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Employment Law

By Andrew H. Friedman

In sharp contrast to 2015, when California state and federal courts seemed to be issuing important decisions in labor and employment law cases on a near daily basis, 2016 saw significantly fewer decisions. However, the California Legislature enacted a slew of new employment laws that extend additional protections for employees. This article "cherry-picks" and briefly summarizes not only the most significant laws, cases and regulations from 2016 but also those that are most useful to the employment practitioner, whether defense, plaintiff or neutral.

■ California Legislative and Regulatory Update

Continuing their annual tradition, the California Legislature passed, and Governor Brown signed, numerous labor and employment bills that will affect the workplace in many significant ways. In addition, the California Department of Fair Employment and Housing issued new regulations. Unless noted otherwise, the new legislation became effective January 1, 2017.

Expansion of California's Fair Pay Act to Encompass Race and Ethnicity

In 2015, California enacted SB 358, the California Fair Pay Act. SB 358, the most aggressive equal pay law in the country, amended Labor Code section 1197.5 to prohibit employers from paying an employee a wage rate less than that paid to any employees of the opposite sex for doing substantially similar work—when viewed as a composite of skill, effort, and responsibility. This year, California enacted SB 1063, dubbed the "Wage Equality Act of 2016," which amended Labor Code section 1197.5 to include employee race and ethnicity, in addition to gender, as a protected basis for equal pay.

Prior Salary Alone Does Not Justify Wage Differentials

AB 1676 expanded the California Fair Pay Act (Labor Code section 1197.5) even further by emphasizing that an individual's "[p]rior salary shall not, by itself, justify any disparity in compensation." As originally proposed, AB 1676 would have prohibited employer inquiries into an applicant's prior salary. However, concerns that Governor Brown would veto the bill, as he did AB 1017 in 2015, which also would have banned inquiries into salary history, led the Legislature to remove this prohibition from AB 1676.

Protections for Victims of Domestic Violence, Sexual Assault, or Stalking

Labor Code section 230.1 provides that employers with 25 or more employees shall not retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking because he or she took time off from work for certain specified activities, such as seeking medical attention, obtaining psychological counseling, or obtaining services from a domestic violence shelter or rape crisis center. Effective July 1, 2017, section 230.1 (amended by AB 2337) will require covered employers to give certain written information to new employees upon hire (and to other employees upon request) regarding their rights to take leave under that statute.

AB 2337 also amended section 230.1 to provide that, on or before July 1, 2017, the Labor Commissioner must develop, and post on the Labor Commissioner's website, a form notice that employers may use to comply with the foregoing provision. Employers are not required to comply with the new notice provisions until the Labor Commissioner posts the form.

Clarification Regarding Itemized Wage Statements

AB 2535 amended Labor Code section 226 to clarify that an itemized wage statement for certain exempt employees does not have to show the employee's "total hours worked." The new provision applies to employees who meet the requirements of the executive, managerial, professional or outside sales exemptions pursuant to any IWC Wage Order or the overtime exemption for computer software professionals under Labor Code section 515.5. Of course, employers must continue to include the total hours worked by non-exempt employees on the itemized wage statements for each pay period.

Employers Restricted from Considering Certain Juvenile Criminal Records

AB 1843 expanded Labor Code section 432.7's restrictions on what inquiries employers may make regarding the criminal history of applicants for employment. Employers are now prohibited from asking applicants about, or considering information relating to, "an arrest, detention, process, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law." Likewise, employers may not use "self-help" to find out about an applicant's juvenile criminal history—*i.e.,* an employer may not "seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law."

Additionally, the California Fair Employment and Housing Council ("FEHC") has proposed regulations related to the use of criminal history information in employment decisions.[1] The proposed regulations would prohibit criminal history consideration in a manner that would adversely impact individuals on a basis protected by FEHA. These regulations could impose restrictions greater than those set forth in Labor Code section 432.7 on the use of criminal history information by employers.

Single-user Restrooms must be Labeled "All Gender"

Effective March 1, 2017, Health and Safety Code section 118600 (added by AB 1732) provides that all single-user toilet facilities in any business establishment must be identified with signage as "all-gender" facilities rather than designated as male or female. In addition, the signage must comply with Title 24 of the California Code of Regulations and be designated for use by no more than one occupant at a time or for family or assisted use. For the purposes of section 118600, "'single-user toilet facility' means a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user."

Expanded Immigration Related Unfair Employment Practices

SB 1001 created new Labor Code section 1019.1, which provides that it will be an "unfair immigration-related practice" for employers to take any of the following actions when verifying an employee's authorization to work in the United States: (1) request more or different documents than required under federal law; (2) refuse to honor documents tendered that, on their face, reasonably appear to be genuine; (3) refuse to honor documents or work authorization based on the specific status or term that accompanies the authorization to work; or (4) attempt to reinvestigate or re-verify an incumbent employee's authorization to work. Any person who violates the law will be subject to a penalty imposed by the Labor Commissioner of up to $10,000.

Employers Restricted from Imposing Choice-of-Law and Forum Provisions in Employment Contracts

Increasingly, employers doing business in California have been including choice-of-law and forum selection provisions in employment agreements for their California based employees in an effort to seek resolution of disputes in employer-friendly forums. To counter this trend, SB 1241 amended the Labor Code to add section 925. Under section 925, for contracts entered into, modified, or extended on or after January 1, 2017, an employer may not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision requiring the employee to adjudicate claims arising in California outside of California, or deprive the employee of the substantive protection of California law with respect to a controversy arising in California. Any provision of a contract that violates these prohibitions is voidable and any dispute over a voided provision must be adjudicated in California under California law. The new law specifies that injunctive relief is available and authorizes a court to award reasonable attorneys' fees. A contract with an employee who was represented by legal counsel is excepted from the foregoing provisions.

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1. The proposed regulations and information pertaining the approval process can be accessed at http://www.dfeh.ca.gov/fehcouncil/. The comment period for the amended version of the proposed regulations expired on December 9, 2016. Final approval of the proposed regulations could occur as early as March 2017, with the effective date set in the final version.

Increase in Minimum Wage

Effective January 1, 2017, the minimum wage for California employers with 26 or more employees is $10.50 per hour. The minimum wage for California employers with 25 or fewer employees will remain $10.00 per hour and will not increase to $10.50 per hour until January 1, 2018. Many cities and counties (*e.g.,* Los Angeles, Oakland, Palo Alto, Mountain View, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo) have their own minimum wage ordinances that provide a higher minimum wage than the state. Prudent counsel will review the county and city ordinances to ensure compliance with those local regulations.

Bond Posting Requirement for Employers Appealing from Minimum Wage and Overtime Citations Issued by the Labor Commissioner

AB 2899 amended Labor Code section 1197.1 to require that, before an employer can appeal from a citation by the Labor Commissioner for minimum wage and overtime violations, employers post a bond in favor of the employee with the Labor Commissioner in an amount equal to the unpaid wages and liquidated damages assessed under the citation. The bond is to be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.

Expanded Transgender Protections

Counsel should be aware of and monitor the status of proposed regulations issued by the FEHC related to transgender identity and expression. If promulgated, the proposed regulations will clarify issues relating to transgender protections in the workplace.[2]

California Code of Regulations Updates Cover Entire Range of FEHA Issues

After approval by the California Office of Administrative Law and filing with the Secretary of State on December 9, 2015, the California Fair Employment and Housing Council's Amendments to its Fair Employment and Housing Act Regulations became effective on April 1, 2016. The breadth of these new regulations—which cover everything FEHA related from re-defining the terms "employee" and "employer" to mandating that employers develop a comprehensive written harassment, discrimination, and retaliation prevention policy—is expansive, and detailed discussion of the amended regulations is beyond the scope of this article.[3]

DOL's Overtime Regulations

On May 18, 2016, President Obama and Secretary of Labor Thomas Perez announced the publication of the Department of Labor's final rule updating the Department's overtime regulations which, effective December 1, 2016, set the annual salary and compensation level needed for Executive, Administrative and Professional workers to be exempt at $47,476.00. It is unclear whether this rule will actually go into effect given the election of Donald Trump, and the fact that on November 22, 2016 U.S. District Court Judge Amos Mazzant granted an Emergency Motion for Preliminary Injunction and enjoined the Department of Labor from implementing and enforcing this overtime rule. The case, filed by 21 states, was heard in the United States District Court for the Eastern District of Texas.[4] The Department of Labor's appeal of the preliminary injunction is pending before the Fifth Circuit on an expedited briefing schedule.[5]

■ Case Law Update

The U.S. Supreme Court

During 2016, the U.S. Supreme Court issued four major decisions impacting labor and employment law practitioners. Interestingly, the most significant of those four decisions, *Campbell-Ewald Co. v. Gomez*,[6] was a non-employment law case. In *Campbell-Ewald*,

2. The proposed regulations and information pertaining the approval process can be accessed at http://www.dfeh.ca.gov/fehcouncil/. The comment period for the amended version of the proposed regulations expired on December 9, 2016. Final approval could come as early as March 2017, with the effective date set in the final version.
3. A redlined version of these new regulations comparing them to the former regulations can be accessed at: http://www.dfeh.ca.gov/files/2016/09/FinalText.pdf.
4. *State of Nevada v. United States Department of Labor* (E.D. Texas Nov. 22, 2016, No: 4:16-CV-00731) 2016 WL 6879615.
5. *State of Nevada v. U.S. Dept. of Labor*, Case No. 16-41606. On January 3, 2017, Judge Mazzant denied the DOL's motion to stay trial court proceedings pending the appeal. *State of Nevada v. U.S. Dept. of Labor* (E.D. Texas Jan. 3, 2017, No: 4:16-CV-00731) 2017 WL 26079.
6. (2016) ___ U.S. ___ [136 S.Ct. 663].

the Supreme Court answered a question it had left open three years earlier in *Genesis Healthcare Corp. v. Symczyk*:[7] is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated? The Court in *Campbell-Ewald* held that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case. The Supreme Court's ruling removes what was rapidly becoming an effective defense tactic to use Rule 68 offers of judgment (or settlement offers) to resolve named plaintiffs' claims in putative class actions and thereby attempt to end the class action.

Justice Ginsburg, writing the majority opinion (and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan with a concurring opinion by Justice Thomas), explained that the Court was not deciding whether a claim can be mooted "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[8] Taking advantage of this unanswered question, Chief Justice Roberts wrote a dissenting opinion (in which Justices Scalia and Alito joined) that provides a roadmap for other defense strategies that might moot the named plaintiff's case and, thereby, the class action. For example, defendants can deposit full relief with the district court on the condition that it be released to the plaintiff when the case is dismissed as moot.

Another important Supreme Court case in 2016 was *Tyson Foods, Inc. v. Bouaphakeo*.[9] Following Justice Scalia's 5-4 majority opinion in 2011 in *Wal-Mart Stores, Inc. v. Dukes*,[10] the defense bar began slowly ringing the funeral bells for the employment class action, predicting that *Dukes* had effectively established a categorical exclusion of representative or statistical evidence in class actions. The *Tyson Foods* decision, however, brings to mind a quote attributed to Mark Twain: "The reports of my death are greatly exaggerated."[11]

The *Tyson Foods* plaintiffs brought a class action under the FLSA contending that because they spent unpaid time donning and doffing safety gear, they actually worked more than 40 hours per week and were entitled to overtime pay. At trial, because there were no records regarding how long it took the employees to don and doff, the plaintiffs used an industrial relations expert who had watched videotapes of the workers changing their gear. The expert averaged the time taken and estimated that donning and doffing took 18 minutes a day for employees in the "cut and retrim" departments and 21.25 minutes in the kill department. The plaintiffs then used another expert to estimate the amount of uncompensated work that each employee performed. This expert estimated that the plaintiffs were owed $6.7 million. The jury returned a verdict in the plaintiff's favor in the amount of $2.9 million.

Relying heavily on *Dukes*, Tyson Foods appealed, arguing that the verdict had to be overturned because "[r]eliance on a representative sample, [ ] absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims."[12] Tyson Foods and its amici then called upon the Court of Appeal, and the Supreme Court, to finish the job that *Dukes* started and formally announce a broad rule against the use in class actions of "representative evidence."

Both the Court of Appeals and the Supreme Court rejected this invitation. Instead, the Supreme Court held:

> [P]etitioner and various of its amici maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.[13]

Practitioners who bring or defend class actions will want to closely read *Tyson Foods* because it details

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7. (2013)___ U.S. ___, ___ [133 S.Ct. 1523, 1529 and fn. 4].
8. *Campbell-Ewald, supra*, ___ U.S.___ [136 S.Ct. at p. 672].
9. (2016) ___ U.S. ___ [136 S.Ct. 1036].
10. (2011) 564 U.S. 338.
11. Papers of Mark Twain, Accession #6314, etc., Clifton Waller Barrett Library, Special Collections, University of Virginia Library, Charlottesville, Va., in Box 1 ("Report of my death was an exaggeration.").
12. *Tyson Foods, supra*, ___ U.S. ___, ____ [136 S.Ct. at p. 1046]
13. *Ibid.*

the standards that must be satisfied when plaintiffs seek to rely on statistical evidence to transform individualized issues into common ones for purposes of Rule 23(b)(3)'s predominance inquiry.

The Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*[14] illustrates what appears to be a growing trend in the Roberts Court: not only is the Court accepting fewer and fewer cases, but the Court appears to be "punting" in more cases than ever. In *Encino Motorcars*, five current and former service advisors for an automobile dealership sued the dealership alleging that it violated the Fair Labor Standards Act by failing to pay them overtime compensation. The district court dismissed the lawsuit, finding that the FLSA overtime provisions did not apply to the plaintiffs because service advisors are covered by the statutory exemption set forth in 29 U.S.C. section 213(b)(10)(A).[15] The Ninth Circuit, applying *Chevron*[16] deference to a Department of Labor regulation, held that service advisors are not covered by the section 213(b)(10)(A) exemption and reversed. Because the Ninth Circuit's decision conflicted with cases from the Fourth and Fifth Circuits and the Supreme Court of Montana, the Supreme Court granted certiorari to determine "whether 'service advisors' at car dealerships are exempt under 29 U.S.C. section 213(b)(10)(A) from the FLSA's overtime-pay requirements." Rather than answering that question, the Supreme Court "kicked the can down the road" by merely holding that the Ninth Circuit should not have applied *Chevron* deference to the DOL regulation, and then reversing and remanding for the Ninth Circuit to interpret the statute without consideration of the DOL's regulation. In concurrence, Justices Ginsburg and Sotomayor suggested that the service advisors are not exempt from overtime. In dissent, Justices Thomas and Alito chastised the majority for "punting" on the ultimate issue in the case and argued that the exemption covered the service advisors.[18] On remand, the Ninth Circuit held that the section 213(b)(10)(A) exemption does not encompass service advisors.[19]

In *Heffernan v. City of Paterson, N.J.*,[20] the Supreme Court continued a remarkable pro-employee streak by finding in favor of a plaintiff employee in a retaliation case, as it has done in 10 of its last 12 retaliation cases.[21] *Heffernan* involved a police officer who sued his employer (the City of Paterson, New Jersey) for

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14. (2016) ___ U.S. ___ [136 S. Ct. 2117].
15. Section 213(b)(10(A) exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."
16. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.
17. Question presented in *Encino Motorcars, LLC v. Navarro,* Case No. 15-415, accessible at https://www.supremecourt.gov/qp/15-00415qp.pdf.
18. *Encino Motorcars, supra*, ___ U.S. ___ [136 S.Ct. at p. 2129] (dis. opn. of Thomas, J.)("I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because deference is not warranted where [a] regulation is procedurally defective. But I disagree with its ultimate decision to punt on the issue before it. We have an obligation ... to decide the merits of the question presented.")(internal quotations and citations omitted).
19. *Navarro v. Encino Motorcars, LLC* (9th Cir. 2017) 845 F.3d 925.
20. (2016) ___ U.S. ___ [136 S.Ct. 1412].
21. *See Jackson v. Birmingham Bd. of Educ.* (2005) 544 U.S. 167 (holding that Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, which prohibits sex discrimination by recipients of federal education funding and which does not contain an explicit anti-retaliation provision, prohibits retaliation); *Burlington Northern and Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53 (expansively interpreting Title VII's anti-retaliation provision and holding that a plaintiff could prove retaliation if a reasonable employee would have found the challenged action materially adverse, i.e., where the allegedly retaliatory conduct would have dissuaded a reasonable worker from making or supporting a charge of discrimination); *CBOCS West, Inc. v. Humphries* (2008) 553 U.S. 442 (holding that 42 USC section 1981 encompasses retaliation claims even though it does not contain an express anti-retaliation provision); *Gomez-Perez v. Potter* (2008) 553 U.S. 474 (holding that the Age Discrimination in Employment Act prohibits retaliation against a federal employee who complains of age discrimination even though there is no explicit anti-retaliation clause applicable to public employees, and there is an ADEA provision specifically prohibiting retaliation against individuals complaining about private-sector age discrimination); *Crawford v. Metropolitan Government of Nashville and Davidson County* (2009) 555 U.S. 271 (reversing the Sixth Circuit and holding that Title VII's anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation); *Thompson v. North American Stainless, LP* (2011) 562 U.S. 170 (expansively interpreting Title VII's anti-retaliation provision to hold that it creates a cause of action for third-party retaliation for persons who did not themselves engage in protected activity); *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 563 U.S. 1 (holding that the FLSA's anti-retaliation provision that prohibits employers from discharging an employee because he or she has "filed" a complaint alleging a violation of the FLSA includes oral, as well as written, complaints); *Lawson v. FMR LLC* (2014) ___ U.S. --- [134 S.Ct. 1158] (holding that whistleblower protection under Sarbanes–Oxley extends to employees of private contractors and subcontractors serving public companies); *Dep't of Homeland Sec. v. MacLean* (2015) ___ U.S. ___ [135 S.Ct. 913] (ruling in favor of a federal air marshal who argued that his removal by the Transportation Security Administration, Department of Homeland Security, for his unauthorized disclosure of sensitive security information constituted unlawful retaliation due to his protected whistle-blowing). *But see Garcetti v. Ceballos* (2006) 547 U.S. 410 (holding that when public employees make statements

retaliation under 42 U.S.C. section 1983, contending that he was demoted in retaliation for exercising his First Amendment rights. Hefferman worked for the Chief of Police, James Wittig. At that time, the mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Heffernan. Heffernan argued that Chief Wittig and the subordinate demoted Heffernan because they believed that he was overtly supporting Spagnola in the mayoral race. Interestingly, Heffernan was not actually involved in the Spagnola campaign.

In his lawsuit, Heffernan claimed that Chief Wittig and others had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. The district court dismissed his lawsuit, finding that Heffernan had not engaged in protected conduct. The Third Circuit affirmed, finding that a free-speech retaliation claim is actionable under section 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights. In a 6–2 decision written by Justice Breyer, the Supreme Court reversed, finding that "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior."[22] Dissenting, Justice Thomas (joined by Justice Alito) explained that he would have affirmed the dismissal of Heffernan's lawsuit because, in his view, public (and presumably private) employers are free to fire employees whom they *mistakenly* believe to have engaged in protected activity. Attempting to turn a phrase *a la* Justice Scalia (and failing miserably), Justice Thomas writes "'[W]hat is sauce for the goose' is not 'sauce for the gander,' when the goose speaks and the gander does not."[23]

The Ninth Circuit

The most important Ninth Circuit employment case of 2016 is almost certainly *Morris v. Ernst & Young, LLP*.[24] *Morris* is the latest high-profile case in the ongoing arbitration/class-action waiver wars, and it may cause the Supreme Court to finally weigh in. In *Morris*, the Ninth Circuit joined the National Labor Relations Board[25] and the Seventh Circuit[26] in holding that a provision in an arbitration agreement that prohibits class and collective actions violates the National Labor Relations Act and, is therefore, non-enforceable.[27] Setting the stage for a blockbuster decision likely to come later this year, the Supreme Court, on January 13, 2017, granted the petitions for writs of certiorari in all three of those cases—*Morris*[28], *Murphy Oil USA, Inc.*[29] and *Lewis v. Epic Systems Corporation*.[30]

The other two cases decided by the Ninth Circuit that merit discussion are retaliation cases—*Rosenfield v. GlobalTranz Enterprises, Inc.*[31] and *Stilwell v. City of Williams*.[32] In *Rosenfield*, the Ninth Circuit was called upon to determine whether a manager of human resources had engaged in activity protected by the Fair Labor Standards Act of 1938 ("FLSA") when she reported up the chain-of-command that her employer was not compliant with the FLSA. Rosenfield's employer had prevailed at the district court level on summary judgment by arguing that the so-called "manager rule" precluded the claims. The "manager rule," according to GlobalTranz Enterprises, Inc., meant that a managerial-level employee does not engage in protected activity merely by alerting management to potential violations of the law; rather, the employee must "step outside" of her professional role and take a role "adverse" to the company by filing (or threatening to file) an action against the

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pursuant to their official duties, the employees lack protection from retaliation under the First Amendment); *Univ. of Texas Sw. Med. Ctr. v. Nassar* (2013) ___ U.S. ___ [133 S.Ct. 2517] (holding that Title VII retaliation claims must be proved according to traditional principles of but-for causation).

22. *Heffernan, supra*, ___ U.S. ___ [136 S.Ct. at p. 1418].
23. *Id*. at p. 1423.
24. (9th Cir. 2016) 834 F.3d 975.
25. *D.R. Horton Inc*. (2012) 357 NLRB 184; *Murphy Oil USA, Inc*. (2014) 361 NLRB 72.
26. *Lewis v. Epic Systems Corporation* (7th Cir. 2016) 823 F.3d 1147.
27. 29 U.S.C. §§ 151 et seq.
28. *Morris, supra*, cert. granted Jan. 13, 2017, ___ U.S. ___ [2017 WL 125665].
29. Murphy Oil USA, Inc. v. N.L.R.B. (5th Cir. 2015) 808 F.3d 1013, cert granted Jan. 13, 2017, ___ U.S. ___ [2017 WL 125666].
30. *Lewis, supra*, cert. granted Jan. 13, 2017, ___ U.S. ___ [2017 WL 125664].
31. (9th Cir. 2015) 811 F.3d 282.
32. (9th Cir. 2016) 831 F.3d 1234.

company or actively assisting other employees in asserting their FLSA rights. Not surprisingly, counsel for Rosenfield argued that the Ninth Circuit should not adopt the "manager rule." Citing *Kasten v. Saint-Gobain Performance Plastics Corp.*,[33] the Ninth Circuit rejected the "manager rule" holding that an employee need *only* provide her employer with "fair notice" that she was making a complaint that could subject the employer to a later claim of retaliation.

The court then held that the question of "fair notice" must be resolved on a case-by-case basis in which the employee's managerial status is only one consideration:

> Because *Kasten* requires consideration of the content and context of an alleged FLSA complaint, the question of fair notice must be resolved on a case-by-case basis. An employee's managerial position is only one consideration, and the Supreme Court's general rule provides adequate guidance for considering that fact. Moreover, an employee's status as a "manager" is not entirely binary. A different perspective on fair notice may apply as between a first-level manager who is responsible for overseeing day-to-day operations and a high-level manager who is responsible for ensuring the company's compliance with the FLSA. Refining the general rule to focus on only one specific factual element may obscure important nuances.[34]

In *Stilwell*, Ronnie Stilwell, the Superintendent of the Water Department for the City of Williams, sued the City for retaliation in violation of the ADEA and the First Amendment. Stilwell brought his First Amendment retaliation claim under 42 U.S.C. section 1983. Stilwell alleged that he was fired because he signed a sworn statement for and agreed to testify on behalf of another employee who was suing the City for age discrimination. The district court granted summary judgment in favor of defendants on Stilwell's section 1983 First Amendment claim on the grounds that: (1) the retaliation provision of the ADEA, 29 U.S.C. section 623(d), precluded a section 1983 First Amendment retaliation claim such as Stilwell's; and (2) Stilwell's speech was not "speech as a citizen on a matter of public concern" and so fell outside the First Amendment's protections. On appeal, the Ninth Circuit reversed. First, the Ninth Circuit held that the retaliation provision of the ADEA did not preclude a related section 1983 First Amendment retaliation claim. Second, the Ninth Circuit ruled that Stilwell's affidavit "on a matter of public concern and his express plan to testify in court along the same lines, [fell] within the purview of the First Amendment."[35]

The California Supreme Court

In December 2016, a holiday gift arrived several days early for thousands of security guards employed by ABM Security Services, Inc. ("ABM"). In *Augustus v. ABM Sec. Services, Inc.*[36] Jennifer Augustus filed a putative class action on behalf of all ABM security guards alleging, among other things, that ABM violated California law by requiring that they remain "on call" (*i.e.*, keeping their radios and pagers on, remaining vigilant, and responding when needs arose) during their rest breaks. The trial court granted summary judgment on behalf of the plaintiffs and then awarded them approximately $90 million in statutory damages, interest, and penalties. The Court of Appeal reversed, holding that state law does not require employers to provide off-duty rest periods, and, moreover, "simply being on call" does not constitute performing work.

On December 22, 2016, the Supreme Court reversed, explaining that state law does, in fact, prohibit on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time, similar to the obligation of an employer to relinquish control over the employee during a statutorily protected duty-free meal break.

In 2016, the California Supreme Court also issued opinions in two major cases involving attorneys' fees and costs: *Laffitte v. Robert Half Int'l Inc.*[37] and *DeSaulles v. Community Hosp. of Monterey Peninsula.*[38]

Laffitte involved objections to a $19 million settlement of a wage and hour class action that included an attorneys' fees award of one-third of the gross settlement. The objector argued that the fee award

33. (2011) 563 U.S. 1.
34. *Rosenfield, supra*, 811 F.3d at pp. 287–88.
35. *Stilwell, supra*, 831 F.3d at p. 1240.
36. (2016) 2 Cal.5th 257.
37 .(2016) 1 Cal.5th 480.
38. (2016) 62 Cal.4th 1140.

was not reasonable because it was not calculated on the basis of time spent by the attorneys on the case. In a unanimous decision authored by Justice Werdegar, the court held that "a trial court [may] calculate an attorney fee award from a class action common fund as a percentage of the fund."[39] The court also held that while trial courts have discretion to conduct a lodestar cross-check on a percentage fee, they are also free to forgo a lodestar cross-check altogether and use other means to evaluate the reasonableness of a requested percentage fee. Finally, the court held that if the trial courts elect to conduct a lodestar cross-check, they retain the discretion to either rely on attorney declarations summarizing the overall time spent or to consider detailed time sheets broken down by individual task.

One important question remains unanswered in the aftermath of *Laffitte*. Given that the court expressly did not adopt a benchmark percentage but did affirm a one third percentage, will the Ninth Circuit continue to apply a 25% benchmark in cases arising under California law, increase that benchmark to one-third, or simply grant district courts the discretion to determine fee awards constrained only by *Laffitte*?

In *DeSaulles*, the Supreme Court interpreted Code of Civil Procedure section 1032, which provides that a prevailing party is entitled to recover costs.[40] Section 1032, subdivision (a)(4) defines the "prevailing party" to include "the party with a net monetary recovery" and "a defendant in whose favor a dismissal is entered." The question *DeSaulles* answered was whether a plaintiff who voluntarily dismisses an action after entering into a monetary settlement is a prevailing party. The Supreme Court answered in the affirmative, holding, "When a defendant pays money to a plaintiff in order to settle a case, the plaintiff obtains a 'net monetary recovery,' and a dismissal pursuant to such a settlement is not a dismissal 'in [the defendant's] favor.' [ ] this holding sets forth a default rule; settling parties are free to make their own arrangements regarding costs."[41]

In 2016, the California Supreme Court also issued two important employment-related decisions concerning arbitration: *Baltazar v. Forever 21, Inc.*[42] and *Sandquist v. Lebo Auto., Inc.*[43]

In *Baltazar*, a unanimous opinion authored by Justice Kruger, the Supreme Court resolved several issues frequently encountered during proceedings to enforce arbitration agreements. Maribel Baltazar sued her former employer, Forever 21, Inc., alleging that she was constructively discharged and subjected to discrimination and harassment based on race and sex. Forever 21 moved to compel arbitration based on an arbitration agreement between it and Baltazar. Baltazar argued that the arbitration provision was procedurally unconscionable because Forever 21 did not attach a copy of the arbitration rules to the arbitration agreement, and substantively unconscionable because the agreement: (1) allowed the parties to seek a temporary restraining order or preliminary injunctive relief; (2) listed only employee claims as examples of the types of claims that were subject to arbitration; and (3) stated that "all necessary steps will be taken" to protect employer's trade secrets and proprietary and confidential information.

Initially, the Supreme Court noted that Baltazar's argument of procedural unconscionability faltered because she merely challenged Forever 21's failure to attach the arbitration rules to the arbitration agreement as opposed to challenging some element of the arbitration rules of which she had been unaware when she signed the arbitration agreement. Next, the court rejected all of Baltazar's substantive unconscionability arguments. *Baltazar* is a favorable ruling for employers, providing ammunition against common employee attempts to circumvent the unfriendly environs of arbitration.

In *Sandquist*, a 4–3 opinion written by Justice Werdegar, the California Supreme Court answered the following question: who decides whether an arbitration agreement permits or prohibits class-wide arbitration—a court or the arbitrator? The Supreme Court's answer was, essentially, "It depends."

> We conclude no universal rule allocates this decision in all cases to either arbitrators or courts. Rather, who decides is in the first instance a matter of agreement, with the parties' agreement subject to interpretation under state contract law.[44]

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39. *Laffitte, supra*, 1 Cal.5th at p. 488.
40. Code Civ. Proc., § 1032, subd. (b).
41. *DeSaulles, supra*, 62 Cal.4th at p. 1144.
42. (2016) 62 Cal.4th 1237.
43. (2016) 1 Cal.5th 233.
44. *Sandquist, supra*, 1 Cal.5th at p. 214.

The court admonished that when construing arbitration provisions to determine whether a court or the arbitrator decides whether an arbitration agreement permits or prohibits class-wide arbitration, the parties' likely expectations about allocations of responsibility must be considered. In that regard, the court recognized that those who enter into arbitration agreements expect their dispute to be resolved without necessity for any contact with the courts. The court also explained that two interpretive principles should be considered in determining whether an arbitrator or court should decide whether the arbitration agreement allows class-wide arbitration: (1) when the allocation of a matter to arbitration or the courts is uncertain, all doubts should be resolved in favor of arbitration; and (2) ambiguities in written agreements are to be construed against their drafters.

Applying the foregoing, the court concluded that, as a matter of state contract law, the parties' arbitration provisions allocated the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court. Accordingly, the Supreme Court remanded the matter to be determined by an arbitrator. Justices Kruger, Chin and Corrigan dissented arguing that the availability of class arbitration should be a question for a court, rather than an arbitrator, unless the parties' agreement clearly and unmistakably provides otherwise.

The California Courts of Appeal

The two most important California Court of Appeal employment-related decisions of 2016 involve California's anti-SLAPP statute.[45]

California enacted the anti-SLAPP statute in 1992 "out of concern over 'a disturbing increase'" in civil suits "aimed at preventing citizens from exercising their political rights or punishing those who have done so."[46] The courts have recognized that "[t]he quintessential SLAPP is filed by an economic powerhouse to dissuade its opponent from exercising its constitutional right to free speech or to petition."[47] Unfortunately, since its passage, "economic powerhouses" have used the anti-SLAPP statute to quash the very people whom it was supposed to protect. For example, in *Hunter v. CBS Broadcasting, Inc.* (Second District, Division Seven),[48] CBS Broadcasting, Inc., an "economic powerhouse" if there ever was one, used the anti-SLAPP statute to defeat a gender and age discrimination lawsuit. Likewise, in *Tuszynska v. Cunningham* (Fourth District, Division Two),[49] the defendant used the anti-SLAPP statute to obtain the dismissal of a gender discrimination lawsuit.

In *Nam v. Regents of the University of California*,[50] the Court of Appeal for the Third District affirmed the denial of the Regents of the University of California's motion to strike the sexual harassment and retaliation claims brought by a former anesthesiology resident at state university hospital. In its affirmance, the Court of Appeal explained that alleged victims of discrimination and retaliation should not be subjected to an "earlier and heavier burden of proof than other civil litigants" and thereby dissuaded from "the exercise of their right to petition for fear of an onerous attorney fee award."[51]

In *Wilson v. Cable News Network, Inc.*,[52] the Court of Appeal for the Second District, reversed the trial court's grant of CNN's motion to strike discrimination and retaliation claims brought by a former Emmy Award-winning producer. The Court of Appeal explained that the discrimination and retaliation the plaintiff had allegedly suffered were not acts in furtherance of CNN's free speech rights and therefore could not support an anti-SLAPP motion.

Both the *Nam* and *Wilson* decisions stand for the general proposition that private employment discrimination and retaliation claims are not properly the subject of anti-SLAPP motions because they are not acts designed to prevent employers from exercising their First Amendment rights.

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45. Code Civ. Proc. § 425.161.
46. *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.
47. *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176, 1193.
48. (2013) 221 Cal.App.4th 1510.
49. (2011) 199 Cal.App.4th 257.
50. (2016) 1 Cal.App.5th 1176.
51. *Nam, supra*, 1 Cal.App.5th at p. 1189.
52. (2016) 6 Cal.App.5th 822.