



# 2019 Mid-Year Employment Law Update



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# Brenda S. Kasper



**Brenda S. Kasper** is a founding member of **Kasper & Frank LLP**, a law firm representing California and multi-state employers for all of their human resources and employment law needs. She regularly advises employers of all sizes on wage and hour compliance, leaves of absence, disability accommodation, reductions in force, terminations and discipline management, employment contracts, personnel policies, and hiring issues. Brenda is a former HR director so her legal advice is practical, creative and tailored to each client's needs. She is an instructor for the HR Certification program at the University of California San Diego Extension and holds her SHRM-SCP and SPHR-CA certifications.

# Lisa A. Frank



**Lisa A. Frank** is co-founder of **Kasper & Frank LLP**, a law firm specializing in providing employment law advice and counseling to California and multi-state employers. In addition to advising employers on issues such as hiring, leaves of absence, disability accommodation, performance management, wage and hour compliance, reductions in force and the protection of intellectual property, Lisa regularly provides management and human resources training, conducts workplace investigations and is a skilled litigator. Prior to founding Kasper & Frank, Lisa served as partner at one of San Diego's leading employment law firms, in-house counsel at the world's largest independent biotechnology company and associate at a prominent international law firm.



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# California Legislative and Regulatory Updates and Trends

# California #TakeTheLead Legislation

- Package of anti-harassment bills described as some of the “boldest” in the county
- Impact on settlement agreements, including confidentiality restrictions
- Clarifies legal obligations of employers to prohibit sexual and other forms of harassment
- Imposes new training obligations

# SB 1343 Expanded Anti-Harassment Training

By January 1, 2020, training requirements apply to employers of 5 employees rather than 50

- Supervisor training is 2 hours every 2 years, within 6 months of assumption of position
- Employee training is 1 hour every 2 years, within 6 months of assumption of position
- Temps and seasonal employees whose total employment is shorter than 6 months must be trained within 30 calendar days of hire or 100 hours worked, whichever comes first
- Temporary services workers are trained by temporary services employer



# ***Proposed Employee Training Extension (SB 778)***

- Would change deadline to provide one-hour non-supervisory training from January 1, 2020 to January 1, 2021
- Employers who provide compliant training in 2019 would be able to wait two years to retrain



# SB 1300 Confidentiality and Release Agreements

- Employers are prohibited from requiring confidentiality, release or non-disparagement agreements that deny the employee the right to disclose information about unlawful acts in the workplace
- Rule does not apply to “negotiated” settlement agreements to resolve an actual claim, including one filed under the employer’s internal complaint process



# SB 820 Confidentiality in Settlement Agreements

- Settlement agreements for a *filed claim* cannot prevent disclosure of certain “factual information” in four types of claims:
  - Sexual assault that cannot be prosecuted as a felony sex offense
  - Sexual harassment in a non-employment relationship
  - Workplace sexual harassment, discrimination or retaliation
  - Sexual harassment, discrimination or retaliation in housing
- The amount paid may be kept confidential and the plaintiff can request confidentiality of identity



# SB 1123 Paid Family Leave

- As of January 1, 2021, California's paid family leave benefits will cover "qualifying exigency" leave
- "Qualifying exigency" leave may be taken by employees who need time off due to a family member's call to certain active military duty



# SB 826 Female Board Members

- By December 31, 2019, publicly held domestic or foreign corporations whose principal executive offices are in California must have at least 1 female director on the board
- Number of women who must be on the board depends on overall number of directors
- Corporation may increase number of directors to satisfy this law

# New CFRA and New Parent Leave Act Poster

- Effective April 1, 2019, employers must post an updated version of the Family Care and Medical Leave and Pregnancy Disability Leave poster available from the DFEH
- Available at [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CFRA\\_PregnancyLeave\\_English.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CFRA_PregnancyLeave_English.pdf)
- Employers must translate the notice into any language(s) spoken by at least ten percent of the workforce
- In addition to posting the new notice in a conspicuous location at each worksite, employers are “encouraged” to provide a copy of the notice to every new and current employee and to ensure that copies are available for employees’ reference



# New CFRA Med Cert

- Effective March 2019, the DFEH has updated its model Certification of Health Care Provider Form for employees who request leave under the CFRA and/or the FMLA
- Available at [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/CFRA-Certification-Health-Care-Provider\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/CFRA-Certification-Health-Care-Provider_ENG.pdf)
- Employers may use either the DFEH model form or their own form, but any employer-provided forms should be reviewed to ensure that they do not seek additional information not included in the DFEH model form



# Three CA Cases Find Employee Non-Solicitation Provision Void

- Employee non-solicitation provision found to be an unlawful restraint of trade in violation of B&P Code 16600
  - *AMN Healthcare, Inc. v. Aya Healthcare, Inc.* (Cal.App. 2018)
  - *Barker v. Insight Global* (N.D.Cal. 2019)
  - *WeRide Corp., et al. v. Kun Huang* (N.D.Cal. 2019)



# 2019 Federal Agency Update





# Employers Must Report 2017 and 2018 EEO-1 Pay Data

- EEOC announced employers must present pay data, broken down by race, sex and ethnicity, from 2017 and 2018 payrolls
- Pay data reports are due September 30, 2019

# DOL Proposes Exempt Salary Increase

- In March 2019, DOL issued proposed rule raising FLSA annual minimum salary under white collar exemptions from \$23,360 per year to \$35,308 per year
- Highly compensated employee exemption would increase from \$100,000 per year to \$147,414 per year
- No estimate on when final rule will be released, but likely not before January 2020



# DOL Proposes Updates to Regular Rate

- In March 2019, the DOL proposed updated guidance regarding calculating the regular rate of pay under the FLSA
- Designed to clarify that certain perks and benefits can be excluded from regular rate, including wellness programs, gym and fitness classes, employee discounts, paid sick leave, reimbursements, tuition programs
- Comment period extended until June 12, 2010



# DOL Issues Joint Employer Proposed Rule

- Issued in April 2019, proposed rule creates four-factor test to evaluate whether potential joint employer exercises the power to:
  - hire or fire the employee
  - supervise and control the employee's work schedules or conditions of employment
  - determine the employee's rate and method of payment and
  - maintain the employee's employment records
- Proposal includes examples that would further help to clarify joint employment status
- Comment period extend until June 25, 2019



# DOL Says “Gig Economy” Is Still Alive

- In April 2019, DOL issued an opinion letter finding that workers for an unnamed gig economy platform that connects service providers with clients are contractors
- Among other factors, DOL concluded that the workers weren't economically dependent on the platform, had autonomy and little supervision in their work and could work for competitors



# FMLA Opinion Letter

- According to DOL, employers must start clock on FMLA leave when they learn an absence qualifies for protection, even if an employee wants to delay beginning of leave by taking vacation or sick time

# DOL Seeks Request for Information on FMLA Regulations

- DOL is seeking comments to find ways to improve FMLA regulations to protect and provide for needs of workers and to reduce administrative burdens for employers
- Projected date for Request for Information is April 2020

# NLRB Takes Expansive View of Independent Contractors

- In April 2019, the NLRB concluded that Uber drivers are independent contractors and thus have no rights under the NLRA
- NLRB evaluated 10 factors, with key question being “entrepreneurial opportunity” the worker has
- Independent contractor status supported by drivers’ near complete control of their cars and work schedules, the ability to log into app at their discretion and work for competitors, obligation to indemnify Uber for liability based on driver’s conduct





# NLRB Narrows Definition of Protected Concerted Activity

- Individual gripes, even if made in a group setting, are not protected, concerted activities under the NLRA
- To be protected concerted activity, must seek to initiate group action or better employees' working conditions
  - *Alstate Maintenance* (NLRB 2019)



# NLRB Narrows Definition of Protected Concerted Activity

- Complaining and swearing about clients not protected under the NLRA
  - *Quicken Loans* (NLRB 2019)

# OSHA

- DOL's workplace safety office on 1/24/19 rolled back part of an Obama administration rule requiring large employers to file detailed injury data over the internet, citing concerns about worker privacy

# Social Security Administration

- SSA resumed issuing social security number “no-match” letters in March 2019
- Review records for any clerical errors, notify employee of the mismatch and give a reasonable opportunity to resolve the mismatch
- No-match letter alone should not be used as basis for employment action

# DOJ Compliance Guide

- On April 30, 2019, the Criminal Division of the DOJ released “The Evaluation of Corporate Compliance Programs”
- Guidance sets forth framework for designing, implementing and evaluating compliance programs, providing practical steps companies should take to ensure that their compliance programs are effective



# Wage and Hour

# California Minimum Wage Increase

## ■ 26 or more employees:

■ 1/1/19: \$12.00/hr	\$49,920
■ 1/1/20: \$13.00/hr	\$54,080
■ 1/1/21: \$14.00/hr	\$58,240
■ 1/1/22: \$15.00/hr	\$62,400



# California Minimum Wage Increase

## ■ 25 or fewer employees:

■ 1/1/19: \$11.00/hr	\$45,760
■ 1/1/20: \$12.00/hr	\$49,920
■ 1/1/21: \$13.00/hr	\$54,080
■ 1/1/22: \$14.00/hr	\$58,240
■ 1/1/23: \$15.00/hr	\$62,400





# City of San Diego

- Minimum wage increased to \$12.00 for 2019

# Computer Professional Exemption Increases

- Effective 1/1/19, minimum pay rate to meet CA computer professional exemption increased
  - from hourly rate of \$43.58 to \$45.41
  - from monthly salary of \$7,565.85 to \$7,883.62
  - from annual salary of \$90,790.07 to \$94,603.25



# On-Call Scheduling

- When “on-call” employees contact Tilly’s two hours before on-call shifts, they are “report[ing] for work” within the meaning of Wage Order 7 and are owed reporting time pay
  - *Ward v. Tilly's, Inc.* (Ct.App. 2019)



# The Gig Economy is Dead in California

- Workers are presumed employees unless an A, B, C test is satisfied
- Test is applied retroactively
  - *Dynamex Operations West, Inc. v. Superior Court* (CA S.Ct. 2018)

# The “ABC” Test

**A**

- Free from the control and direction of the hiring entity

**B**

- Performs work outside the usual course of hiring entity’s business

**C**

- Customarily engaged in an independently established trade, occupation or business of the same nature as the work performed



# Retroactive Application of *Dynamex*

- The Ninth Circuit of Appeals held that *Dynamex* applies retroactively because it clarifies established California law and does not create new law
  - *Vazquez v. Jan-Pro Franchising Int'l.* (9<sup>th</sup> Cir. 2019)

# DLSE *Dynamex* Opinion Letter

- ABC test applies to both the Wage Orders and any Labor Code provisions that enforce requirements set forth in the Wage Orders, including:
  - Itemized wage statements
  - Meal and rest periods
  - Overtime and minimum wage
  - Reimbursement of expenses
- *DLSE Opinion Letter, May 3, 2019*



# ***Proposed AB 5***

- Amends Labor Code so that “ABC” test is applied to determine the status of a worker as an employee or independent contractor for all provisions of the Labor Code and the Unemployment Insurance Code, unless another definition or specification of “employee” is provided
- Exempts licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, a direct sales salesperson, real estate licensees, workers providing hairstyling or barbering services, and those performing work under a contract for professional services





# Take Home Points

- It's the nature of the relationship and not the agreement
- Individuals cannot waive their right to be employees (rule since the 1930s)
- Not legal defenses:
  - Employer/individual preference
  - Budget/FTE
  - Casual/part-time status
  - Everyone else is doing it

# Next Steps for *Dynamex*

- Multi-state obligations?
- Determine strategy
- If reclassifying, consider the tax year, communication method and result

# Next Steps for Dynamex

- Review all independent contractor relationships
- Assess scope of hiring entity's "usual course of business"
- Create an intake process (or perform diligence into) whether contractors have a separate business
- Don't forget to examine "control" issue
- Use a privileged *Dynamex* checklist

# Flat Sum Bonus and the Regular Rate

- Special overtime calculation rules apply to non-exempt employees who earn a flat rate bonus and work overtime during the period the bonus was earned
- For overtime on a flat rate bonus, employers must divide the total compensation earned in the pay period by only the non-overtime hours
- For production bonuses, piece work and commissions, a “different analysis may be warranted”
  - *Alvarado v. Dart Container Corp. of California* (CA S.Ct. 2018)



# ***De Minimis* Time Rule In California**

- California Supreme Court rejected the federal “de minimis” standard based on facts of the case
- The Court specifically declined to “decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded”
- California non-exempt employees must be paid for all hours of work
  - *Troester v. Starbucks Corp.* (CA S.Ct. 2018)



# Shortened Meal Period Triggers Penalties

- Shortened meal periods not only trigger additional hour premium but entitle employees to at least the minimum wage for the time the employer required them to work even if the working time was de minimis
  - *Kaanaana v. Barrett Business Servs., Inc.* (Cal.App. 2018)

# Records of Work Hours

- “Imprecise evidence” by the employee can provide a sufficient basis for damages where employer fails to keep accurate records of employee time
  - *Furry v. East Bay Publishing, LLC* (Cal.App. 2018)

# Payroll Provider Not Liable for Unpaid Wages

- Employee cannot bring action against payroll company for payment of wages or tort damages
  - *Goonewardene v. ADP, LLC* (CA S.Ct. 2019)



# Wage Statement

- Employer's use of fictitious business name and failure to include the ZIP+4 code on employees' wage statements did not violate Labor Code section 226
  - *Savea v. YRC Inc.* (Ct.App. 2019)



# Compensable Travel Time

- Providing employees with option to use company vehicle rather than their own transportation does not turn travel time into compensable work time, even when transporting company equipment
- Use of company vehicle must be optional, especially where restrictions apply
  - *Hernandez v. Pacific Bell Telephone Co.* (Cal.App. 2018)



# Meal Periods and Regular Rate of Pay

- Employees were relieved from all work during rest breaks even though they could get a discounted meal if they stayed on premises
- Value of free meal not required to be included in the regular rate
  - *Rodriguez v. Taco Bell* (9<sup>th</sup> Cir. 2018)

# Meal Periods

- Employer need not “police” meal breaks
- Employer satisfied obligation to provide meal breaks by (1) having a compliant policy, (2) training employees on the policy, (3) requiring employees to notify Aerotek of any non-compliance, and (4) requiring clients to comply with meal break law
  - *Serrano v. Aerotek, Inc.* (Cal.App. 2018)



# Waiting Time Penalties

- 72-hour period to pay employee who resigned did not start at 6:38 pm on a Friday night when employee resigned via email
- Inadvertent clerical error is not evidence of “willfulness” for waiting time penalties, but the clerical error must be corrected immediately
  - *Nishiki v. Danko Meredith, APC* (Cal.App. 2018)



# Individual Liability for Wage and Hour Violations

- Individual owners, officers or agents may be liable for civil penalties resulting from a corporate employer's failure to comply with California's overtime pay and minimum wage laws even if there is no evidence of individual wrongdoing
  - *Atempa v. Pedrazzani* (Cal. App. 2018)



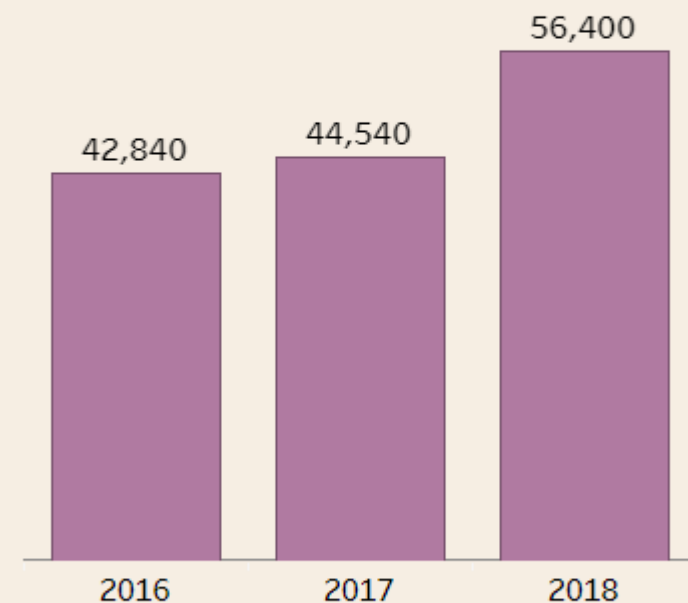
# Harassment, Discrimination and Retaliation

# #MeToo Update

- EEOC Charges for FY 2018 at lowest level since 2006
  - Sexual harassment charges increased by 13.6% compared with FY 2017
  - Monetary recovery for sexual harassment charges increased by more than 20%
- *Internal* workplace harassment charges have surged

## Internal Harassment Reports Have Surged In #MeToo Era

Internal harassment complaints rose more than 25% from 2017 to 2018 and comprised 8.5% more of the total complaints fielded through Navex Global services.



Source: Navex Global



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# SCOTUS To Decide Whether Title VII Protects Sexual Orientation and Gender Identity

- The Supreme Court granted certiorari in three cases that raise the question of whether Title VII prohibits discrimination on the basis of sexual orientation or gender identity
- Oral argument will be held in the fall with the decision expected in 2020

# Title VII Charge-Filing Requirement

- Employers must timely raise defense of administrative exhaustion or it will be waived
  - *Fort Bend County v. Davis* (U.S. S.Ct 2019)

# Employee Reliance on Supervisor's Statements

- Former supervisor's comments were admissible to help prove employee's failure-to-promote claim
- Former supervisor told employee: "You have three things going against you: You're a former Verizon employee, okay. You're not white. And you're not female."
  - *Weil v. Citizens Telecom Servs. Co.* (9<sup>th</sup> Cir. 2019)



# Pregnancy Discrimination

- Potential employer can be liable under FEHA for thwarting pregnant employee from applying for job by falsely telling her there were no openings
  - *Abed v. Western Dental* (Cal.App. 2018)



# Disability Issues and Accommodation Obligations

# Arizona Employee Fired for Medical Marijuana Wins Bias Suit

- Employee fired for testing positive for medical marijuana, but who was not impaired on the job, established violation of Arizona Medical Marijuana Act
  - *Whitmire v. Wal-Mart Stores* (D. Ariz. 2019)



# Multi-Month Leave As An Accommodation

- Employer not required to extend an employee's “multi-month” medical leave of absence where the employee is totally disabled and cannot provide a definite end date to her leave
  - *Ruiz v. ParadigmWorks Group, Inc.* (S.D. Cal. 2018)



# Obesity Discrimination Claim Allowed to Proceed under FEHA

- Employer not entitled to summary judgement on disability discrimination and harassment claim filed by obese employee
- Obesity could result from a physiological cause, making summary judgment improper
  - *Cornell v. Berkeley Tennis Club* (Cal.App. 2018)





# ADA Website Accessibility (Public Accommodation)

- Domino's Pizza website and app are places of public accommodation subject to the ADA—noting that the ADA applies to services of a public accommodation, not services in a place of public accommodation.
  - *Guillermo Robles v. Domino's Pizza LLC* (9<sup>th</sup> Cir. 2019)



# ADA Website Accessibility (Public Accommodation)

- Employee who admitted she came to work impaired by prescription drugs could not demonstrate that she was subjected to discrimination, denied reasonable accommodation or terminated unlawfully
  - *Connelly v. Wellstar Health System, Inc.* (11<sup>th</sup> Cir. 2019)

# Disability Harassment

- Court upholds \$500,000 verdict awarded to employee who was mocked for having a stutter on more than five, but less than fifteen occasions over a two-year period
  - *Caldera v. Department of Corrections* (Cal.App. 2018)

# EEOC Accommodation Settlement

- Hospital who required an annual flu shot for all hospital workers paid \$75,000 to settle a claim for failure to accommodate a sincerely held religious objection to vaccinations

# EEOC Leave Settlement

- \$1 million consent decree approved to end disability discrimination claim based on no-fault attendance and 180-day maximum leave policies

# Lactation Accommodation Jury Verdict

- Tucson, Arizona jury awarded \$3.8 million to employee denied workplace accommodation under the FLSA for lactation accommodation
- FLSA requires lactation accommodation for non-exempt employees

# Grab Bag

# Stand-Alone Documents Required for Background Checks

- A single form combining state and federal background check disclosures violates state and federal law
- FCRA disclosure must be separate from state law disclosures
  - *Gilberg v. Cal. Check Cashing Stores, LLC* (9<sup>th</sup> Cir. 2019)





# Arbitration

- Under the FAA, class arbitration must be explicitly authorized
  - *Lamps Plus, Inc. v. Varela* (U.S. S.Ct 2019)

# Continued Employment Constitutes Acceptance of Arbitration Agreement

- CA at-will employees who remained employed after employer adopted arbitration as mandatory condition of employment bound by arbitration agreement
  - *Diaz v. Sohnen Enterprises* (Cal.App. 2019)



# Arbitration Agreement May Retroactively Apply to Claims

- An arbitration agreement may be applied retroactively to transactions that occur prior to the execution of the arbitration agreement
  - *Salgado v. Carrows Restaurants Inc.* (Cal.App. 2018)





**Thank You!**



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