Clock out and GO Home or pay the price

The California Supreme Court recently rejected the federal "de minimis" doctrine for wage and hour regulations. California **now has a different standard than federal law for deciding whether small amounts of work "off the clock" must be paid.** [1]In reaching the decision at the request of the Ninth Circuit in *Troester v. Starbucks Corporation*, Ninth Circuit Case No. 14-55530, California Supreme Court Case No. S-234969, the California Supreme Court overruled adoption of the de minimis doctrine by both lower California courts and even the traditionally pro-employee California Department of Labor Standards.

For over **70 years** under the Federal Fair Labor Standard Act (FLSA), courts have held that small amounts of time – usually 10 minutes or under of work – does not have to be compensated

[1] https://www.laboremploymentlawblog.com/2018/07/articles/class-actions/rounding-policy/

because it is de minimis[2]. The California Supreme Court's new decision, however, ***creates enormous risks for all employers***, [3]especially those in the **hospitality and retail** industries, that rely on the de minimis doctrine to determine pay periods for employees. **It also will result in a feeding frenzy by the plaintiffs' bar with even more wage and hour lawsuits.**

Here are the facts of this very disturbing employment case

The plaintiff employee, a Starbucks manager, complained that he had to perform several tasks each day after clocking out, including 1-2 minutes spent initiating a computer-run "store closing procedure" and setting the alarm, 30 seconds walking to the store exit, and "15 seconds to 'a couple minutes'" locking the door. Occasionally, he would escort a fellow employee to their car, or let a co-worker back into the store to retrieve a forgotten item. All told, the employee spent about 4-10 minutes per day on these unrecorded and uncompensated "tasks." *Over a 17-month period, this added up to just $102.67* of allegedly unpaid wages.

Under federal de minimis doctrine which includes a Ninth Circuit (that's us) decision in *Lindow v. U.S.*, 738 F.2d 1057 (Ninth Cir. 1984), which said that "otherwise compensable "work beyond the eight-hour day which was 10 minutes or less was de minimis and need not be paid, it honestly looked good for employer. But in true California fashion the California Supreme Court rejected *Lindow*, (after 70 years) holding that California has a stricter standard than the FLSA.

While the California Supreme Court left open "whether a de minimis principle may ever apply to wage and hour claims," it rejected it in the Starbucks case.

The California Supreme Court justified this departure of longstanding federal and California law by saying that **"problems in recording employee work time" have been cured by technical advances which supposedly enable employers to track and register work time via smartphones, tablets, or other devices**. The California Supreme Court went on to warn,

"*An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine. As the facts here demonstrate, a few minutes of work each day can add up*."

Employers next Steps – Crying is not an option

- Carefully review any off-the-clock work required of its employees, no matter how small, or "de minimis."

[2] too trivial or minor to merit consideration, especially in law.
[3] http://www.mondaq.com/article.asp?articleid=724134&email_access=on&chk=1794958&q=1070824

- Look at new ways to track work time individually, including by iPhones or tablets, rather than the traditional time clock.
- This new case creates even more uncertainty for small amounts of "work" beyond the eight-hour day. This will affect not only end of the day tasks such as in Starbucks, **but lunch time and breaks.** Employers will have to carefully examine when work stops and starts in calculating work hours. Failure to do so will result in overtime and wage penalties.
- This is decision is a plantiff attorneys dream come true, so if you currently use meal waivers make sure you are not scheduling individuals for the full 6 hours, consider scheduling them 5.5 hours so there is less chance on them staying past the waiver exemption.

While a supposed "rule of reason" still may apply, employers in California are now at the mercy of a judge or jury second guessing their decisions. For what is reasonable to one person can be unreasonable to another.

Employer protection expanded to include information regarding Sexual harassment.

Your HR professional has probably frequently warned you about giving references and liability that attaches with potential slander. The best practice that has been reccomended is a well written policy that's states the Company will only confirm dates of hire and position, with the new salary laws I don't feel comfortable confirming salary anymore.

Here is the reality #metoo has sent employment law and legislation into a tizzy. Sacramento is currently posed to pass several new laws regarding sexual harassment and employer responsibilities.

The most recent law signed on July 9 by Governor Brown and which takes effect immediately is Assembly Bill 2770 (AB 2770) . The new statute amends California Civil Code Section 47, which designates certain communications as "privileged," meaning that individuals cannot be liable for defamation (including libel and slander) based on those communications.

How does this relate to you? It means when giving a reference if certain conditions are met then you **may have** a duty to tell a future employer about any credible harassment investigation. In true California fashion the law leaves more questions unanswered than it answers.

In the context of workplace sexual harassment complaints and investigations, the new amendments add language to Section 47(c) to protect three different groups:

- **Complainants** – The amendments classify as privileged written and oral sexual harassment complaints that employees make, without malice, based upon credible evidence. The amendments do not define "credible evidence."
- **Witnesses** – In addition, AB 2770 makes privileged witness communications to an employer if the witness makes the communications without malice. For example, the statute protects a witness who responds to an employer's sexual harassment investigation questions.
- **Employers** – The statute allows employers to respond to reference checks by the alleged harasser's potential new employers if the potential employers ask if the alleged harasser is eligible for rehire and, if not, "whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment." Again, the employer must make the statements without malice.

AB 2770 leaves some legal issues unresolved. The statute limits itself to sexual harassment communications; it does not address communications involving any other type of prohibited harassment, such as race, national origin, disability, age, or sexual orientation harassment. The legislation also does not define the "credible evidence" upon which a victim or others must base a sexual harassment complaint. Moreover, harassers still can argue that an alleged victim made his or her complaint maliciously.

Finally, the legislature may have opened up a new basis for **negligent hiring claims.** An employer that fails to ask previous employers during reference checks about an employee's rehire eligibility and whether sexual harassment is the reason for the employee's inability to be rehired may have difficulty explaining why it did not ask those questions if the employer finds that it hired a repeat sexual harasser.

Oh joy Oh Bliss.

Salary Ban – Pay Equity [4]

California Governor Brown signed into law July 24, 2018 Assembly Bill No. 2282 to clarify previously passed legislation that prohibits inquiries into an applicant's salary history. Yep the law AB 168 that we have had follow since January 1, is now being explained. Who's more fun than California legislatures?

When AB 168 was signed into law in October 2017, California prohibited employers from asking job applicants for "salary history information." Under this legislation, California employers must provide "applicants" with the "pay scale" for a position upon "reasonable request." The law was

[4] https://www.calpeculiarities.com/tag/ab-2282/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link

rather unclear, however, about what each of these three terms meant. On July 18, 2018, Governor Brown signed new legislation, Assembly Bill 2282, designed to clarify those terms and other items in AB 168.

For example, under AB 168, it was not clear whether the term "applicant" meant only external applicants for a position or also current employees applying for the position. **AB 2282 clarifies that an "applicant" is an individual who seeks employment with the employer, not a current employee.**

Next, it was not clear what information an employer would have to supply when a reasonable request was made for the "pay scale" of a position. **AB 2282 defines "pay scale" as a salary or hourly wage range and clarifies that the definition of "pay scale" does not include bonuses or equity ranges.**

AB 2282 also clarifies what constitutes a "reasonable request" for pay scale information. **A "reasonable request" is defined as a request made after the applicant has completed the initial interview.**

Additionally, AB 2282 clarifies that although AB 168 prohibits employers from asking for the applicant's salary history information, **employers may ask about an applicant's salary expectations for the position.**

The new legislation addresses aspects of the California Equal Pay Act as well. It was unclear under what circumstances an employer could use prior salary to justify a disparity in pay. The new legislation attempts to clarify this: "Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors listed in this subdivision." Those factors are (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production; and (4) a bona fide factor other than race or ethnicity, such as education, training, or experience.

EDD – Mandated Poster Update

EDD released an new unemployment poster. Please follow this link to print yours out and put it on the wall. The new update will be incorporated in the 2019 posters, which all have to order in December.

Have fun out there!