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Employment Law News Spring 2023 | Volume 3, Issue 2

Happy Spring!

Welcome to the second issue of Murphy Austin's Employment Law News, Volume 3.

We have lots of news to share with California employers this quarter, including important updates on wage-and-hour issues, employee agreements, and COVID-19 guidance. You will find these topics and more in the articles below.

But first, a few important reminders:

- Due May 10, 2023: California employers with 100 or more employees or workers hired through labor contractors must submit their annual report of pay, demographic, and other workforce data to the California Civil Rights Department ("CRD"). Employers should visit the CRD Pay Data Reporting portal for this year's updated templates and information on how to submit reports. The CRD FAQ page has been updated to reflect changes in the law and provide answers to common questions.

- Please note: The federal pay data reporting deadline has been extended from the original May 10 deadline to a date to be determined. Employers of 100 or more employees (and some federal contractors with 50 or more employees) must submit their annual report of demographic and pay data to the U.S. Equal Employment Opportunity Commission ("EEOC"). Information will be posted as soon as it is available at https://www.eeoc.gov/data. At present, the EEO-1 portal is scheduled to open in mid-July.

- Changes in the law that became effective January 1 should be reflected in updated employee handbook policies on paid sick leave, bereavement, California Family Rights Act leave, and discrimination and harassment. Make sure you have made all of the required updates to your employee handbook.

We know it can be a challenge to stay up to date on the changes in California employment law. We hope that our newsletter makes that challenge easier for you to meet.

Sincerely,

Shawn M. Joost, Partner
Murphy Austin **Labor and Employment Law Team**

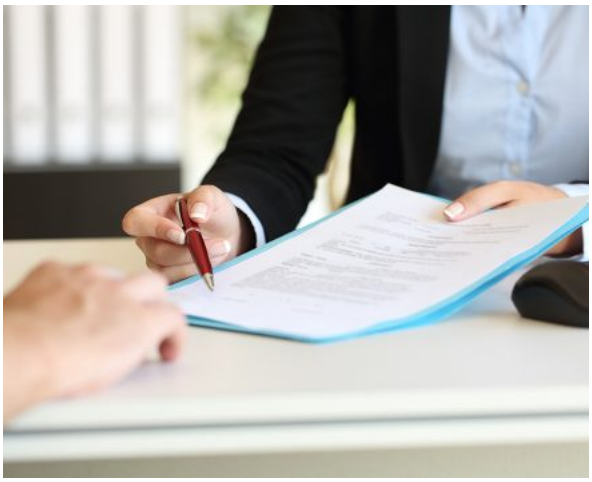
More Changes in Employee Agreements

For the past year, the laws governing employee agreements have been in flux. This quarter brings changes in severance agreements and arbitration agreements, along with both good and bad news for employers.

Confidentiality and Non-Disparagement Provisions May Violate the NLRA

By Charles R. Hellstrom

In *McLaren Macomb*, the National Labor Relations Board ("NLRB") held that an employer violates the National Labor Relations Act ("NLRA") when it offers employees a severance agreement with provisions that potentially restrict employees' exercise of their rights under Section 7 of the NLRA, which applies to most employers, whether unionized or not.



Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

The severance agreement at issue included non-disparagement and confidentiality clauses that the NLRB found to be unlawful. The confidentiality clause permitted very limited disclosure of the terms of the agreement (e.g., to spouses, to obtain legal or tax advice, or to comply with a court order). Meanwhile, the non-disparagement clause contained no limiting language and prevented the employee from making statements to other employees or the general public, which could disparage or harm the employer's image.

The NLRB ruled that this type of severance agreement violates the NLRA because it conditioned the employees' receipt of severance on agreement to these unlawful restrictions.

A month after the McLaren Macomb decision, the NLRB's general counsel issued a memo with guidance on the decision, including some of the following key points:

1. The decision applies retroactively to existing severance agreements.

2. Severance agreements with limited confidentially and non-disparagement clauses may still be lawful if the following conditions are met:
    - Confidentiality clauses must be "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications."
    - Non-disparagement provisions may be lawful if they are "limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."
3. Overly-broad confidentiality or non-disparagement clauses are unlawful regardless of whether it is the employer or the employee who requests the inclusion of those clauses.
4. Severance agreements should not be found to be void in their entirety because they include unlawful provisions. That is, the NLRB will generally seek to void only those provisions that it determines to be unlawful, instead of voiding the entire agreement.
5. In limited circumstances, this decision could apply to severance agreements offered to employees who are supervisors.

Employers should carefully review their severance agreements to ensure they comply with this decision. Further, departing employees who ask for confidentiality and non-disparagement clauses should be advised of the impact of this decision.

Back to Where We Were Before – Most Employers Can Require an Employee to Sign an Arbitration Agreement as a Condition of Employment

By Charles R. Hellstrom

As you know from prior editions of this newsletter, the enforceability of California Labor Code § 432.6, a statute enacted in 2020 that prohibits and criminalizes mandatory employee arbitration agreements, has been uncertain.

The Ninth Circuit Court of Appeals has finally concluded that Labor Code § 432.6 is preempted by the Federal Arbitration Act ("FAA"). After vacating a prior opinion that found the law was only partly preempted, the court held that the FAA fully preempts the statute, reasoning that a state law that discriminates against the formation of an arbitration agreement is preempted, even if the agreement is ultimately enforceable.

Absent further review by the Supreme Court, the Ninth Circuit's conclusion that the FAA preempts Labor Code § 432.6 will likely lead to the law being permanently enjoined. While the Ninth Circuit's opinion does not end the litigation, it is a major decision that establishes that employers are not currently prohibited from requiring an arbitration agreement as a condition of employment (if their agreement is governed by the FAA).

We recommend that all employers review and update their arbitration agreements accordingly.

Can Employees Making over $200,000 Be Owed Overtime? Yes!

By Matthew H. Green

As we often discuss with clients, correctly classifying employees as exempt or nonexempt is of critical importance. A recent United States Supreme Court case, *Helix Energy Sols. Grp. v. Hewitt* (2023), provides a textbook example of the perils of misclassification.

The employee, Michael Hewitt, worked on an offshore oil rig, and typically averaged 84 hours of work per week, working 12-hour days for 28 straight days, before having 28 days off work. Mr. Hewitt was paid a daily-rate and earned over $200,000 annually. His employer classified him as an executive employee exempt from overtime compensation under the federal Fair Labor Standards Act ("FLSA").

Under the FLSA, as under the California wage order exemption tests, in order to qualify as exempt, one of the criteria the employer must meet is that the employee in question must be paid a fixed salary that does not vary based on the amount of time worked in the workweek (salary basis test).

There was no dispute that Hewitt met the other criteria under the executive exemption. However, the Court found that Hewitt was not exempt from the FLSA because he was paid a daily-rate instead of a weekly salary, (and thus, he was not paid for days he did not work). As such, Hewitt was improperly classified as exempt and, as a result, was owed overtime wages. The fact that he had been paid over $200,000 annually was irrelevant.

This decision serves as an important reminder to all employers to be sure to confirm that all employees classified as exempt do, in fact, meet **all** of the criteria necessary for the applicable exemption. Improperly classifying an employee can leave an employer on the hook for unpaid overtime wages, as well as other wage and hour penalties.

The Future is Uncertain for Payroll Rounding Policies

By Shawn M. Joost

A rounding policy is a practice by which employers "round" up or down an employee start and end time, often to the nearest quarter-hour, to more easily calculate the number of hours worked for payroll purposes. Although not without risk because of potential pitfalls in implementation, the use of a rounding policy has not been considered illegal as long as it was administered in a "neutral" fashion and implemented fairly so that it was not

always to the employer's benefit. Rounding policies have been accepted because of the practical and administrative difficulties in otherwise calculating the number of hours worked.

The continuing viability of rounding policies, however, is now in question. Last fall, a California appellate court decision, *Camp v. Home Depot U.S.A., Inc.*, held that since Home Depot's electronic time-keeping system allowed Home Depot to capture the exact amount of time employees worked during their shifts, Home Depot was required to pay the employees for all hours and minutes worked as calculated by its system, rejecting the application of Home Depot's rounding policy. The California Supreme Court accepted a petition to review the case, and opening briefs are to be filed in May.

Given the fact that electronic time-keeping systems have resolved the practical and administrative difficulties related to calculating the number of hours and minutes worked, employers using such electronic systems should not use a rounding policy and should not round time. And all employers continuing to round time should carefully evaluate their policies and determine whether or not rounding is necessary and appropriate. While we cannot predict exactly what the California Supreme Court will decide, it is highly likely that the court will issue more restrictive guidelines related to rounding – if not an outright prohibition of rounding policies altogether.

Employers Have Some Flexibility in Calculating Non-Discretionary Bonus Amounts

By Shawn M. Joost

A bonus plan that enables employees to earn non-discretionary bonuses calculated as a percentage of total wages for the week was upheld as an appropriate way to treat overtime rates in the calculation of bonuses. In *Lemm v. Ecolab Inc.,* the court rejected the employee's argument that the employer was required to use the bonus calculation method set forth in the Department of Labor Standards Enforcement ("DLSE") Manual. The DLSE's method was approved in the 2018 case of *Alvarado v. Dart Container Corp.* for the calculation of a flat-rate bonus. In *Dart,* the flat-rate bonus was earned during the straight time and overtime hours worked. As such, the DLSE Manual's method requiring a separate computation of the overtime rate earned on the bonus was correct.

However, in *Lemm,* the bonus was calculated as a percentage of earnings for both straight time and overtime hours. As such, the overtime rate was already taken into account when the employer applied the percentage to the employees' total earnings to calculate the bonus amount.

An Eligible Employee with a Serious Health Condition May Use FMLA Leave on an Intermittent Basis

By Matthew H. Green

In a February 9, 2023 Opinion Letter, the U.S. Department of Labor's Wage and Hour Division ("DOL") responded to a request from an employer as to whether the Family and Medical Leave Act ("FMLA") entitles an employee to limit their workday to eight hours per day, due to a chronic serious health condition, where that employee normally worked more than eight hours per day. The employer suggested that it would be preferable to treat the work-hours restriction as a reasonable accommodation under the Americans with Disabilities Act ("ADA").

The DOL definitively confirmed that employees are well within their rights under the FMLA to utilize the available leave on an intermittent basis (rather than all at once) in order to work a reduced number of hours per day, as long as the employees do not exhaust their FMLA leave entitlement.

Under FMLA, an employee may take up to 12 workweeks of unpaid job-protected leave in a 12-month period for qualifying family and medical reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee."

In its Opinion Letter, the DOL made clear that the FMLA entitles an employee up to 12 "workweeks" of leave, not just 40 hours a week for 12 weeks. If the employee regularly works more than 40 hours a week, then that employee would be entitled to FMLA leave based on their actual hours worked.

Additionally, the DOL clarified that the protections granted under the FMLA are separate and distinct from those of the ADA, and an employee may be entitled to invoke protections under both laws simultaneously. Employees who have exhausted their FMLA leave may have additional rights under the ADA or other laws, and an employer should verify the applicability of all leave requests before issuing a denial.

COVID-19 UPDATES

Cal/OSHA Adopted a Non-Emergency COVID-19 Standard

By Shawn M. Joost

The proposed Cal/OSHA COVID-19 Non-Emergency Regulation discussed in our last issue was approved and became effective as of February 3. Employers should review the new regulation thoroughly. Cal/OSHA recently updated its FAQ page, which addresses many questions on the regulations and is a great resource for employers.

California Department of Public Health Updated COVID-19 Guidance

By Shawn M. Joost

On March 3, following the end of the COVID-19 State of Emergency, the California Department of Public Health ("CDPH") updated its public health guidance to align with federal Centers for Disease Control guidance.

Of particular importance to employers, employees who contract COVID-19 may return to the workplace after five days, even if they still test positive, as long as their symptoms are improving and they are fever-free for 24 hours. Review the FAQ on Isolation and Quarantine Guidance for up-to-the-minute guidance. In addition, updated guidance on face coverings became recommendations and not requirements on April 3.

Employers should continue to stay abreast of the Cal/OSHA and CDPH regulations and guidance on COVID-19 and ensure that their COVID-19 prevention plans are up-to-date and are implemented properly.

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*Created and curated by Shawn Joost, **Murphy Austin's Employment Law News** is a quarterly update focused on the top changes affecting California employers.*





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Murphy Austin's Labor and Employment Law Team

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Aaron B. Silva is a Partner and Chair of Murphy Austin's **Labor and Employment Law Team**. Aaron has an extensive background defending employers before state and federal courts and several administrative boards regarding nearly all matters employment-related, including wage and hour, discrimination, harassment, ADA, OSHA, and union relations. Aaron also produces a monthly employment law podcast, **HR Legalcast**.

Dennis R. Murphy is a Partner with Murphy Austin's **Labor and Employment Law Team**. Dennis's experience commenced in 1972 and includes the representation of employers in every aspect of labor and employment law. It includes both trial and appellate advocacy and counseling. He has appeared before the United States Supreme Court, before many state and federal appellate courts, in numerous jury trials and before most of the governmental agencies that handle labor and employment issues.

Charles R. Hellstrom is a litigation attorney who counsels and represents clients in labor and employment matters and disputes. Charles's experience includes litigating claims under the California Labor Code and Unemployment Insurance Code in both civil litigation and administrative hearings, as well as misclassification, discrimination, and wrongful termination claims. He has also represented businesses in connection with employee misconduct, misappropriation, and embezzlement and assists businesses in revising employee handbooks and separation agreements to prevent future litigation.

Matthew H. Green represents employers in litigation and dispute resolution, including defending class action and Private Attorney General Act lawsuits. Matthew also provides employers with advice and counsel on a wide range of employment law issues. His practice encompasses wage and hour matters, leaves of absence, discrimination and harassment, workplace safety, hiring, and termination.

Murphy Austin is a premier business law firm based in the Sacramento region with practices focused on Labor and Employment, Business and Commercial Litigation, Insurance Coverage and Bad Faith Litigation, Appellate Law, Commercial Real Estate and Construction, Corporate and Business, Nonprofits, Public Contracts, Tax and Estate Planning. Murphy Austin attorneys place the highest value on meaningful client relationships. For more information, visit **www.murphyaustin.com.**