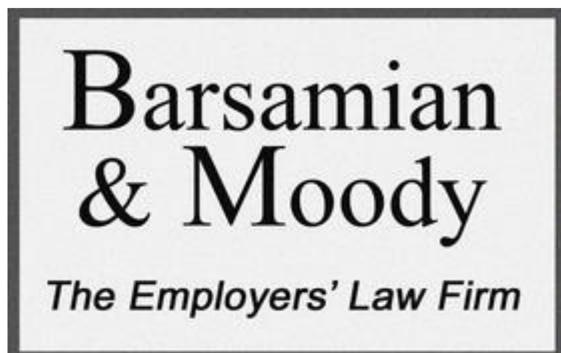
39th Annual APMA Forum

2019 Labor & Employment Law Update



Patrick S. Moody, Esq.
BARSAMIAN & MOODY PC
1141 West Shaw Avenue, Suite 104
Fresno, California 93711
TEL. (559) 248-2360
E-MAIL. pmoody@theemployerslawfirm.com

Jason Resnick, Esq.
Western Growers
15525 Sand Canyon
Irvine, California 92618
TEL. (949) 885-2253
E-MAIL. jresnick@wga.com

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

TABLE OF CONTENTS

Introduction..5

Employment Law Updates..5

Hiring, Training, Discipline, and Discharge.. 6

New classification guidelines for independent contractors 6

Appellate court limits *Dynamex*'s ABC test to claims brought under the Wage Orders..................7

California's AB 2282 clarifies AB 168's ban on salary history questions 8

SB 1412 amends California's criminal history inquiry law..9

California Supreme Court addresses background checks..10

Leave of Absence and Benefits 10

AB 1976 requires lactation locations..10

Paid Family Leave (AB 2587)..11

Equal Employment Opportunity..11

Sexual harassment omnibus bill (SB 1300) 11

California Legislators give the #MeToo Movement a megaphone 13

The scope of mandatory sexual harassment training is expanding..14

AB 2770 shields employers and accusers against defamation suits brought by alleged harassers 15

California-based publicly held corporations are now required to have women on their boards ...16

Human Trafficking Notice (AB 2034) 16

Wage and Hour Issues.. 16

California's minimum wage increased..16

AB 1066's changes to Wage Order 14 are now in effect (for "large" employers) 17

California law no longer recognizes the de minimis doctrine..22

SCOTUS says that FLSA exemptions should not be narrowly construed 23

California Supreme Court provides important guidance on how to factor in flat sum bonuses to overtime computations..23

Employees now have a right to receive a copy of their pay statements (as opposed to a right to inspect or copy their pay statements)..24

Challenge to AB 1513 safe harbor tossed out of court on appeal 24

The Adverse Effect Wage Rate for H-2A workers 25

Immigration-related Laws 25

A federal judge blocked AB 450 25

Labor Law Updates 26

National Labor Relations Act 26

Class action waivers are lawful under the NLRA, and enforceable under the Federal Arbitration Act 27

No more agency fees for public employees 27

The NLRB is in the process of returning to the traditional joint employer standard 28

Agricultural Labor Relations Act 29

The Absurdity of AB 2751 29

Litigation and Enforcement Trends 30

Equal Employment Opportunities Commission 31

The EEOC is cracking down on employers who do not sufficiently discipline employees for engaging in sexual harassment 32

Cal/OSHA 33

Division of Labor Standards Enforcement 34

The Labor Commissioner continues to pursue wage and hour claims 34

Private Wage and Hour Litigation 35

Policies requiring "off-the-clock" work are the new rest and meal break violation 35

Inadvertent mistakes lead to substantial waiting time penalties 36

Drug Testing in the Workplace 36

California employers can prohibit recreational marijuana use at work 36

Immigration 38

INTRODUCTION

Like most years, 2019 has brought about much change to labor and employment laws governing agricultural employers. There are big changes coming to agriculture with the first step in the elimination of agriculture's unique overtime rules under Wage Order 14. Effective January 1, 2019, employers with 26 or more employees must pay overtime after 9.5 hours per day and 55 hours per workweek. If you have 25 of fewer employees, you will still be subject to 10-hour per day overtime rules for a few more years.

January 1 also brought us another increase in the California minimum wage. Employers with 25 or fewer employees must pay at least $11 per hour, while those with 26 or more employees saw the minimum rate increase to $12 per hour. Of course, keep in mind that an increase in the minimum hourly wage also requires an increase in the minimum salary in order to make certain that your exempt employees retain their exemption. The minimum monthly salary for employers with 25 or fewer employees is now $3,813.33 in 2019, and employers with 26 or more employees must pay a minimum monthly salary of at least $4,160.00 to retain the exemption.

There is also new sexual harassment training, which must be completed by the end of 2019. If you have 5 or more employees, all of your supervisory employees must get at least 2 hours of training, and all non-supervisory employees must get at least 1 hour of training. The DFEH is in the process of developing approved training materials for employers to use to meet this requirement, or employers can utilize other compliant training material.

This paper addresses these changes and more below.

EMPLOYMENT LAW UPDATES

Employment law is the body of law governing employee rights and is constantly developing through newly enacted federal

and state laws and regulations and the court decisions that interpret them. This section discusses the most important updates that are most important for agricultural employers to be aware of. New laws summarized here went into effect on January 1, 2019, unless otherwise indicated.

Hiring, Training, Discipline, and Discharge

New classification guidelines for independent contractors

In *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court clarified the standard for determining whether workers in California should be classified as employees or as independent contractors for purposes of the Wage Orders adopted by California's Industrial Welfare Commission ("IWC"). In doing so, the Court held that there is a presumption that individuals are employees, and that the hiring entity bears the burden of establishing that an individual is properly classified as an independent contractor. To meet this burden, the hiring entity must establish each of the following three factors, commonly known as the "ABC test":

(A) That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; **and**

(B) That the worker performs work that is outside the usual course of the hiring entity's business; **and**

(C) That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

For example, a store that hires an outside plumber to fix a leak, or an electrician to install a new line, could consider them contractors. But, a clothing manufacturer that hires seamstresses who work at home to make dresses that the company will sell has hired them to perform work in its usual line of business and must pay them as employees.

What this means for employers: Following *Dynamex*, California employers will have to be much more careful about how they classify their workers. Certainly, California employers that treat some or all workers as independent contractors will want to review their relationship under the "ABC test" to determine whether any or all such workers should be reclassified as employees. As a practical matter, it is very likely that many more workers will be considered employees under the new ABC test as it is much more difficult to make the argument that a worker is an independent contractor.

Appellate court limits *Dynamex*'s ABC test to claims brought under the Wage Orders

In *Garcia v. Border Transportation Group, LLC*, a taxi driver sued the transportation company that leased the driver his taxicab, alleging that he was misclassified as an independent contractor. The company argued that it exerted very little control over the driver, and neither required the driver to remit fares, nor required the driver to maintain trip logs or respond to a dispatch. The driver was free to set his own hours and breaks, select his own routes, set his own prices, he could use his taxicab for personal errands, enter into sublease agreements, and advertise services under whatever name he wanted.

Citing pre-*Dynamex* case law, the trial court agreed with the company that the driver was an independent contractor and dismissed all of the driver's claims. However, after the trial court issued its decision, the California Supreme Court issued its *Dynamex* decision. During review, the Court of Appeal found that under *Dynamex* the driver was not an independent contractor, because the employer could not show that the driver had an independently established business (part C of the ABC test). Most significantly, however, the court held that *Dynamex* only applies to claims based on alleged violations of the Wage Orders (e.g., unpaid overtime, meal and rest period violation, failure to pay minimum wage for all hours worked, etc.). For non-wage-order claims like wrongful termination, workers' compensation claims and waiting time penalties, courts will continue to apply the more lenient "control" test, which was traditionally applied before *Dynamex*.

What this means for employers: *Garcia* is not a license to return to the old "control" test, which classified employees based primarily on the degree of control exercised by the hiring entity over the details of the work. Moreover, *Garcia* does not support classifying or reclassifying agricultural workers as a significant percentage of the claims such employees typically bring are based on the Wage Orders. However, for those employers that are not at risk for being targeted by claims based on the Wage Orders, *Garcia* provides an opportunity to continue using the control test.

California's AB 2282 clarifies AB 168's ban on salary history questions

California's legislature enacted AB 168 in 2017, which prohibiting employers from asking job applicants about their salary history. The law requires California employers to provide "applicants" with the "pay scale" for a position upon a "reasonable request." However, AB 168 was unclear as to the meaning of the terms "applicants," "pay scale," and "reasonable request." Employers were left wondering if the term "applicants" was limited to external applicants, or whether it also included current employees who were applying for a new position. It was also unclear what information employers were obligated to provide when an applicant requested a "pay scale" for a given position. Finally, many employers questioned what time frame constituted a "reasonable request."

Assembly Bill 2282, which was passed in July 2018, provides a bit of clarity as to each of these terms. The law provides that the term "applicant" refers to an individual who seeks employment with the employer, and not a current employee. Additionally, the term "pay scale" is a salary or hourly wage range that does not include bonuses or equity ranges. Finally, AB 2282 defines a "reasonable request" as one that is made after the applicant has completed the initial interview. Furthermore, AB 2282 clarified that although AB 168 prohibits employers from asking applicants about their salary history, employers are allowed to inquire about an applicant's salary expectations.

Lastly, it is important to note that AB 2282 clarified an aspect of California's Equal Pay Act by expressly stating that employers may not rely on prior salary history alone to justify a disparity in compensation for men and women. This portion of

AB 2282 mirrors the Ninth Circuit's decision in *Rizo v. Yovino*, which held that the federal Equal Pay Act prohibits an employer from justifying a wage differential between men and women by relying on prior salary.

More specifically, in April 2018, the Ninth Circuit held that the federal Equal Pay Act prohibits employers from using an employee's salary history as a factor in setting the employee's initial salary. In *Rizo*, the Fresno County Office of Education ("FCOE") had a long-standing policy that all new hires were offered 5% more pay than their last position, which meant that FCOE only considered an applicant's prior salary history. Rizo, an FCOE employee, discovered that her male colleague who had the same position and experience as her was being paid more. Rizo sued FCOE and claimed that the policy of solely considering prior salary violated the federal Equal Pay Act by perpetuating wage disparities between men and women in the same positions. The Ninth Circuit agreed. The court's decision here is a landmark decision and given the statistics about the realities of the gender pay gap, it could reverberate throughout the country in the form of copycat litigation.

Accordingly, under both federal and state law, California employers are prohibited from considering prior salary at all in justifying a difference in pay for men and women.

SB 1412 amends California's criminal history inquiry law

Senate Bill 1412 amends Labor Code section 432.7, which prohibits employers from asking job applicants about:

- An arrest or detention that did not result in conviction.
- Information concerning a referral to, and participation in, any pretrial or post-trial diversion program.
- A conviction that has been judicially dismissed or ordered sealed pursuant to law.

The new law clarifies that "conviction" includes a plea, verdict, or finding of guilt, regardless of whether a sentence is imposed by the court. It also provides exemptions from this law, such as when an employer is required by law to obtain information about a particular conviction, regardless of whether that conviction was expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

California Supreme Court addresses background checks

In *Connor v. First Student Inc.*, over one thousand bus drivers filed suit against their employer, a bus transportation company, alleging the employer unlawfully failed to adequately notify them and obtain their prior written authorization when conducting background checks. At issue was the fact that the information procured by the investigation related to both the driver's character and creditworthiness, creating confusion as to whether the background check was governed by the Investigative Consumer Reporting Agencies Act ("ICRAA") or the Consumer Credit Reporting Agencies Act ("CCRAA"). Most notably, the ICRAA requires the person procuring the report to certify that they made certain required disclosures, and that the consumer give written authorization for the report's procurement. The California Supreme Court resolved this conflict and held that when there is overlap between the two acts, the employer must comply with both the ICRAA and the CCRAA depending on which is more protective of the employee.

What this means for employers: In what is a well-established recurring theme, employers must comply with the more protective of competing laws to insulate themselves from liability. Background checks that contain both credit reports and information on the general reputation or character of an employee or potential employee (i.e., criminal records, sex offender registries, address history, etc.) requires compliance with both the CCRAA and the ICRAA. Employers should pay close attention to the types of information solicited in background checks and make it a practice to obtain prior written authorization.

Leave of Absence and Benefits

AB 1976 requires lactation locations

Assembly Bill 1976 requires employers to make reasonable efforts to provide a room or location for lactation, and expressly requires this location not to be a bathroom. Previously, California law prohibited the lactation location from being a "toilet stall. AB 1976 expands the prohibition to include bathrooms, generally. This new law also authorizes a

temporary lactation location if certain conditions are met and provides a narrow undue hardship exemption.

What this means for employers: At minimum, agricultural employers will need to provide an employee with a private space that is both enclosed and shaded.

Paid Family Leave (AB 2587)

Assembly Bill 2587 removes the seven-day waiting period before an employee is eligible to receive Paid Family Leave wage replacement benefits to take time off to care for a seriously ill family member or to bond with a new child. This new law also eliminates the requirement that if an employer requires its employees to take up to two weeks off earned but unused vacation before and, as a condition of, the employee's receipt of PFL, employees must apply one week of vacation given (if at all) to the unpaid seven-day waiting period, because the waiting period is no longer required.

Equal Employment Opportunity

Countless high-profile lawsuits, stories, and allegations concerning sexual harassment and pay discrimination have called into question the corporate culture of some of the world's largest and most successful organizations. Lawmakers everywhere, and perhaps especially in California, have taken serious note. There are many important developments to be aware of in this area. Last year, the State Legislature, prompted by the #MeToo Movement, sent numerous sexual harassment, retaliation, and pay discrimination-related measures to former Governor Brown's desk, a number of which he signed into law. As a result, there are numerous new laws that went into effect on January 1, 2019.

Sexual harassment omnibus bill (SB 1300)

Senate Bill 1300 adds to the Government Code a law that declares that the purpose of harassment laws is "to provide all Californians with an equal opportunity to succeed in the workplace." In that regard, and perhaps most importantly, SB 1300 expressly affirms and rejects certain judicial decisions, as follows:

- The law affirms the standard set forth by Justice Ginsburg in her concurrence in *Harris v. Forklift Systems*, which stated that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."

- On the other hand, SB 1300 rejects the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, and expressly provides that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute actionable harassment under FEHA. The *Brooks* decision was sometimes interpreted as holding that a single incident of harassment was not actionable.

- The new law affirmed *Reid v. Google, Inc.*'s rejection of the "stray remarks" doctrine[1] because the "existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if made not directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination."

- The law also disapproved of the use of *Kelley v. Conco Companies* to support different standards for hostile work environment harassment depending on the type of workplace. The law expressly states that the "legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the

---

[1] The "stray remarks" doctrine was a defense that was commonly used by employers to defend against discrimination claims with little to no evidence of discriminatory intent on the part of management. Under the doctrine, isolated discriminatory remarks made by employees who have no role in personnel decision making or by supervisors who were not involved in the decision making process as it relates to the plaintiff cannot be used to prove discriminatory intent by the employer.

nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties."

- Finally, SB 1300 affirmed *Nazir v. United Airlines, Inc.*, and its observation that hostile working environment cases involve issues "not determinable on paper." Accordingly, the law disapproves of harassment cases being appropriate for disposition on summary judgment, meaning that most cases cannot be dismissed prior to trial absent settlement.

But, wait; there's more: In addition, and subject to limited exceptions, SB 1300 prohibits employers from requiring an employee to sign a release of claims under the FEHA in exchange for a raise, bonus, or as a condition of employment. This new law also prohibits employers from requiring an employee to sign a nondisclosure agreement that aims to prevent the employee from disclosing information about unlawful acts in the workplace, including sexual harassment. Next, this law expands an employer's potential FEHA liability for acts of nonemployees to all forms of unlawful harassment instead of just sexual harassment. Finally, this law prohibits a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or that the plaintiff continued to litigate after it clearly became so.

California Legislators give the #MeToo Movement a megaphone

The former Governor also signed two bills that specifically restrict an employer's ability to prevent victims of sexual harassment in the workplace from talking about their experiences. This bills go to the heart of the #MeToo Movement.

Restrictions on the confidentiality of sexual harassment settlement agreements: Effective January 1, 2019, SB 820 prohibits and makes void any provision in a settlement agreement that prevents the disclosure of information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. In other words, gone are the days when

employers could simply pay victims to keep quiet about sexual harassment in the workplace.

In addition, the new law expressly authorizes provisions that (1) preclude the disclosure of the amount paid in settlement and (2) protect the claimant's identity and any fact that could reveal the identity, so long as the claimant has requested anonymity and the opposing party is not a government agency or public official. Finally, the law suggests that a violation of its provision can give rise to a civil damages.

Employees are prohibited from waiving the right to testify: Senate Bill 3109 affects settlement agreements executed after January 1, 2019, by rendering void any provision that waives a party's right to testify regarding criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding, if the person is called pursuant to a subpoena, court order, or written request. The important thing to note with this new law is that the focus is on whether the individual is providing testimony in response to a subpoena or a written request. In other words, AB 3109 does not permit a person to volunteer their testimony in breach of a settlement agreement requiring confidentiality.

The scope of mandatory sexual harassment training is expanding

Since 2005, employers with at least 50 employees have been required to train supervisory personnel in the prevention of sexual harassment. Senate Bill 1343 lowers the number of employees for coverage to five (including seasonal and temporary employees) and also requires training of all non-supervisors.

Employers must provide at least two hours of sexual harassment prevention training to all supervisory employees and at least one hour of such training to all non-supervisory employees by no later than January 1, 2020. Training must take place within six months of hiring (or promotion into a supervisory position) and once every two years thereafter, as specified under the new law.

The Department of Fair Employment and Housing is developing material that employers may utilize for the training,

or employers may utilize qualified trainers who use material that meets the applicable requirements**.**

AB 2770 shields employers and accusers against defamation suits brought by alleged harassers

In direct response to a number of defamation lawsuits that have been filed by individuals who have been accused of committing sexual harassment in the workplace, AB 2770 protects both accusers and employers. The law creates a qualified privilege in three categories:

(1) Complaints of sexual harassment made by an employee to an employer, based on credible evidence, and made without malice;

(2) Communications (made without malice) between an employer and "interested persons," such as witnesses, regarding complaints of sexual harassment; and

(3) Responses by an employer to a reference check as to whether the employer would rehire an employee, and, if not, whether that decision is based on the employer's determination that the former employee engaged in sexual harassment, so long as the statement is made without malice.

Important to note: All of these categories require the statements to be made without malice in order to fall within the protection of the privilege. In addition, this law does not address communications regarding harassment based on race, age, religion, national origin, etc. This law codifies case law, which protects that victims of sexual harassment and employers from defamation lawsuits brought by the alleged harasser based on a complaint of sexual harassment and the employer's internal investigation. This law is welcome news for employers who have been put in an untenable position as they have an affirmative duty to take reasonable steps to prevent and promptly correct harassment. In addition, AB 2770

allows employers to warn potential employers about an individual's harassing conduct during a reference check without threat of a defamation lawsuit.

California-based publicly held corporations are now required to have women on their boards

Senate Bill 826 requires California-based publicly held corporations to have at least one female—which is defined as a person who self-identifies as a woman regardless of their designated sex at birth—on their board of directors. The deadline for compliance is December 31, 2019. In addition, this law imposes minimum seat requirements that must be filled by women, proportional to the total number of seats, by December 31, 2021. For each director's seat not held by a female during at least a portion of the calendar year—when by law it should have been—the corporation will be subject to a $100,000 fine for the first violation and a $300,000 fine for further violations. Corporations that fail to timely file board member information with the Secretary of State will also be subject to a $100,000 fine.

Human Trafficking Notice (AB 2034)

Assembly Bill 2034 requires specific business, including **farm labor contractors**, to post a compliant notice regarding human trafficking in a conspicuous location in clear view of the public and employees where similar notices are customarily posted and to conduct employee training. Businesses subject to this posting requirement are subject to this posting requirement as of January 1, 2019. Employers may use the model notice available for download on the State of California Department of Justice's website. The notice is available at URL:

https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/HumanTraffick Mandate_ENG.pdf?

Wage and Hour Issues

California's minimum wage increased

Effective January 1, 2019, state minimum wage for employers with 26 or more employees increased to $12.00 per hour, and

for employers with 25 or fewer employees, state minimum wage increased to $11.00 per hour. These increases are the result of SB 3, which raises the state minimum wage over the next few years until reaching $15.00 per hour (in 2022 for employers with 26 or more employees, and in 2023 for employers with 25 or fewer employees). The following chart indicates the coming increases:

Date	Minimum Wage for Employers with 26 Employees or More	Minimum Wage for Employers with 25 Employees or Fewer
January 1, 2019	$12.00/hour	$11.00/hour
January 1, 2020	$13.00/hour	$12.00/hour
January 1, 2021	$14.00/hour	$13.00/hour
January 1, 2022	$15.00/hour	$14.00/hour
January 1, 2023	-	$15.00/hour

Important to note: The increased minimum wage also increased the minimum exempt salary that must be paid to meet the so-called "white collar" exemptions (i.e., executive, administrative, and professional). Thus, for employers with 26 or more employees, the minimum salary for exempt employees is now $49,920 per year as of January 1, 2019. And, for employers with 25 or fewer employees, the minimum salary for exempt employees is now $45,760 per year.

AB 1066's changes to Wage Order 14 are now in effect (for "large" employers)

Beginning on January 1, 2019, AB 1066 took effect for so-called "large" employers, which are employers with 26 or more employees. (For "small" employers, the law does not take effect until 2022.) The law, which Governor Brown signed in 2016, gradually lowers the daily and weekly hours of work thresholds for paying overtime to agricultural employees. The AB 1066 phase-in for paying overtime to agricultural workers under Wage Order 14 is as follows:

Date	For Employers with 26 Employees or More	For Employers with 25 Employees or Fewer
January 1, 2019	9.5 hours/day; 55 hours/week	10 hours/days
January 1, 2020	9 hours/day; 50 hours/week	10 hours/days
January 1, 2021	8.5 hours/day; 45 hours/week	10 hours/days
January 1, 2022	8 hours/day; 40 hours/week	9.5 hours/day; 55 hours/week
January 1, 2023	8 hours/day; 40 hours/week	9 hours/day; 50 hours/week
January 1, 2024	8 hours/day; 40 hours/week	8.5 hours/day; 45 hours/week
January 1, 2025	8 hours/day; 40 hours/week	8 hours/day; 40 hours/week

Determining whether your company is a "large" employer: The new law makes an important distinction between employers with 26 or more employees ("large" employers), and those with 25 or fewer ("small" employers). Because small employers do not have to comply with the new overtime requirements until January 1, 2022, many employers (especially those that rely on FLCs for labor) are wondering whether they qualify for small employer status under the new law. In particular, we have received many questions concerning how to count employees retained through an FLC.

To date, the Labor Commissioner has not provided any specific guidance on how it will interpret and enforce the changes brought about by AB 1066. However, in December 2016, the Labor Commissioner did offer guidance on SB 3, which began a series of minimum wage increases intended to raise the state minimum wage to $15.00/hour. Similar to AB 1066, SB 3 also distinguished between employers with 26 or more employees and those with 25 or fewer. Under SB 3, large employers were required to begin the new minimum wage phase in on January 1, 2017, while small employers did not have to begin the phase in until January 1, 2018. The Labor Commissioner noted that an employer with 26 or more employees at any time during a pay period should apply the large employer minimum wage to

its employees for that pay period. In addition, the Labor Commissioner stated that because employers are required by Labor Code section 2810.5 to provide workers a Notice to Employee upon hire and in advance of changes in the terms of their compensation, before an employer switches to a different minimum wage rate, the employer must notify all affected employees in writing and wait until the next pay period to implement the change.

The Labor Commissioner's SB 3 guidance, which is available at https://www.dir.ca.gov/dlse/SB3_FAQ.htm, would almost certainly be applied to analyze the changes introduced by AB 1066. Therefore, in determining whether your company is a "large employer" for purposes of the new overtime requirements, there are a few things to apply from the Labor Commissioner's SB 3 guidance:

First, in any pay period where a grower's direct hire employees and any FLC-hired employees combine to total 26 or more employees, the grower is subject to the new overtime requirements. For example, imagine a grower with 10 direct hires contracts with an FLC for 20 workers. The grower's 10 direct hire employees are aggregated with the 20 FLC-hired employees, and the grower would be considered a large employer subject to the new overtime requirements.

Second, in any pay period where an FLC has a total of 26 or more direct hires, the FLC must abide by the large employer overtime requirements, regardless of where the FLC's direct hire employees are working. For example, imagine an FLC has 50 direct hires, and Grower A and Grower B have five employees each. If 40 of the FLC's employees perform services for Grower A and 10 perform services for Grower B. The 10 employees performing services for Grower B are still subject to the new requirements because the FLC is a large employer. In other words, even though there are only 15 total employees working for Grower B (five direct hire employees and 10 FLC-hired employees), because the FLC has 50 employees, all of the FLC's employees are subject to the new overtime requirements.

A related question is whether Grower B required to comply with the new overtime requirements as to Grower B's five direct hire employees? In this situation, Grower B's five direct hire employees would not be subject to the new overtime

requirements because Grower B's five direct hire employees and the 10 FLC-hired employees do not combine to total 26 or more employees (refer to the discussion under the "first" point). Of course, in this scenario it is important to remember that Grower B would still be required to pay overtime to the 10 FLC-hired employees according to the large employer overtime requirements because the FLC would still be a large employer in and of themselves (the FLC in this example had 50 total employees).

Switching back and forth between large and small employer status: Some growers that operate on the cusp of large employer status have asked whether they can switch between large and small employer status. For example, imagine an employer with 20 direct hire employees adds 10 seasonal employees during a peak season, but then lays the additional employees off. Does the employer return to small employer status once the employer's total number of employees returns to 25 or less? While the Labor Commissioner's SB 3 guidance states that the distinction between large and small employers applies to specific pay periods (which indicates that employers could technically switch back and forth upon giving the required Labor Code section 2810.5 Notice of the new hourly rate and overtime compensation, and waiting for the start of the next pay period before implementing such changes), the Labor Commissioner has long taken the position that when the law creates an ambiguity, employers should adopt the policy that provides the greater benefit to employees. We offer this guidance: Once your company has reached the large employer status, the safest course of action is to consider your company a large employer even if you later qualify for small employer status. Unfortunately, the way that this issue will probably get clarified is through litigation. So, by taking this approach, you will avoid the costly situation of being the "test" case that clarifies the new rules. In addition, and as a practical matter, by adopting the higher wage rate year-round once the large employer status is reached, you will avoid having to continually sending out 2810.5 Notices (and relying on FLCs to do the same). In addition, in this era of real or perceived labor shortages, where workers may hunt for the "best deal" they can get for their work on a weekly or periodic basis, offering the higher rate will help you to avoid losing workers.

An important note concerning the "irrigator exemption": Beginning on January 1, 2019, the irrigator exemption no longer applies during any pay period where an employer is considered a large employer. On the other hand, if your company is a smaller employer, then the irrigator exemption continues until January 1, 2022. This is another reason why it is important to properly determine whether your company is a large or small employer under the new law.

Weekly overtime rules now apply to Wage Order 14: Weekly overtime is another change that large employers must comply with. Ironically, due to widespread misconceptions about weekly overtime previously being required under Wage Order 14, this change is probably not a "change" for many employers. Nonetheless, it is important to note the change here. For small employers, weekly overtime will not begin until January 1, 2022.

One day's rest in seven is required: In *Mendoza v. Nordstrom*, the California Supreme Court ruled that the required "day of rest" is measured by the workweek as defined by the employer, and not on a seven-day rolling calendar basis. The Court agreed the law allows a limited exception for part-employees who work no more than six hours a day and not more than 30 hours in a workweek. The Court further clarified that employees may voluntarily decide to work more than six days in seven, after the employees have been informed of their right to take a day of rest and may take it free from coercion.

How AB 1066 impacts Paid Sick Leave: Per the Healthy Workplace, Healthy Families Act of 2014, employers are required to provide agricultural workers with 3 days or 24 hours of paid sick leave for qualified employees. On August 7, 2015, the Division of Labor Standards Enforcement issued an Opinion Letter changing the required PSL hours from 24 hours to 30 hours for agricultural workers working under Wage Order No. 14, due to the fact that a typical (straight time) workday is 10 hours. While, the Labor Commissioner's Office has yet to officially announce an enforcement policy that is consistent with AB 1066, on January 8, 2019, a DLSE representative informally announced that the Labor Commissioner is taking the position that the typical hours worked by an agricultural employee applies to the calculation of paid sick leave. Therefore, if the typical farmworker's day is now 9.5 hours, then 3 days of PSL time is now 28.5 hours. Employers should

note that the methods described in the PSL statute for calculation of the amount of PSL pay remain the same.

California law no longer recognizes the de minimis doctrine

Historically, federal courts have consistently applied a legal principle known as the “de minimis” doctrine to excuse employers from having to pay wages for small amounts of otherwise compensable time. California courts generally followed the federal rule and did not require employers to track those small bits of time worked that were administratively difficult to record. However, on July 26, 2018, the California Supreme Court decided that the de minimis exception no longer applies in California. As a result, employers must be sure to compensate employees for any and all time that employees work, regardless of how minor or trivial the amount of time and money may seem.

In *Troester v. Starbucks Corporation*, a Starbucks employee brought a class action lawsuit on behalf of all Starbucks employees who were required to close up the store, arguing that the computer software required employees to clock out on every closing shift before activating the store’s alarm, exiting the store, and locking the front door. The California Supreme Court held that under California law, employers are required to compensate employees for all the time that employees are required to work, which includes the small bits of time like shutting off the lights, turning on the alarm and locking the door. The fact that recording certain small bits of time might be difficult is no longer an excuse that will forgive payment of all wages owed.

Spinoffs and copycat lawsuits are coming: The *Troester* case is certain to result in spinoffs cases and copycat class actions brought under similar theories. In fact, the Court’s willingness to accept the employees’ theory in *Troester* gives us reason to believe that “off-the-clock” claims are going to become another boilerplate allegation included in wage and hour class actions. More than ever employers need to ensure that employees are paid at least minimum wage for all hours worked.

What this means for employers: Employers can no longer require employees to clock out, and then engage in minor work

tasks. Instead, employers must alter their practices to ensure that employees are compensated for every minute of work. This may require amending employee handbooks and employer procedures for clocking in and out, and starting and stopping operations.

SCOTUS says that FLSA exemptions should not be narrowly construed

In *Encino Motorcars, LLC v. Navarro*, a group of Encino Motorcars service advisors sued the company for backpay, alleging that the company violated the Fair Labor Standards Act ("FLSA") by failing to pay overtime. The company moved to dismiss the lawsuit, arguing that the service advisors were exempt from the FLSA's overtime-pay requirements, which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." In finding that the service advisors were exempt from overtime-pay requirements, the Supreme Court held that the FLSA's overtime exemptions should not be narrowly construed. Instead, the Court directed lowers courts to give the exemptions a fair reading. This decision is welcome news for employers who can now take the FLSA overtime exemptions at face value. Caution – California courts are not likely to follow this rationale for state law claims.

California Supreme Court provides important guidance on how to factor in flat sum bonuses to overtime computations

Last year, the California Supreme Court clarified a legal gray area that had long been problematic for employers: factoring in flat sum bonuses to overtime computations. In *Alvarado v. Dart Container Corporation of California*, the Court held that for purposes of determining an employee's "regular rate of pay" an employee's total compensation during the pay period, should be divided by only the non-overtime hours worked, rather than the sum of all hours worked during the pay period, which might include overtime hours. In *Alvarado*, the employer relied on a commonly used federal formula to calculate the "regular rate of pay." This case serves as a reminder that despite an employer's best intentions, California courts, as a matter of public policy, interpret wage and hour laws liberally in favor of

employees. However, it is important to note that the court in *Alvarado* limited its ruling to apply only to a flat sum bonus, which is generally considered to be a bonus that does not increase or decrease based on the amount of time worked or production of the employee. So as of now piece-rate bonuses, production bonuses, and other types are not affected by the ruling.

Employees now have a right to receive a copy of their pay statements (as opposed to a right to inspect or copy their pay statements)

Employees now have a right to receive a copy of—not just inspect or copy—their pay statements. This "new" law, SB 1252, simply clarifies existing law. Still, employers need to know that employees are now legally entitled to be provided with a copy of their pay statements. A good "best practice" is to keep copies of the actual check stubs. In light of the abundance of lawsuits challenging check stubs, having the ability to produce an exact copy is often critical.

Challenge to AB 1513 safe harbor tossed out of court on appeal

Two employer-groups recently challenged the constitutionality of AB 1513's safe harbor rule on the grounds that the law was vaguely written and being retroactively applied. In *Nisei Farmers League v. California Labor and Workforce*, the court held that the law defines "other nonproductive time" as time "that is not directly related to the activity being compensated on a piece-rate basis," which they said was reasonably clear and specific, and provides fair notice of the nature of the conduct that is being described. In regard to the argument concerning the unlawful retroactive application, the court held that the safe harbor rule did not retroactively impose any new substantive requirements on employers retroactively. Accordingly, the constitutionality of AB 1513's safe harbor rule was upheld.

The Adverse Effect Wage Rate for H-2A workers

As of January 2019, the Adverse Effect Wage Rate payable to H-2A workers and others in “corresponding employment” has increased to $13.92 in California and $12.00 in Arizona. This is a significant 5.6% increase in California and a 14.7% increase in Arizona, and these increases will undoubtedly place a larger burden on smaller growers and FLCs alike.

Immigration-related Laws

A federal judge blocked AB 450

Assembly Bill 450 imposed fines on private employers of up to $10,000 per violation if they “voluntarily consent[ed]” to giving federal immigration authorities access to nonpublic areas of a workplace or employee records. Specifically, the law required employers to insist that the authorities presented a judicial warrant or subpoena before allowing the authorities to access their property or records. Additionally, AB 450 also limited an employer’s ability to re-verify employees’ employment eligibility unless otherwise required by law. In *United States v. California*, the court enjoined the State of California from enforcing these provisions. However, the court let stand a provision of AB 450 that requires employers to notify employees of enforcement action or document review conducted by ICE.

What this means for employers: While employers can still require a judicial warrant for a search of the nonpublic areas of the work premises, employers will no longer be penalized for consenting to such searches. Moreover, employers will also be able to re-verify I-9 forms without a federal mandate. Employers must remember that they are still required to provide employees with 72 hours’ notice of any impending inspection of employment records (e.g., I-9 forms). Employers must post a notice of the impending inspection to insulate themselves from civil penalties. While this may seem like a simple step to take to avoid any penalties, there will no doubt be many employers who forget to post a notice. Finally, it is important to understand that while certain provisions of this law are currently enjoined, litigation on the merits of each law will

likely continue. Consequently, there might be more changes to come at a later date.

LABOR LAW UPDATES

Labor law is generally considered the body of law that regulates the relationship between employers, groups of employees, and unions, and governs employees' right to take collective action to bring about change in wages, hours, and working conditions. The National Labor Relations Board ("NLRB") is the federal agency responsible for administering the National Labor Relations Act ("NLRA"), which directly regulates labor relations other than primary agriculture. California's Agricultural Labor Relations Board ("ALRB") is the state-equivalent to the NLRB, except that ALRB only regulates the agricultural industry. While the NLRA expressly excludes "agricultural employees" from its coverage, we discuss its decisions here because the ALRB is required to follow NLRA precedent in ALRB cases involving agricultural employees, and many packing operations fall under NLRA coverage, not ALRA coverage.

National Labor Relations Act

Following an aggressively pro-labor Obama-era board, a certain degree of balance has been restored to the NLRB. However, the widely predicted changes have been slow to come. Ironically, the most significant labor law developments in the last year have not come from the NLRB or from Congress, but from the Supreme Court of the United States, which issued two landmark decisions in *Epic Systems Corp.* and *Janus*. While NLRB Chairman John Ring and NLRB General Counsel Peter Robb have demonstrated a more pro-business agenda, the NLRB is using the slower and more incremental approach of formal rulemaking to roll back Obama-era decisions and policies. The important thing to note here is that employer-friendly changes are happening, just very slowly.

Class action waivers are lawful under the NLRA, and enforceable under the Federal Arbitration Act

In *Epic Systems Corp. v. Lewis*, the United States Supreme Court held that neither the Federal Arbitration Act, nor the NLRA, prohibit enforcement of arbitration agreements with class and collective action waivers. It is now clear that courts should enforce properly drafted arbitration agreements between employers and employees requiring “individualized” proceedings.

In *Epic Systems*, an administrative law judge found that the company’s maintenance and enforcement of its dispute resolution program violated the NLRA. The company’s dispute resolution program required, as a condition of employment, that the employee waive his or her rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The employee argued that this violated the NLRA because class action lawsuits are a form of concerted activity, which should be protected under the NLRA. The United States Supreme Court disagreed, and held that the NLRA does not provide a basis for refusing to enforce, under the Federal Arbitration Act, clauses in employees’ arbitration agreements that waive collective actions under the Fair Labor Standards Act and class actions under state law.

What this means for employers: In the era of multi-million dollar wage and hour class actions, this decision is an important win for employers because individualized arbitration agreements are a tool that can be used to limit exposure to class actions. The Court’s decision provides some peace of mind to employers utilizing mandatory bilateral arbitration agreements in the labor context.

No more agency fees for public employees

In *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448, the United States Supreme Court reversed decades of precedent by holding that mandatory agency shop service fees are unconstitutional under the First Amendment of the U.S. Constitution. Under an agency shop arrangement, public employees within a designated bargaining unit who decline

membership in a labor organization must pay a proportionate "fair share" agency shop fee to the labor organization. An employee challenged this theory claiming that he was being compelled to pay agency shop fees, which labor organizations could use to advance political speech that he disagreed with. These agency shop fees are different from dues, in that that they are meant to cover the labor organization's representation costs for collective bargaining activities conducted on the unit members' behalf. In *Janus*, the Supreme Court specifically held that public agencies and "public sector unions may no longer extract agency fees from nonconsenting employees," because compelling employees to pay agency fees violates the First Amendment. An agency fee or any other payment to the union may not be deducted from a non-member's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

What this means for employers: While this case applies exclusively to public employers and employees, this case is expected to make an impact on the private sector as well because it is expected to have a substantial overall impact on funds for union activity generally. Unions have relied on strong growth in their public sector ranks as private sector membership has seriously dwindled. For example, nationwide, government workers account for roughly half of the unionized workforce despite only representing less than 20% of the nation's total workforce. Overall, *Janus* is considered an enormous blow to organized labor because employees can reap any benefits that might flow from of a collective bargaining agreement without having to pay union dues or agency fees.

The NLRB is in the process of returning to the traditional joint employer standard

Last January, we celebrated the NLRB's decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), which overruled *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), and returned to a more traditional standard for making joint employer determinations. Then, a few weeks after the APMA conference, the NLRB's ethics official determined that one of the NLRB members who voted on the *Hy-Brand* case should have recused himself from the case due to a conflict of interest.

Accordingly, the NLRB vacated its decision in *Hy-Brand* (thereby reinstating the *Browning-Ferris* rule). This was a major disappointment for employers.

Thankfully, in September 2018, the NLRB announced that it would overturn *Browning-Ferris* by way of the formal rulemaking process. That being said, the NLRB has indicated that the proposed rule will reverse *Browning-Ferris*'s holding that the Board would no longer require proof that a putative joint employer has exercised any "direct and immediate" control over the essential terms and conditions of employment of another company's employees. Instead, the proposed rule will return to the Board's prior joint employer standard. Accordingly, a "new" (but historic) rule is coming. Under the proposed rule, an employer will be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment (e.g., hiring, firing, discipline, supervision, and direction). In addition, under this rule, a putative employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

What this means for employers: This will be a huge win for employers (knock on wood). Under *Browning-Ferris*, a company could be found to be a joint employer of another employer's employees based solely on its indirect influence over those employees' terms and conditions of employment, or on a contractual reservation of authority that had never been exercised. Returning to the pre-*Browning-Ferris* rule will greatly limit the definition of the joint-employer relationship, and decrease the number of employers which can be held liable to employees under the NLRA. This is particularly important for those employers, like many growers, that regularly supplement their workforce with labor contractors.

Agricultural Labor Relations Act

The Absurdity of AB 2751

Last year, former Governor Brown delivered agricultural employers an enormous blow by signing Assembly Bill 2751 into law. This new law greatly insulates the ALRB and its

decisions from judicial oversight and requires employers to immediately comply with ALRB orders, which might later be invalidated by a court of law.

The new law requires "immediate implementation" of ALRB orders, except in limited circumstances. An employer who appeals the validity of a Board order will generally have to comply with the order pending the appeal. For good reason, this was not always the case. Previously, when an employer sought judicial review of an ALRB order, enforcement of the order was delayed until the court's review could be completed. If, upon judicial review, the ALRB's decision was upheld, then the employer would be required to implement the terms of the order. On the other hand, if the order was invalidated by the court, then the employer would be relieved of the underlying obligations under the ALRB order. In theory and in practice, this procedure made sense. A recent case involving Gerawan Farming, Inc. ("Gerawan") illustrates that point extremely well. The UFW reappeared at Gerawan after a 20-year absence. Employees who wanted nothing to do with the union obtained a decertification election, but UFW challenges held up the vote count for nearly five years. In the interim, the UFW was able to force Gerawan into Mandatory Mediation and Conciliation, and to obtain an ALRB imposed collective bargaining agreement. Gerawan challenged the imposition of the agreement and was successful in getting it thrown out in court. Gerawan eventually succeeded in forcing the decertification ballots to be counted, and it was shown that the employees had overwhelmingly rejected the UFW. Had AB 2751 been the law in 2013, Gerawan could have been required to immediately implement the MMC contract while its challenges worked their way through the courts.

LITIGATION AND ENFORCEMENT TRENDS

This section briefly covers various developing and ongoing trends in litigation and enforcement of labor and employment laws. These trends are not necessarily developments in the law so much as they are what employees are focusing on litigating, and what agencies are choosing to enforce.

Equal Employment Opportunities Commission

The EEOC is stepping up its enforcement of harassment claims; however, retaliation claims continue to be the most prevalent claim pursued by the EEOC. The EEOC recently released its 2017 enforcement and litigation data. In total, the EEOC received roughly 85,000 workplace discrimination charges, and secured nearly $400 million from employers. The data indicates that retaliation claims continue to be the most frequently filed charge filed with the agency, followed by race discrimination, and disability discrimination. Specifically, the charge numbers show the following breakdowns by bases alleged, in descending order:

- Retaliation: 41,097 (48.8 percent of all charges filed)
- Race: 28,528 (33.9 percent)
- Disability: 26,838 (31.9 percent)
- Sex: 25,605 (30.4 percent)
- Age: 18,376 (21.8 percent)
- National Origin: 8,299 (9.8 percent)
- Religion: 3,436 (4.1 percent)
- Color: 3,240 (3.8 percent)
- Equal Pay Act: 996 (1.2 percent)
- Genetic Information: 206 (.2 percent)

(These percentages add up to more than 100 because some charges allege multiple bases.)

What this means for employers: The data for 2018 is likely to be very similar as the 2017 numbers; however, it is anticipated that sex discrimination claims will increase. Still, retaliation claims, in part, because they easier to prove, are expected to remain the focus of the EEOC. One thing that is particularly noteworthy about the EEOC's data is that California had the third highest number of claims filed in 2017, behind Texas and Florida.

The EEOC is cracking down on employers who do not sufficiently discipline employees for engaging in sexual harassment

One trend we have seen develop in the last year is that the EEOC is coming down hard on employers who fail to take action against employees who have engaged in sexual harassment. These lawsuits demonstrate why employers must appropriately respond to complaints of sexual harassment.

The United Airlines case: The EEOC accused United Airlines of discriminating against a flight attendant on the basis of sex for its refusal to punish a pilot, even after the pilot pled guilty to posting provocative images and videos of her on the internet for years.

The flight attendant and pilot were in a consensual relationship. While they were having sex, the pilot took private photographs and video of the flight attendant in provocative poses--sometimes with her consent but in at least one instance without permission. Thereafter, the flight attendant's coworkers advised her that they had come across nude photos of her on the Internet. She broke off the relationship but the conduct continued for the next ten years. In some of the posts the pilot mentioned the flight attendant's position with the airline, and occasionally mentioned that she worked for United Airlines. The flight attendant complained about the pilot's misconduct, but United did not take any action because the conduct did not occur in the workplace. The EEOC's lawsuit criticized United Airline's "passive and ineffective approach to prevent and correct the reported and continued harassment."

The Piggly Wiggly case: Last year, the EEOC sued a Piggly Wiggly in Georgia claiming the grocery store refused to take action when two female employees complained of sexual harassment and ultimately fired the victims for speaking up. Specifically, the grocery store allegedly failed to stop a male employee who allegedly made lewd comments and advances to two female store, instead firing the women after they lodged a written complaint.

What this means for employers: Employers must be able to show that they take complaints of sexual harassment seriously. Certainly, employers must ensure that they do not punish individuals for reporting sexual harassment as disciplining

employees who report sexual harassment will only serve to a make a bad situation worse (again, remember that retaliation claims are the most prevalent in EEOC enforcement). Finally, it is critical that employers deal with instances of sexual harassment by issuing appropriately severe discipline to employees engaging in such harassment.

Cal/OSHA

This past summer was brutally hot. In fact, according to data from the National Oceanic and Atmospheric Administration, 2018 was the fourth hottest year on record. Not surprisingly, Cal/OSHA spent the summer urging employers to protect their farm workers by ensuring that appropriate heat illness prevention measures are in place to protect farm workers from heat illness. As a reminder, California's heat illness prevention regulations generally require employers with outdoor workers to take the following four steps to prevent heat illness:

(1) Plan—develop, implement, and put in writing, effective heat illness prevention plans that include emergency response procedures.

(2) Train all employees and supervisors on heat illness prevention.

(3) Water—provide drinking water that is fresh, pure, suitably cool, and free of charge so that each worker can drink at least 1 quart per hour, and encourage workers to do so.

(4) Shade—provide shade when workers request it or when temperatures exceed 80 degrees, and encourage workers to take a preventative cool-down rest in the shade for at least five minutes (in other words, workers should not wait until they feel sick to cool down).

Online information on heat illness prevention requirements and training materials are available on Cal/OSHA's Heat Illness

Prevention web page and the “Water. Rest. Shade.” campaign site.

Division of Labor Standards Enforcement

The Labor Commissioner continues to pursue wage and hour claims

One ongoing trend is the Labor Commissioner’s continued pursuit of wage theft claims. One reason these claims continue to be an issue for employers is that there are a number of sources that can trigger wage theft investigations, including complaints from California Rural Legal Assistance (“CRLA”), PAGA claims, and disgruntled employees.

A few things are important to note here:

First, using a farm labor contractor will not insulate the grower from liability for wage theft claims. The Labor Commissioner will cite the FLC and the grower that hired the FLC. For example, this past July, the Labor Commissioner issued wage theft citations to a large FLC for allegedly failing to pay discharged workers on the last day of work as required by law. The Labor Commissioner is also seeking to hold the FLC’s client-employers liable for the FLC’s violations.

Second, these enforcement investigations are broad and typically include a payroll audit of the previous three years to determine minimum wage, overtime, and other violations, so that any and all payments owed and penalties due can be calculated. These enforcement investigations often result in additional findings and penalties which can be downright crippling. Last July, a nail salon was hit with $1.2 million in wage theft citations for misclassifying and failing to properly pay 36 workers. The $1.2 million citation amount included $650,000 payable to workers, and $550,000 in civil penalties. Of the total due to workers, $130,000 was for minimum-wage violations (plus interest), $150,000 for liquidated damages, $120,000 for failure to pay overtime, $92,492 for not providing final paychecks as required by law, $87,155 for improperly paid rest periods, $65,312 for not providing proper itemized wage statements, and $18,103 for meal period violations. The civil penalties include $207,887 for failure to maintain valid workers’ compensation insurance, $160,000 for misclassifying workers

as independent contractors, $104,000 for not providing proper wage statements and $100,300 for penalties associated with the wage violations.

What this means for employers: Employers should consider regularly conducting audits of their wage and hour practices to ensure that all employees are being properly compensated. California has the most onerous and complex wage and hour laws in the country, and the agricultural industry in particular has long been a favorite target for plaintiffs' attorneys. Of course, if you do intend to audit your practices, be sure to enlist the help of your labor counsel. This will help to protect the confidentiality of the audit (through the attorney-client privilege and attorney work product doctrine), and ensure that your wage and hour practices are up to date with an ever-changing body of law.

Private Wage and Hour Litigation

Policies requiring "off-the-clock" work are the new rest and meal break violation

Due in part to the California Supreme Court's *Troester* decision (discussed above), "off-the-clock" claims are likely to become a new favorite class action vehicle for plaintiffs' attorneys. Last year a federal judge recommended class certification for a group of employees in a class action lawsuit alleging that fitness wear retailer Lululemon Athletica Inc. does not pay its employees for time spent on mandatory "community outreach" and administrative work. This lawsuit is interesting because it goes to the heart of the company's culture, which encourages workers to attend fitness classes and write reports off-the-clock. The employees are claiming that the company required employees to participate in such activities and regularly assigned employees too much work. In addition, the employees are claiming that the company's management placed "immense pressure" on store supervisors to avoid overtime, which ultimately results in employees working off-the-clock. The company argues that "community work" is unpaid because it is completely voluntary. The evidence being used to refute this claim is e-mails from management encouraging employees to "do more" community work. Such evidence of de facto company policies can be extremely

damaging and undermine your actual written policies. Employers, and especially California employers, must ensure that employees are not being required, pressured, or encouraged to engage in off-the-clock work.

Inadvertent mistakes lead to substantial waiting time penalties

Employers must pay employees who quit all wages owed to the employee within 72 hours or pay waiting time penalties. In *Nishiki v. Danko Meredith*, an employee resigned after business hours via e-mail on a Friday evening. Danko, the employer, sent out her final check four days after the e-mail was sent. The court held that the 72 hours did not begin to run when the employee sent her e-mail but instead once the e-mail was received. However, due to a discrepancy in the way the check was written not only was it missing $80, but the bank would not accept the check with the discrepancy. The employee informed Danko of the mistake on the check but Danko did not immediately replace the check and instead waited nine days to issue a new one. The court held that the employee was entitled to waiting time penalties from the date that the employee notified Danko of the mistake on the check until the date the corrected check was mailed.

Lastly, even though the employee achieved only minimal success in the amount of $2,250 award, the court allowed the employee attorney's fees which totaled more than $80,000.

Drug Testing in the Workplace

California employers can prohibit recreational marijuana use at work

California is one of eight states and the District of Columbia that have legalized marijuana for recreational use. California's Proposition 64, the Adult Use of Marijuana Act, went into effect January 1, 2018. Nonetheless, California employers are still permitted to ban marijuana use in the workplace.

While California employers are not allowed to randomly drug test employees, they can drug test in these circumstances:

- As part of pre-employment screening;

- As part of a physical examination;
- Under reasonable suspicion; and
- In rare cases, as part of random testing for employees working in a highly regulated industry or a position critical to public safety or the protection of life, property, or national security.

California employers are also still permitted to have:

- A zero-tolerance drug policy;
- Job descriptions of safety-sensitive positions, which include a no-drug clause; and
- No smoking policies, including tobacco and cannabis, in the workplace.

A note about AB 2069: Assembly Bill 2069 would have protected medical marijuana patients from being fired for failing a drug test. While the law currently allows employers to fire both recreational and medical marijuana users for failing a drug test, a proposed bill would have changed that. If passed into law, AB 2069 would have prohibited employers from firing workers or job applicants who are medical marijuana patients and test positive for cannabis. The bill's author, Oakland Assembly member Rob Bonta, framed the debate around civil rights, arguing that medical cannabis patients deserve the same employment privileges as those who are prescribed pharmaceutical drugs.

How the bill would have worked: The protections outlined in the bill would not have allowed employees to come to work under the influence of marijuana. In addition, the bill did not offer protections to recreational users. Rather, the bill solely concerned medical marijuana patients who fail drug tests at work. Under the bill employers would have needed to make "reasonable accommodations" to employees who are medical cannabis patients to help them continue working.

What this means for employers: Employer-groups defeated this bill by arguing that the current state of drug testing technology makes it difficult to prove whether a cannabis user is impaired on the job, or was previously impaired while off the clock. As the drug testing technology develops, however, the efficacy of this argument will be greatly diminished. Accordingly, we expect that Sacramento will revisit this issue in the near future.

Immigration

The Trump administration will very likely continue to focus on immigration-related issues and on ensuring that foreign workers are not favored over domestic workers. This trend has several important implications for agricultural employers. First, agricultural employers are more likely to be impacted by the labor shortage created, at least in part, by more stringent immigration policies. Second, agricultural employers, who have historically relied on foreign labor, are more likely to draw the attention of federal agencies. This will mean that more agricultural employers will be the subject of enforcement actions taken by federal agencies like the Department of Labor. For example, since January 2018, the ICE has issued more than 5,200 I-9 audit notices to employers throughout the country. Many of these audits have targeted agricultural employers. Third, federal agencies are more likely to step up enforcement of the laws and regulations governing the H-2A visa program.

In sum, agricultural employers should anticipate federal policies that encourage the hiring of domestic workers by discouraging the hiring foreign workers. There are many ways that the federal government might go about effectuating this policy. One way that we saw this done this past year was by federal agencies entering into formal agreements to pool their resources to combat employment discrimination against domestic workers. Specifically, these federal interagency agreements are designed to increase the ability of federal agencies to share information and identify, investigate, and prosecute employers who may be discriminating against U.S. workers or violating immigration laws. While these agreements, which are explained below, do not change existing law, they are likely to result in an uptick in enforcement actions. Accordingly, it is important that employers are mindful that their employment practices and policies reflect the latest immigration laws and regulations.

DOJ & USCIS: In May 2018, the Department of Justice (“DOJ”) and U.S. Citizenship and Immigration Services (“USCIS”) entered into an interagency agreement whereby the two agencies agreed to work together to eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States.

DOJ & DOL: In July 2018, the DOJ and the Department of Labor ("DOL") agreed to formally collaborate to combat suspected employer non-compliance with immigration laws. The two agencies have agreed to pool their resources where needed, and to refer cases to one another when an agency learns of employer non-compliance. Both agencies play important roles in employment-based immigration compliance. The DOJ prosecutes violations of the anti-discrimination provision of the Immigration and Nationality Act, which prohibits employers from hiring temporary foreign workers instead of qualified domestic workers. The DOL is responsible for ensuring proper wage and working conditions for all workers in the U.S. (both foreign and domestic).