LEGISLATIVE AND REGULATORY UPDATE

Wage and Hour

- **Rest and Recovery Periods Are Hours Worked**:

  SB 1360 clarifies that recovery periods taken pursuant to heat illness prevention regulations are paid breaks and count as hours worked. SB 1360 reiterates what is already in existing law in this area and was passed simply to clear up any confusion employers may have had. In other words, a recovery period (commonly known as a "cool down" period) shall be counted as hours worked and employers may not deduct from wages the time taken for a recovery period.

- **Social Security Taxes to Increase for High Wage Earners**:

  Effective January 1, 2015, the maximum amount of earnings subject to the Social Security tax will increase to $118,500 from $117,000. High wage earners will also be subjected to an additional 0.9% Medicare tax under the Affordable Care Act. The threshold annual compensation amounts that trigger the additional Medicare tax are:
    - $250,000 for married taxpayers who file jointly
    - $125,000 for married taxpayers who file separately
    - $200,000 for single and all other taxpayers

    While the Medicare tax portion for the employer stays at 1.45%, the above individuals will be deducted at the rate of 2.35% on wages above the threshold amounts noted above.

Minimum Wage

- **Minimum Wage Increase in Effect**:

  California's minimum wage rose to $9.00 per hour on July 1, 2014. On January 1, 2016, it will increase to $10.00 per hour. The rates for overtime (time and one-half) and double time are currently $13.50 per hour and $18.00 per hour, respectively.

- **New Federal Minimum Wage for Construction and Service Contracts**:

  The minimum wage for new federal contracts for construction work or services starting January 1, 2015, is $10.10 per hour.

- **Bay Area Local Minimum Wage Increases**:

  City ordinances raised the local minimum wage in the following cities:

  - San Jose: $10.30/hr - Jan. 1, 2015
  - San Francisco: $11.05/hr - Jan. 1, 2015 $12.25/hr – May 1, 2015
  - Oakland: $12.25/hr - Mar. 2, 2015
  - Berkeley: $10.00/hr - Oct. 1, 2014 $11.25/hr - Oct. 1, 2015
  - Richmond: $9.60/hr - Jan. 1, 2015

- **Increased Minimum Salary Requirements for Exempt Employees**:

  The minimum monthly salary for exempt employees is increased to $3,120.00. The minimum wage rate for the computer software professional's exemption is increased to $41.27 per hour.

- **Updated Industrial Wage Orders**:

  The Department of Industrial Relations has updated the Wage Orders required to be posted by all employers with the new minimum wage in effect. The limits set by the Wage Orders on the extent to which meals and lodging provided to an employee can be credited against the minimum wage were also increased as a result of the higher minimum wage.

- **DLSE Can Recover Waiting Time Penalties for Failure to Timely Pay Minimum Wage**:

  The Labor Commissioner can cite an employer who pays less than the minimum wage; the citation can include a civil penalty, restitution and liquidated damages. AB 1723 authorizes the Labor Commissioner to also include in this citation process any applicable penalties for an employer's willful failure to timely pay wages to a resigned or discharged employee, also called "waiting time" penalties. The law does not create new penalties; just a new way for the Labor Commissioner to enforce existing penalties.

- **<u>Statute of Limitations for Liquidated Damages in Minimum Wage Claims</u>**:

  AB 2074 states that a lawsuit seeking to recover liquidated damages for minimum wage violations can be filed any time before the expiration of the statute of limitations that applies to the underlying wage claim, which is three years. Some recent court cases had held that liquidated damages claims had to be filed within one year.

Farm Labor Contractors

SB 1087 modifies the licensure requirements and duties for farm labor contractors in an effort to prevent sexual harassment in the industry. The changes include an increase in the farm labor contractor license fee and a requirement that a farm labor contractor cannot have committed sexual harassment of an employee in the past three years, and cannot employ a supervisory employee who has committed sexual harassment against an employee in the past three years.

- **Mandatory Sexual Harassment Training for FLCs and Employees**:

  The annual mandatory continuing education requirement for FLCs has been increased from 8 hours to 9 hours and must include at least one hour of training on prevention of sexual harassment. Supervisory employees must receive training on prevention of sexual harassment each calendar now, as opposed to once every 2 years under AB 1825. In addition, non-supervisory employees must now receive the same training at the time of hire and once every 2 years thereafter. The training must cover the following areas:

  - The illegality of sexual harassment.
  - The definition of sexual harassment under applicable state and federal law.
  - A description of sexual harassment, utilizing examples.
  - The internal complaint process of the employer available to the employee.
  - The legal remedies and complaint process available through the Department of Fair Employment and Housing.
  - Directions for how to contact the Department of Fair Employment and Housing.

- **Increased FLC License Fee**:

  The new application fee increased to $600. The examination fee increased to $184.

- **No License Issued If Sexual Harassment Occurred In the Preceding Three Years**:

  The Labor Commissioner is barred from issuing new FLC licenses, and may revoke, suspend, or refuse to renew any license, if the applicant has been found by a court or an administrative agency to have committed sexual harassment of an employee within the preceding three years, or if the applicant knew or should have known that any of the employer's supervisory employees (crewleader, mayordomo, foreperson, etc.) has been found by a court or an administrative agency to have committed sexual harassment of an employee within the preceding three years.

- **Increased Penalty for Operating Without A Valid FLC License**:

  The prior penalty of $1,000 (min) to $5,000 (max), for engaging in Farm Labor Contractor activities after a license has been suspended, revoked, or denied reissuance increased to (A) ($100) for each farmworker employed by the unlicensed person, plus one hundred dollars ($100) for each calendar day that a violation occurs, for a total penalty not to exceed ten

thousand dollars ($10,000); (B) for a second citation, two hundred dollars ($200) for each farmworker employed by the unlicensed person, plus two hundred dollars ($200) for each calendar day that a violation occurs, for a total penalty not to exceed twenty thousand dollars ($20,000); (C) for a third or subsequent citation, five hundred dollars ($500) for each farmworker employed by the unlicensed person, plus five hundred dollars ($500) for each calendar day that a violation occurs, for a total penalty not to exceed fifty thousand dollars ($50,000).

- **Penalty for Failing to Timely Provide Written Statement of Compensation Rate**:

  FLCs must have a written statement in English and Spanish available showing the rate of compensation they receive from the grower and the rate of compensation they are paying to their employees for services rendered to, for, or under the control of the grower. If either the grower or a current or former employee makes a written request for a copy of the statement, the FLC must provide a copy within 21 calendar days, or be subject to a civil penalty of seven hundred fifty dollars ($750) recoverable by the employee or the grower.

Discrimination and Retaliation

- **New Dept. of Labor Rule Adds Sexual Orientation and Gender Identity as Protected Classes**:

  The U.S. Department of Labor (DOL) finalized a new rule on December 3, 2014, prohibiting discrimination on the bases of sexual orientation and gender identity in the federal contracting workforce. The rule implements Executive Order 13672, which was signed by President Obama on July 21, 2014. Although this requirement may be new for federal contractors, California's employment laws have prohibited discrimination on the basis of sexual orientation and gender identity for several years under the Fair Employment and Housing Act.

  The DOL's Office of Federal Contract Compliance Programs will enforce the new federal requirements. The OFCCP also enforces Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. These laws require contractors and subcontractors that do business with the federal government to follow the fair and reasonable standard that they not discriminate in employment on the basis of sex, race, color, religion, national origin, disability, status as a protected veteran and now sexual orientation and gender identity. The final rule will become effective 120 days after its publication in the Federal Register and will apply to federal contracts entered into or modified on or after that date.

- **Protections Added for Unpaid Interns and Volunteers Under FEHA**:

  AB 1443 adds unpaid interns and volunteers to the list of individuals protected from harassment under the Fair Employment and Housing Act (FEHA). The bill prohibits employers from discriminating against individuals in an unpaid internship or another limited duration program to provide unpaid work experience for that person, and extends religious belief protections and religious accommodation requirements to anyone in an apprenticeship training program, an unpaid internship or any other program to provide unpaid experience for a person in the workplace or industry.

- **AB 60 Driver's License**:

Vehicle Code section 12801.9 allows a person to obtain a license to drive in California even if not legally present in the country, as long as he or she can provide proof of identity and California residency. These licenses are referred to as "AB 60" licenses after the name of the bill passed in 2014, which went into effect on January 1, 2015. *An AB 60 license cannot be used to verify eligibility to work – in fact, no driver's license can verify work eligibility. A driver's license can only be used to verify identity. Until we hear guidance to the contrary from Department of Homeland Security, it appears that genuine AB 60 licenses must be accepted as a valid List B document if coupled with a genuine appearing employment authorization document from List C.*

AB 1660, an AB 60 "clean-up" bill signed into law in September, bans discrimination against an individual for holding or presenting an AB 60 license. AB 1660 specifically makes it a violation of the Fair Employment and Housing Act for an employer to discriminate on that basis or to require a person to present a driver's license, unless possessing a driver's license is required by law or is a lawfully permitted employer requirement. Furthermore any driver's license information obtained by an employer must be treated as private and confidential.

This creates a potential problem for employers, however, who also have to comply with federal immigration law by ensuring that all employees are lawfully allowed to work in the United States. An AB 60 license can create a doubt as to the employee's lawful status, as such licenses are only issued to people who cannot present the DMV with satisfactory evidence of lawful presence in the country. Federal immigration authorities assert that an employer's failure to take reasonable steps to resolve such a discrepancy is evidence the employer had "constructive knowledge" the employee's immigration status was suspect. Thus, the employer would have to question the employee about the discrepancy between the documents he showed in the I-9 process and his AB 60 license. AB 1660 does provide that an employer who complies with federal immigration requirements is not discriminating against as employee with an AB 60 license.

- **Protection From Immigration Related Discrimination**:

  AB 2751 clarifies that the authority of a court to order suspension of a business license (for unfair immigration-related practices such as retaliating against workers who exercised their rights under the Labor Code) is limited to the specific location or locations where the unlawful practice occurred. In addition, the civil penalties for violations of California's anti-discrimination and retaliation statutes are to be awarded to the aggrieved employee(s) rather than to the state.

  AB 2751 also expands the definition of an unfair immigration-related practice to include threatening to file or filing a false report or complaint with any state or federal agency. Current law extended the protection only to reports filed with the police. AB 2751 also clarifies that an employer cannot discriminate against or retaliate against an employee who updates his or her personal information "based on a lawful change of name, social security number, or federal employment authorization document."

- **Protection for Medi-Cal Recipients**:

  AB 1792 prohibits discrimination and retaliation against employees receiving public assistance, which is defined as meaning the Medi-Cal program. Under the new law, the employer may not:

  - Discharge, discriminate, or retaliate in any manner against an employee who enrolls in a public assistance program;
  - Refuse to hire a beneficiary because they are enrolled in a public assistance program;

- Disclose to any person or entity that an employee receives or is applying for public assistance, unless otherwise permitted by state or federal law.

AB 1792 also requires state agencies to prepare an annual list of the top 500 employers with the most number of employees enrolled in a public assistance program. The reports will be made public and will be prepared starting in January 2016. “Employer” is defined by the law as an individual or organization with more than 100 employees that are beneficiaries of the Medi-Cal program.

Labor Contractors

- **Increased Liability for Employers that Contract for Labor**:

  Senate Bill AB 1897 went into effect on January 1, 2015, and provides that an employer utilizing workers supplied by labor contractors for regular and customary work at the employer's worksites shares with the labor contractor all civil legal responsibility and civil liability for the payment of wages to the workers, and for failing to secure valid workers' compensation coverage. The bill also prohibits the worksite employer (client employer) from shifting any legal duty or liability to provide a safe workplace for such workers to the labor contractor. The bill also states that any contractual waiver of its provisions is contrary to public policy and is void and unenforceable.

  In brief, if a labor contractor fails to pay its workers properly or fails to provide workers' compensation coverage for those employees, the "client employer" can now be held legally responsible and liable. The law contains specific definitions and exclusions. A fact sheet released by the California Chamber of Commerce on the new law is available at: http://www.calchamber.com/governmentrelations/documents/ab-1897-fact-sheet.pdf.

- **Foreign Labor Contractors; Registration**:

  In an effort to prevent human trafficking and exploitation of foreign workers by abusive foreign labor contractors, SB 477 created a registration system for foreign labor contractors in the Business and Professions Code, to be administered and enforced by the Labor Commissioner.

  This bill requires foreign labor contractors to register with the Labor Commissioner on and after July 1, 2016. To register as a foreign labor contractor applicants must provide specified information and obtain a surety bond. Foreign labor contractors must also provide full and fair disclosure of working conditions to foreign workers. Failure to register or violation of the bill's provisions results in civil penalties as specified. California Farm labor contractors are not covered by this new law.

Immigration

- **President's Executive Action on Immigration**:

  The Deferred Action for Parents (DAP) program is intended to cover qualified adults who are the parents of U.S. citizens or lawful permanent residents and who are otherwise not enforcement priorities. Assuming the DAP applicant complies with the six conditions set forth in the Executive Action, they will be required to file an application within approximately 180 days. According to the Immigration Service, however, the Service has indicated that it may not be able to act on such applications, which include requests for employment authorization, until the end of 2016.

Unemployment Insurance

- **Increased Penalty for Failing to File Timely Return**:

  The penalty for failing to file the DE 9 – Quarterly Contribution Return and Report of Wages with the EDD increased on July 1, 2014. Failure to file a timely return will result in a penalty of 15 percent of the tax due, plus interest compounded daily. If the return is not filed within 60 days of the last timely date, an additional penalty of 15 percent will be charged on unpaid contributions due on the return. In addition, a wage item penalty of $20 per unreported worker may be charged if the EED does not receive the wage detail.

- **Increased Time to Appeal Notice of Determination**:

  Starting July 1, 2015, the 20-day period in which to file an appeal to the EDD's Notice of Determination/Ruling increases to 30 days.

Health and Safety

- **Potential Changes to Cal/OSHA's Heat Illness Prevention Regulation**:

  The Cal/OSHA Standards Board has proposed significant changes to the Heat Illness Prevention Regulation. These include high-heat procedures, preventative cool down rest periods, additional employee and supervisory training, acclimatization issues, emergency response procedures, and observation and response requirements. Details on the proposed changes are available at: http://www.dir.ca.gov/oshsb/Heat_illness_prevention.html.

- **Mandatory Training for Supervisors on Prevention of Abusive Conduct**:

  Existing law requires employers with 50 or more employees to provide at least 2 hours of training and education regarding sexual harassment to all supervisory employees at least once every 2 years. The new law (AB 2053) additionally requires that the above-described training and education include, as a component of the training and education, prevention of abusive conduct.

  For purposes of the new training requirement, "abusive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

  Employees who were trained before January 1, 2015, do not need to be retrained until their next training year comes up. However, if the employer provided training to employees on or after January 1, 2015, the training must contain the preventing abusive conduct component.

- **Penalties for Failure to Abate Safety Hazards**:

  Cal/OSHA can require an employer to abate (fix) serious workplace safety violations and also to pay substantial civil penalties. An employer can appeal the citation. AB 1634, in effect, prohibits the state Occupational Safety and Health Appeals Board from modifying civil penalties for abatement or credit for abatement unless the employer has fixed the violation.

  In cases of serious, repeat serious, or willful serious violations, AB 1634 will generally prohibit a stay or suspension of an abatement requirement while an appeal or petition for reconsideration is pending, unless the employer can demonstrate that a stay or suspension will not adversely affect the health and safety of employees.

- **<u>Email for Workplace Safety Reports</u>**:

  AB 326 modernizes reporting requirements for employers reporting serious injury, illness or death. Under the previous law, employers were required to report such incidents immediately via telephone or telegraph. The new law provides that employers may also report such incidents via email and removes the option to report via telegraph.

- **<u>Hazard evaluation system and information service</u>**:

  SB 193 provides that the Chief of the Hazard Evaluation System and Information Service (HESIS) may obtain information from chemical manufacturers, distributors, and others about customers to whom they have sold products that may pose a serious new or unrecognized health hazard to employees.

Leaves and Benefits

- **Mandatory Paid Sick Leave**.

  Under the Healthy Workplace, Healthy Families Act of 2014 (the "Act"), employers are required to provide paid sick leave (PSL) to employees. Employees are entitled to accrue PSL once they have worked in California for 30 days within one year of the start of employment, and may begin using accrued PSL on the 90th day of employment. The benefit applies to all employees who meet the eligibility requirement, regardless of full time or part time status. However, certain categories of employees are excluded from the Act, including:

  - Employees covered by a collective bargaining agreement that provides for sick leave, in addition to certain other requirements, such as binding arbitration and a regular hourly rate of pay not less than 30 percent more than the state minimum wage;
  - Construction employees under a collective bargaining agreement;
  - Providers of publicly funded in-home support services under certain sections of the Welfare and Institutions Code;
  - Certain air carrier employees who are provided time off that is equal to what is provided under the new law.

  PSL must accrue at a rate of at least 1 hour for every 30 hours worked, to a maximum of 24 hours per year. Accrued PSL carries over to the following year, but can be capped at a maximum accrual of 48 hours. The employer may also limit use of accrued PSL to 24 hours per year.

  If the employer grants the full 24 hours of sick leave up front, rather than utilizing the accrual method, unused sick leave does not carry over to the following year. Furthermore, unused sick leave need not be paid out upon termination of employment.

  Employers are not required to begin providing the benefit until July 1, 2015, however, new notice and posting requirements went into effect on January 1, 2015. The Department of Labor Standards Enforcement (DLSE) has provided a poster with the required information, available at: www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf.

  All nonexempt employees hired on or after January 1, 2015, must be given notice of the PSL benefit at the time of hire, and revised notice must be given to all nonexempt employees within 7 days of any changes to an existing PSL policy. (See California Labor Code section 2810.5.) Although the Act applies to exempt employees as well as non-exempt employees, there is no requirement that notice be given to exempt employees. The DLSE has published a new "Notice to Employee" which should be used for all new hires starting January 1, 2015: http://www.dir.ca.gov/dlse/Publications/LC_2810.5_Notice_(Revised-11_2014).pdf.

  Employees may also use the entire amount of accrued PSL under the Act to care for a defined family member. The definition of "family member" under the Act is broader than under the existing kin care law and the Family and Medical Leave Act/California Family Rights Act, in

that it expands the "family member" from child, spouse, or registered domestic partner, to include grandparent, grandchild, and sibling.

Employers must show, on the employee's pay stub or a document issued the same day as the paycheck, how many days of sick leave are available. Employers also must keep records showing how many hours each employee has earned and used for three years. The DLSE has published a list of Frequently Asked Questions and answers, available online at: http://www.dir.ca.gov/dlse/paid_sick_leave.htm.

- **Time Off For Emergency Duty**:

  Current law provides employment protections for specified emergency rescue personnel who serve in emergency duty. Employers are prohibited from discharging these employees or discriminating against them should they take time off to perform emergency duties. This bill expands the definition of emergency rescue personnel to include health care personnel who are also members of disaster medical response teams. Employees who are health care providers would be required to notify their employer when they become designated as an emergency rescue personnel member and at the time they are deployed.

- **Family and Medical Leave Act (FMLA)**:

  The Department of Labor has amending the definition of "spouse" with regard to same sex couples. Now, a spouse of a same sex marriage is considered a "spouse" for purposes of the FMLA if the law of the jurisdiction where the employee resides recognizes the same sex marriage.

  Keep in mind that in California, same sex registered domestic partners are eligible to take leave to care for their partner under California's version of the law, the California Family Rights Act.

- **Affordable Care Act – Notice of Coverage Options**:

  Employers covered by the Fair Labor Standards Act (FLSA) must provide a notice of health care coverage option to each employee, regardless of plan enrollment status (if applicable) or of part-time or full-time status. The notice requirement went into effect on October 13, 2013, and employers must provide the notice to each new employee at the time he or she is hired. The Department of Labor has made two versions of a model notice available online, in English and Spanish:

  - For employers who offer a health plan: http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf
  - For employers who do not offer a health plan: http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf

- **Flexible Spending Accounts – Increased Limit on Salary Reductions**:

  In 2014, employee salary reduction contributions to a health Flexible Spending Account (FSA) were limited to $2,500 per year. In 2015, the limit is increased to $2,600.

- **Health Savings Accounts – Increased Minimum Annual Deductible**:

  The minimum annual deductible for employees participating in a Health Savings Account was increased to $1,300 for individual coverage and $2,600 for family coverage. The maximum limit on out-of-pocket expenses was also increased to $6,450 for individuals and $12,900 for families.

- **Employer Wellness Programs**:

  The EEOC brought 3 lawsuits in 2014 against employers that imposed penalties on employees for declining to participate in employer wellness programs. The EEOC stated that requiring employees to choose between participating in the wellness programs and facing financial penalties or other disciplinary action rendered the programs involuntary, in violation of the Genetic Information Nondiscrimination Act (GINA).

<u>Children and Minors</u>

- **<u>Child Labor Law Violations: Increased Remedies</u>**:

  As drafted, the existing law provided a statute of limitations of three years for a minor employee to bring a claim based on statutory law which includes claims violations labor law. The law has been amended to state that the statute of limitations for claims arising from a Labor Code violation committed against a minor do not begin until the minor has become an adult.

  The new law also enhances the remedies available to minors and enhances applicable penalties. For violations of specific Labor Code sections where there is an imminent danger to minor employees or a substantial probability that death or serious physical harm would result therefrom, in cases where the minor employee is 12 years old or younger, the penalty for such a violation would be no less than $25,000 and no more than $50,000.

Reimbursing Employee Expenses

- **Increase in Standard Mileage Rate**:

  Employers in California are required to reimburse employees for reasonably necessary expenses incurred in connection with their work via Labor Code section 2802. Expenses associated with personal use of their vehicles are included within section 2802. Although they are not required to do so, most employers pay the standard IRS reimbursement rate. As of January 1, 2015, the standard rate increased to $0.575 per mile.

NLRB Updates

- **New NLRB "Ambush Election" Rules**:

  The National Labor Relations Board (NLRB) has issued new regulations, effective in April 2015, requiring union elections to occur in less than 21 days. Most observers agree that the elections will occur somewhere between 10-21 days after the union files its petition. These new rules will eliminate most employer rights during the representation case process which afforded employers the opportunity to dispute the union's organizational drive tactics.

  In addition to expediting the elections, voter eligibility issues will now be deferred until after the election, and there will also be expedited hearings and onerous requirements for NLRB position statements. There are also changes in the manner in which employers will be required to provide lists of employees ("Excelsior lists") to the union.

  These amended rules make it easier for unions to win elections by, among other things: (a) shortening the timeline between the election petition and the actual election, (b) making it easier for unions to communicate with employee voters, and (c) eliminating a number of methods employers had to challenge election issues before the election takes place.

  The NLRB has provided a detailed "NLRB Representation Case-Procedures Fact Sheet" on its website, which describes the new procedures in detail and even provides a table that compares the current election procedures with the new procedures that will be effective on April 15, 2015. Some of the key changes to the election procedures include the following:

  1. **Electronic Filing** – Parties may file documents, such as petitions, electronically, rather than by fax or mail.
  2. **Election Voter List/Expanded Excelsior List** – The employer must include available personal email addresses and phone numbers of voters on the voter list (aka Excelsior list). Under current procedures, only a home address is required. The timing for providing the list was also materially shortened: from seven days to two business days after the election agreement was approved or the regional director directed an election.
  3. **Pre-Election Hearing** - Pre-election hearings will now be set 8 days after the hearing notice is served in almost all cases.
  4. **Early Identification of Disputed Issues** – Under the new rules, the employer will be required to respond to the petition by filing a written Statement of Position, stating its position on key issues before the pre-election hearing opens, and generally within 7 days of the pre-election hearing notice being served. Issues not raised at that time by the employer will be barred from being raised at the hearing. However, the union will be still able to wait and can respond to the issues raised by the non-petitioning parties at the opening of the hearing. In addition, as part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties. This is a new requirement.

5. **Litigation of Eligibility and Inclusion Issues** – Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. All other issues will now have to be deferred and must be litigated post-election and then only if not moot.
6. **Earlier and more complete information to employees** – Under the new rules, the employer will be required to post a Notice of Petition for Election containing more detailed information on the filing of the petition and employee rights within two business days of the region's service of the petition for election. This Notice of Election will provide prospective voters with more detailed information about the election and the voting process.

Workers Compensation

- **Expedited Worker's Compensation Hearings for Unrepresented Employees**:

  AB 1746 requires that workers' compensation cases in which an unrepresented employee, who is or was employed by an uninsured employer, be placed on the priority conference calendar at the Workers' Compensation Appeals Board (WCAB). Under existing law, a WCAB priority conference, a monitoring process to expeditiously move cases to resolution, was limited to cases where the employee was represented by counsel.

LABOR AND EMPLOYMENT CASES – YEAR IN REVIEW

Wage and Hour

***Integrity Staffing Solutions, Inc. v. Busk* (December 9, 2014)**

Time employees spend waiting to undergo security screening is not compensable under the Federal Fair Labor Standards Act (FLSA).

Busk was an hourly warehouse employee working for a staffing agency whose job was to retrieve products off shelves and package them for Amazon customers. Integrity Solutions required the employees to undergo an anti-theft security check at the end of their shifts before allowing them to leave for the day. During this process, employees had to remove items such as belts, keys, and phones from their persons and go through a metal detector. The employees were not compensated for the time they spent waiting in line for the security checks and undergoing the checks.

Busk and other employees filed a class action, claiming that the time spent on the screenings should be compensated under the Fair Labor Standards Act (FLSA) because they were required to wait to be screened, because screening was for the employer's benefit, and because the screening process could take considerably more than a couple of minutes in some cases (sometimes up to 25 minutes).

The trial court dismissed the employees' claim, holding that the security check time was not compensable time under the FLSA. The Ninth Circuit Court of Appeal reversed the lower court's ruling, holding that the security checks were required by the employer, and that 25 minutes per day would not be *de minimis* amount of time, and therefore would be compensable under the FLSA.

The U.S. Supreme Court unanimously held that the claim was governed by the standards in the Portal to Portal Act (rather than the FLSA standard regarding whether the time taken was *de minimus*), which expressly excludes the following activities from compensable time:

1. Time spent walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and

2. Activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

The Court defined the term "principal activity or activities" to mean activities that are an "integral and indispensable" part of the principal activities the employee is hired to perform, and reasoned that the security screenings were not "integral and indispensable" to the principle activities of the employees. The employees were primarily employed to retrieve products from the warehouse and package them for customers, not to undergo security checks. Furthermore, undergoing security checks is not an "integral" or "indispensable" part of packaging merchandise. The security checks were not necessary in order for the employees to perform their packaging duties, and the mere fact

that the employer required the screenings does not change the nature of the screenings as being separate from the employees' principal activities.

***Sandifer v. U.S. Steel Corp*., 134 S.Ct. 870 (2014)**

Steelworkers' Time Spent Donning and Removing Protective Gear Is Not Compensable Where a Collective Bargaining Agreement Excludes Changing Clothes From Compensable Time.

U.S. Steel Corp. workers sued their employer to recover wages for the time they spent putting on and taking off protective gear needed to perform their duties as steel workers. The employees were covered by a collective bargaining agreement which stated that time spent changing clothes before and after each shift was not compensable time. The employees did not dispute that the Fair Labor Standards Act specifically allows collective bargaining agreements to exclude changing clothes from compensable time. The employer did not dispute that, had it not been for the exclusion clause in the collective bargaining agreement, the time spent donning and doffing the protective gear would be compensable time under the Portal-to-Portal Act (as an integral part of the employee's principal activity).

The parties disputed whether the term "clothes" included the protective gear in this context. The employees argued that the protective gear should be considered equipment rather than clothing, so as to place the time spent putting on and taking of the gear outside the scope of the clause in the collective bargaining agreement. The Court sided with the employer and held, that the protective clothing in this context was "clothes" within the dictionary definition of the word. Although the safety glasses, earplugs, and respirators used by the workers did fall outside the definition of "clothes", the time spent putting them on and taking them was not compensable either because it was such a small part of the overall time spent changing clothes.

***In re Walgreen Co. Overtime Cases* (10/23/14, pub. 11/13/14)**

***Court of Appeal Affirms That Employers Must Make Meal Periods Available, But Do Not Need to Ensure That Employees Take Them*.**

A California Court of Appeal recently affirmed a trial court's denial of a motion for class certification in the case *In re Walgreen Co. Overtime Cases*. The plaintiffs sought to certify a class of hourly employees based on the theory that although Walgreens had a lawful meal period policy, in practice the company failed to provide compliant meal period to employees.

Plaintiffs were Walgreens employees who alleged that on some occasions meal periods were not made available to them because the company was short-handed. The plaintiffs presented forty-four form declarations to that affect, and the court gave the declarations no weight because they found them to be unreliable. The evidence presented on certification showed that Walgreen's made meal periods available, but that sometimes employees decided to skip or delay them.

Although plaintiffs utilized an expert witness to attempt to prove the rate at which Walgreens' records showed a missed or late meal period, the trial court rejected this evidence because the expert incorrectly assumed there was a Labor Code violation every time a worker did not take a timely break. The trial court denied plaintiffs motion for class certification, and held that

employers must make meal periods available, but need not ensure that their employees actually take the meal periods. Plaintiffs appealed, and the Appeals court affirmed the trial court's decision.

As the ruling in the *Brinker* case made clear, the employer must affirmatively relieve their employees of all work duties during the time allotted for their breaks. Once the employer has done this, they have "provided" a break, and they do not have a further obligation to police their employees during their breaks. Since the *Brinker* decision, meal break cases have become more difficult to certify.

***Mendiola v. CPS Security Solutions* (January 8, 2015)**

Under Wage Order No. 4, Employees Working 24-Hour Shifts Cannot Agree to Exclude On-Call Time From Compensable Hours Worked.

Plaintiffs were security guards who were required to remain on premises and on call at times when they were not active. When "on-call" time applied, they could stay in trailers provided for their use on the construction sites to which they were assigned. They were paid for time actually worked, but not for time they were "on call" in the trailers. During the week, they worked 16-hour shifts with 8 hours on active patrol and 8 hours on call. On the weekends, they worked 24-hour shifts, with 16 hours on active patrol and 8 hours on call. Pursuant to the employer's on-call agreement, which the security guards all signed, the guards were not paid for on-call hours unless they were actually required to perform work during those hours.

While on call, the guards were permitted to use their time to read, watch television, eat, sleep, talk on the phone, etc. However, CPS placed certain restrictions on the security guards' activities. For example, they were not permitted to have children, pets, or alcohol on the premises, and adult visitors were allowed only with the client's permission. If a guard wanted to leave the job site, he or she could do so only by first notifying dispatch of where the guard would be and for how long and then was required to wait for a reliever to arrive before actually leaving the job site. Then, the guard had to remain within a 30-minute radius of the job site and be available via pager or radio telephone to respond to any calls and return to the job site as needed.

The guards filed a class action lawsuit for to recover wages for the on-call time that they were never paid for. The Court of Appeal ruled that California law (IWC Wage Order No. 4) required the on-call time during the week to be compensated based on the restrictions placed on the guards' activities while on call, as described above. However, the same court ruled that the on-call time on the weekend was not compensable. This was based on a federal regulation that permits employees who are required to be on duty for 24-hours to enter into agreements to exclude up to 8 hours of regularly scheduled sleep time from hours worked. In 2011, a California appellate court applied that federal regulation in a case to hold that ship crewmembers could lawfully agree that 8 hours of sleep time during their 24-hour shifts would not be compensated. (*Seymore v. Metson Marine*, 194 Cal.App.4th 361 (2011).)

The California Supreme Court overruled the appellate court, holding that the on-call time on the weekend was compensable hours worked, as well as the on-call time during the week. The Court overturned *Seymore* and ruled that there was no reason to apply the federal regulation, because

California law has a more expansive definition of "hours worked" than federal law, and Wage Order No. 4 governed in this case.

CPS was required to pay back wages to all of the guards, even though, prior to the lawsuit, CPS obtained the Labor Commissioner's endorsement of the policy as lawful in 1999, and 2 years later, when a new Labor Commissioner reversed the endorsement, CPS entered into a Memorandum of Understanding with the new Labor Commissioner, effectively agreeing (again) that CPS' policy was lawful.

The Court remarked that its decision was based on the language of Wage Order No. 4, and that other Wage Orders (e.g. Wage Order No. 9, applicable to ambulance drivers), have different language that allows for agreements to exclude 8 hours of sleep time from compensable hours worked in a 24-hour shift. Employers that have employees working 24-hour shifts should carefully review their pay practices in light of the *CPS* decision, paying particular attention to the Wage Order specifically applicable to their industry to determine whether there is any lawful basis for excluding sleep time from compensable hours worked.

Class Actions

***Dynamex Operations West, Inc. v. Superior Court (Lee)* (10/15/14)**

The Test for Determining Independent Contractor or Employee Status Depends on the Type of Labor Law Violation the Employee Is Alleging.

A recent California appellate opinion made it more difficult for employers to determine if workers should be classified as employees or independent contractors. The result is that it could be much easier for workers to certify class action claims as employees which would not be available to them as independent contractors.

The plaintiff in the case was a delivery driver for Dynamex, a nationwide courier and delivery service. In 2004, Dynamex reclassified its drivers from employees to independent contractor status. One driver filed a class action lawsuit alleging that the reclassification to independent contractor status violated California law in that Dynamex unlawfully denied the drivers overtime compensation and reimbursement for expenses. The plaintiff sought to represent a class of about 1,800 Dynamex drivers, and the trial court certified the class over objections by Dynamex.

California case law historically uses a multi-factor test to determine employment status (i.e. whether a worker is an independent contractor or an employee) that considers, among other things, the extent of control that a company exercises over an individual worker. This is known as the "Borello" test after the California Supreme Court case that established it. Using the Borello test, a court must consider a number of factual circumstances to determine whether a claimant is an employee with the right to sue for labor law violations, or an independent contractor without such rights.

However, the Department of Labor's Industrial Wage Orders define "employ" as "to engage, suffer, or permit to work," and defines "employer" as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or

working conditions of any person." Some courts use these broad definitions to determine whether a claimant is an "employee" as opposed to an independent contractor.

The trial court in *Dynamex* used the Wage Order definitions to determine that all of the drivers were "employees", and therefore a class action was appropriate. Dynamex argued to the Court of Appeal that the Borello test should be used to determine employment status for <u>each individual driver</u>, and therefore a class action was <u>not</u> appropriate.

The appellate court stated that some of the drivers' claims, (e.g. the overtime claims) were enforceable by both the Wage Orders and the Labor Code, while some claims (e.g. some of the expense reimbursement claims) were not contained in the Wage Orders at all. Therefore, for those claims that were enforceable by the Wage Orders, the trial court was correct to use the Wage Order definitions to determine if the drivers were "employees" for purposes of class action certification. However, for the remaining claims, the trial court needed to use the Borello multi-factor test.

The appellate court's holding that the Wage Order definitions should be used for some claims is unfortunate for employers. Since the Wage Order definitions of "employ" and "employer" are so simple and broad, it makes it much easier for workers to establish that they are "employees" rather than independent contractors, and also makes it much easier for workers to certify class based on common practices or policies of the "employer." It is also more difficult for business to determine beforehand if they should classify workers employers or independent contractors, since the courts will use different tests depending on the nature of the alleged violations.

Employers should keep an eye on this case, as it could likely come before the California Supreme Court, which would, hopefully, result in clarification of these issues.

<u>Unemployment Insurance</u>

***Paratransit Inc. v. Unemployment Insurance Appeals Board*, 59 Cal.4th 551 (2014)**

***Refusing to Sign a Disciplinary Notice is Not Misconduct Justifying Denial of Unemployment Insurance*.**

An employee's termination for misconduct will not necessarily prevent the employee from receiving unemployment insurance; the underlying misconduct must be "willful or wanton disregard for an employer's interests or such carelessness or negligence as to manifest equal culpability."

In *Paratransit*, the plaintiff was a driver for a company that provided transportation services for the elderly. Pursuant to a collective bargaining agreement between Paratransit and the drivers' union, all disciplinary notices were to be put in writing and signed by the employee to indicate receipt (though the signature was not an admission by the employee of fault or truth as to any statement in the notice). A passenger accused the plaintiff of harassing her, and Paratransit, after an investigation, determined that the misconduct had occurred. Paratransit gave the driver a disciplinary notice and directed him to sign it. He refused to sign it, believing that it was admission of guilt, and following the union president's instructions not to sign anything without a union representative present.

Refusing to sign the notice was a violation of the bargaining agreement justifying termination, and the driver was fired. (There was no dispute that Paratransit had the right to fire him for insubordination.) He subsequently filed for unemployment insurance. Paratransit argued that the refusal to sign the notice was misconduct that barred the driver from receiving unemployment insurance. The California Supreme Court disagreed, holding that the driver was confused and thought the meeting would be rescheduled so he could have a union representative present, and was not refusing to sign just to be difficult. Furthermore, the disciplinary notice itself was not clear that the signature was solely for the purpose of acknowledging receipt, and there were no admission of liability disclaimers. Therefore, the refusal to sign was not "misconduct" as defined above, and the driver was allowed to collect unemployment.

Expense Reimbursements

***Cochran v. Schwan's Home Service, Inc*. (2014) 228 cal.App.4th 1137**

***Employers Must Reimburse Employees for Personal Cell Phone Use That Is Required for Work, Even If The Employee Has An Unlimited Call/Data Plan*.**

1,500 customer service managers for a food delivery company sued their employer to recover reimbursement expenses for being required to use their cell phones to make work-related calls. The appellate court ruled that "reimbursement is always s required," and the employer must pay "some reasonable percentage' of the employee's cell phone bill in order to comply with the Labor Code. To prove liability, an employee only needs to show that "he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed." The Court did not provide any guidance on what a "reasonable percentage" of the employee's cell phone bill is.

Retaliation

Salas v. Sierra Chemical Co., 59 cal.4th 407 (2014)

***An Unauthorized Worker Using a Stolen Social Security Number Was Allowed to Bring a Discrimination/Retaliation Lawsuit for Back Pay Damages*.**

Vicente Salas injured his back on the job and filed a worker's compensation claim. He then sued his employer for failure to accommodate his disability and for retaliation after he filed the worker's compensation claim. While preparing for trial, his employer discovered that Salas fraudulently used the Social Security number of another person to fill out h is I-9 and W-4 forms.

Sierra Chemical argued that Sala was barred from bringing his claims because he violated federal immigration law. The California Supreme Court disagreed and held that an unauthorized worker is entitled to employment protections for the period of time the employer discovers that the employee is not authorized to work, even if the worker used false documents to obtain employment. Salas was allowed to recover back pay up until the time his employer discovered that he was not authorized to work, but not after.

Arbitration

***Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 364**

Pursuant to Employment Arbitration Agreements, Employees Can Waive Their Right to Bring Class Actions, But Cannot Waive Their Right to Representative PAGA Claims.

Iskanian represented a class of drivers for CLS Transportation Los Angeles (CLS) seeking to recover on a number of alleged Labor Code violations. Pursuant to their employment, the drivers signed an employment arbitration agreement that provided that "any and all" claims arising out of their employment were to be submitted to binding arbitration. The arbitration agreement contained a clause whereby the employees agreed that they would not assert "class action or representative action claims" against the company "in arbitration or otherwise."

The trial court initially granted CLS' motion to compel arbitration. However, while the decision was being considered by the appellate court, the California Supreme Court decided *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which invalidated class action waivers in employment arbitration agreements under certain circumstances. In light of that case, CLS withdrew its motion to compel arbitration and the case proceeded as a class action. Iskanian then amended his complaint to add Private Attorney General Act (PAGA) claims, which allow for substantial penalties (in addition to other penalties in the Labor Code) and attorney's fees.

Thereafter, the U.S. Supreme Court decided *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, which invalidated another California Supreme Court decision that had restricted consumer class action waivers in arbitration agreements. *AT&T Mobility* held that the Federal Arbitration Act (FAA) preempted California's prohibition on class action waivers in arbitration agreements. The court reasoned that arbitration is most effective with individual claims, that requiring class-wide arbitration interferes with fundamental attributes of arbitration, and therefore creates a scheme inconsistent with the FAA. Where a state law creates a scheme inconsistent with a federal law, the federal law preempts the state law.

CLS renewed its motion to compel arbitration in light of the decision in *AT&T Mobility*, arguing that since California law cannot prevent consumers from waiving class action claims in arbitration agreements, then it should not be able to prevent employees from waiving class action claims in arbitration agreements either.

The California Supreme Court agreed with CLS in that, in light of the U.S. Supreme Court decision in *AT&T Mobility*, California law is preempted by the FAA, and therefore employees can waive their right to class actions in employment arbitration agreements. However, the Court also held that the FAA does not preempt California's right to the representative action provided by the PAGA. The reason is that, in a PAGA representative action (unlike a class action), there is no dispute between the employees and the employer to be resolved by arbitration. Instead, the state is suing the employer to enforce penalties in the Labor Code, and the employees are merely functioning as proxies for the state in a quasi-law enforcement capacity. Therefore, the PAGA action does not "interfere with fundamental attributes of arbitration," and so does not create a scheme inconsistent with the FAA.

The Court also held that waiving representative PAGA claims violates California Civil Code sections 3513 and 1668, because it would frustrate the objectives of PAGA (which is designed to be representative in nature) and it would exempt CLS from its own Labor Code violations by removing the primary method for enforcing those violations.

Iskanian was remanded to the trial court to proceed with individual arbitration on the claims for wages and damages, and class-wide litigation on the claims for PAGA penalties. The decision is a concern for employers because it flatly prohibits waivers of representative PAGA claims even when employers and employees have agreed in advance to waive them. It also results in confusing situations such as this one, where trial courts need to figure out how to proceed with individual claims on certain allegations and class procedures with respect to PAGA claims.

CLS promptly petitioned for review by the U.S. Supreme Court, which recently declined to grant the petition.

NLRB

Purple Communications, Inc. v. NLRB

NLRB Authorizes Use of Employers' Email Systems for Union Organizing Activities

The National Labor Relations Board (NLRB), recently held 3-2 that employees' use of the employer's e-mail system for union organizing purposes on non-working time must be presumptively permitted. This ruling is contradictory to a 2007 decision in the case of Registered Guard which held that employees have no statutory right to use their employer's e-mail systems for union organizing purposes.

The NLRB held that employees are entitled to use an employer's email system for activities covered by Section 7 of the National Labor Relations Act (NLRA). Section 7 protects employees' right to engage in concerted activity for mutual aid and protection (including, but not limited to, union organizing activity). The NLRB reasoned that in the modern workplace, electronic communications are the functional equivalent of yesterday's "water cooler" conversations. The NLRB held that employees "presumptively" have a right (during nonworking time) to use the employer's email system to communicate about Section 7-covered topics if the employer gives them access to the email system for business purposes.

Furthermore, the NLRB stated that an employer may only impose a ban on nonwork-related use of email if special circumstances make the ban necessary to maintain production or discipline. In addition, employers may continue to monitor employee use of email for ordinary purposes, such as to detect and prevent harassment, trade secret misappropriation, etc. However, the Board will review an employer's conduct for monitoring that is out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.

ALRB

San Joaquin Tomato Growers, Inc., 41 ALRB No. 1 (2015)

***UFW Must Attempt Arbitration Before Board May Review Collective Bargaining Agreement*.**

The Board issued an order in October, 2012, implementing a collective bargaining agreement (CBA) between the United Farm Workers of America (UFW) and San Joaquin Tomato Growers, Inc. (SJTG), via the Mandatory Mediation and Conciliation procedures specified by the Agricultural Labor Relations Act (the "Act"). The CBA provided that disputes between the UFW and SJTG arising from the CBA would be submitted to arbitration.

In May, 2014, the UFW filed a position statement with the Board alleging that SJTG had violated the terms of the CBA by interfering with UFW access, allowing disparaging anti-union comments by supervisors, and failing to provide accurate addresses of agricultural employees. The UFW sought Board intervention to enforce compliance with the CBA.

The Board referred to U.S. Supreme Court cases holding that an arbitration agreement contained in a collective bargaining agreement is treated the same as an arbitration agreement in any other kind of contract. Therefore, they are subject to the Federal Arbitration Act (FAA). The FAA preempts state laws that are inconsistent with the FAA's purpose of promoting resolution of contract disputes by arbitration.

According to the FAA, and those cases, parties to a collective bargaining agreement that contains an arbitration clause, must first attempt arbitration to enforce compliance with the CBA. In those situations where arbitration would be futile, or the other party has refused to arbitrate, the aggrieved party can file a lawsuit in the Superior Court to enforce the CBA.

In the instant case, the UFW had not shown that SJTG had refused to arbitrate, that arbitration would be futile, or that the UFW had even attempted to arbitrate. Therefore, the Board denied the UFW's request to intervene in the matter.