Published on *The National Law Review* https://natlawreview.com

# California Employment Law Notes: November 2017

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**Newly Enacted California Statutes**

## Statewide "Ban-the-Box" Legislation

Known as "Ban-the-Box" legislation in reference to the box applicants are asked to check if they have any prior criminal convictions, the new law prohibits employers from inquiring about or considering a job applicant's conviction history prior to an offer of employment. Specifically, the new law amends California's Fair Employment and Housing Act ("FEHA") by making it unlawful for employers in California with five or more employees to include on any application for employment any question that seeks the disclosure of an applicant's conviction history; to inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer; and, when conducting a conviction history background check, to consider, distribute, or disseminate information related to specified prior arrests, diversions, and convictions. The law expands existing "Ban-the-Box" legislation currently in effect in at least 15 local jurisdictions, including Los Angeles and San Francisco, to the whole of California. (AB 1008.)

## Parental Leave Protections Expanded

This new law expands parental leave protections to those individuals who work for employers with at least 20 employees. Under the new law, employers with at least 20 employees must allow an employee who has more than 12 months of service with the employer to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The new law expands the protections afforded under existing law, which had previously applied only to employers with 50 or more employees. The new law also requires the DFEH to create a parental leave mediation pilot program, which permits an employer to request mediation within 60 days of receipt of a right-to-sue notice and thereby stay any civil action by the employee. However, an employee may notify the Department in response that he or she has elected not to participate in a mediation and thereby proceed with the civil action. (SB 63.)

## California Becomes A "Sanctuary State"

California Gov. Jerry Brown signed into law nearly a dozen new immigration-related bills, including AB 450, which prohibits employers from cooperating with federal immigration authorities in the absence of a judicial warrant or court order. Among other things, the new law:

- Prohibits employers from voluntarily consenting to an immigration enforcement agent's entering nonpublic areas of the workplace without a warrant;

- Prohibits employers from voluntarily consenting to an immigration enforcement agent's accessing, reviewing or obtaining employment records without a subpoena or court order;

- Prohibits employers from reverifying the employment eligibility of a current employee at a time or in a manner not required by federal law; and

- Requires employers to provide notice to current employees of an inspection of I-9 forms and other employment records by an immigration agency within 72 hours of receiving the federal notice of inspection.

Penalties for failure to comply with the new law range from $2,000 to $10,000 per violation. (AB 450.)

## Mandatory Training To Prevent Gender Identity Harassment

This law expands the scope of mandatory sexual harassment training employers must provide to their supervisory employees. Currently, FEHA requires employers with 50 or more employees to provide at least two hours of prescribed training and education regarding sexual harassment to all supervisory employees within six months of their assumption of a supervisory position and then once every two years thereafter. This new law expands the scope of FEHA's requirements by mandating that the training must also cover harassment based on gender identity, gender expression, and sexual orientation. Such training must be conducted by individuals with knowledge and expertise in these topics and must include practical examples. California employers also will be required to place in a prominent and accessible location in the workplace a new poster developed by the DFEH regarding transgender rights. (SB 396.)

## New Restrictions On Inquiries Into Applicants' Salary History

This law is a new statewide salary history inquiry law that will largely restrict employers in the state from seeking and relying upon salary history information obtained from applicants during the hiring process. The law will apply to all private and public sector employers and will prohibit employers from:

- relying on salary history as a factor in determining whether to offer employment to an applicant or what salary to offer; or

- seeking, orally or in writing or through an agent, salary history information about an applicant.

The law will also require an employer, upon reasonable request by an applicant, to provide the pay scale for a position. The law further provides that if an applicant voluntarily and without prompting discloses salary history information to a prospective employer, that employer may then consider and/or rely on that voluntarily disclosed salary history information in determining the salary for that applicant. However, the law reiterates that, consistent with the state's currently existing equal pay law, employers may not rely upon voluntarily disclosed prior salary, by itself, to justify any disparity in compensation.

In passing this law, California joins Oregon, Massachusetts and Delaware and the cities of San Francisco, New York and Philadelphia in enacting salary history inquiry restrictions. (AB 168.)

## Employer Must Provide Assistance To Employees Injured By Domestic Terrorism

In instances in which the governor has declared a state of emergency in connection with an act of domestic terrorism, employers must provide immediate support to injured employees from a nurse case manager who will assist claimants to obtain medically necessary medical treatment. "Treatment" includes mental health treatment and counseling services for psychological injuries and post-traumatic stress disorder. Employers are also required to provide a prescribed notice to claimants. (AB 44.)

## Labor Commissioner's Anti-Retaliation Jurisdiction Expanded

This law expands the Labor Commissioner's power to commence an investigation of an employer – *with or without a retaliation complaint being filed* – when retaliation by the employer against an employee is suspected during the course of adjudicating a wage claim, a field inspection or in instances of suspected immigration-related threats in violation of the Labor Code. The Labor Commissioner is further authorized to petition the Superior Court for a TRO/preliminary injunction if it has reasonable cause to believe an employer has engaged or is engaging in unlawful retaliation; employees also may seek injunctive relief. The new law also expands the Labor Commissioner's authorization to issue citations. (SB 306.).

## New Case Law

## Employer May Be Liable For Sexual Harassment By Nonemployee Trespasser

*M.F. v. Pacific Pearl Hotel Mgmt. LLC*, 2017 WL 4831603 (Cal. Ct. App. 2017)

M.F., a housekeeping employee who worked for a hotel, alleged she had been raped while working on the employer's premises by a drunk, nonemployee trespasser whom the employer knew or should have known was on the premises and who had "aggressively propositioned at least one other housekeeping employee for sexual favors." M.F. alleged the hotel had violated the Fair Employment and Housing Act ("FEHA"), which, among other things, requires an employer to protect an employee from sexual harassment caused by a nonemployee. The trial court sustained the employer's demurrer on the ground that the FEHA claim was barred by the exclusive remedy provided by the Workers' Compensation Act ("WCA"). However, the Court of Appeal reversed, holding that FEHA protects an employee from sexual harassment at the hands of a nonemployee when an employer knows or should have known of the conduct and failed to take immediate and appropriate corrective action as was sufficiently alleged in this case. The Court further held that in view of the existence of a viable FEHA claim, the WCA presents no bar to the civil action.

## Workers' Compensation Decision Barred Employees' FEHA Claims

*Ly v. County of Fresno*, 2017 WL 4546059 (Cal. Ct. App. 2017)

Three Laotian correctional officers were allegedly subjected to racial and national origin discrimination, harassment and retaliation by their employer, the County of Fresno. The employees

filed suit in court under the FEHA while simultaneously pursuing their workers' compensation remedies before the Workers' Compensation Appeals Board ("WCAB"). The administrative law judge in the WCAB proceeding denied the employees' claims after finding the County's actions were nondiscriminatory, good faith personnel decisions. The County then moved for summary judgment of the civil action based upon the doctrines of res judicata and collateral estoppel, arguing the decision of the WCAB barred plaintiffs' FEHA claims. The trial court granted the motion for summary judgment, and the Court of Appeal affirmed, holding that while the two forums are different, the "harm suffered [alleged psychiatric injuries caused by the County's discrimination] is identical and therefore the same primary rights are implicated…. When two tribunals have jurisdiction… then the first final judgment from one of the tribunals becomes conclusive and renders the same issue res judicata in the other court."

## Employer Was Not Liable For Marital Status Discrimination Or Failure To Investigate

*Nakai v. Friendship House Ass'n of Am. Indians, Inc.*, 15 Cal. App. 5th 32 (2017)

Orlando Nakai was employed for over 20 years by Friendship House, a drug and alcohol rehabilitation program providing treatment services to Native Americans. His employment was terminated by the program's CEO (who also happened to be his mother-in-law) after his wife informed the CEO that Nakai had a gun and was angry at Friendship House employees and that she had obtained a restraining order against him. The trial court granted summary judgment in favor of Friendship House, and the Court of Appeal affirmed, holding that Nakai was "treated differently not because he was married, but because he happened to be married to the CEO's daughter – a political problem, not a marital discrimination problem. Further, Nakai failed to show that the employer's stated reasons for the termination – the gun and the TRO, etc. – were pretext for marital status discrimination. Finally, the Court held that Friendship House was not contractually or statutorily required to conduct an investigation prior to terminating Nakai's employment, which was terminable at will.

## Whistleblower's Claim Should Not Have Been Dismissed

*Levi v. Regents of the Univ. of Cal.*, 15 Cal. App. 5th 892 (2017)

Dr. Leah Levi, a neuro-ophthalmologist, alleged retaliation under California's Whistleblower Protection Act ("CWPA") against the University, her former employer. Dr. Levi alleged that her supervisor (Dr. Robert Weinreb) had a conflict of interest related to his wife's position in the department for which he served as vice-chair. Dr. Levi alleged that Dr. Weinreb had retaliated against her because he thought she was a whistleblower with regard to the conflict of interest issue. The trial court granted summary judgment in favor of the employer, but the Court of Appeal reversed, holding that Dr. Levi's complaints about Dr. Weinreb's conflict of interest "implicated policies that have the force and effect of statutes…. Exposing conflicts of interest, misuse of funds, and improper favoritism of a near relative at a public agency are matters of significant public concern that go well beyond the scope of a similar problem at a purely private institution." *See also Denton v. City & County of San Francisco*, 2017 WL 4873259 (Cal. Ct. App. 2017) (trial court erred in granting summary judgment against temporarily in pro per plaintiff).

## Employer's Violation Of PAGA Need Not Be Knowing And Intentional

*Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773 (2017)

Eduardo Lopez filed this action seeking recovery of civil penalties under the Labor Code Private Attorneys General Act of 2004 ("PAGA") for his employer's failure to include the last four digits of its employees' Social Security numbers or employee identification numbers on itemized wage statements in violation of Cal. Lab. Code § 226(a)(7). The employer brought a motion for summary judgment predicated upon its argument that Lopez had suffered no injury as a result of Friant's "inadvertent wage statement error." The trial court granted the motion based on the lack of evidence that the wage statement error was "knowing and intentional." The Court of Appeal reversed, holding that the "knowing and intentional" requirement for proving damages under Section 226(e)(1) is inapplicable to a PAGA claim for recovery of civil penalties under Section 2699(f).

## Taxicab Driver May Have Been An Employee Rather Than An Independent Contractor

*Linton v. DeSoto Cab Co.*, 15 Cal. App. 5th 1208 (2017)

DeSoto Cab Co. had required Darnice Linton to pay a "gate fee" in exchange for his obtaining a taxicab to drive for each of his shifts. Linton alleged that he is an employee (not an independent contractor) and that by charging him "gate fees," DeSoto is violating the wage and hour laws. The Labor Commissioner determined that Linton is an employee and not an independent contractor. On appeal, the trial court ruled in favor of DeSoto, holding that Linton is an independent contractor and had not been misclassified. The Court of Appeal reversed the trial court's ruling, however, and held that the trial court had failed to properly apply the law when it concluded that existing precedent only applied to unemployment and workers' compensation cases and not to wage claims such as those that exist in this case. Accordingly, the appellate court reversed the judgment and remanded the case, instructing the trial court to apply the law properly.

## DOL's Interpretation Of Tip Credit Regulation Does Not Merit Judicial Deference

*Marsh v. J. Alexander's LLC*, 869 F.3d 1108 (9th Cir. 2017)

Alec Marsh, who worked as a server for J. Alexander's, alleged violation of the Fair Labor Standards Act ("FLSA") based upon the employer's failure to pay him the federal minimum wage of $7.25 per hour. Marsh further alleged that he received more than $30 per month in tips and that J. Alexander's took a tip credit (a credit against the minimum wage amount), which was illegal because Marsh spent time at work on a range of duties other than serving customers. Because Marsh failed to allege that his average hourly wage (including tips) across any given workweek was below the federal minimum wage, the district court dismissed Marsh's claim and denied him leave to amend his complaint. The United States Court of Appeals for the Ninth Circuit reversed, holding that while the district court was correct in refusing to defer to the Department of Labor's interpretation of the operative regulation, the lower court should have granted plaintiff leave to amend his complaint.

## Employer Is Not Liable For Injuries Caused By Employee Who Was En Route To Work

*Morales-Simental v. Genentech, Inc.*, 2017 WL 4700383 (Cal. Ct. App. 2017)

Vincent Inte Ong was driving to work at Genentech when his vehicle collided with another vehicle,

which resulted in the death of Marisol Morales. In this personal injury lawsuit, Morales's survivors alleged that Ong was acting within the course and scope of his employment with Genentech at the time of the collision and that Genentech was, therefore, liable for the damages they seek. The trial court granted summary judgment in favor of Genentech, and the Court of Appeal affirmed, holding that Ong was going to work and was not performing a "special errand" for Genentech at the time, which exempted Genentech from vicarious liability in this matter.



National Law Review, Volume VII, Number 311