Employment Litigation on the Rise in California

Summary

Labor and employment litigation is a growing threat to employers that continues to rise each year. As noted in Norton Rose Fulbright's Annual Litigation Trend Survey 2014, labor and employment disputes was one of the top three types of litigation facing companies in 2013. In its updated report issued in 2015, Norton Rose stated: "[o]f particular concern is the increasing number of class action lawsuits with a quarter of all respondents reporting at least one call or group action against their companies in the preceding 12 months, 80% of which are based in the U.S."

Seyfarth Shaw's *Annual Workplace Class Action Litigation Report* for 2015 indicates that wage-and-hour class action is the top area of litigation, with the Ninth Circuit (which includes California) as the highest area for wage-and-hour class action filings. Specifically, Seyfarth's report stated: "[t]he most dominant trend has been a steep rise in the number of class action lawsuits filed in state courts alleging violations of California's overtime laws or the California Labor Code and wage & hour regulations. This trend continued unabated in 2014. The rate of new case filings has continued to grow to the point where multiple class actions are filed in California every day."

California's labor and employment laws, housed in various code sections, all provide an opportunity for costly civil litigation against an employer for any alleged mistake. While the labor and employment protections or mandates may be a burden that the employer can withstand, the multiple threats of constant litigation create significant costs for California employers and hamper their ability to create new jobs and expand their businesses. Below is a summary of the most common employment lawsuits that employers face under California law.

Labor Code Private Attorneys General Act (PAGA)

In 2003, Governor Gray Davis signed into law SB 796 (Dunn; D-Garden Grove, Chapter 906), which created the Private Attorneys General Act (PAGA) and went into effect January 1, 2004. PAGA basically allows an aggrieved employee to file a representative action on behalf of the employee and all other current or former employees similarly aggrieved, for civil penalties due to the violation of a Labor Code provision. When the Labor Code violation at issue has a penalty associated with it, then that is the penalty the employee may collect on behalf of himself/herself and the "aggrieved employees," in the PAGA action.

If the Labor Code provision does not have a specific penalty associated with it, then PAGA provides a penalty as follows:

- If at the time of the violation the employer does not employ one or more employees, the penalty is $500;
- If at the time of the alleged violation the employer employs one or more employees, the civil penalty is $100 per employee, per pay period for the first violation and $200 per pay period, per employee, for each subsequent violation.

Notably, there is no requirement under PAGA that an employee actually suffer harm, such as unpaid wages, as a result of the violation, nor is there any required intent by the employer to have actually committed the violation for the penalties to apply. PAGA penalties are imposed regardless of whether the employer simply made a good faith mistake and regardless of whether the employee is actually harmed.

The penalties collected under PAGA are supposed to be divided as follows: 75% to the Labor and Workforce Development Agency (LWDA) and 25% to the aggrieved employees. PAGA also provides a statutory right to attorney fees for the employee's attorney only, thereby adding another layer of cost onto employers and providing an incentive for plaintiff's attorneys to file the case.

An April 2014 *Los Angeles Daily Journal* article found that over the last eight years, PAGA lawsuits have increased by more than 400%. In the Governor's 2016–2017 Budget, the LWDA indicated that it receives more than 6,000 PAGA notices a year. The popularity of these lawsuits is likely due to the significant monetary awards that can be leveraged against an employer for minor, unintentional violations (See issue summary on California's Private Attorneys General Act).

Misclassification of Employees as Salaried vs. Hourly Employees

A prime area for class action litigation as well as PAGA claims is the alleged misclassification of employees as exempt, salaried employees versus hourly, nonexempt employees, as well as independent contractor versus employee. Although there is no question that some employers intentionally misclassify their employees

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as salaried or as independent contractors to gain a competitive advantage, many employers try to classify employees correctly by going through the subjective tests and simply get it wrong. California's exempt classifications for employees are confusing and differ from the federal test, which adds another layer of complexity for California employers. See *Ramirez v. Yosemite Water Co.; Inc.*, 20 Cal. 4th 785 (1999).

This distinction is even more problematic due to the U.S. Department of Labor changing the federal minimum salary requirements for exempt employees. The changes were supposed go into effect December 1, 2016, but are currently enjoined due to pending litigation in a federal court in Texas.

Similarly, there is no consistent definition of independent contractor versus employee in statute, and state agencies admittedly apply different tests to determine independent contractor status, thereby making the challenge for employers to get it completely right almost impossible. (See article on Independent Contractors and the Gig Economy.)

Numerous industries, including financial services, restaurants, retailers, realtors, insurance, transportation, and technology, have all been targeted with multimillion-dollar class actions for alleged "misclassification" of employees. Given the significant costs involved in simply defending a class action, many of these cases settle before trial. In each class action, the majority of the settlement award is allocated to the plaintiffs' attorneys for fees and costs. Two recent cases involving misclassification illustrate the typical breakdown of such settlements:

• ***Campbell v. Pricewaterhouse Coopers, LLC*** (2015): alleged misclassification of associates as exempt employees: **Total settlement award**: $5 million (this amount does not reflect the costs incurred by the defendant to defend the case, including defense attorney fees).

Plaintiffs' attorney fees and costs: $2.9 million.

Class representative awards: enhancement of $15,000 for serving as representative.

Class member awards (injured employees): 1,900 members split the remaining $2 million based upon weeks worked, which if split evenly would be approximately $1,000 to each employee.

• ***Boyd v. Bank of America*** (2015): alleged misclassification of appraisers as exempt employees.

Total settlement award: $36 million (this amount does not reflect the costs incurred by the defendant to defend the case, including defense attorney fees).

Plaintiffs' attorney fees: $11,988,000 (subject to approval by court).

Class representative awards: enhancement of $25,000 per representative.

Class member awards: approximately $64,000 (this amount assumes the attorney fee award referenced above is granted by the court and each class member worked the same hours to equally divide the remaining settlement award after deducting for attorney fees, costs, enhancement awards and PAGA penalties).

Fair Employment and Housing Act and California Family Rights Act

The Government Code houses California's Fair Employment and Housing Act (FEHA), which basically precludes employers from discriminating against or harassing employees having a protected status, as well as the California Family Rights Act (CFRA), which provides employees with 12 weeks of protected leave to care for the serious medical condition of the employee or family member, or to bond with a new child.

FEHA and CFRA each have a private right of action for any alleged claim of discrimination, harassment, or interference/denial of an employee's rights under CFRA. The damages available for such a claim include: 1) backpay; 2) reinstatement or front pay; 3) injunctive relief; 4) attorney fees and costs; 5) compensatory damages for pain and suffering; and 6) punitive damages.

In 2015, there were 16,285 employment complaints filed with the Department of Fair Employment and Housing alleging violations of FEHA. Although there are some employers that may unlawfully harass or discriminate against employees, many employers face litigation under FEHA for making an objective employment decision that involves an employee who is a member of a protected classification or who recently engaged in protected activity. A basic example of this type of litigation is as follows:

Protected activity/status: Employee is over 40, transgender, and recently returned from medical leave under CFRA.

Objective conduct: One week after returning from medical leave, the employee is caught on camera taking merchandise, which results in the employee's termination.

Employee FEHA allegation: The employer's adverse employment action of terminating the employee was not based upon the employee's misconduct, but rather was based upon the employee's status as a transgender, older worker, or because the employee recently took leave under CFRA.

Cost of Defending Litigation

While some suggest that companies settle litigation only when there is liability, oftentimes companies settle to avoid the cost of defending the litigation. This phenomenon was the subject of a discussion paper by Randy J. Kozel and David Rosenburg, "Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment" (*Virginia Law Review*, March 2004). The authors summarize the issue as follows: "Civil litigants often exploit the litigation process strategically for private gain at the expense of social welfare . . . One of the most significant exploitative strategies entails asserting a claim or defense to obtain a 'nuisance-value settlement.'" The nuisance-value settlement is essentially "paying off the proponent of the meritless claim or defense rather than incurring the greater expense of litigating to have it dismissed . . .." Class actions exacerbate this problem, given the significant increased cost of defending such claims.

A 2016 *Santa Clara Law Review* article by Matthew Goodman, "The Private Attorney General Act: How to Manage the Unmanageable," explained the potential for nuisance-value settlements, or a "strike suit," leading to "blackmail settlements," in PAGA cases:

"The possibility of a meritless claim leading to a settlement increases in PAGA actions for two reasons: (1) they are commonly joined with class actions; and (2) PAGA contains a penalty scheme allowing for a large amount of liability to be imposed. [For example] there are 10,000 employees in an action that, after four years, proceeds to trial; assuming that a violation is found and not fixed, the PAGA penalty of $200 per week is triggered; for one employee, a potential recovery of more than $40,000 would amount; this sum is then multiplied by 10,000 employees, and, the employer now faces a litigation risk of $400 million. Faced with this risk and litigation expense, a settlement for a bargain rate will look attractive."

In November 2015, insurance provider Hiscox released a study about the cost of employee lawsuits. The study analyzed discrimination complaints filed by employees throughout the country and identified states that had stricter anti-discrimination laws, which increased their risk of litigation. California was ranked as exposing employers to a 40% higher risk of a discrimination claim than other states given its state-specific statutes. The study estimated that the cost for a small to mid-size employer to defend and settle a single plaintiff discrimination claim was approximately $125,000. This amount, especially for a small employer, reflects the financial risk associated with defending a lawsuit and the ability of plaintiffs to leverage employers into resolving or settling the case regardless of merit.

Recent Legislation That Would Have Had Negative Impact on California Legal Climate

In 2013, SB 404 (Jackson; D-Santa Barbara) would have created a new protected classification under the FEHA for an employee's "familial status," broadly defined as any employee who is, who is perceived to be, or who is associated with a person that provides medical or supervisory care to a listed family member. Given that almost all employees would fall within the scope of SB 404, it would have created a new litigation avenue for plaintiffs' attorneys to file numerous lawsuits against employers on the basis that any adverse employment action taken was due to the employee's "familial status" rather than for a nondiscriminatory reason.

SB 404 was sponsored by the California Employment Lawyers Association (CELA), a membership organization of plaintiffs' attorneys that represent employees, and failed to pass out of the Assembly Appropriations Committee.

In 2015, SB 406 (Jackson; D-Santa Barbara) sought to expand the California Family Rights Act to include five additional family members for whom an employee could take a 12-week protected leave of absence to care for the family member's medical condition. CFRA already includes a private right of action with the opportunity for significant damages, including punitive damages. Expanding the family members under CFRA also would have expanded the opportunity for more litigation. The bill was sponsored and supported by CELA and was vetoed by Governor Edmund G. Brown Jr.

In 2016, SB 1166 (Jackson; D-Santa Barbara) proposed to create a new 12-week leave of absence applicable to employers with 10 or more employees for bonding with a new child. This new leave would be housed in FEHA, and therefore, enforced through the existing private right of action with the opportunity for significant financial damages. The California Chamber of Commerce opposed this bill as a job killer with a large business coalition. The bill failed to pass the Assembly Labor and Employment Committee. In the last month of the session, however, Senator Jackson amended SB 654 with language that would have created a new 6-week leave of absence applicable to employers with 20 or more employees within a 75-mile radius for

bonding with a new child. The CalChamber also opposed this bill as a job killer, as it also would have opened the door for costly litigation against small employers with limited financial resources.

SB 654 was vetoed by the Governor. In his veto message, the Governor stated: "It goes without saying that allowing new parents to bond with a child is very important and the state has a number of paid and unpaid benefit programs to provide for that leave. I am concerned, however, about the impact of this leave particularly on small businesses and the potential liability that could result. As I understand, an amendment was offered that would allow an employee and employer to pursue mediation prior to a lawsuit being brought. I believe this is a viable option that should be explored by the author."

CalChamber Position

The CalChamber does not defend employers who intentionally violate the law or discriminate against employees based upon their protected statuses or protected activity. The current litigation environment, however, is not targeted at just employers who intentionally violate the law. Good employers who make innocent mistakes, or who make objective, reasonable employment decisions still are subject to constant threats of costly litigation in an attempt to leverage a settlement from the employer that is less than what it would cost the employer to defend the lawsuit.

California needs to limit the numerous pathways of costly litigation against employers and either allow employers an opportunity to resolve good faith mistakes before lawsuits are filed or allow employers to recover their costs and attorney fees for successfully defending litigation in order to limit the nuisance value lawsuits filed.

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