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Inside This Issue

CARES Act Brings Big Changes for Employers
HILLARY E. AUGUST 151

WAGE & HOUR ADVISOR: California Court of Appeal Provides Guidance on "Unlimited" Vacation Policies
AARON BUCKLEY 156

Return to Work Issues Amidst the COVID-19 Pandemic
ARTHUR F. SILBERGELD & KACEY RICCOMINI 159

Updated EEOC Guidance Related to Medical Information in the Time of COVID-19
GENEVIEVE NG 164

CASE NOTES 169
- *ADA* 169
- *ADEA* 169
- *Attorney's Fees* 170
- *Collective Bargaining* 171
- *Gender Discrimination* 172
- *Rest Break* 173
- *Sexual Harrasment* 173
- *State Employee* 174
- *Termination* 175
- *Wages* 176
- *Whistleblower* 176

CALENDAR OF EVENTS 178

EDITORIAL BOARD AND AUTHOR CONTACT INFORMATION 180

CARES Act Brings Big Changes for Employers

Hillary E. August

Introduction

The coronavirus has brought with it a raft of legislative changes meant to ease rules for employers and employees alike. Most notably, on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law. The sweeping, $2.2 billion law affects numerous aspects of employer-provided health and welfare benefits, from required health insurance coverage to the loans that retirement plan participants can take out. This article provides a summary of the pertinent provisions – and potential pitfalls for employers.

Retirement Plan Provisions

In acknowledgement that many individuals may need an extra source of cash to weather the pandemic, Congress made it easier for employees to take loans and early distributions from qualified retirement plans – like 401(k) plans.

Coronavirus-related Distributions

The CARES Act provides that eligible employees may be allowed to take a "coronavirus-related distribution" of up to $100,000.[1] Coronavirus-related distributions can only be taken between January 1, 2020, and December 31, 2020, and they will be exempt from the 10 percent penalty that would otherwise apply to a distribution taken by an employee who has not yet reached age 59½.[2]

A distribution is "coronavirus-related" if it is taken by a "qualified individual" who is either diagnosed (or has a spouse or dependent diagnosed) with

[1] CARES Act § 2202(a)(2)(A).

[2] CARES Act § 2202(a)(4)(A)(i), (a)(1); *see also* 26 U.S.C. § 72(t).

(Continued on page 153)

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CARES Act Brings Big Changes for Employers

Hillary E. August

(Continued from page 151)

SARS-CoV-2 or COVID-19 by a Centers for Disease Control and Prevention (CDC)-approved test, or who experiences "adverse financial consequences" due to being quarantined, furloughed, laid off, having reduced hours or loss of child care, or the closing or reduction in work hours of a business owned or operated by the individual due to SARS-CoV-2 or COVID-19.[3] The plan administrator may rely on an "employee certification" that they meet the criteria for taking a coronavirus-related distribution.[4]

Although the distribution must be taken within the 2020 calendar year, it will be taxed over three years (unless the individual elects otherwise) so they do not incur a huge tax penalty in 2020.[5] Moreover, individuals who no longer need their coronavirus distributions may repay them at any time during the three-year period beginning on the date of distribution – and the repayment will be treated as a rollover not subject to annual maximum contribution limits.[6] Some companies that act as plan recordkeepers have begun announcing that they will waive the normal distribution fees they would otherwise impose on 401(k) plan distributions.[7]

There are certain pitfalls for employer/plan sponsors, however. For example, employers should not presume that simply because the CARES Act is law, their employees can take coronavirus-related distributions. Instead, the provisions are optional, and employers will need to amend their plans to provide for such relief (although they have until December 31, 2022 to do so).[8] Employers should check with their plan recordkeepers, however, as some recordkeepers are adopting either an "opt-in" or "opt-out" model for CARES Act-related procedures.[9]

Moreover, the $100,000 distribution limit is the maximum aggregate distribution that an individual may take – from employer-sponsored plans (such as a 401(k) plan) and non-employer sponsored plans (such as an IRA) alike. But the onus is on the plan administrator to ensure that the "aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer)" does not exceed $100,000.[10] So while the plan administrator will not be required to ask the employee who wishes to take a $100,000 distribution from his 401(k) plan if he also took a distribution from his IRA, the plan administration will be required to ensure that he did not also take a distribution from another one of his employer-sponsored retirement accounts. The plan administrator will thus need to work closely with the recordkeeper and the administrator of any other employer-sponsored plan to ensure that the $100,000 limit is enforced.

Plan administrators will also need to decide what kind of "certification" they will require from employees who seek to take a coronavirus-related distribution, as the CARES Act does not specify what form the certification that the employee is entitled to a coronavirus-related distribution must take. To the extent that participants report they are entitled to a coronavirus-related distribution because they, their spouse, or their dependents have tested positive for COVID-19 or SARS-CoV-2, plan administrators/recordkeepers will want to ensure the confidentiality of that information. One potential approach is to ask employees to certify that they are entitled to a coronavirus-related distribution but not state why.

Loans from Plan Accounts

In addition to coronavirus-related distributions, the CARES Act also allows employers to adopt provisions easing rules on taking loans from plan accounts.

3 CARES Act § 2202(a)(4)(A)(ii).

4 CARES Act § 2202(a)(4)(B).

5 CARES Act § 2202(a)(5)(A).

6 CARES Act § 2202(a)(3)(A).

7 *See, e.g., Securian Financial Waives 401(k) COVID-19 and Hardship Distribution Fees, Offers Employers Fiduciary and Wellness Services,* BUSINESSWIRE, (Apr. 10, 2020), *available at* https://www.businesswire.com/news/home/20200410005020/en/Securian-Financial-Waives-401-COVID-19-Hardship-Distribution.

8 CARES Act § 2202(c)(2). Governmental plans have until the end of 2024 to amend their plans.

9 *See, e.g.,* National Association of Plan Advisors, *CARES Act Adoption Defaults, available at* https://www.napa-net.org/cares-act-adoption-defaults.

10 CARES Act § 2202(a)(2)(B).

Absent the CARES Act, participants may only take loans of the lesser of $50,000 or 50 percent of a participant's vested account balance.[11] But the CARES Act ups the maximum loan amount to the lesser of $100,000 or 100 percent of a participant's vested account balance for any loan taken within 180 days of the CARES Act's enactment (i.e., by September 22, 2020).[12]

The CARES Act also extends the amount of time to repay loans. Any loan repayments due before December 31, 2020 are delayed for one year, and subsequent repayments "shall be appropriately adjusted to reflect the delay."[13] The CARES Act does not, however, wipe out interest obligations – the repayments will also have to account for "any interest accruing during such delay."[14] The CARES Act also overrides the normal 5-year repayment window for plan loans,[15] providing that loan repayment may extend into a sixth year.[16]

Again, these provisions apply to a "qualified individual" affected by the coronavirus, as described in connection with the distribution provisions above, so plan administrators will need to implement procedures to collect certifications from participants. Employers/plan sponsors will also need to determine whether they wish to incorporate expanded plan loans. Conversely, the wording of the CARES Act suggests that the loan repayment extensions are not optional, so plan administrators will need to work with plan recordkeepers immediately to determine how to implement these provisions (and how to ensure that individuals taking advantage of the expanded loan provisions truly are "qualified"). Plan administrators should also consider alerting participants about the loan repayment extensions – in addition to the potentially heavy interest payments (and possible loan reamortization).

Temporary Waiver of RMD

Other retirement plan amendments in the CARES Act include a temporary waiver of required minimum distribution (RMD) rules for 401(k) plans and IRAs. Because the value of plan accounts may have decreased dramatically with the stock market's downturn, participants may leave assets in their plan accounts in the hopes that they bounce back, even if they were otherwise required to take a distribution in 2020.[17] Those who would rather receive a distribution in 2020 remain eligible to do so.

Health and Welfare Provisions

On the health and welfare side, Congress adopted rules that facilitate access to COVID-19 diagnostic testing through the Families First Coronavirus Response Act (FFCRA), effective March 18, 2020, as amended by the CARES Act. The rules apply to insured and self-funded group health plans, among others.

The FFCRA "generally requires group health plans and health insurance issuers offering group or individual health insurance coverage to provide benefits for certain items and services related to diagnostic testing for the detection of SARS-CoV-2 or the diagnosis of COVID-19" on or after March 18, 2020.[18] The CARES Act amends the FFCRA to "include a broader range of diagnostic items and services that plans and issuers must cover without any cost-sharing requirements or prior authorization or other medical management requirements."[19] The CARES Act also expands coverage for *in vitro* diagnostic testing, including tests that are "approved, cleared, or authorized" by the Food and Drug Administration (FDA), or are otherwise in development with the FDA, states, or Department of Health and Human Services.[20]

In terms of payment, these services must be provided without cost sharing to participants "when medically appropriate for the individual, as determined by the individual's attending healthcare provider in accordance with accepted standards of current medical practice."[21] Furthermore, insurers cannot impose any prior authorization requirements.[22] The group health plan or insurer must also reimburse the provider at the negotiated rate or, in the absence of a negotiated rate, at "the cash price for such service that is listed by the provider on a

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11 26 U.S.C. § 72(p)(2)(A).

12 CARES Act § 2202(b)(1).

13 CARES Act § 2202(b)(2).

14 CARES Act § 2202(b)(2)(B).

15 26 U.S.C. § 72(p)(2)(B).

16 CARES Act § 2202(b)(2)(C).

17 CARES Act § 2203.

18 Departments of Labor, Health and Human Services, and Treasury, *FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 42* (Apr. 11, 2020) (hereinafter "FAQs"), at 2, *available at* https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf.

19 FAQs, *supra* note 18, at 2 (Apr. 11, 2020).

20 CARES Act § 3201.

21 FAQs, *supra* note 18, at 6 Q5.

22 FAQs, *supra* note 18, at 2.

public website."[23] This requirement also puts the onus on providers to publish cash prices online; the failure to do so can result in monetary penalties of up to $300 per day.[24]

The Internal Revenue Service (IRS) has published guidance for employers that provide employees with high deductible health plans (HDHP) to clarify that they will not lose their HDHP status simply because the plan provides benefits associated with testing and treatment of COVID-19 without a deductible.[25] (Among the benefits of an HDHP is that participants can contribute to a Health Savings Account (HSA) in pre-tax dollars and then use those funds to pay for medical costs, in addition to having lower premiums in exchange for the high deductible.) Similarly, the CARES Act allows HDHPs to cover all telehealth and other remote care services – even if the participants have not reached their deductible.[26] Agency guidance "strongly encourage[s] all plans and issuers to promote the use of telehealth and other remote care services, including by notifying consumers of their availability, by ensuring access to a robust suite of telehealth and other remote care services, including mental health and substance use disorder services, and by covering telehealth and other remote care services without cost sharing or other medical management requirements."[27]

In order to ease the provision of coronavirus treatment, the IRS has clarified that plan sponsors that wish to amend their plans to add benefits or reduce costs related to COVID-19 are not required to provide the 60-day advance notice to participants that would otherwise be required.[28]

Furthermore, the CARES Act requires group health plans and health insurance issuers offering group or individual health insurance to cover "any qualifying coronavirus preventative services," without imposition of cost-sharing.[29] A "qualifying" service is "an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019" that has either received an A or B rating in United States Preventative Service Task Force Ratings or is recommended by the CDC's Advisory Committee on Immunization Practices.[30] Coverage must be provided within 15 business days after a recommendation for the service is made.[31]

Finally, under the CARES Act, certain medical products that previously were not eligible for payment with HSAs, Flexible Spending Accounts (FSA), Health Reimbursement Arrangements (HRA) and Archer MSAs now qualify. In particular, the CARES Act recognizes menstrual care products as medical products that may be paid for through these health savings accounts. It also provides that over-the-counter medications are eligible without a prescription, reversing laws imposed by the Affordable Care Act (ACA) 10 years ago.[32] These changes apply to any amounts paid starting January 1, 2020.[33]

General Recommendations for Employers

What does all of this mean for employers? First and foremost, employers would be well advised to contact their health insurers and third-party administrators (TPA) to ensure that all diagnostic services are being provided without cost to plan participants, and that insurers will be ready to provide preventative services when they become available. Employers that sponsor HDHPs should also consider and discuss with their insurers/TPAs to what extent they wish to implement telehealth options for plan participants. Additionally, employers should consult with TPAs about the feasibility of implementing changes to debit accounts associated with FSAs, HSAs, etc., to process payments for over-the-counter drugs and menstrual products. If these debit card changes cannot be implemented immediately, participants may need to submit post-payment reimbursement requests.

Finally, to the extent possible, employers would be well advised to communicate these changes to employees. In the current uncertain environment, understanding what employers are doing to facilitate employees' access to diagnostic and other health services could provide much needed comfort.

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[23] FAQs, *supra* note 18, at 2.

[24] CARES Act § 3202(b)(2).

[25] IRS Notice 2020-15, *High Deductible Health Plans and Expenses Related to COVID-19* (Apr. 6, 2020), *available at* https://www.irs.gov/pub/irs-drop/n-20-15.pdf.

[26] CARES Act § 3701(a).

[27] FAQs, *supra* note 18, at 10-11 Q13.

[28] FAQs, *supra* note 18, at 8, Q9.

[29] CARES Act § 3203(a).

[30] CARES Act § 3203(b)(1).

[31] CARES Act § 3203(b)(2).

[32] CARES Act § 3702(a)-(c).

[33] CARES Act § 3702(d).

Wage & Hour Advisor: California Court of Appeal Provides Guidance on "Unlimited" Vacation Policies

Aaron Buckley

Introduction

In recent years, some employers have implemented so-called "unlimited" vacation policies, mostly applied to exempt employees, that leave it up to employees and their supervisors to determine how much paid time off is appropriate to take. On April 1, 2020, the California Court of Appeal addressed for the first time whether an employer's "unlimited" vacation policy might require an employer to pay an employee for "unused" vacation upon the employee's separation from employment. The court of appeal held that on the specific facts of the case before it, the employer *was* required to pay its former employees for unused vacation, but also offered guidance as to what kind of unlimited vacation policy *might* relieve an employer of the obligation to pay out accrued but unused vacation upon an employee's separation.

Background on California Law Governing Vacation Policies

California law does not require employers to provide employees with paid vacation.[1] But when an employer does provide paid vacation, Labor Code section 227.3 requires employers to pay as wages any "vested" vacation time that separating employees have not used.[2] Section 227.3 provides, in pertinent part:

> Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, than an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. . . .

Decades ago, in *Suastez v. Plastic Dress-Up Company,*[3] the California Supreme court addressed when the right to vacation "vests" under Section 227.3, stating:

> The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3 On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.[4]

While Section 227.3 effectively prohibits so-called "use-it-or-lose-it" vacation policies, an employer may adopt a policy that creates a waiting period for an employee's "initial employment" during which no vacation time is earned, and therefore "none is vested."[5] An employer may also adopt a policy that "caps" the amount of vacation an employee accrues, by precluding accrual of additional vacation time once an employee has reached a specified maximum.[6] Under such a policy, the employee does not forfeit vested vacation pay because "no more vacation is earned" once the maximum is reached, and therefore "no more vests."[7]

In order to pay a separating employee all "vested" vacation, an employer necessarily must keep track of how much vacation an employee earned and used during employment. But what happens if an employer offers "unlimited" vacation to an employee, or allows an employee to take paid time off, but never notifies the employee of precisely how much paid time off the

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1 *Owen v. Macy's, Inc.,* 175 Cal. App. 4th 462, 468 (2009).

2 CAL. LAB. CODE § 227.3.

3 31 Cal. 3d 774 (1982).

4 *Suastez,* 31 Cal. 3d at 784.

5 *Owen,* 175 Cal. App. 4th at 464.

6 *Boothby v. Atlas Mechanical, Inc.,* 6 Cal. App. 4th 1595, 1602 (1992).

7 6 Cal. App. 4th at 1602.

employee may take? That is the question addressed by the California Court of Appeal in its recent opinion.

McPherson v. EF Intercultural Foundation, Inc.[8]

EF Cultural Foundation, Inc. (EF) runs educational and cultural exchange programs between the United States and other countries.[9] Plaintiffs Teresa McPherson, Donna Heimann, and Linda Brenden were employed by EF as exempt "area managers" to run EF's programs within their regions.[10] While EF's employee handbook included a policy providing other salaried employees with a fixed amount of paid vacation days per month based on their lengths of service, that policy did not apply to the plaintiff area managers.[11] While area managers could, with their supervisors' permission, take paid time off, they did not accrue vacation days or track the number of vacation days they took, nor were they ever notified of any specific limit on the amount of paid days off they could take.[12]

After their employment ended, the three area managers sued EF, alleging the company failed to pay them accrued but unused vacation upon their separation from employment.[13] After a bench trial, the trial court held EF liable for failing to pay the plaintiffs unused vacation, finding the plaintiffs' right to take vacation time was not truly "unlimited" but rather was "undefined."[14] The trial court found that "vacation time vests under a policy where vacation time is provided, even if the precise amount is not expressly defined by the employer in statements to employees."[15] The trial court explained that "offering vacation time in an undefined amount simply presents a problem of proof as to what the employer's policy was. That policy is implied through conduct and the circumstances, rather than through an articulated statement."[16] The trial court concluded that based on the evidence presented at trial, the area managers were provided at least 20 days of vacation per year, therefore that amount vested annually for each plaintiff, and Section 227.3 required EF to pay them the unused portion when their employment ended.[17]

[8] 47 Cal. App. 5th 243 (2 Dist. Apr. 1, 2020).

[9] 47 Cal. App. 5th at 250.

[10] 47 Cal. App. 5th at 250.

[11] 47 Cal. App. 5th at 251.

[12] 47 Cal. App. 5th at 251.

[13] 47 Cal. App. 5th at 252.

[14] 47 Cal. App. 5th at 252-53.

[15] 47 Cal. App. 5th at 253.

[16] 47 Cal. App. 5th at 253.

[17] 47 Cal. App. 5th at 254.

The court of appeal agreed with the trial court's conclusion that Section 227.3 applied to the area managers "[o]n the particular, unusual facts of this case."[18] The appellate court emphasized that the company did not provide the area managers "unlimited" vacation in practice, nor did the company publish a formal policy notifying the area managers they had "unlimited' vacation, and therefore the trial court was correct in determining their right to vacation was undefined, not unlimited.[19] But the court of appeal was careful to note that although Section 227.3 applied to EF's informal, unwritten vacation policy, that does not mean Section 227.3 "necessarily applies to truly unlimited time off policies."[20] The court suggested that such a policy "may not trigger [S]ection 227.3" if the policy is in writing and it:

1. Clearly provides that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule—including employees' ability to decide when and how much time to take off;
2. Spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;
3. In practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and
4. Is administered fairly so that it neither becomes a *de facto* "use it or lose it policy" nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off.[21]

Unfortunately, the court of appeal offered these criteria as only an "example" of an unlimited time off policy that *might* not require a payout of unused vacation upon the end of employment, and not as a bright-line rule.[22]

Conclusion

The California Court of Appeal's opinion makes it clear that not all unlimited vacation policies necessarily dispose of the requirement to pay some amount

[18] 47 Cal. App. 5th at 258.

[19] 47 Cal. App. 5th at 263.

[20] 47 Cal. App. 5th at 268.

[21] 47 Cal. App. 5th at 268-69.

[22] 47 Cal. App. 5th at 268-69.

of "vested" vacation upon an employee's separation. Employers that wish to establish or continue unlimited vacation policies should review those policies, and modify them if necessary, to ensure they are consistent with the court of appeal's guidance.

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Return to Work Issues Amidst the COVID-19 Pandemic

Arthur F. Silbergeld & Kacey R. Riccomini

Introduction

As the nation reels in the wake of the COVID-19 outbreak, California businesses and their employees are often left with more questions than answers. What steps should employers take to return employees to a safe and healthy working environment as required under Cal-OSHA provisions? What procedures can employers follow to ensure that returning employees are in good health and will not infect others? What obligations does an employer have to an employee who is offered work, but is turned away because of health risks? How can an employer protect the privacy of employees who are unable to return? What expenses should an employer expect to incur for teleworking employees? This article attempts to shed some light on some of the practical problems facing employers today.

Cal-OSHA Health and Safety Requirements and Guidelines

Approaches to employee safety during the current pandemic are still evolving, which requires employers to be aware of and check for updates to guidance from government entities. Employers must take current and developing government guidance seriously because, although many workplace injuries and illnesses are subject to workers' compensation statutes, an employer who is grossly negligent, such as one who fails to implement basic COVID-19 safety protocols, may be subject to lawsuits from sick employees.

Cal-OSHA requires all employers to maintain a workplace that is safe and healthy, which includes creating and carrying out an Injury and Illness Prevention Program (IIPP) and providing washing facilities that have an adequate supply of suitable cleansing agents, water, and single-use towels or blowers. On March 16, 2020, Cal-OSHA issued general written guidance concerning COVID-19 for employers.[1] Cal-OSHA also provided more specific guidance for various industries, including health care facilities, agriculture, child care, and grocery stores.[2] Employers should also consider federal guidance on the corona virus response, available on the federal Centers for Disease Control (CDC), Occupational Safety and Health Administration (OSHA), and Mine Safety and Health Administration (MSHA) websites.

Under current Cal-OSHA guidance, employers covered by the Aerosol Transmissible Diseases (ATD) Standard, including but not limited to hospitals and other employers in the health and medical field, are required to comply with the ADT Standard, including developing and implementing an effective written ATD Exposure Control Plan.

The majority of employers, who are not covered by the ATD Standard, should develop a plan to respond to the COVID-19 pandemic. Such a plan should include, at a minimum:

- Actively encouraging sick employees to stay home;
- Immediately sending home employees with acute respiratory illness symptoms;
- Providing information and training to employees on cough and sneeze etiquette, effectively wearing masks, hand hygiene, avoiding close contact with sick persons, avoiding touching eyes, nose, and mouth with unwashed hands, and avoiding sharing personal items with co-workers;
- Providing tissues, no-touch disposal trash cans, and hand sanitizer for use by employees;
- Performing routine environmental cleaning of shared workplace equipment and furniture; and
- Advising employees to check CDC's Traveler's Health Notices prior to travel.

Additionally, employers should follow CDC guidelines to create an infectious disease outbreak response plan to be followed in the event of an outbreak, including: allowing flexible worksites, telecommuting, and

[1] *Cal/OSHA Interim Guidelines for General Industry on 2019 Novel Coronavirus Disease (COVID-19)* (hereinafter "Cal/OSHA General Guidelines"), *available at* https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html.

[2] *See Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus, available at* https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html.

flexible work hours to increase physical distance among employees; using other methods of minimizing exposure between employees and between employees and the public; and postponing or canceling large work-related meetings or events.[3]

If the employer maintains a workplace where there is significant risk of exposure to COVID-19, the employer must implement measures to prevent or reduce infection hazards, such as implementing the above-listed CDC recommended actions and provide training to employees on their COVID-19 infection prevention methods.[4] Additionally, the employer must provide properly fitting personal protective equipment (PPE) where necessary and protect employees from inhalation exposure if there is an increased risk of infection in the workplace, which includes implementing engineering and administrative controls where feasible and practicable or providing respiratory protection. Notably, surgical and other non-respirator face masks do not protect persons from airborne infectious disease and cannot be relied upon for novel pathogens because they do not prevent inhalation of virus particles, do not seal to the person's face, and are not tested to the filtration efficiencies of respirators.[5]

Federal OSHA Requirements and Guidelines Related to COVID-19

Strict federal OSHA guidelines apply to high and very high exposure risk jobs, such as those in the healthcare field. However, the majority of jobs are classified as medium to low risk.

Lower exposure jobs, those that do not require contact with persons known or suspected to be infected with the corona virus nor in frequent and close contact (within 6 feet) of the general public should follow OSHA guidance applicable to all employers.[6] This includes, but is not limited to, developing an infectious disease preparedness and response plan that addresses the level of risk at each jobsite.[7] When assessing the risks at each individual worksite, employers should take into consideration where and how workers might be exposed - such as through customers, the general public and coworkers, risk factors at employees' homes and in the community, workers' individual risk factors like older age and known medical conditions, and controls necessary to assess those risks.[8] Employers must also implement basic infection prevention measures, including: promoting frequent handwashing; encouraging sick employees to stay home; training employees to effectively cover coughs and sneezes; providing customers and the public with tissues and hands-free trash receptacles; considering flexible worksites, telecommuting, flexible work hours, and/or staggered shifts to increase physical distancing; discouraging the use of other employee's equipment; and maintaining regular housekeeping practice.[9]

Medium exposure risk jobs include those that require frequent or close contact with persons who may have COVID-19. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings). For medium risk jobs, OSHA guidance advises that employers should implement following control measures:

- Engineering controls, such as installing physical barriers like plastic sneeze guards;
- Administrative controls, such as offering face masks to ill employees and customers, keeping customers informed about COVID-19 and asking them to minimize contact with workers; limiting customer and public access to the worksite if appropriate; minimizing face to face contact, and communicating the availability of medical screening and other worker health resources.
- PPE - Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.[10]

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[3] CDC, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission* (Mar. 12, 2020) (hereinafter "CDC Mitigation Strategies"), *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf

[4] *See* Cal/OSHA General Guidelines, *supra* note 1.

[5] *See* Cal/OSHA General Guidelines, *supra* note 1.

[6] OSHA, *Guidance on Preparing Workplaces for COVID-19,* OSHA 3990-03 2020 (hereinafter "OSHA Guidance"), at 20.

[7] OSHA Guidance, *supra* note 6, at 7-8.

[8] OSHA Guidance, *supra* note 6, at 7-8.

[9] OSHA Guidance, *supra* note 6, at 8-9.

[10] OSHA Guidance, *supra* note 6, at 21-22.

CDC Guidance Regarding Community Transmission Risks

Employers must also consider the relative risk of transmission in the communities in which they have jobsites. Where there is minimal to moderate transmission of COVID-19 in the surrounding community, employers should encourage telework where possible and, particularly for individuals with increased risk of severe illness, implement social distancing measures like increasing space between workers, staggering their work schedules, decreasing in-person meetings, limiting large work gatherings, and considering regular health checks like temperature and respiratory symptom screening of staff and visitors if feasible.[11] If transmission in the community is substantial, employers should additionally implement extended telework arrangements where feasible, ensure flexible leave policies, and cancel non-essential travel and work-sponsored conferences.[12]

Under current CDC guidance, employers must also separate sick employees.[13] Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.[14] If an employee is confirmed to have a COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act (ADA) by, among other things, ensuring that they do not disclose the name or personally identifiable information of the COVID-19 positive or exposed employee.[15] Failure to notify employees of potential exposure could lead to a lawsuit by any other employees who then develop the symptoms. While difficult to prove, the litigation would be costly. At the same time, disclosure of medical information of particular employees, including a COVID-19 diagnosis, could lead to privacy lawsuits.

Screening Employees for COVID-19 Symptoms

On April 23, 2020, the United States Equal Employment Opportunity Commission (EEOC) released guidance on COVID-19, the ADA, the Rehabilitation Act, and other equal employment opportunity laws.[16] Specifically, during the COVID-19 pandemic, the EEOC is allowing employers to ask employees if they are experiencing symptoms of COVID-19, like fever, chills, cough, shortness of breath, sore throat, or symptoms more recently identified by the CDC like loss of smell or taste, as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Although measuring an employee's body temperature is considered a medical examination, due to community spread of the corona virus and harm posed by it, employers may currently measure employees' body temperature. Employers may also require that an employee with symptoms of COVID-19 stay home and leave the workplace. The current guidance also allows employers to administer COVID-19 tests before permitting employees to enter the workplace as it is "job related and consistent with business necessity."[17] However, the tests must be accurate and reliable under guidance from public health authorities like the U.S. Food and Drug Administration (FDA) and the CDC.

As with any type of medical screening, testing, or medical documentation, employers must ensure confidentiality. Thus, each screening should be done privately, where other employees cannot see or hear screenings of other employees, and where employees are not standing in line together. Additionally, medical information obtained through such screenings or testing, must be maintained as a confidential medical record in compliance with the ADA and stored separately from the employee's personnel file. Failure to properly maintain these confidential records may lead to lawsuits for privacy and other violations.

Employees Returning to Work

Although the EEOC allows employers to require a doctor's note certifying fitness for duty when employees return to work, as a practical matter, doctors and other medical professionals may be too busy addressing the pandemic to provide this documentation. Under EEOC

[11] CDC Mitigation Strategies, *supra* note 3.

[12] CDC Mitigation Strategies, *supra* note 3.

[13] CDC, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)* (May 2020) (hereinafter "CDC Interim Guidance," available at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

[14] CDC Interim Guidance, *supra* note 13.

[15] CDC Interim Guidance, *supra* note 13.

[16] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Mar. 21, 2020) (hereinafter, "EEOC Guidance"), *available at* https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

[17] *EEOC Guidance, supra* note 16, at II.A.2.

guidance, it may be necessary to rely on local clinics to provide a form, a stamp, or an e-mail to certify that an employee does not or no longer has the pandemic virus. In light of current burdens on healthcare providers, the CDC warns that employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work.[18]

As a practical matter, the employer may also wish to obtain a certification from employees, representing, for example, that within the last couple weeks the employee has not experienced symptoms of COVID-19, had personal contact with anyone testing positive for COVID-19, or travelled to areas that are considered "hot spots" by the CDC. They may also wish to require that employees self-report any symptoms of COVID-19.

Payment for Reporting Time and Testing

California's Department of Industrial Relations (DIR) has also released COVID-19 guidance for employers. Generally, if an employee reports to work for their regular shift but is sent home or is limited to working fewer hours, the employee must be paid at least two hours or no more than four hours of reporting time pay. Even if a state of emergency is declared, such as in response to the coronavirus, reporting time pay is required "unless the state of emergency includes a recommendation to cease operations."[19] Under current guidance, employers who are still operating in some fashion during the pandemic should pay employees reporting time even if they are sent home due to screening or testing for the coronavirus. Even where a government authority recommends cessation of operations, the safest course is to pay employees for reporting time.

Although there is no current government guidance on the issue, the best practice is to pay employees for the time that they are screened or tested for COVID-19, or waiting for such procedures. While dependent a variety of facts, as in *Frlekin v. Apple Inc.,*[20] a court could find that while waiting for or being tested or screened, employees were subject to an employer's control and that their time is compensable. The safer course, to avoid the time and expense of litigation, is for employers to pay for the time that employees are tested or screened, or waiting to for testing or screening.

Telework Expenses

Many employers have, in whole or in part, allowed employees to work from home. However, this practice raises a host of new issues, including reimbursement of employee expenses. Generally, under California Labor Code section 2802(a), "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." In *Cochran v. Schwan's Home Service, Inc.,*[21] the California Court of Appeals found that Labor Code section 2802 required an employer to reimburse employees for the use of employees' personal cell phones for business-related calls, even where the employee did not incur extra expense as a result because, otherwise, the employer would receive a windfall. "Thus, to be in compliance with Section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill. Because of the differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case."[22]

Unfortunately, *Cochran* provides little guidance regarding what expenses and portion thereof employers should pay employees who are teleworking. The amount the employer should pay for expenses like internet access, paper, ink, or other supplies reasonably necessary for the employee to perform their duties depends on the employer's and individual employee's circumstances. Employers should consider what utilities and supplies employees are likely using to perform their work, any requests for reimbursement from employees, and documentation of employee expenses in determining what portion of those expenses to pay. For example, if an employee incurs an expense to perform their job that would otherwise have been paid by the employer, such as providing office or other supplies, the employer should pay the entirety of that expense. However, for expenses that an employee would normally use for personal reasons and is now also using to perform work, such as internet service, the employer should pay a reasonable portion of that expense.

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18 CDC Interim Guidance, *supra* note 13.

19 DIR, *FAQs on Laws Enforced by the California Labor Commissioner's Office, available at* https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm.

20 8 Cal. 5th 1038 (2020).

21 228 Cal. App. 4th 1137 (2014).

22 228 Cal. App. 4th at 1144.

Closing Remarks

As a final point, federal, state and local governments, in their attempts to reign in the virus, have created a variety of restrictions, which rapidly change from day to day. In this uncertain time, employers should work with their counsel to ensure compliance with recent executive orders, local ordinances, and guidance from government and health authorities, as well to develop appropriate policies and practices to prepare for and address incidents of COVID-19 in the workplace. This article does not detail every legal requirement that may be applicable to employers during this pandemic, and should not be construed as legal advice.

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Updated EEOC Guidance Related to Medical Information in the Time of COVID-19

Genevieve Ng

Introduction

For many years legal practitioners have counseled employers against asking employees about medical diagnosis and medical condition information. Then COVID-19 happened, and it seemed like all bets were off.

Summary of Updated Guidance

The Equal Employment Opportunity Commission (EEOC) has recently given employers the go-ahead to test employees for COVID-19 before they enter the worksite. On April 23, 2020, the EEOC indicated that an employer may choose to administer COVID-19 testing to employees to determine whether or not they have the virus before allowing the employee to enter the workplace. These tests must be carried out in compliance with normal requirements under the Americans with Disabilities Act[1] (ADA). Namely, the test must be "job related and consistent with business necessity."[2] Additionally, tests must be "accurate and reliable," but the EEOC recognizes that testing, at this stage, is not perfect.[3] The EEOC has not yet made any pronouncements related to antibody testing and whether that would be allowable under the ADA.

The EEOC has a history dating back to the arrival of H1N1 in 2009 of allowing employers to send employees home if they displayed any influenza-like symptoms. Normally, taking an employee's temperature or administering a COVID-19 test would be considered a medical examination, but it is currently allowable due to the special circumstances caused by the pandemic.

The EEOC has been guided in part by the Centers for Disease Control (CDC), and it is important to note that taking a temperature, inquiring about flu-like symptoms, or requiring a fitness for duty test, are not considered "disability related inquiries." Flus are considered a seasonal illness and even where an influenza like COVID-19 becomes much more serious or severe, the inquiry is still considered valid and lawful due to the overriding public safety concerns presented by the pandemic. However, these employer actions may not be allowed under normal circumstances, especially if there is no objective evidence of a pandemic influenza.

The demonstration or articulation of a "direct threat" is very significant in the analysis of whether the employer's inquiry is permissible.[4] In practice, this may result in some geographical differences in what is considered permissible, as COVID-19 may present a greater threat in some areas versus others. For example, New York and New Jersey have far more confirmed cases and deaths then Alaska. This means that there may be more flexibility for employers in New York City to make medical inquiries than employers in Juneau.

A seasonal flu is generally not severe enough to pose a direct threat or justify disability related inquires. However, if the CDC or local or state public health officials articulate that the threat is serious enough (as in the case of H1N1 or COVID-19), that information provides the employer with an objective basis for the inquiry. And because the level of threat may change over time, employers should monitor the CDC and their local public health director for contemporaneous assessments of their local conditions.

An employer is legally obligated to provide employees with a safe working environment. During a pandemic, the employer has more latitude in how it engages with employees on medical issues because of the objective threat posed by the pandemic. Here, in addition to the EEOC's clarification above allowing an employer to test an employee for COVID-19, an employer may also:

- Require employees to adopt infection control practices such as handwashing;
- Require employees to wear personal protective equipment (PPE) such as face masks, gloves, and gowns unless an employee with a disability needs a reasonable accommodation under the ADA;

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1 42 U.S.C. § 12101 et seq.

2 See EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (May 6, 2020) (EEOC Guidance), at A.6, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

3 EEOC Guidance, *supra* note 2, at A.6.

4 EEOC Guidance, supra note 2, at A.6.

- Send an employee home, if the employee is exhibiting symptoms of a contagious illness like the flu or COVID-19;
- Ask employees if they are experiencing influenza or COVID-19 like symptoms;
- Ask employees why they are absent from work;[5]
- Ask employees if they have traveled during this time and if they have been exposed to COVID-19;
- Require an employee who has been away from work to provide a note certifying fitness for duty; or
- Take the temperature of employees to determine whether they have a fever, which is a measurable symptom of COVID-19.[6]

To date, the most common symptoms of COVID-19 are low grade fever, a dry cough, and shortness of breath. Other symptoms include fatigue, chills, muscle pain, headache, sore throat, and loss of sense of smell and/or taste.[7]

While employers have more latitude to make inquiries, the information gleaned from employees does need to be kept confidential, similar to other employee medical information.

Nevertheless, although medical information is private, employers are required to notify the CDC and other public health officials if an employee has tested positive for COVID-19. Employers may also want to inform others in order to allow co-workers to take precautionary measures or implement a telework program or deep cleaning protocol. However, employers should limit disclosure of the information to only those who "need to know."[8]

Employers should also limit, to the greatest extent possible, disclosing the names of employees with COVID-19. The EEOC recommends interviewing the employee with COVID-19 (safely or remotely of course) to gather a list of names of co-workers the employee came into contact with during the asymptomatic period, so that coworkers can be provided notice. Employers should not disclose the identity of the coworker with COVID-19 and should train supervisors and managers on how to respond to inquiries from employees.

As many of us are now working remotely, if an employee does provide a supervisor or manager with confidential medical information, the employer should follow its existing confidentiality procedures to safeguard the information from inadvertent disclosure, until the information can be secured in the appropriate file.

If an employee refuses to allow the employer to take their temperature or answer questions about whether they have COVID-19 symptoms, the employer may prohibit the employee from entering the worksite.[9] The employer's foremost responsibility is to ensure that the workplace is safe for all employees.

An employer need not take every employee's temperature or ask every employee about symptoms, but if the employer does single out an employee for such evaluation, the employer must be able to justify the ask. The employer must have a reasonable belief based on objective evidence.[10] The EEOC has indicated that reasonable belief may be based on such symptoms as a persistent cough or if the employee exhibits tiredness.

Although an employer may not ask employees about medical conditions that make them more vulnerable if they are exposed to COVID-19, if the pandemic becomes more severe, and in accordance with local, state or federal assessment that employees would face a direct threat if they contract the virus, an employer may be permitted to make disability related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk. Obviously, employers may also require employees to stay at home if there

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[5] This federal allowance is modified in California by the Healthy Workplaces, Healthy Families Act which requires an employer to provide paid sick leave upon verbal or written request (Cal. Lab. Code § 246.5(a).) It further provides that the employee can determine how much paid sick leave they need to use. (Cal. Lab. Code § 246(j).) The employer cannot deny the employee use of such leave so there is a risk of an employer insisting on verification of sick leave under the Act in most instances. Request for sick leave verification may be allowable by law (i.e., for domestic violence, sexual assault or stalking) or under the parameters of a collective bargaining agreement.

[6] *See* EEOC Guidance, *supra* note 2.

[7] *See* CDC, *Symptoms of Coronavirus, available at* https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html.

[8] *See* EEOC, *Transcript of March 27, 2020 Outreach Webinar* (Mar. 27, 2020) (hereinafter, Outreach Webinar), *available at* https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar.

[9] Outreach Webinar, *supra* note 8.

[10] Outreach Webinar, *supra* note 8.

is no work or if employees are able to telework.[11] The EEOC has not yet changed its guidance on this particular issue and has not articulated what additional assessment by local, state or federal public health officials would be needed for such inquiries to be allowable.

Conclusion

While employers should still exercise caution when asking employees about medical information, it appears that the EEOC is temporarily allowing employers to engage with employees on the medical condition or diagnosis to ensure workplace safety. Of course, employers are allowed only limited leeway during this time under the specific circumstance of a declared pandemic. Employers are still reminded to treat any disclosed medical information with the utmost sensitivity and confidentiality.

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[11] It must be noted that working from home may be a form of reasonable accommodation under the ADA as well as being a part of an effective social distancing protocol.

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CASE NOTES

ADA

Anthony v. Trax Int'l Corp., No. 18-15662, 2020 U.S. App. LEXIS 12299 (9th Cir. Apr. 17, 2020)

On April 17, 2020, the U.S. court of appeals for the Ninth Circuit in an ADA action, affirmed the grant of summary judgment to the employer because the employee was not "otherwise qualified," and the employer was not obligated to engage in the interactive process where the employee did not satisfy the prerequisites for the Technical Writer position.

Sunny Anthony ("Anthony") appealed the grant of summary judgment in favor of TRAX International Corporation (TRAX) in her action alleging disability discrimination under the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination against "a qualified individual on the basis of disability" [42 U.S.C. § 12112(a)]. Here, TRAX terminated Anthony from her position as a Technical Writer—a position that by virtue of a third-party contract required a bachelor's degree in English, journalism, or a related field—allegedly due to an inability or unwillingness to accommodate her disability. TRAX discovered during the course of this litigation that Anthony lacked the requisite degree. The U.S. court of appeals for the Ninth Circuit had to decide under these circumstances whether such "after-acquired evidence" that an employee does not satisfy the prerequisites for the position, including educational background, renders the employee ineligible for relief under the ADA.

Contrary to her representation on her employment application, Anthony lacked the requisite bachelor's degree required of all technical writers under the TRAX's government contract. The Ninth Circuit stated that because plaintiff did not satisfy one of the prerequisites for her position, she was not "otherwise qualified," and TRAX was not obligated to engage in the interactive process.

Under the two-step qualified individual test promulgated by the Equal Employment Opportunity Commission and embedded in the court's precedent, an individual who fails to satisfy the job prerequisites cannot be considered "qualified" under the ADA unless she shows that the prerequisite is itself discriminatory in effect. Disagreeing with the Seventh Circuit and agreeing with other circuits, the Ninth Circuit held that a limitation on the use of after-acquired evidence, applicable under *McKennon v. Nashville Banner Publishing Co.,*[1] to an employer attempting to excuse its discriminatory conduct under the Age Discrimination in Employment Act, does not extend to evidence used to show that an ADA plaintiff is not a qualified individual, as required to establish a prima facie case of disability discrimination. Further, the court stated that TRAX had no obligation to engage in the interactive process to identify and implement reasonable accommodations.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 41.32, *Disability and Medical Condition Discrimination* (Matthew Bender).

ADEA

Babb v. Wilkie, No. 18-882, 206 L.Ed.2d 432 (April 6, 2020)

On April 6, 2020, the U.S. Supreme Court held that in a federal employee's ADEA suit, under the plain meaning of 29 U.S.C. § 633a(a), age had to be a but-for cause of differential treatment, but not necessarily a but-for cause of a personnel action itself; § 633a(a) concerned personnel actions, and if age discrimination played any part in the way a decision was made, then the decision was not made in a way that was untainted by such discrimination.

Noris Babb ("Babb") a clinical pharmacist at a U. S. Department of Veterans Affairs Medical Center, sued the Secretary of Veterans Affairs ("VA") under the Age Discrimination in Employment Act [29 U.S.C. § 633a(a)]. The VA moved for summary judgment, offering nondiscriminatory reasons for the challenged actions. The District Court granted the VA's motion after finding that Babb had established a prima facie case, that the VA had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude that those reasons were pretextual. On appeal, before the U.S. court of appeals for the

[1] 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995).

Eleventh Circuit, Babb contended that the district court's requirement that age be a but-for cause of a personnel action was inappropriate under the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA"). Because most federal-sector "personnel actions" affecting individuals aged 40 and older must be made "free from any discrimination based on age," 29 U.S.C. § 633a(a), Babb argued, such a personnel action is unlawful if age is a factor in the challenged decision. Thus, even if the VA's proffered reasons in her case were not pretextual, it would not necessarily follow that age discrimination played no part. The Eleventh Circuit found Babb's argument foreclosed by a Circuit precedent. The U.S. Supreme Court granted certiorari to resolve a Circuit split over the interpretation of § 633a(a).

The Court stated that the plain meaning of § 633a(a) demands that personnel actions be untainted by any consideration of age. To obtain reinstatement, damages, or other relief related to the end result of an employment decision, a showing that a personnel action would have been different if age had not been taken into account is necessary, but if age discrimination played a lesser part in the decision, other remedies may be appropriate.

The Court stated that two matters of syntax were critical here. First, "based on age" is an adjectival phrase modifying the noun "discrimination," not the phrase "personnel actions." Thus, age must be a but-for cause of discrimination but not the personnel action itself. Second, "free from any discrimination" is an adverbial phrase that modifies the verb "made" and describes how a personnel action must be "made," namely, in a way that is not tainted by differential treatment based on age. Thus, the Court stated that the straightforward meaning of § 633a(a)'s terms is that the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account. Instead, if age is a factor in an employment decision, the statute has been violated.

The Court stated that § 633a(a) requires proof of but-for causation, but the objection of that causation is "discrimination," not the personnel action. Further, the Court stated that it is not anomalous to hold the federal government to a stricter standard than private employers or state and local governments. When Congress expanded the ADEA's scope beyond private employers, it added state and local governments to the definition of employers in the private-sector provision.

But-for causation is nevertheless important in determining the appropriate remedy. The Court stated that to obtain reinstatement, damages, or other relief related to the end result of an employment decision, a showing that a personnel action would have been different if age had not been taken into account is necessary, but if age discrimination played a lesser part in the decision, other remedies may be appropriate.

Accordingly, the Court reversed and remanded.

References. See, e.g., Wilcox, *California Employment Law,* § 41.31, *Age Discrimination* (Matthew Bender).

ATTORNEYS' FEES

Cardinal Care Mgmt., LLC v. Afable, Nos. A154062, A155229, 2020 Cal. App. LEXIS 317 (Apr. 20, 2020)

On April 20, 2020, a California appellate court held that employers seeking to appeal an administrative award of unpaid wages and penalties could request a waiver of the undertaking requirement of Lab. Code § 98.2(b), by reason of inability to pay because the superior court had discretion under Code Civ. Proc. § 995.240, to waive a bond based on indigency, consistent with the rights of access to courts and due process; denying a waiver was not an abuse of discretion because the employers made only a conclusory showing of indigency and there was evidence that their owner had transferred substantial assets to impede collection on a judgment.

Cardinal Care Management, LLC ("plaintiffs") operated several residential care facilities for the elderly. Defendants were seven former employees who worked at the facilities, and who brought administrative proceedings against plaintiffs before the Labor Commissioner (the "commissioner") seeking unpaid wages and penalties. When the commissioner awarded the employees more than $2.5 million, plaintiffs sought de novo review in the trial court, an action that required them to post an undertaking in the amount of the award or to obtain a waiver [Lab. Code § 98.2; Code Civ. Proc. § 995.240]. The primary question for the California appellate court to address was whether the trial court provided an adequate hearing on plaintiffs' financial ability to post the undertaking. The appellate court concluded that the proceedings were adequate and comported with due process. Plaintiffs also challenged an award of attorneys' fees.

The appellate court held that plaintiffs could request a waiver of the undertaking requirement by reason of inability to pay because the superior court had discretion to waive a bond based on indigency consistent with the rights of access to courts and due process. Denying a waiver was not an abuse of discretion because the employers made only a conclusory

showing of indigency and there was evidence that their owner had transferred substantial assets to impede collection on a judgment.

The appellate court stated that the due process claim failed because the employers were allowed to present evidence at the hearing, which lacked an adequate record. The employees were entitled to attorneys' fees because they successfully obtained an award from the superior court.

Accordingly, the appellate court affirmed the trial court's judgment and order.

References. See, e.g., Wilcox, *California Employment Law,* § 5.40, *Civil Action by Employee or Former Employee to Recover Wages and Penalties* (Matthew Bender).

Reynolds v. Ford Motor Co., No. A154811, 2020 Cal. App. LEXIS 326 (Apr. 21, 2020)

On April 21, 2020, a California appellate court held that the trial court did not abuse its discretion in awarding plaintiff prevailing buyer attorney fees under the Song-Beverly Consumer Warranty Act without considering the contingency fee agreement; the trial court acted well within its discretion in using the prevailing market value in the community for similar legal services, relying on its personal knowledge and familiarity with the area legal services, as the touchstone for determination of the reasonable hourly rates.

In 2006, Peter Reynolds ("Reynolds") purchased a 2005 Ford F-250 truck with a 6.0-liter diesel engine. Over the next six years, Reynolds had the truck repaired 15 times but it continued to malfunction. In 2013, Ford denied Reynolds's request that it buy back or replace the truck under the Song-Beverly Act. Thereafter, Reynolds hired counsel to pursue a lawsuit against Ford. The second amended complaint, the operative pleading, was filed August 2014 and contained several causes of actions including one for relief under the Song-Beverly Act; Ford's answer denied all liability. Following extensive litigation, the parties settled the case in its entirety in September 2016. The terms of the settlement provided both that "[Ford] will issue one check, inclusive of all purported damages incurred by [Reynolds] in the amount of $277,500.00, except attorney's fees and costs which will be resolved via agreement or motion," and that Ford agreed to "pay [Reynolds's] attorney's fees, costs, and expenses pursuant to Civil Code section 1794(d) in an amount determined by the Court, by way of noticed motion, to have been reasonably incurred by [Reynolds] in the commencement and prosecution of this action." Reynolds filed a motion requesting fees in the aggregate lodestar sum of $308,696.25, comprised of $205,797.50 for legal services provided by Knight Law Group, LLC (formerly O'Connor and Mikhov, LLP) and The Altman Law Group plus a lodestar multiplier of 1.5 ($102,898.75).

The trial court conducted a lodestar analysis and awarded Reynolds attorneys' fees in the aggregate sum of $201,891, based upon compensation for 457.85 hours at reasonable hourly rates ranging from $225/hour to $500/hour, plus a lodestar multiplier of 1.2, "reasonable and appropriate to accomplish the salutary objectives of the Song-Beverly Act." The trial court ruled that Reynolds had no obligation to disclose the fee terms of his retainer agreement with counsel.

The California appellate court could not reverse the trial court's order awarding attorneys' fees unless the court was convinced the court is clearly wrong. The court stated that it found it sufficient to note that "lawyers are often faced with a conflict between their own economic interests and the welfare of their clients. This conflict arguably exists whenever contingent fee agreements are involved. … Absent evidence to the contrary, however, the Court should assume that the plaintiff's lawyer has abided by his ethical obligations and avoided the temptation to place his own interest ahead of his client's" [*Bonetti v. Embarq Management Co.*].[2] "Nothing we say in this opinion … alters existing rules forbidding attorneys to charge or obtain unreasonable fees, or diminishes clients' established remedies if unreasonable fees are sought or exacted. (See, e.g., Bus. & Prof. Code, § 6200 et seq. [arbitration of attorney fees].)"

Accordingly, the appellate court affirmed the trial court's order.

References. See, e.g., Wilcox, *California Employment Law,* § 5.40, *Civil Action by Employee or Former Employee to Recover Wages and Penalties* (Matthew Bender).

COLLECTIVE BARGAINING

Int'l All. of Theatrical Stage Emples., Local 15 v. NLRB, No. 19-70651, 2020 U.S. App. LEXIS 13739 (9th Cir. Apr. 29, 2020)

On April 29, 2020, the U.S. court of appeals for the Ninth Circuit held the employer did not violate its duty to bargain in good faith, pursuant to 29 U.S.C.S. § 158(a)(5) and (d), because the employer effectively

[2] 715 F. Supp. 2d 1222 (M.D. Fla. 2009).

retracted its claim of inability to pay the union's wage and benefits proposals, thereby limiting its obligation to produce financial documents to the union; the employer expressly communicated to the union that its refusal to pay the requested wage rates stemmed from a judgment regarding appropriate business strategy, not from financial nonviability, and no evidence suggested that the employer's clarification of its position was disingenuous.

At issue in this collective bargaining case is whether the employer, Audio Visual Services Group d/b/a PSAV Presentation Services ("PSAV"), effectively retracted its claim of inability to pay the union's wage and benefits proposals, thereby limiting its obligation to produce financial documents to the union, and whether PSAV failed to bargain in good faith. Petitioner International Alliance of Theatrical Stage Employees, Local 15 ("Local 15" or "Union") is the certified collective-bargaining representative for PSAV's employees. The National Labor Relations Board ("NLRB") found that PSAV did retract its inability-to-pay claim and that PSAV's conduct both at and away from the bargaining table did not establish that it acted in bad faith in violation of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169. Rather, the NLRB concluded that Local 15 "did not sufficiently test [PSAV]'s willingness to bargain prior to filing its bad-faith bargaining charge" [*Audio Visual Servs. Grp., Inc.*].[3]

The U.S. court of appeals for the Ninth Circuit affirmed the NLRB's findings that: (a) the employer, Audio Visual Services Group d/b/a PSAV Presentation Services, effectively retracted its claim of inability to pay the union's wage and benefit proposals, thereby limiting its obligation to produce financial documents to the union; and (b) PSAV's conduct did not constitute bad faith bargaining in violation of the Act.

The Ninth Circuit stated that the union was the certified collective-bargaining representative for PSAV's employees. At issue in this collective bargaining case was whether PSAV effectively retracted its claim of inability to pay the union's wage and benefits proposals, thereby limiting its obligation to produce financial documents to the union, and whether PSAV failed to bargain in good faith.

The Ninth Circuit held that substantial evidence supported the NLRB's finding that the substance of PSAV's bargaining position was an unwillingness to pay, rather than an inability to pay, the union's demands. The panel concluded that substantial evidence supported the NLRB's finding that PSAV retracted its inability-to-pay claim, and PSAV's failure to produce documents responsive to the Union's first document request did not violate the Act.

The Ninth Circuit rejected the union's arguments that PSAV bargained in bad faith. First, the court held that the fact that PSAV never changed its wage proposal did not itself establish that it acted in bad faith; and on this record, the court could not conclude that PSAV's position on benefits was evidence of bad faith either by itself or in conjunction with its overall bargaining posture. Second, PSAV's employee discipline proposals did not evidence its bad faith. Third, PSAV's behavior away from the bargaining table did not demonstrate its bad faith. Fourth, PSAV's withholding of documents did not evidence PSAV's overall bad faith. Finally, PSAV's refusal to bargain before May 2016 did not evidence overall bad faith bargaining.

Accordingly, the Ninth Circuit affirmed the NLRB's decision.

References. See, e.g., Wilcox, *California Employment Law,* § 90.10, *Collective Bargaining Arbitration Agreements* (Matthew Bender).

GENDER DISCRIMINATION

Pinter-Brown v. The Regents of the Univ. of Cal., No. B290086, 2020 Cal. App. LEXIS 329 (Apr. 23, 2020)

On April 23, 2020, a California appellate court held that the trial court's introductory discussion of civil rights heroes, with other cumulative errors, rendered the trial fundamentally unfair to the employer by giving the appearance of partiality in suggesting that the jurors should strive to end discrimination.

Lauren Pinter-Brown ("Brown") sued The Regents of the University of California for gender discrimination based on a series of events that took place while she was a Professor of Medicine at the University of California at Los Angeles ("UCLA"). The jury found in favor of Brown and awarded her upward of $13 million in economic and noneconomic damages.

The California appellate court stated that the trial court committed a series of grave errors that significantly prejudiced The Regents' right to a fair trial by an impartial judge.

First, the trial court delivered a presentation to the jury highlighting major figures in the civil rights movement, and told the jury their duty was to stand in the shoes of Dr. Martin Luther King and bend the arc of the moral universe toward justice. Second, the trial court allowed

[3] 2019 NLRB LEXIS 173 (Mar. 12, 2019).

the jury to hear about and view a long list of discrimination complaints from across the entire University of California system that were not properly connected to Brown's circumstances or her theory of the case. Third, the trial court allowed the jury to learn of the contents and conclusions of the Moreno Report, which documented racial discrimination occurring throughout the entire UCLA campus. Finally, the trial court allowed Brown to resurrect a retaliation claim after the close of evidence despite having summarily adjudicated that very claim prior to trial.

The appellate court stated that these errors were cumulative and highly prejudicial. They evidenced the trial court's inability to remain impartial and created the impression that the trial court was partial to Brown's claims.

Accordingly, the appellate court reversed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 41.36, *Sex Discrimination* (Matthew Bender).

REST BREAK

Ibarra v. Wells Fargo Bank, N.A., No. 18-55626, 2020 U.S. App. LEXIS 11891 (9th Cir. Apr. 15, 2020)

On April 15, 2020, the U.S. court of appeals for the Ninth Circuit held that the former employees were entitled to summary judgment in a class action against their bank employer, because the bank's commission-based compensation plan for their mortgage sales violated Lab. Code § 226.7 by not separately compensating them for time spent on rest breaks; the bank was not entitled to reduction of damages for class members who purportedly earned only hourly pay because it did not meet its burden of establishing the number of such class members—a figure that could likely only be discovered from its own records.

Jacqueline Ibarra ("plaintiff"), a mortgage broker for Wells Fargo Bank, N.A. ("Wells Fargo"), brought a putative class action alleging that Wells Fargo's commission-based compensation plan violated California Lab. Code § 226.7 by not separately compensating her for time spent on rest breaks. The district court certified a class of Wells Fargo employees who sold mortgages ("plaintiffs"). Based on a set of facts stipulated to by the parties, the district court granted summary judgment for plaintiffs and awarded damages of $97,284,817.91.

The U.S. court of appeals for the Ninth Circuit stated that under *Vaquero v. Stoneledge Furniture LLC*,[4] plaintiffs were correct that Wells Fargo's compensation method violated California's rest break requirements. The court stated that *Vaquero*'s reasoning drew from other California law precedents that the California Supreme Court has declined to disturb and the California Supreme Court denied review in *Vaquero* itself. The court thus had no reason to think the California Supreme Court would decide *Vaquero* any differently than the court of appeal did. The court stated that although Wells Fargo attempted to draw distinctions, its commission-based compensation plan was virtually identical to the compensation plan that *Vaquero* held violated Lab. Code § 226.7. Because the commission-based approach here was mathematically equivalent to that in *Vaquero*, it yielded the same violation of state law that occurred in *Vaquero*.

The Ninth Circuit rejected Wells Fargo's argument that damages should be reduced to account for the 961 class members who Wells Fargo asserted earned only hourly pay. The court stated that even if Wells Fargo was not liable to any class members who earned only hourly pay, it had not met its burden of establishing the number of such class members—a figure that could likely only be discovered from Wells Fargo's own records.

Further, the Ninth Circuit stated that although some judicial economy might be lost by remanding to the district court, the fact that the parties have stipulated to alternative damages amounts—leaving only the question of which legal approach to calculating damages is correct—significantly narrows the scope of what remains to be resolved in any further proceedings.

Accordingly, the Ninth Circuit affirmed in part the district court's judgment and remanded in part.

References. See, e.g., Wilcox, *California Employment Law,* § 1.06, *Federal Law Governing Wages and Hours* (Matthew Bender).

SEXUAL HARASSMENT

Ducksworth v. Tri-Modal Distribution Servs., No. B294872, 2020 Cal. App. LEXIS 284 (Apr. 7, 2020)

On April 7, 2020, a California appellate held that staffing companies were entitled to summary judgment on discrimination and sexual harassment claims under Gov. Code § 12940, alleging failure to promote

[4] 9 Cal. App. 5th 98 (Ct. App. 2017), *review denied* (June 21, 2017).

because the staffing companies were entirely uninvolved with the promotion decisions, as shown by an undisputed fact in the separate statement, and thus could have no liability; admitting a declaration that stated promotion dates without foundational facts for the business records hearsay exception in Evid. Code § 1271, was not an abuse of discretion because the trial court reasonably accepted the declarant's assertion of personal knowledge of the facts.

Bonnie Ducksworth ("Ducksworth") and Pamela Pollock ("Pollock") were customer service representatives at Tri-Modal Distribution Services ("Tri-Modal"). Tri-Modal promoted others but, for decades, never promoted them. Ducksworth and Pollock believed this was due to discrimination against African Americans. They sued Tri-Modal. In addition to her discrimination claim, Pollock also sued about sexual harassment. Tri-Modal's executive vice-president Kelso began "a dating relationship" with Pollock. Pollock refused Kelso's request to make the relationship more sexual. Pollock ultimately ended the relationship. Pollock alleged that after she dumped him, Kelso blocked her promotions at Tri-Modal. These contentions implicated employer Tri-Modal, but it was not involved in this appeal. Rather three different defendants were the sole concern of this appeal. Two of these other defendants were two staffing agencies called Scotts Labor Leasing Company, Inc. ("Scotts") and Pacific Leasing, Inc. ("Pacific"). Scotts and Pacific supplied employees, including Ducksworth and Pollock, to Tri-Modal. The trial court granted summary judgment for Scotts and Pacific because they were uninvolved in Tri-Modal's decisionmaking about whom to promote. The California appellate court affirmed this ruling for the staffing agencies.

The third defendant was Kelso. The trial court granted a separate summary judgment for Kelso because the statute of limitations barred Pollock's claim against him. Pollock appealed this ruling on two grounds. First, she asserted that the court erred at summary judgment in overruling her hearsay objection to a key part of Kelso's evidence. Second, she argued that the court miscalculated the statute of limitations by running the clock from the date the employer offered a competitor the promotion and the competitor accepted the promotion rather than the later date when the competitor began working at the new position. The appellate court affirmed this summary judgment ruling for Kelso.

The appellate court held that the staffing companies could have no liability because they were entirely uninvolved with the promotion decisions, as shown by an undisputed fact in the separate statement. Admitting a declaration that stated promotion dates without foundational facts for the business records hearsay exception [Evid. Code § 1271] was not an abuse of discretion because the trial court reasonably accepted the declarant's assertion of personal knowledge of the facts. The court stated that because the statute of limitations [former Gov. Code § 12960(d)] ran from the denial of promotion, not from a later date when another worker's promotion took effect, the claims were untimely and summary judgment was correctly granted on that ground.

Accordingly, the appellate court affirmed the trial court's decision.

References. See, e.g., Wilcox, C*alifornia Employment Law,* §43.01, *California Fair Employment and Housing Act* (Matthew Bender).

STATE EMPLOYEE

Obbard v. State Bar of Cal., No. A155106, 2020 Cal. App. LEXIS 348 (April 28, 2020)

On April 28, 2020, a California appellate court held that in finding that a research attorney for the superior court was exempt from the State Bar's mandatory continuing education requirements, the trial court did not err in construing "employees of the State of California," as used in Bus. & Prof. Code § 6070(c), to include employees of the superior courts; the research attorney was a superior court employee and a state employee.

The State Bar's mandatory continuing legal education program, Bus. & Prof. Code § 6070(c) exempts "full-time employees of the State of California, acting within the scope of their employment." When the Bar implemented the continuing education program in 1992, two State Bar employees informally concluded attorneys employed by the superior court were not exempt state employees. Philip B. Obbard ("Obbard"), a research attorney for the superior court of the State of California, asserted that he was exempt. The State Bar disagreed, acknowledging that superior courts are funded by the state but reasoning that Obbard's paychecks were issued by the superior court, rather than the State Controller, and he was "covered by different labor rules and collective bargaining agreements." The State Bar has been inconsistent on this position.

Obbard filed a petition for writ of mandate and a complaint for declaratory relief, asking the trial court to decide whether superior court attorneys are employees of the State of California as used in Bus. & Prof. Code, § 6070(c), and therefore exempt from the State

Bar's mandatory continuing legal education requirements. The trial court agreed with Obbard and entered judgment in his favor.

The California appellate court stated that in finding that the research attorney was exempt from the State Bar's mandatory continuing education requirements, the trial court did not err in construing "employees of the State of California," as used in Bus. & Prof. Code § 6070(c), to include employees of the superior courts. The research attorney was a superior court employee and a state employee. The court declined to defer to the State Bar's interpretation of Bus. & Prof. Code § 6070. The record suggested that the State Bar had applied the interpretation inconsistently by granting continuing education exemptions to other research attorneys employed by the superior court. The court rejected the State Bar's contention that the Legislature created a special employment status for trial court employees that excludes them from the exemption for state employees in Bus. & Prof. Code § 6070(c).

Accordingly, the appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 41.42, *Employee Selection Criteria* (Matthew Bender).

TERMINATION

Tilkey v. Allstate Ins. Co., No. D074459, 2020 Cal. App. LEXIS 322 (Apr. 21, 2020)

On April 21, 2020, a California appellate court held that the employer did not violate Lab. Code § 432.7 when it terminated the employment based on the employee's guilty plea to disorderly conduct because the guilty plea was a conviction for purposes of Lab. Code § 432.7 and the information was used to terminate employment before the charges were dismissed.

While Michael Tilkey ("Tilkey") and his girlfriend Jacqueline Mann ("Mann") were visiting at her home in Arizona, the two got into an argument. Tilkey decided to leave the apartment. When he stepped out onto the enclosed patio to collect his cooler, Mann locked the door behind him. Tilkey banged on the door to regain entry, and Mann called police. Police arrested Tilkey and charged him under Arizona law with criminal damage deface, possession or use of drug paraphernalia, and disorderly conduct, disruptive behavior. Domestic violence charges were attached to the criminal damage and disorderly conduct charges. Tilkey pled guilty to the disorderly conduct charge only, and the other two charges were dropped. After Tilkey completed a domestic nonviolence diversion program, the disorderly conduct charge was dismissed. Before the disorderly conduct charge was dismissed, Tilkey's company of 30 years, Allstate Insurance Company ("Allstate"), terminated his employment based on his arrest for a domestic violence offense and his participation in the diversion program. Allstate informed Tilkey it was discharging him for threatening behavior and/or acts of physical harm or violence to another person. Following the termination, Allstate reported its reason for the termination on a Form U5, filed with Financial Industry Regulatory Authority ("FINRA") and accessible to any firm that hired licensed broker-dealers like Tilkey. Tilkey sued Allstate for wrongful termination in violation of Lab. Code § 432.7 and compelled, self-published defamation. At trial, Allstate presented evidence that it would have terminated his employment based on after-acquired evidence that Tilkey had circulated obscene and inappropriate e-mails using company resources.

The jury returned a verdict in Tilkey's favor on all causes of action and awarded him $2,663,137 in compensatory damages and $15,978,822 in punitive damages. It advised the trial court that it did not find Allstate's after-acquired evidence defense credible, and the court agreed.

Allstate appealed the verdicts before the California appellate court, contending it did not violate Lab. Code § 432.7 and so there was no wrongful termination; compelled self-published defamation per se is not a viable tort theory; it did not defame Tilkey because there is not substantial evidence its statement was not substantially true; punitive damages are unavailable in compelled self-publication defamation causes of action; the defamatory statement was not made with malice; and (6) the punitive damages awarded here were unconstitutionally excessive.

The appellate court agreed that Allstate did not violate Lab. Code § 432.7 when it terminated Tilkey's employment based on his plea and his participation in an Arizona domestic nonviolence program and reversed that judgment. However, the court concluded that compelled self-published defamation was a viable theory, and substantial evidence supported the verdict that the statement was not substantially true, the court affirmed that portion of the judgment. Additionally, while the court concluded that punitive damages were available in this instance, the punitive damages awarded here were not proportionate to the compensatory damages for defamation, and the court remanded the matter for recalculation of the punitive damages.

Accordingly, the appellate court affirmed in part and reversed in part the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

WAGES

McPherson v. EF Intercultural Found., Inc., No. B290869, 2020 Cal. App. LEXIS 267 (Apr. 1, 2020)

On April 1, 2020, a California appellate court held that an employer was required to pay accrued vacation wages to exempt employees upon termination pursuant to Lab. Code § 227.3, because the employer had a policy of providing paid vacation, which consisted of informally allowing employees to take time off when their schedules permitted, and had no clear and express written policy limiting the accrual of vacation wages.

When an employer's policy allows an employee to take an unspecified amount of paid time off without accruing vacation time, does the employee's right to that paid time off vest so the employer must pay her for unused vacation under Lab. Code § 227.3 when her employment ends? Or does Lab. Code § 227.3 apply only to policies providing a fixed amount of vacation that accrues over time? That is the primary issue posed by this appeal by EF Intercultural Foundation, Inc. ("EF"), from the trial court's judgment awarding vacation wages to three of EF's former exempt employees—Teresa McPherson ("McPherson") Donna Heimann ("Heimann ") and Linda Brenden ("Brenden").

The California appellate court concluded that Lab. Code § 227.3 applies to EF's purported "unlimited" paid time off policy based on the particular facts of this case. The court by no means held that all unlimited paid time off policies give rise to an obligation to pay "unused" vacation when an employee leaves. Flexible work arrangements and unlimited paid vacation policies may be of considerable benefit to employees and to the employers who want to recruit and retain those employees. Employees and employers are free to contract for unlimited paid vacation, consistent with the Labor Code and governing case law. However, the court stated that, here EF never told McPherson and her fellow plaintiffs that they had unlimited paid vacation. EF had no written policy or agreement to that effect, nor did its employee handbook cover these plaintiffs. As it turned out, McPherson, Heimann, and Brenden took less vacation than many of EF's other managers and exempt employees covered by the employee handbook, whose accrued vacation vested as they worked for EF month after month.

As to Heimann only, the appellate court reversed the judgment and remanded the case to the trial court to recalculate the amount of vacation wages owed her, excluding vacation wages earned after she moved to Virginia in 2005. In sum, the court held that EF was required to pay accrued vacation wages because EF had a policy of providing paid vacation, which consisted of informally allowing employees to take time off when their schedules permitted, and had no clear and express written policy limiting the accrual of vacation wages. A former employee who no longer resided in California, but who had worked temporarily within the state after moving away, was not entitled to payment of vacation wages accrued after moving because the protections afforded to nonresidents by statute [Lab. Code § 1171.5(a)] and case law requiring payment of overtime compensation to nonresidents do not apply to vacation wages, in light of the administrative difficulties of making such payments and the absence of any indication the Legislature so intended.

Accordingly, the appellate court affirmed in part, reversed in part, the trial court's judgment and remanded the matter.

References. See, e.g., Wilcox, *California Employment Law*, § 4.01, *Time and Place of Payment* (Matthew Bender).

WHISTLEBLOWER

Flynn v. United States Dep't of the Army, No. 18-73009, 2020 U.S. App. LEXIS 12758 (9th Cir. Apr. 21, 2020)

On April 21, 2020, the U.S. court of appeals for the Ninth Circuit held that the Merit Systems Protection Board properly dismissed for lack of jurisdiction Flynn's claims related to her filing an Equal Employment Opportunity Commission ("EEOC") complaint and reporting sexual harassment because such complaints fall within the province of the EEOC.

Dr. Kathryn A. Flynn ("Flynn") petitioned pro se for review of the Merit Systems Protection Board's ("MSPB's") final order in her administrative action against the Department of the Army ("the agency") alleging violations of the Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. § 2302(b)(8), arising out of the agency's disciplinary decisions and ultimate failure to renew her employment.

The U.S. court of appeals for the Ninth Circuit stated that MSPB properly dismissed for lack of jurisdiction Flynn's claims related to her filing an Equal Employment Opportunity Commission ("EEOC") complaint and reporting sexual harassment because such complaints fall within the province of the EEOC.

The Ninth Circuit stated that MSPB properly dismissed for lack of jurisdiction Flynn's claims related to the agency's alleged lack of transparency because Flynn failed to allege non-frivolous allegations of protected whistleblower activity under Section 2302(b)(8) of the Whistleblower Protection Act ("WPA").

Further, the Ninth Circuit stated that the MSPB properly dismissed Dr. Flynn's remaining claims related to the agency's mismanagement and abuse of government contracts as barred under the doctrine of res judicata because Flynn could have raised these claims in her prior MSPB complaint, which was adjudicated in a final decision on the merits. The MSPB did not abuse its discretion by denying Flynn's motion to compel discovery.

The Ninth Circuit rejected as unsupported by the record Flynn's contention that the MSPB did not properly conduct a de novo review of her petition and erroneously relied on the Office of Special Counsel's determination in her prior petition.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

CALENDAR OF EVENTS

2020

June 12	CLA, Workers' Compensation Webinar, From Head to Toe, Rating All Parts of the Body with the AMA Guides: The Hematopoietic System and Upper Extremities (Part 6 of 8)	12:00 PM – 1:00 PM
June 15	CLA, Labor & Employment Law Webinar, Banner is Toast (Apogee and other NLRB Developments Affecting Workplace Investigations)	12:00 PM – 1:00 PM
July 8	NELI: California Employment Law Update	Andaz San Diego 600 F Street San Diego, CA 92101 (619) 849-1234
July 9-10	NELI: Employment Law Update	Andaz San Diego 600 F Street San Diego, CA 92101 (619) 849-1234
July 10	CLA, Workers' Compensation Webinar, From Head to Toe, Rating All Parts of the Body with the AMA Guides: The Lower Extremities and Pain (Part 7 of 8)	12:00 PM – 1:00 PM
July 22	CLA, Litigation Webinar: How Arbitrators Think	10:00 AM – 11:00 AM
Aug. 7	CLA, Workers' Compensation Webinar, From Head to Toe, Rating All Parts of the Body with the AMA Guides: Case Law and Controversies (Part 8 of 8)	12:00 PM – 1:00 PM
Aug. 20-21	NELI: Public Sector EEO and Employment Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

Dec. 3-4	NELI: Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

2021

Mar. 21-24	NELI: Employment Law Briefing	Hotel Del Coronado 1500 Orange Avenue Coronado, CA 92118 (619) 435-6611

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