

# Morgan Lewis

## Labor and Employment Summer Webinar Series: State Employment Law Road Trip Across the United States

California

August 1 | 1–2 pm ET

presenters

**Barbara Miller**

**Daryl Landy**

California

A stylized map of the United States is shown in a light yellow color with a grid pattern. A red line with circular markers at each point traces a path across the country. The path starts in California, goes to Texas, then to Florida, and finally to New York. The word "California" is written in red text next to the first marker.

Bridge to California's Employment Laws

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# Bridge to California's Employment Laws

- California overview
- Wage and hour
- Leaves of absence
- Domestic partnerships
- Noncompete agreements
- Arbitration agreements
- Issues that should be on your radar





## California leads the United States:

- In establishing “exceptions” to “at-will” employment
- In class action wage and hour filings
- In pro-employee legislation and regulations
  - Private Attorneys General Act of 2004 (PAGA)
  - “Suitable Seating” wage order
  - Disability/accommodation
  - Leaves of absence

# The Current Wage and Hour Litigation Landscape in California

- California is the epicenter of wage and hour litigation.
  - State courts favor granting class certification.
  - State wage and hour laws provide extensive opportunities for claims.
  - Penalties are large.
  - Representative actions under PAGA do not require certification.

# California Employment Law Jury Verdicts

- In 2010, there were 65 reported employment law jury verdicts in California:
  - 29 of the 65 (44%) reported verdicts were in favor of plaintiffs
  - The average jury award in cases where plaintiffs prevailed:
    - *Approximately \$965,402, plus attorneys' fees*
  - The median jury award in cases where plaintiffs prevailed:
    - *Approximately \$344,198, plus attorneys' fees*
  - Total jury awards to plaintiffs in 2010 totaled \$27,966,645

# California Wage and Hour Issues

- Misclassification
- Overtime and regular rate calculation issues
- Hours worked
- Meal and rest breaks
- Penalties
- Expenses
- Pay statement requirements
- Vacation and other paid time off
- Deductions from pay
- Wage Theft Prevention Act
- Commission contracts

# Recently Settled Wage and Hour Class Actions

- \$65 million to settle an alleged misclassification of 32,000 current and former systems administrators, network technicians, and other technical staff nationwide
- \$27.5 million to settle an alleged misclassification of 800 software engineers
- \$15.6 million to settle an alleged misclassification of 618 animators, modelers, and artists involved in installing, producing, or copying images for computer games
- \$24 million to settle an alleged misclassification of 30,000 technical support workers



## The Waves

- Retail
- Financial Services
- Pharmaceutical
- Technology
- Transportation
- Independent Contractor



# Overtime Exemption Issues

- Exemption Issues:
  - Differences between California and the Fair Labor Standards Act (FLSA)
  - Professional exemption – licensed professionals vs. learned professionals
  - Administrative exemption – >50% of time on exempt duties
  - Managerial exemption – >50% of time on exempt duties
  - Outside sales – >50% of time selling outside of office
  - Computer professional – discretion and judgment vs. pay
  - Commissioned employees (inside salespersons)

# Overtime Calculation and Regular Rate

- Daily overtime
  - More than 8 hours in a day or 40 hours in a week
  - Double time for more than 12 hours in a day
  - Overtime for first eight hours on seventh consecutive workday
- No fluctuating workweek for salaried nonexempt employees
- Fixed incentive pay (e.g., not based on productivity or hours)
- Pay at different rates
- Higher minimum wage

# Time Worked and Premiums

- No Portal-to-Portal Act – pay for time employer controls work
- Piece-rate and commission-only workers
- Travel time
- On-call time
- Reporting time pay
- Call-back pay
- Split-shift pay

# Meal and Rest Break Issues



- Must “provide” meals
  - What is a meal break?
  - What is a rest break?
- Documenting breaks
- Automatic deductions
- Late/early breaks
- On-duty breaks
- Waivers
- Failure to provide premium pay
- Policies

# Meal and Rest Breaks

Nonexempt employees **must** be provided:

- One 30-minute uninterrupted meal period for every five or more hours worked
- One 10-minute rest period for every four hours worked or major fraction thereof
  - *0 – 3.5 hours: no breaks*
  - *3.5 – 6 hours: one rest; one meal (taken before end of 5<sup>th</sup> hr?)*
  - *6 – 10 hours: two rests; one meal*
  - *10 – 14 hours: three rests; two meals*

Note: Recent amendments may exempt certain unionized employees

# Remedies

- Unpaid overtime
  - Time and a half up to 12 hours
  - Double time after 12 hours
- Attorneys' fees
- Waiting-time penalties
- PAGA penalties
- Interest
- One hour of pay for each day a meal or rest break is not “provided”

# Reimbursement of Expenses

- Labor Code Section 2802 requires employers to reimburse/indemnify employees for all reasonable and necessarily incurred expenses.
- Can employers increase pay in lieu of reimbursing expenses?
  - *Gattuso v. Harte-Hanks* – yes, but . . .
- Includes attorneys' fees enforcing this indemnification statute.

“I don’t know how to put this, but wage statements are kind of a big deal.”



Detailed information must be included with all employee wage payments.

Cal. Lab. Code § 226.



# Wage Statements

- Gross rate, total hours worked, piece-rate units and piece rate, deductions, net wages, dates of pay period, name and unique id, name and address of employer, applicable hourly rates in effect, and hours worked at each rate.
- Paystub claims added to most wage and hour cases.
- Class certification issues.
- Technical noncompliance can result in significant monetary penalties.

# Timing of Pay

- Labor Code Section 204
  - At least two times per month for nonexempt employees
  - In general, pay cannot lag close of pay period by more than seven calendar days
- Commission payments
  - Earned and ascertainable
- Pay upon employment termination
  - Involuntary or voluntary with more than 72 hours' notice
  - Voluntary with less than 72 hours' notice

# Vacation/Paid Time Off

- What is vacation?
- No use it or lose it
- Caps on accrual
  - Implementation challenges
- Accrual increments



# Deductions

- Proper deductions from earned compensation limited
  - Benefits
  - Written authorization for benefit of the employee
- Deductions from “commissions”
- Advances
- Purchases from employer

# Wage Theft Prevention Act

- Cal. Lab. Code § 2810.5, effective January 2012.
  - Creates new notice requirements and increases penalties and criminal liability for nonpayment of wages.
  - Notice must be provided to employees who are nonexempt under California law.
  - Notice must be given at time of hire.
  - Does not apply to union employees if CBA covers wages, hours of work, overtime rates.
  - Does not apply to exempt employees.

# Labor Code Section 2751– Commission Contracts

- New law is effective January 1, 2013.
- Requirements apply “where the contemplated method of payment of the employee involves commissions.”
  - Must be in writing.
  - Must "set forth the method by which the commissions shall be computed and paid."
  - Employer must sign.
  - Employer must give signed copy to employee and obtain a signed acknowledgment of receipt.
  - If term of plan expires and parties continue to work, all existing terms remain in effect until plan is superseded or employment is terminated.

# PAGA

- Effective January 1, 2004; amended in August 2004.
- Employee must follow certain notice procedures before filing a lawsuit.
- Penalties to be split between plaintiff (1/4) and state fund (3/4).
- Court has discretion to reduce penalties.
- Attorneys' fees available.
- **Any violation** of Labor Code now gives rise to penalties – except for some technical posting or filing requirements.
- Representative (not class) actions can be maintained (*Arias v. Superior Court* (2009)).

# California “Suitable Seats” Cases

- Recent flood of litigation in California claiming that employers did not provide employees with “suitable seats.”

Section 14 of the California Wage Order provides:

All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

\* \* \*

When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.



# California “Suitable Seats” Cases



- No private right of action, *but* . . .
- Enforceable through PAGA as a violation of Labor Code Section 1198 governing “conditions of labor”

# California Leaves of Absence (LOAs)

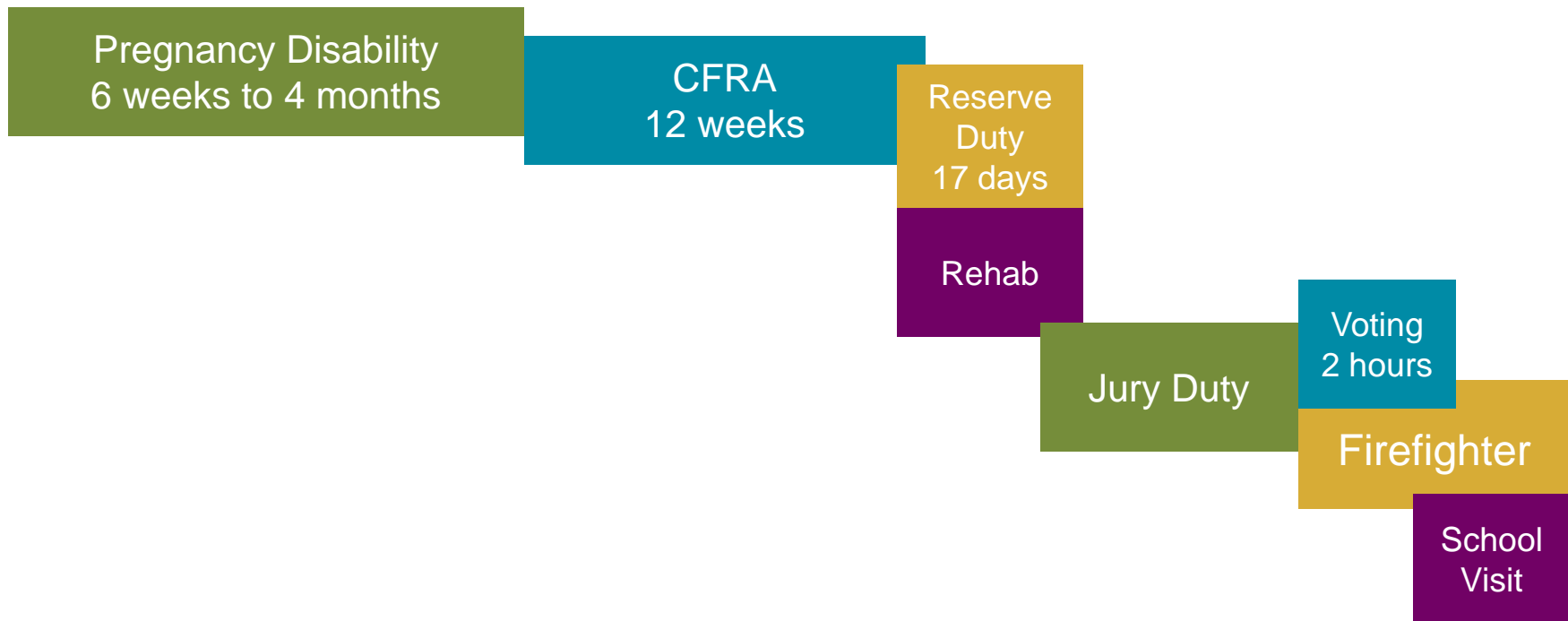
- Pregnancy disability leave
- Family care/child bonding/medical disability (CFRA)
  - Paid family leave (not an LOA – a right to be paid during leave)
- Military spouse leave law
- Domestic partners are covered



*Kobe on a California LOA*

# Theoretical LOA Calendar

Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec



# Other LOAs

- Other “California-Specific” Leaves
  - Drug and alcohol rehabilitation
  - Jury duty, witness testimony
  - Crime and domestic abuse victims
  - Voting
  - Volunteer firefighter duty/reserve peace officer and emergency reserve personnel
  - School visits
  - Literacy
  - Organ and bone marrow donation leave (SB 272)

# Domestic Partnerships

- Domestic partners are treated the same as spouses.
  - Make sure your handbooks and policies are revised to include domestic partners.
  - Health insurance coverage for domestic partners (SB 757).
- Be careful about requiring proof of domestic partnership if you do not require proof of marriage.

# Noncompetition Agreements

- Generally unenforceable in California (Cal. Bus. & Prof. Code § 16600).
- You can be liable for using or honoring them. *Silguero v. Creteguard* (2010).
- Trade-secret protection.
- Solicitation of customers may be allowed but only if the company can show that it is necessary to protect the company's trade secrets.
- OK to prohibit solicitation of employees.
- Inevitable disclosure doctrine does not exist in California.

# Arbitration Agreements

- California reluctantly allows them
  - Includes arbitration of wage claims. *Giuliano v. Inland Empire Pers., Inc.* (2007)
  - Can compel arbitration of claims pending before Labor Commissioner. *Sonic-Calabasas A, Inc. v. Moreno* (2009)
- Must be a two-way street
- Must not limit remedies
- Should not exclude trade secrets and intellectual property claims (mutuality concern)
- Employer must pay almost all arbitration fees

# Class Action Waivers in Arbitration Agreements

- Prohibition on class arbitration difficult, but not impossible, to achieve. *Gentry v. Superior Court* (2007)
- Impact of silence re: class arbitration. *Stolt-Nielsen v. Animalfeeds Int'l* (2010)
- *AT&T Mobility LLC v. Concepcion*
- *In re: D.R. Horton*
- *Armendariz* requirements – alive or dead?
- *Gentry* – alive or dead?



# Issues To Shine A Moonbeam On



- Exemption Issues: Retail managers, network engineers, and technical writers are being challenged as improperly classified as exempt:
  - Key issues include whether these employees exercise independent judgment and discretion, whether their work is “predominantly” managerial, whether their work is nonmanual or manual, whether their work relates directly to management policies or general business operations, and whether they are learned professionals.
  - The California Supreme Court has opined on the “administrative/production” dichotomy – *Harris v. Superior Court* (Dec. 2011).

# Misclassification of Independent Contractors

- New statute prohibits *persons* and employers from:
  - Willfully misclassifying an individual as an independent contractor
  - Charging misclassified independent contractors for expenses that could not be charged to employees
  - Deducting from the pay of misclassified independent contractors where the deductions would be prohibited for employees
  - Knowingly advising an employer to treat an individual as an independent contractor if the individual is found to not be an independent contractor
    - *Does not apply to employees who advise their employers*
    - *Does not apply to attorneys who provide legal advice to clients*

# Misclassification of Independent Contractors



*Independent contractor? Employee?*

- Penalties
  - \$5,000–\$15,000 per violation
  - If a “pattern or practice” of violations is found
    - \$10,000–\$25,000 per violation
  - Penalties as established by other laws – examples
    - *Illegal deductions*
    - *Failure to reimburse expenses*
    - *Failure to pay overtime*

# Other California Issues

- New-Hire Pamphlets
- Final Paychecks
- Paid Sick Time
- Proprietary Information and Inventions (Cal. Lab. Code § 2870)
- Privacy
- Drug Testing
- Arrest and Conviction Records
- Background Checks
- Credit Reports (AB 22)
- False Promises and Failure to Disclose (Cal. Lab. Code § 970)
- Fair Employment and Housing Act (FEHA)
- Recent Changes to Discrimination Laws – Gender Nondiscrimination, CalGINA (AB 887 and SB 559)
- Recent Changes to California Family Rights Act (AB 592 and SB 1304)

# Other California Issues

- Disabled Employees in California
- “Stray Remarks” Doctrine
- Strict and Personal Liability
- Off-Site Conduct (Cal. Lab. Code § 96k)
- Workplace Privacy
- Lactation Accommodations
- Poster Requirements
- California Wage Orders
- California WARN Act
- California Whistleblower Statute
- Civil Code Section 1542 Waivers
- Unfair Competition/Unfair Business Practices (Cal. Bus. & Prof.Code § 17200)
- . . . and more

# Questions?

What is on your mind about California employment law?

# Presenters



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