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California Employment Law: 2023 Q3/Q4 Recap and 2024 Key New Legislation

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What's Inside

Key Cases

Kuciemba v. Victory Woodworks, Inc.
(2023) 14 Cal.5th 993

The California Supreme Court's pronouncement that employers' duty of care to their employees does not extend to the employees' household members for take-home exposure to COVID-19 will have consequences for employer liability.

In *Kuciemba*, an employee contracted COVID-19 at work and passed it on to his wife, raising the question of whether an employer owes a duty of care under California law to prevent the spread of COVID-19 to employees' household members. To decide on the duty of care issue, the Court analyzed the default statute rule found in Civil Code section 1714 and then applied the policy application nuances analysis in *Rowland v. Christian* (1968) 69 Cal.2d 108, which, in some instances, provides an exception to the Civil Code. The Court looked to precedent from *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, which established an employer's duty of care to prevent "take-home" exposure to hazardous substances. The Court then turned to *Rowland* to examine potential foreseeability and policy exceptions to the general duty of care. Foreseeability focuses on the information available at the time of alleged negligence, while policy considerations are forward-looking and assess the potential burdens on defendants. The Court concluded that while the transmission of COVID-19 to household members of employees may be a foreseeable consequence of an employer's failure to take proper precautions against the virus in the workplace, policy considerations require the adoption of an exception to the duty of care. The Court reasoned that foreseeability alone is insufficient to create an independent tort duty, and the Court considered policy factors such as moral blame, prevention of future harm, burden on the defendant, and consequences to the community in reaching its decision.

The Court did not find any substantial support to implicate the employer for moral blame or find any obvious financial gain resulting from any failure to strictly adhere to government health orders. The Court also recognized that imposing a tort duty on employers would cause a direct and pervasive negative impact on the economic outcomes for all businesses, leading to slowdowns or shutdowns caused by the weight of restrictions. The Court also expressed the concern that an extension of the duty of care of an employer to non-employee household members of employees and the resulting consequences and detrimental changes in business practices risked harm to society, including that an extension of duty in such cases might compel essential service providers to close down during future pandemics. The *Kesner* ruling provides for liability in limited circumstances for alleged workplace exposure to asbestos where the employers have significant control over the means and methods of work.

Adolph v. Uber Technologies
(2023) 14 Cal.5th 1104

On July 17, 2023, the California Supreme Court issued an opinion in *Adolph v. Uber Technologies* (2023) 14 Cal.5th 1104, in which the Court held that non-individual claims under California's Private Attorneys General Act ("PAGA") can remain in court when individual claims are sent to arbitration.

In *Adolph*, Erik Adolph, an Uber Eats delivery driver, filed suit in 2019 regarding alleged misclassification of Uber drivers as independent contractors rather than employees. Adolph's position aligned with prior state court decisions supporting the premise that an aggrieved employee does not lose standing to pursue "representative" PAGA claims on behalf of other employees merely because they must arbitrate their own PAGA claims. Essentially, Adolph took the position that he should be allowed to pursue both his individual claims and non-individual claims in arbitration and/or in court. Uber took the position that Adolph signed a contract requiring him to take any employment-related disputes to arbitration and thus could not lead a case in court on behalf of other drivers. **(Cont. on page 2)**

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(Cont. from page 1) The issue before the Court was whether an employee could adjudicate their own individual PAGA claim in arbitration while maintaining an ability to bring a non-individual PAGA claim in court. Justice Liu, writing for the *Adolph* Court, stated, "where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court." According to the Court, an employee has statutory standing to litigate non-individual PAGA claims if he (1) "was employed by the alleged violator" and (2) is someone "against whom one or more of the alleged violations was committed." A plaintiff who satisfies both requirements does not lose standing based on the "enforcement of an agreement to adjudicate [his] individual claim in another forum."

Adolph is a big win for employees, as it refutes the U.S. Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, which held that an individual employee lacked standing to bring a non-individual PAGA claim on behalf of other employees in a court, only allowing the employee's individual dispute to be handled in a different forum (i.e., arbitration). The *Adolph* decision also forces employers to face the prospect of having one claim brought in multiple forums.

Hartstein v. Hyatt Corp.
(9th Cir. 2023) 82 F.4th 825

The Court in *Hartstein v Hyatt* held that the prompt payment provisions of California Labor Code section 201 are triggered in the event of temporary layoff or furlough without a specific return date within the pay period.

In March 2020, Hyatt Corporation notified over 7,000 employees that they were temporarily furloughed due to the COVID-19 pandemic. Three months later, Hyatt terminated the employees as of June 27, 2020, and paid out all unused accrued vacation. Plaintiff Karen Hartstein filed a class action on behalf of California employees of Hyatt asserting violations of the California Labor Code for failure to pay all wages upon discharge, waiting time penalties, failure to furnish accurate wage statements, failure to pay overtime, and unfair business practices, as well as enforcement under PAGA.

The district court granted Hyatt's summary judgment motion, ruling that the furlough was not a complete severance of the employer-employee relationship. The Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment as to the vacation pay claim, concluding that the prompt payment provisions of the Labor Code required Hyatt to pay employees their accrued vacation in March 2020. The Court found that a California Division of Labor Standards Enforcement opinion letter and its Policies and Interpretations Manual established that a temporary layoff without a specific return date within the normal pay period is a discharge that triggers the prompt payment provisions of Labor Code section 201. As Hyatt's layoff was longer than a normal pay period and there was no specific return date, Hyatt should have paid out accrued vacation pay to the furloughed employees in March 2020.

In re Uber Technologies Wage & Hour Cases
(2023) 95 Cal.App.5th 1297

The recent Court decision in *In re Uber Technologies* provided that Uber and Lyft could not compel the Labor Commissioner or the People of the State of California to arbitrate claims against them, as neither the Labor Commissioner nor the People of the State of California were parties to the arbitration agreements between the companies and their drivers.

In May 2020, the People of the State of California brought an action against rideshare companies alleging the companies violated the Unfair Competition Law by misclassifying workers as independent contractors instead of employees and thereby depriving the workers of wages and benefits associated with employee status. In August 2020, the Labor Commissioner filed separate actions against Uber and Lyft alleging they misclassified drivers as independent contractors and violated certain Labor Code provisions and wage orders. **(Cont. on page 3)**

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(Cont. from page 2) The two actions were consolidated. Uber and Lyft filed motions to compel arbitration to the extent the claims sought "driver-specific" or "individualized" relief based on their agreements with the drivers to arbitrate on an individual basis most disputes arising from the relationship with Uber or Lyft. The motions to compel arbitration were denied by the trial court and Uber and Lyft appealed.

The California Court of Appeals affirmed the trial court's decision denying the motions to compel arbitration on the grounds that neither the People of the State of California nor the Labor Commissioner were parties to the agreements, the Federal Arbitration Act ("FAA") did not preempt the claims against the companies, and the People of the State of California and the Labor Commissioner were not bound by the drivers' arbitration agreements based on equitable estoppel. The Court ruled that FAA preemption did not apply to compel the actions to arbitration because the People and Labor Commissioner were not parties to the agreements, had no preexisting relationship with the drivers, and did not act as proxies for the drivers but had independent statutory authority to bring civil enforcement actions. Regarding equitable estoppel, the Court held the claims were not dependent upon or inextricably intertwined with the underlying contractual obligations of the agreement containing the arbitration clause. Therefore, nonsignatory plaintiffs could not be estopped from refusing to arbitrate.

Kava Holdings, LLC v. National Labor Relations Board
(9th Cir. 2023) 85 F.4th 479

In the *Kava Holdings, LLC v National Labor Relations Board* case, the Court found that the National Labor Relations Board ("NLRB") properly considered Kava Holdings, LLC's ("Kava") prior unfair labor practices in determining whether to infer animus towards union-affiliated former employees in a refusal to hire claim, as the prior improper practice was sufficiently connected and close in time to the events at issue.

Employer Kava employed a unit of UNITE HERE Local 11 ("Union") employees at the Hotel Bel-Air. In September 2009, Kava temporarily closed the hotel for renovations and laid off all the unit employees. Kava's conduct surrounding the temporary closure gave rise to two separate NLRB orders. The first order (Hotel Bel-Air I) addressed conduct from the closure. The NLRB found that KAVA violated its duty to bargain in good faith with the Union regarding the negotiation over the effects on the laid-off employees. The second order (Hotel Bel-Air II) addressed conduct surrounding the reopening. In preparation to reopen the hotel, Kava held a job fair to fill 306-unit positions. Although 176 Union-affiliated former employees applied, Kava refused to hire 152 of them. The Union filed an unfair labor practice charge, and the NLRB found that Kava committed unfair labor practices by refusing to rehire these former employees based on their Union affiliation and refusing to recognize the Union and the new employees' representative. Kava petitioned for review of the decision and the NLRB cross-petitioned for enforcement of the decision.

The Court of Appeals granted the NLRB's cross-petition, finding substantial evidence that Kava committed an unfair labor practice by refusing to hire former employees affiliated with the Union so that Kava could avoid its statutory duty to bargain with the Union. The Court found that the NLRB permissibly considered Kava's prior unfair labor practices in Hotel Bel-Air I to infer animus toward Union-affiliated former employees, as they were sufficiently connected and close in time to events at issue in Hotel Bel-Air II. The Court found the NLRB could reasonably infer that Kava intended to prevent Union-affiliated employees from comprising a majority of the Hotel Bel-Air workforce upon reopening. Kava's unlawful conduct in Hotel Bel-Air I was substantial evidence supporting the finding of animus in Hotel Bel-Air II.

Key Legislation Effective January 1, 2024

Increased Paid Sick Days (SB 616)

Effective January 1, 2024, most employers (with a few exceptions) will be required to provide their employees with 56 hours or seven days (whichever is greater) of paid sick leave by the 280th calendar day of employment, each calendar year, or in each 12-month period. Current law only requires employers to provide employees with a minimum of 24 hours or three days (whichever is greater) of paid sick leave by the 120th calendar day of employment, each calendar year, or in each 12-month period.

Consistent with existing law, an employer who uses the accrual method of granting paid sick leave must allow employees to carry over unused accrued sick leave to the next year. However, the employer may limit the amount of accrued sick leave the employee may use in a year to 56 hours or seven days (whichever is greater). This is an increase from existing law, which allows employers to limit the use of accrued sick leave in a year to 24 hours or three days (whichever is greater).

As with existing law, the new law allows an employer to cap the total amount of unused sick leave an employee may accrue. The new cap is 112 hours or 14 days (whichever is greater), an increase over the existing cap of 48 hours or six days (whichever is greater).

For employers that award employees the full amount of sick leave at the start of each year of employment (the front-loaded method), no accrual or carryover is required.

Consistent with the current law, the new law does not require employers to pay their employees for unused accrued sick leave upon termination.

Bereavement Leave Extended to Loss Related to Reproduction or Failed Adoption (SB 848)

Under current law, an employer with five or more employees must allow an employee who has been employed for at least 30 days to take up to five days of unpaid bereavement leave for the death of a family member. Effective January 1, 2024, the right to bereavement leave extends to an employee who suffers a reproductive loss, including a miscarriage, failed surrogacy, unsuccessful assisted reproduction (such as through artificial insemination), stillbirth, or failed adoption. If an employee experiences more than one reproductive loss leave event within a 12-month period, the total amount of time taken shall not exceed 20 days within a 12-month period. The leave is unpaid, but employees may elect to use certain other leave balances otherwise available to them, including accrued and available paid sick leave.

Employment Discrimination – Cannabis Use (SB 700)

Effective January 1, 2024, an employer may not discriminate against an employee for using cannabis products during nonworking hours and away from the workplace. SB 700, which Governor Newsom signed on October 7, 2023, expands existing law to prohibit an employer from requesting information from applicants relating to their prior cannabis use. Additionally, the new law prohibits employers from considering an applicant's history of cannabis use obtained from a criminal background check, unless they are allowed to do so under the California Fair Chance Act or other state or federal law.

Key Legislation Effective January 1, 2024

Updates to Workplace Violence Prevention Requirements (SB 553)

Under existing law, employers are required to establish, implement, and maintain an effective written injury prevention program. Effective July 1, 2024, covered employers must also adopt a written workplace violence prevention plan that must include:

1. Names or job titles of the persons responsible for implementing the plan;
2. Effective procedures to obtain the active involvement of employees in developing and implementing the plan, including, but not limited to, through their participation in identifying, evaluating, and correcting workplace violence hazards, in designing and implementing training, and in reporting and investigating workplace violence incidents;
3. Methods the employer will use to coordinate implementation of the plan with other employers, when applicable, to ensure that those employers and employees understand their respective roles, as provided in the plan;
4. Effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report;
5. Effective procedures to ensure that supervisory and nonsupervisory employees comply with the plan;
6. Effective procedures to communicate with employees regarding workplace violence matters;
7. Effective procedures to respond to actual or potential workplace violence emergencies;
8. Procedures to develop and provide training;
9. Procedures to identify and evaluate workplace violence hazards;
10. Procedures to correct workplace violence hazards identified and evaluated in a timely manner;
11. Procedures for post-incident response and investigation;
12. Procedures to review the effectiveness of the plan and revise the plan as needed; and
13. Procedures or other information required as being necessary and appropriate to protect the health and safety of employees.

Additionally, the new law requires employers to maintain a log of workplace violence incidents and provide workplace violence training to all employees.

No Stay Pending Appeals of Decisions Regarding Arbitration (SB 365)

Existing law allows a party to immediately appeal an order denying a motion to compel arbitration. However, effective January 1, 2024, the appellant is not entitled to an automatic stay of the proceedings in the trial court pending the outcome of such an appeal. The practical effect of this new law is that an employer could be forced to defend a case in court that an appellate court ultimately determines should be litigated in private arbitration. This will likely increase defense costs, as the employer will be forced to litigate the case in two forums.

Earlier this year, the United States Supreme Court held in C*oinbase, Inc. v. Bielski* (2023) 599 U.S. 736, that the Federal Arbitration Act ("FAA") requires a district court to stay its proceedings while a party pursues an interlocutory appeal of an order denying a petition to compel arbitration that invokes the FAA. SB 365 appears to conflict with this decision. Thus, it is likely that there will be future legal challenges to this new California law.

Noncompete Agreements Are Unlawful in Employment Agreements Without Statutory Exceptions (AB 1076 and SB 699)

Existing law generally provides that noncompete agreements in employment relationships are void except in very narrow circumstances that are defined by statute. AB 1076 takes this law a step further by making it unlawful to include a noncompete clause in an employment agreement or to require an employee to enter a noncompete agreement that does not fall within a statutory exception. **(Cont. on page 6)**

Key Legislation Effective January 1, 2024

(Cont. from page 5) Additionally, the law requires employers to notify, in writing, by February 14, 2024, current and former employees who were employed after January 1, 2022, and whose contracts include a noncompete clause, or who were required to enter a noncompete agreement that does not fall within a statutory exception, that the noncompete clause or agreement is void.

Further, SB 699 provides that void noncompete agreements are unenforceable regardless of when and where they were signed. Thus, an employer is precluded from enforcing a void noncompete agreement even if it is with an employee or applicant who is located outside the state of California. The new law allows employees or prospective employees to sue their employers or prospective employers for injunctive relief and actual damages for violating this law.

About Walsworth

Walsworth's employment lawyers defend a broad spectrum of employment litigation matters, as well as provide advice and counsel services. We represent a wide variety of large and small businesses, public entities, and nonprofit corporations. We also act as coordinating and local counsel by assisting our clients and their national counsel in managing all aspects of discovery, trial preparation, and trial in large-scale litigation.

We have successfully defended single, multi-plaintiff, and class action claims in state and federal courts, and in private, binding arbitration and mediation. These cases involved allegations of wrongful termination, harassment, discrimination, whistleblowing, wage and hour violations, breach of contract, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination and harassment, violations of the Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), misappropriation of trade secrets, and unfair competition. We have also successfully represented employers at administrative hearings before the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the California Division of Labor Standards Enforcement, the Employment Development Department, and the Workers' Compensation Appeals Board in connection with Labor Code Section 132a discrimination/retaliation and serious and willful claims. Our team has also represented public entities in arbitrations, Skelly (disciplinary) hearings, and Pitchess motions.

We also provide advice and counsel for a full scope of labor and employment matters, including but not limited to:

- Disability Access and Accommodation
- Employee Handbooks
- Executive Compensation
- FMLA/CFRA Leave Management
- Independent Contractor Agreements
- Policy Memoranda (including anti-harassment policies and investigation guidelines)
- Severance Policies and Separation Agreements
- Sexual Harassment Policies and Prevention Training
- Terminations
- Whistleblower Claims
- Workplace Investigations and Audits

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