

2019 Employment Law Update

*By Cepideh Roufougar
Jackson Lewis P.C.*



Lawyer's Disclaimer

- ◆ Jackson Lewis P.C. has prepared the materials contained in this presentation for the participants' reference and general information in connection with education seminars presented by the firm and its attorneys. Attendees should consult with counsel before taking any actions that could affect their legal rights and should not consider these materials or discussions about these materials to be legal or other advice regarding any specific matter.



INDEPENDENT CONTRACTORS

Freelance Work is Booming

- ◆ 2017 – 57.3 million people freelanced
- ◆ Nearly 1 in 2 millennials already freelance
- ◆ 3 of 4 freelancers see their role as a long-term personal work model
- ◆ 2027 – More than 50% of the U.S. workforce will be freelancers
- ◆ New tax law has incentives

Source: Gig Economy & Future Work. N. Maganha; Freelancing in America: 2017. Edelman Intelligence

Dynamex Operations West, Inc. v. Superior Court

- ◆ Diverging from decades-old precedent, the California Supreme Court has broadened the definition of “employee.”
- ◆ To establish IC status, presumed “employer” must show:
 - It does not control how the individual performs the work, through conduct or contract;
 - The individual provides a service that is not part of the employer’s usual business; and
 - The individual customarily engages in an established business, trade, or profession that is independent of the employer’s business.

Why Does It Matter?

- ◆ Employment laws and benefits generally only apply to “employees,” not independent workers
 - Overtime
 - Minimum Wage
 - Business Expenses
 - Most Protections Against Discrimination & Harassment
 - Worker’s Compensation
 - Unemployment Insurance
 - Benefits

What Should Employers Do?

- ◆ Understand the NEW factors that establish an employee/employer relationship in California.
- ◆ Conduct an analysis of potentially questionable worker arrangements
- ◆ Enter written agreements with all non-employee workers that clearly detail how the *Dynamex* factors are met
- ◆ Consider converting or modifying any questionable worker arrangements

HIRING PROCESS

Labor Code section 432.3

- Prohibits employers from relying on salary information as a factor in determining whether to offer employment
- Prohibits employers from seeking salary history from applicants
- Requires employers to provide the pay scale for a position upon an applicant's reasonable request
- Voluntarily disclosures are allowed, but must be truly voluntary - **NO PROMPTING**

Clarifying Legislation

- ◆ Applicants defined as an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position
 - Does not include current employees
- ◆ “Pay Scale” is the salary or hourly range for the position
- ◆ A “reasonable request” is one made after an applicant has completed an initial interview
- ◆ Employers can ask about salary expectations – just not history

Employment Applications – Criminal History Questions

- ◆ Prohibits employers with 5 or more employees from inquiring about criminal convictions on any application for employment or before making a conditional job offer
- ◆ Exceptions for:
 - Positions where employer is required by law to conduct a conviction history background check for employment purposes or to restrict employment
 - Positions with a criminal justice agency
- ◆ Applies to employers and their agents
- ◆ No exception for the fire service

Conducting Criminal Background Checks

- ◆ Comply with Fair Credit Reporting Act and Investigative Consumer Reporting Agencies Act
- ◆ Must conduct an individualized assessment that considers:
 - Nature and gravity of the offense or conduct;
 - Time that has passed since offense and completion of sentence; and
 - The nature of job held or sought
- ◆ Must notify applicant of preliminary decision to disqualify in writing and give an opportunity to respond before final decision

Notice Requirements

- ◆ Notice to Applicant shall contain all of the following:
 1. Notice of the disqualifying conviction(s) that is the basis for the decision to rescind the offer
 2. A copy of the conviction history report
 3. An explanation of the applicant's right to respond before the decision becomes final, including the deadline to respond
- ◆ Applicant shall have at least five (5) business days to respond to the notice
- ◆ If applicant timely notifies the employer in writing that the applicant disputes the accuracy of the conviction history report, then the applicant shall have five (5) additional business days to respond to the notice

An Employer's Final Decision

- ◆ Employer must consider any information from the applicant before making a final decision
- ◆ Final decision must include:
 1. The final denial or disqualification
 2. Information on any existing procedure the employer has for the applicant to challenge the decision or request reconsideration, or a statement that there is no procedure
 3. Notice of the right to file a complaint with the DFEH.
- ◆ The employer may, but is not required to, justify or explain the reasoning for the final decision

FEHA Regulations

- ◆ The regulations prohibit employers from using criminal records and information in any employment decisions if:
 - Such use would have an adverse impact on individuals in a legally protected class designated by the Fair Employment and Housing Act (“FEHA”), or
 - The applicant or employee is able to demonstrate an effective and less discriminatory way of achieving the specific business necessity.
- ◆ The employer must first be able to demonstrate that its practice of considering criminal history is both (1) job-related, and (2) consistent with business necessity.
 - Even if the employer can meet these two prongs, the applicant or employee may still prevail against the employer by demonstrating a less discriminatory policy or practice.
- ◆ The regulations substantially mirror the EEOC Enforcement Guidance

What Should Employers Do?

- ◆ Review your job applications to make sure there are no improper questions
- ◆ Ensure your recruiters/hiring managers are not asking impermissible questions
- ◆ Review notice documents to ensure compliance with federal and state laws
 - Beware of new Fair Credit Reporting Act Notice of Consumer Rights

WAGE AND HOUR

Overview of FLSA

- ◆ Covers 128.5 million workers—almost 90% of workers in the United States.
- ◆ Requires payment of minimum wage and overtime.
 - Subject to exemptions
- ◆ Goals of FLSA:
 - Reduce unemployment—overtime pay for workers encourages employers to spread the work and increase hiring.
 - Provide “Fair days pay’s for a fair day’s work.”
 - Reduce overwork and detrimental effect on health and well-being.

General Overtime Principles

- ◆ An employer is required to pay an employee 1.5 times the regular rate of pay for all hours worked above the overtime threshold
- ◆ Overtime is generally owed when an employee actually works more than 40 hours in a 7-day workweek
- ◆ Section 7(k) Exemption for employees engaged in fire protection activities
 - Work above 106 hours in a 14-day work period
 - Work above 182 hours in a 24-day work period
 - Work above 204 hours in a 27-day work period
 - Work above 212 hours in a 28-day work period

The Regular Rate of Pay

- ◆ Not the same as base rate
- ◆ Includes all remuneration paid to an employee unless there is an exception
- ◆ Includes:
 - Hourly earnings
 - Salary
 - Differentials (e.g., Paramedic or EMT differentials)
 - Additional pays for having a degree or certain certificates
 - Attendance bonuses
 - Acting pay

The Regular Rate Does Not Include

- ◆ Extra compensation provided by a premium rate paid pursuant to a collective bargaining agreement for work outside of the regular workday or work week.
- ◆ Payments made for occasional periods when no work is performed due to vacation, holiday, illness, or other similar causes
- ◆ Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan providing for retirement, life, accident, or health insurance or similar benefits for employees

Flores v. City of San Gabriel

- ◆ A group of police officers filed suit alleging violations of the FLSA
- ◆ Alleged that cash paid in lieu of health benefits was not being properly included in overtime calculations
- ◆ Employer argued that the bona fide plan exception applied to exclude the cash
 - 40% of benefits were being paid in cash
 - Employer alleged that these cash payments were “incidental”
 - Employer argued that DOL Opinion Letter establishing 20% as the threshold for “incidental” was wrongly decided

Flores v. City of San Gabriel

- ◆ The Court agreed that the DOL opinion letter was wrong
- ◆ BUT ... the Court did not agree that the payments were incidental
- ◆ OUTCOME:

“Because the City’s Flexible Benefits Plan is not a ‘bona fide plan’ under § 207(e)(4) pursuant to the requirements of § 778.215(a)(5), even the City’s payments to trustees or third parties under its Flexible Benefits Plan are not properly excluded under § 207(e)(4).”

McKinnon v. City of Merced

- ◆ A group of police officers filed suit alleging violations of the FLSA
- ◆ Alleged that holiday pay was not being properly included in the overtime calculation
- ◆ The City moved to dismiss the lawsuit, arguing that holiday pay is excluded from the regular rate of pay
 - Employees who worked on the holiday received double time
 - Employees who did not work on the holiday received pay on a day off

McKinnon v. City of Merced

- ◆ The Court denied the motion to dismiss
- ◆ The Court focused on whether employees had the ability to “forego” work on a holiday
 - Was the payment because they had the time off or was the payment for working an undesirable schedule?

- ◆ **OUTCOME:**

“the holiday pay attributable to those occasions where Plaintiffs work on a holiday does not fall within the boundaries of §207(e)(2), and the exemption in that section does not apply.”

Englert v. City of Merced

- ◆ This case involved a claim by firefighters alleging violations of the MOU
- ◆ The City moved to dismiss the lawsuit
 - Same grounds as in the *McKinnon* case
 - Also argued that the pay was excluded as extra compensation paid for work on a holiday
- ◆ Court denied motion to dismiss because of a lack of evidence as to whether the extra compensation provided established a “premium rate” for hours worked to clearly meet the exception.

What Should Employers Do?

- ◆ Review overtime calculations to ensure that the regular rate is being properly calculated
- ◆ Evaluate cash-in-lieu of health care programs to determine if cash benefits are “incidental”
- ◆ Review holiday pay provisions to evaluate if there is risk?
- ◆ Consider conducting dual calculations – one which applies the FLSA hours worked standard and one which applies the MOU hours in paid status standard

A blurred, grayscale image of an office hallway with a railing on the left and a window on the right. The text 'CALPERS' is overlaid in the center-left.

CALPERS

Out of Class Appointments

- ◆ Defined as an appointment to “an upgraded position or higher classification by the employer or governing board or body in a vacant position for a limited duration.”
- ◆ A vacant position is one that “vacant during recruitment for a permanent position”
- ◆ Limited to 960 hours in a fiscal year
- ◆ Limit does not apply to when incumbent is on a leave of absence
- ◆ Not clear on what happens if an agency is not recruiting

Out of Class Appointments

◆ Penalties for violation:

1. Must pay an amount equal to three times the employee and employer contributions that would otherwise be paid for the difference between the compensation paid for the appointment and the compensation paid would have been paid but for the vacancy
2. Must pay reimbursement for administrative expenses incurred by CalPERS

What Should Employers Do?

- ◆ Review your policies?
 - Do you have out of class or acting pay?
 - What is the pay rate associated with those assignments?
 - Is there a difference between the acting pay rate and the rate that would apply if someone was hired in the position?
- ◆ Track hours worked in out of class assignments
 - 960 hours is about 4-months in the fire service for shift employees
- ◆ Report correctly to CalPERS

A blurred, grayscale image of an office hallway. On the left, a glass door or window reflects the word 'JACKSONLEWIS' in a stylized font. In the background, a person is silhouetted against a bright window, and office furniture like a desk and chair are faintly visible.

INVESTIGATIONS

County of Santa Clara – PERB No. 2613

- ◆ County placed the Union President on administrative leave
- ◆ The letter contained the following directives:
 - To stay away from the Sheriff’s Office property and functions unless specifically directed by a captain to enter or attend
 - “You are hereby ordered not to discuss this matter with any witnesses, potential witnesses, the complainant, or any other employee of the Sheriff’s Office other than your official representative.”
- ◆ Union objected and claimed that the directive prevented the employee from meeting with members in the workplace or attending negotiations

County of Santa Clara – PERB No. 2613

- ◆ County clarified letter and state that he could continue to engage in union activities, but left admonishment about talking with others unchanged
- ◆ Association filed an unfair practice charge alleging the directed amount to a “gag order” that interfered with rights provided by the MMBA
- ◆ PERB agreed because:
 - Employer failed to show it had a legitimate business justification for the order that would outweigh the employee’s right to engage in concerted activities

Allen v. City of Burbank

- ◆ Allen was given a notice to attend an interview as a “witness” and that his POBR rights did not apply
- ◆ Allen denied any knowledge of the use of force being investigated
- ◆ Initial investigation was closed. Several months later, a second investigation was opened after one of the witnesses reported that he was “not forthright” in his interview in the first investigation because he feared for his safety
- ◆ Allen was interviewed in the second investigation, but this time as a suspect who was given full POBR rights

Allen v. City of Burbank

- ◆ During second investigation, Allen admitted that he had lied in the first investigation
- ◆ Allen was terminated for dishonesty and failure to report misconduct.
- ◆ Allen filed a petition alleging the first investigation violated his POBR rights and asked that statements from that investigation be suppressed.
- ◆ The court agreed that Allen's POBR rights were violated

Allen v City of Burbank

- ◆ The standard giving rise to the right to representation is not whether the interviewee may make statements during the investigation that may lead to punitive action
- ◆ The standard is whether an interrogation focuses on matters likely to result in punitive action
 - Focus is on the question the investigators will ask, not the responses the interviewee is expected to make
 - Here the focus was on whether Allen had knowledge of another officer's alleged misconduct that he failed to report.
- ◆ The court reasonably exercised its discretion to consider the statements – no material prejudice to the employee because he knew he was required to be truthful

What Should Employers Do?

- ◆ Do not use one size fits all form letters
- ◆ Evaluate the nature of each investigation to determine what type of interview notice should be given (e.g., suspect, witness)
- ◆ Evaluate each notice to determine if there is a special need for issuing a gag order to that witness
- ◆ If there is a need, consider explaining that need in the interview notice

A blurred, grayscale image of an office hallway. On the left, there is a glass-walled office with a sign that partially reads 'JACKSON LEWIS'. In the distance, a person is sitting at a desk in a brightly lit area. The overall scene is out of focus, creating a professional and modern atmosphere.

EMPLOYEE DISCIPLINE

Personnel Rules Matter

- ◆ Personnel Rules are the backbone of the employment relationship
- ◆ They provide a frame work for handling the most common personnel issues
- ◆ They put employees on notice
 - Of what is expected of them
 - Of what they can expect from the employer

Jones v. City of Loma Linda

- ◆ Battalion Chief was terminated, in part, for lying during an investigation and not reporting an act of violence by an employee against a member of the public
- ◆ He appealed the decision and a hearing officer found there was cause for discipline, but recommended a written admonishment instead of termination
- ◆ The City Council reviewed the decision, rejected the hearing officer's recommendation, and upheld the termination
- ◆ The employee filed a writ challenging the City Council's decision

Jones v. City of Loma Linda

- ◆ Employee claimed that there was insufficient evidence that he lied
- ◆ Employee also claimed that there was insufficient evidence that he violated a policy by not reporting the employee's conduct
- ◆ The court found there was sufficient evidence to conclude Jones had lied
- ◆ But ... since the City conceded that there was no specific policy requiring that Jones report the employee's conduct, there was insufficient evidence to support a finding that Jones violated a City policy.
- ◆ Matter was remanded for the City to reevaluate penalty

What Should Employers Do?

- ◆ Review your personnel rules to make sure they are complete
- ◆ Be sure that all charges in a notice of discipline are supported by the facts
 - Do not take a “kitchen sink” approach.

HARASSMENT PREVENTION

SB 1343 – New Training Requirements

- ◆ Previously employers with 50 or more employees to provide harassment prevention training to California “supervisors”
 - Must provide at least 2 hours of training within 6 months of hire/promotion to a supervisor position and once every 2 years thereafter
- ◆ As of January 1, 2019, requires 2 hours of training for supervisors if an employer has 5 or more employees
- ◆ Also requires 1 hour of training for all non-supervisors
- ◆ Training must be completed by December 31, 2019
 - Includes re-training supervisors who attended training in 2018

Thank You

Cepideh Roufougar

Cepideh.Roufougar@jacksonlewis.com

415-796-5417

jackson|lewis[®]

With more than 900 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

jacksonlewis.com

