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Vol. 30, No. 3
December 9, 2019

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CONFIDENTIAL INFORMATION

Protect your lettuce: trade secrets in the agricultural industry

by Matthew A. Goodin
Seyfarth Shaw LLP

The following case illustrates the necessity of protecting trade secrets. Regardless of the industry, competition is almost always fierce, and there will be individuals who are willing to skirt the law to gain an advantage. It's vitally important that companies with trade secrets or other highly confidential information use well-drafted confidentiality and nondisclosure agreements and take all necessary and appropriate measures to protect their trade secrets.

Scientist leaves to work for competitor

Global Protein Products (GPP) is a protein-based coating company that claims as a trade secret a proprietary formula and process for treating field-cored iceberg lettuce. When applied to lettuce, the process prolongs shelf life by preventing dehydration, browning, and pinking of the lettuce's cut surface.

Kevin Le, a scientist, was employed by GPP from 2000 to 2003. During his employment, the company disclosed to him the proprietary formula for its trade-secret product and the identity of an organic acid used in the product. He signed a confidentiality agreement that required him not to use or disclose GPP's confidential information. After leaving the company, Le formed West Coast Ag, LLC (WCA), which competed with GPP and attempted to sell its products to GPP customers.

In June 2005, GPP filed a lawsuit against Le and WCA alleging trade secret misappropriation, breach of contract, and unfair competition. It requested a temporary restraining order and a preliminary injunction against them.

Mark Kierstead, GPP's president and founder, prepared a declaration in support of the company's request stating he invented a process and formula for making a zein film in pure water in 1993. A patent was issued for the invention in 1997 (the 880 patent), which GPP subsequently acquired.

Afterward, GPP discovered that a particular organic acid, if used with the 880 patent, could extend the shelf life of lettuce for seven days. Kierstead stated the company never disclosed the identity of the organic acid, and instead of patenting the combined use of the acid and the 880 patent, it treated the combined use as a trade secret.

Kierstead asserted that in 2005, he received a call from an employee at Dole Fresh, one of GPP's customers, who told him he had received e-mails from WCA promoting a new product that Le had purportedly developed. Le sent Dole a "Material Safety Data Sheet" that included the undisclosed organic acid used in GPP's trade secret.

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CALIFORNIA EMPLOYMENT LAW LETTER (ISSN 1531-6599) is published biweekly for $547 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Injunction to protect company's trade secret

On June 27, 2005, the trial court granted GPP a temporary restraining order against Le and WCA. The order barred them from acquiring, disclosing, using, or attempting or threatening to acquire, disclose, or use GPP's trade secret and from directly or indirectly soliciting its customers using the trade secret. The parties ultimately stipulated that Le and WCA would be permanently barred from, among other things:

(1) Acquiring, disclosing, using, or attempting to acquire, disclose, or use GPP's trade secret, including any information relating to its formulation and process and the identity of the organic acid; and

(2) Directly or indirectly soliciting any of GPP's customers using its trade secret.

Years later, in 2013, GPP's CEO, Bob Cyr, met with representatives of VPS Companies, Inc., to discuss GPP's shelf-life-extender products. At the time, VPS notified Cyr that it was subject to legal restrictions because of a settlement from a prior lawsuit with Le and WCA in which VPS wasn't permitted to use shelf-life extenders provided by Le and was restricted from engaging in the development of shelf-life extenders.

After learning that information, GPP conducted its own investigation and learned that Le had attempted to sell VPS a trade-secret formula he had created called "WCA Blend T6." GPP believed the formula was derived from its trade secret.

In July 2014, the trial court granted GPP's request for an order that Le and WCA show why they shouldn't be held in contempt for violating the 2005 stipulated permanent injunction. VPS intervened in the lawsuit. In the ensuing discovery (the exchange of facts and documents), GPP first admitted that the unidentified organic acid referred to in the stipulated injunction was citric acid but later amended its response to state citric acid was one of several acids in the formula but wasn't the unidentified acid.

Will court toss aside injunction? Lettuce see

In July 2016, Le and WCA filed a motion to modify or dissolve the stipulated permanent injunction, arguing that newly discovered facts—that citric acid was the previously undisclosed organic acid in the injunction—demonstrated that GPP's trade secret didn't possess a commercial advantage. The trial court denied the motion.

Le and WCA appealed, arguing the facts established that GPP didn't have a valid trade secret. The court of appeal upheld the trial court's decision. While the trial court didn't make any express findings in support of its decision, the court of appeal was required to decide whether implied findings would support the trial court's decision.

First, the court noted that the original stipulated injunction stated that GPP's trade secret wasn't limited to the identity of the components used—the trade secret encompassed both the proprietary formula and the *process* for treating lettuce. As a result, the disclosure that a specific acid was part of the formula didn't disclose how the formula was applied and used on lettuce.

Le and WCA also argued that the stipulated injunction was impermissibly vague. But the court pointed out that they agreed to those very terms and could have appealed the order entering the injunction. They did not, and the court held that issues that could have been raised in a prior appeal couldn't be properly raised in this one. *Global Protein Products, Inc. v. Le, et al.* (California Court of Appeal, 6th Appellate District, 11/20/19).

Bottom line

Even with field-cored iceberg lettuce, there is a healthy appetite for competition. Companies with valuable trade secrets must use a variety of methods to ensure their protection. Among the most important are confidentiality and nondisclosure agreements. Those agreements are especially vital in California because while noncompete agreements are illegal, agreements not to compete by using a former employer's trade secrets are valid and enforceable. In this case, those agreements clearly helped GPP protect its lettuce.

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HOLIDAY PARTIES

Avoid holiday heartburn: 10 time-tested ideas for safely celebrating the season

by Judith Droz Keyes
Davis Wright Tremaine LLP

'Tis the season to be jolly. Time to light the candles, deck the halls, and ring in the new year. During the holiday season, many companies celebrate with a party—an event that is fun and festive where employees, and maybe their guests, can let their hair down and have a good time. Eat, drink, and be merry. What could go wrong?

A lot can go wrong

Every HR professional and employment lawyer knows (or should know) the risks of a holiday party run amok. Here is just a sampling.

Driving under the influence—and worse. There is a risk that some employees will have too much to drink, will drive when they shouldn't, and will get arrested for driving under the influence. The employer is faced with the uncomfortable decision of whether that warrants termination, lesser discipline, or some other consequence.

Worse than a DUI, the employee or a guest could be involved in an accident and get hurt or killed—or hurt or kill someone else. Depending on a variety of factors, the company may or may not be legally responsible for the property damage, injuries, or loss of life. There may or may not be workers' compensation coverage for the employee's injuries. Regardless of the legal exposure, it's a terrible situation for the company and employees—including negative publicity and a hit to morale.

Inviting harassment. All too common are stories of an employee becoming tipsy at the party and saying or doing something offensive or harassing to another employee or guest. The range of possibilities is vast—from an arguably innocent comment about the attractiveness of an employee's guest to an obviously inappropriate comment about how the guest might perform in bed. Or from an innocent comment about the religious aspect of the season to a blatantly offensive comment about another's religious beliefs.

If the event is at a hotel or some attendees choose to spend the night at a hotel to avoid a long ride home, beds come into the picture. Who hasn't heard a tale of two employees (or one employee and another employee's spouse, partner, or date) ending up in a hotel room with morning-after allegations of unwanted touching—or worse? These situations can result in criminal charges as well as harassment lawsuits. Arguing in defense of a harassment claim that the conduct was consensual is an uphill battle—especially, heaven forbid, when the accused is a company manager or executive.

Whether any particular incident results in a harassment complaint or is admissible evidence of bias depends on what was said or done and by whom. Regardless, the fact that alcohol was involved—either on the part of the offending actor or on the part of the recipient of the behavior—isn't a defense. And if a member of management did it or witnessed it and did nothing about it, the company is strictly liable.

Rupturing an otherwise healthy relationship. It's not like Vegas. What happens at a company party doesn't stay at the party. On Monday, it follows the employees back into the workplace, where relationships may be tested or ruptured.

10 tips for getting it right

No one wants to be a buzzkill, but the risks are too great to ignore. Here are 10 suggestions for making your holiday party enjoyable and safe for everyone.

(1) **Curtail the alcohol.** If you serve alcohol (and most companies do), consider limiting consumption. Use a professional bartender who is trained in serving alcohol safely. Use smaller, festive glasses, and instruct the bartender to short-pour. Drink tickets can be a good idea—there are obvious ways around them, but they suggest there is a limit to what employees should consume. If the event is a sit-down meal, elicit the caterer's help by instructing the servers to refrain from filling guests' wine glasses as soon as they are empty.

(2) **Serve an attractive alternative to alcohol.** Most bartenders offer alcohol-free mocktails that are interesting, tasty, and festive. Consider serving one of them at your party in addition to water and soft drinks. How about something with Seedlip, for example? It's popular

AGENCY ACTION

NLRB reports progress in case processing. The National Labor Relations Board (NLRB) has reported improved case processing statistics for fiscal year (FY) 2019. The NLRB issued 303 decisions in contested cases during FY 2019. Adopting a case processing pilot program, the Board focused on issuing decisions in some of the oldest cases. As a result, the median age of all cases pending before the Board was reduced from 233 days in FY 2018 to 157 days at the end of FY 2019. The NLRB also said it reduced the number of cases pending before it to its lowest level since 2012. As of the end of FY 2019, the number of pending cases was reduced from 281 at the end of FY 2018 to 227 when the report was released on October 7. Also, the NLRB regional offices made strides toward meeting the Board's strategic goal to reduce case processing time by 20 percent over four years. In just one year, the regions overall nearly met the four-year goal by reducing the time of filing to disposition of unfair labor practice cases from 90 to 74 days, a decrease of 17.5 percent.

OFCCP provides compliance assistance for educational institutions. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) in October released a new Technical Assistance Guide (TAG) for Educational Institutions to assist them in meeting legal requirements and responsibilities as federal contractors. The OFCCP published the new TAG to reflect current regulations and provide compliance assistance resources for universities, senior colleges, and junior/community colleges with federal contracts. The TAG, available at www.dol.gov/ofccp/CAGuides/files/OFCCP-EI-TAG.pdf, is designed to help educational institutions that are federal contractors understand legal and regulatory obligations and prepare for compliance evaluations by highlighting best practices and providing references.

DOL announces more opinion letters. The DOL announced three more opinion letters in September. The letters address compliance issues related to the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Consumer Credit Protection Act (CCPA). FMLA2019-3-A addresses whether an employer may delay designating paid leave as FMLA leave because of a collective bargaining agreement. FLSA2019-13 addresses the ordinary meaning of the phrase "not less than one month" for purposes of FLSA Section 7(i)'s representative period requirement. CCPA2019-1 addresses whether employers' contributions to employees' health savings accounts are earnings under the CCPA. The DOL offers a search function available at www.dol.gov/whd/opinion/search/fullsearch.htm that allows users to search existing opinion letters by keyword, year, topic, and other filters. ✤

and more fun than bottled water. Or even Martinelli's and O'Douls, which also are acceptable alternatives to alcohol.

(3) **Include spouses/partners/guests.** It doesn't guarantee that employees will be well-behaved, but allowing them to bring a "plus one" can help motivate good behavior—and moderate bad behavior.

(4) **Have plenty of food.** If the party is a meal, keep the premeal reception short. If the party is a reception, serve plenty of finger foods in a way that doesn't require standing in line. Food should be plentiful and easily eaten with one hand; otherwise, it's too easy to opt for holding a glass instead.

(5) **Have an activity.** If the event isn't a sit-down meal (or even if it is), provide something fun to do other than just talking and drinking. Make it a group activity to encourage mingling and interaction. (Your introverts will appreciate this, too.) Perhaps party gambling with fun prizes. Or group cooking. Or making something for a charity. Maybe dancing; maybe not. Never anything risqué.

(6) **Have an ending time.** If the party is a luncheon or an afternoon event, end at a designated time and close the office to let staff have the afternoon off. If the party is in the evening, announce beforehand what time it will end (after no more than three hours), and stick to it.

(7) **Monitor the event.** One or two trustworthy representatives—likely from HR—should be "designated drivers" at the event. They needn't be obvious or in your face; they aren't chaperones. But they are charged with keeping an eye on things and savvy about knowing what to do if they spot an issue.

(8) **Provide safe rides home.** Before the party, offer to sponsor taxi, Uber, or Lyft rides home (or to the metro station) for employees who request them. At the event, the "designated driver" staff member should arrange rides for employees who obviously shouldn't drive.

(9) **Remind employees of your harassment policy.** Without making a big deal of it, a week or two before the party, remind employees of the company's antiharassment policy. It's a good idea to do this periodically anyway, but it's especially important around an event like a holiday party.

(10) **Remind company leaders of their role.** The tone really is set at the top. There's no way around it. Company leaders should come to the party and have fun but should remember that all eyes are on them and they are accountable.

Bottom line

Office-sponsored social gatherings are good for camaraderie and morale-building. Thoughtful planning will go a long way toward making them safe for everyone—including the company.

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LEGISLATION

Yet more new laws affecting California employers

by Jim Brown
Duane Morris LLP

California is prolific in passing new laws that affect employers and their workplaces, and this year was no different. We have already written about many important new laws, ranging from the definition of independent contractors to a 300% increase in the statute of limitations for discrimination and harassment cases. But there are many more that may affect policies and practices in your workplace.

AB 673

Wage and hour penalties keep increasing for employers. **Assembly Bill (AB) 673,** which amends California Labor Code Section 210, provides yet another basis on which employees can recover penalties for late payment of wages. Currently, employers are subject to waiting-time penalties under Labor Code Section 203 when all wages aren't paid upon an employee's resignation or termination. As of January 1, 2020, an employee also can recover penalties for wages paid late *during* their employment.

Previously, only the labor commissioner could recover such penalties under Section 210, which therefore permitted those claims to be filed as Private Attorneys General Act (PAGA) actions. AB 673, however, creates a new private right of action for employees to personally seek penalties for late-paid wages during their employment and retain the entire amount for themselves, rather than having to share 75% of any recovery with the labor commissioner under the PAGA.

The penalties for late-paid wages are $100 for the first violation and $200 for each subsequent violation. The employer must also pay 25% of the wages. For example, if an employee's biweekly compensation is $2,000 and isn't timely paid, the employee can recover a $600 penalty: $100 for the initial violation, plus 25% of $2,000 ($500). The only "good news" (if there is such a thing) is that the employee can't recover penalties under *both* Section 210 and the PAGA.

The bottom line is that employees are further incentivized to scrutinize wage-payment practices and wage statements. Employers must ensure that all earned wages are timely paid in full each pay period.

SB 688

Senate Bill (SB) 688 amends Labor Code Section 1197.1, which currently permits the labor commissioner to issue a citation when an employer fails to pay at least the minimum wage. The new law expands the labor commissioner's citation authority to include citations when the employer has *contractually* promised to pay more than the minimum wage but has failed to do so.

This new law also provides procedures for an employer to contest such a citation, including posting a bond. If the employer doesn't ultimately prevail, the bond will be forfeited to the labor commissioner for appropriate distribution.

SB 299

On October 10, 2019, **SB 229** significantly expanded the labor commissioner's appeal and enforcement powers regarding citations issued to employers for alleged antiretaliation provision violations. The law establishes procedures and deadlines that employers, the labor commissioner, and courts must follow.

For example, within 10 days after a final citation, the labor commissioner must file a certified copy and declaration with the appropriate court. The court must immediately enter judgment against the employer. The employer then has 30 days to pay the citation and provide a certificate of compliance. The labor commissioner also can file a petition with the court and ask for an order to show cause for injunctive and other nonmonetary relief. Absent an abuse of discretion, the court must grant the order and enter judgment against the employer.

Allowing employees to seek statutory penalties through a labor commissioner claim requires employers to litigate in an employee-friendly forum that doesn't provide many of the protections available in a court action. You should carefully audit your policies and practices and train employees about breaks, record keeping, and open-door policies. Internal audits and training can be useful in limiting and defending costly litigation.

AB 1353

Previously, Section 45113 of the Education Code allowed the probationary period for classified employees to extend to one year. Classified employees are employees working for public school districts in positions not requiring certification qualifications.

On October 7, 2019, **AB 1353** revised the Education Code to limit the probationary period for classified employees to 130 days of paid service or six months, whichever is longer. Should the amended provisions conflict with any provision of a collective bargaining agreement (CBA) entered into before January 1, 2020, the new law won't apply to the school district until the CBA's expiration or renewal.

AB 543

Governor Gavin Newsom is enacting sexual harassment laws in the #MeToo era. Educational institutions are required to have written sexual harassment policies

and comply with other requirements. Now, **AB 543** adds another layer of responsibilities.

AB 543 requires schools conducting orientation programs for continuing students to include the sexual harassment policy. Each school in a district, county office of education, or charter school that serves grades 9 through 12 must create a poster notifying students of the sexual harassment policy and prominently and conspicuously display it in every bathroom and locker room.

The poster must be at least 8½x11 inches, with at least 12-point font. It must include procedures for reporting harassment, contact information of an appropriate school official, the rights of the reporting pupil and the respondent, and responsibilities of the school.

Schools and school districts should ensure their sexual harassment policies are up to date, their employees are up to date on all mandatory sexual harassment training, and their posters reflect accurate policies and procedures and are appropriately displayed.

SB 271

Current law provides that workers in the motion picture industry who perform services solely in the state of California—or perform work outside California that is *incidental* to the service performed in the state—are eligible to apply for California unemployment benefits so long as the services outside the state are "temporary or transitory in nature" or consist of only "isolated transactions."

Come January 2020, however, **SB 271** expands the law so that *all services* performed outside California will be considered temporary or transitory for purposes of seeking state unemployment benefits, so long as the worker is a resident of the state, is hired and dispatched from the state, and intends to return to the state to seek reemployment at the conclusion of her out-of-state assignment.

AB 1554

AB 1554, which adds Section 2810.7 to the Labor Code, requires employers to notify employees who participate in any flexible spending account (FSA) of any deadline to withdraw funds before the end of the plan year. The purpose of AB 1554 is to decrease the amount of FSA funds employees forfeit each year by failing to file for reimbursement by the deadline.

AB 1554 requires the notice in two different prescribed forms, which may include e-mail, telephone, text message, postal mail, and in-person notification.

Starting in 2020, employers should prepare to alert their employees of this deadline by the end of each plan year.

SB 778

SB 778, which amends Section 12950.1 of the Government Code and went into effect August 30, 2019, extends the original compliance deadline for employers to provide mandatory sexual harassment training to their employees.

Under this section, employers with five or more employees in California are required to provide at least two hours of classroom or other interactive sexual harassment training and education to all supervisory employees and at least one hour of training and education to all nonsupervisory employees. Employers are required to provide the training to new nonsupervisory employees within six months of hire and new supervisory employees within six months of assuming a supervisory position, and once every two years thereafter.

The original January 1, 2020, compliance deadline has been extended to January 1, 2021. In addition, the new law permits employers that have provided training to an employee in 2019 to offer a "refresher" training two years later (rather than by the January 2021 deadline). This will prevent employers that have already provided compliant training from having to do so twice in a single two-year period.

SB 778 doesn't change the training timeline for seasonal and temporary workers—training must be provided to those workers within 30 days or 100 hours of employment beginning January 1, 2020. However, a separate bill, **SB 530,** has extended the beginning of this training requirement for seasonal and temporary workers to January 1, 2021.

Unless you provided training in 2019, most California employees will need to be trained in 2020 to meet the new January 1, 2021, deadline. You should consider scheduling future training for all employees on the same two-year track to ensure they are receiving consistent training to the extent possible.

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SEXUAL HARASSMENT

Employer successfully defends against sexual harassment claim

by Cathleen S. Yonahara
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This case demonstrates that even in the #MeToo era, courts are willing to dismiss sexual harassment claims when an employee is unable to demonstrate the alleged conduct was sufficiently severe or pervasive to create a hostile work environment.

Facts

Serenity Transportation, Inc., transports human remains for local funeral homes. While working for Serenity as an employee or an independent contractor, Emma Martinez removed deceased individuals from hospitals, private residences, and coroners' offices and transported them to funeral homes. She worked for the company from January to July 2012, when she had her own van and performed removals without incident.

Martinez resigned and returned to work for Serenity from December 2012 through March 2014. Since she also was working 40 hours per week as an administrative assistant for another company and no longer had a van, she asked Serenity for the opportunity to do "assists" on house calls, which require two people.

Martinez complained in 2013 about three male contractors with whom she worked while doing assists. First, she reported that Gary Kirby (1) rushed her to get to assignments and repeatedly texted her for an estimated time of arrival, (2) got angry at her and compared her to his ex-wife, and (3) during one call, intentionally bumped her buttocks with a gurney twice and touched her buttocks with his hand.

Second, Martinez complained that Christopher Daniels sent her the following text: "As a matter of fact if memory serves me correctly you said I can do you in the butt." Within a minute of sending the text, he sent another text stating, "Sorry that's not for you." Martinez responded "Whew" by text 20 minutes later and continued texting him.

Third, Martinez reported that Sam Price (1) recorded her during one of the jobs they were on together, (2) tried to prevent her from getting to calls on time to make her look bad, and (3) looked at her in a way that made her uncomfortable.

After Martinez reported the above incidents, David Friedel, the chief operating officer, talked to each of the men. The investigation was inconclusive, however, because Friedel couldn't determine whether Martinez's complaints were true. Following the investigation, he felt it was best for Martinez and the three men not to be placed on calls together to avoid any future issues, and he instructed Martinez and the men not to communicate with each other. Martinez still wanted to be assigned to calls with the men because she needed the money. However, none of them wanted to be on calls with her anymore.

WORKPLACE TRENDS

Research finds HR leaders predicting huge change. A new study has found that 82% of HR leaders expect their role to be unrecognizable in 10 years, thanks in large part to the transformation from HR to a "people" function and the adoption of technology. The report from cloud business management firm Sage also found that 43% of HR leaders surveyed believe their organization won't keep up with related changes in technology in the next 10 years. Key findings show that 24% of those surveyed use artificial intelligence for recruitment, and 56% plan to adopt it within the next year; 42% say HR/people decisions are data-driven, and 51% are planning to access data in real time within the next year; 57% say they can't invest in new technology because of resourcing restrictions; and just 25% rate their team as being experts with HR technology.

Organizations urged to get "age-ready." A new report from workforce solutions provider Mercer urges employers to actively leverage their older, experienced workforce (defined as workers 50 and older) to be best positioned for the future of work. The report, "Next Stage: Are You Age-Ready?" says the need to be "age-ready" is important for both businesses and economies because of the impact of the twin forces of a rapidly aging labor force and an uncertain global economic growth rate. The report says experienced workers are valuable to employers since they often lower costs because they are less likely to leave; as supervisors, they tend to retain, develop, and engage more junior employees; they increase productivity of those around them through knowledge sharing; they strengthen group cohesion, collaboration, and resiliency; and they enable innovation and strengthen customer connections.

Report finds more employees staying put. Research from business research firm Gartner found that 53% of U.S. workers planned to stay with their current employer in 2019's second quarter, a 10% increase from 2019's first quarter. The data from Gartner's second-quarter Global Talent Monitor showed that this record-high intent to stay coincides with other workplace indicators that reflect definitive changes in employees' perceptions of and behaviors within the U.S. labor market. In the second quarter, just 12.5% of U.S. workers indicated they were actively looking for another job, well below the global average of 20.2% and a significant drop from almost 45% of workers in the first quarter of 2019. The second quarter also saw a 2.4% decline in employees' business confidence, with the global business confidence index hitting its lowest point since the third quarter of 2016. ✣

UNION ACTIVITY

SEIU leader applauds public charge ruling. The executive vice president of the Service Employees International Union (SEIU) spoke out in October on a federal court order blocking the implementation of the U.S. Department of Homeland Security's (DHS) public charge rule, calling the rule discriminatory and the ruling against it a victory for all families. "President Trump's hateful and cruel rule would have forced families to choose between feeding their children and a secure future in America," Rocio Saenz said. She also said the fight against the administration's policies is not over. "We will remain vigilant against the relentless attacks against working families and continue to use the strength in a union to fight for policies that put working people and families first, regardless of where we come from or the color of our skin."

Educators' union backs College Affordability Act. The president of the National Education Association (NEA) spoke out in October in support of the introduction in Congress of the College Affordability Act, a measure she called comprehensive legislation to reauthorize and improve the Higher Education Act. "Since 1965, the programs and principles embodied in the Higher Education Act have opened the door for countless Americans to earn a college education," NEA President Lily Eskelsen Garcia said, adding that "in recent years skyrocketing tuition coupled with dramatic disinvestment by states in their public colleges and universities have closed off the dream of a college education for too many Americans." She said the bill could begin "to turn the tide" toward making education affordable.

Union leaders call chemical settlement good first step. Leaders from the United Farm Workers (UFW) spoke out in support of California Governor Gavin Newsom's announcement of a settlement agreement with manufacturers to eliminate use of chlorpyrifos by the end of 2020. The action "ensures that after December 2020 and during the Newsom administration, the dangerous, brain-damaging chemical chlorpyrifos will not be used in California. We look forward to working with Governor Newsom to turn it into a permanent ban," UFW President Teresa Romero and UFW Foundation Executive Director Diana Tellefson Torres said in a statement. They also said they would continue working to understand the risks that remain from granular products that won't be banned through the settlement and cancellation process. The statement also noted that farm workers traveled to the state capitol to support the measure after they were sprayed with chlorpyrifos in what the statement called a mass field poisoning incident. ✤

Serenity dispatches its contractors to calls on a rotating basis. About 65% to 70% of Serenity's calls require only a single contractor, and the other calls require two contractors. Since Martinez didn't have a van during her second period with Serenity, she was limited to being placed on calls when someone with a van needed assistance. Also, because she had a full-time job at another company, she was available to perform assists for Serenity only from 7:00 p.m. to 6:00 a.m.

From January to March 2013, Martinez received on average 8.6% of the total calls before making her complaints about harassment. From April 2013 to February 2014, she received an average of 7.3% of the calls that the three men were not sent on. Serenity's business significantly declined in February and March 2014 compared to the prior year. The contractors with vans were receiving significantly fewer calls during that time period, but the company needed to keep them working as much as possible because they could be placed on any calls, not just assists like Martinez. In March 2014, Serenity terminated its contract with Martinez because of a reduction in business.

Martinez sues for sexual harassment

Martinez sued Serenity, Daniels, Kirby, and Price for a hostile work environment, sexual harassment, and harassment—all under the California Fair Employment and Housing Act (FEHA)—and intentional infliction of emotional distress.

In September 2016, Serenity asked the court to dismiss the case without a trial on the grounds that the alleged conduct by the individual male coworkers wasn't so severe and pervasive that it unreasonably interfered with Martinez's work environment and that Martinez herself didn't consider the work environment to be hostile or abusive.

With respect to the intentional infliction of emotional distress claim, Serenity argued its conduct wasn't outrageous, it didn't intend to cause Martinez emotional distress, and she didn't suffer severe emotional distress. It asserted that although her amended complaint referenced retaliation, she had dropped her retaliation claim from the original complaint, and in any event, she couldn't establish a retaliation claim.

Martinez argued that Serenity "refused to let her work with the [three] individuals involved rather than enforcing [its] sexual harassment policy" and that she lost job opportunities and money, while the three men suffered no loss. According to her, that was "a disincentive to report harassment and in and of itself create[d] a hostile environment."

On February 22, 2018, the trial court dismissed Martinez's case without a trial. First, the court determined her three harassment-related claims were duplicative and alleged only a single claim for sexual harassment. Further, the alleged harassment by the three male coworkers wasn't sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.

Second, the court dismissed the intentional infliction of emotional distress claim because it was based primarily on the

alleged sexual harassment. Third, the court concluded Martinez couldn't establish a retaliation claim. Martinez appealed.

Appellate court affirms dismissal

The FEHA protects not only employees but also "a person providing services pursuant to a contract" from sexual harassment. According to the California Supreme Court in *Miller v. Department of Corrections*, "An employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex."

Interestingly, Martinez argued that her harassment claim under a hostile work environment theory was based on "the actions that Serenity took as a result of her complaints," not the individual coworkers' conduct about which she complained. However, she failed to provide evidence that the actions Serenity took in precluding her and the three men from working together or communicating with each other were "because of sex" as required by the FEHA. The appellate court observed that although Martinez might disagree with Friedel's decision to separate everyone, in the absence of evidence that the decision was "because of" or "on the basis of sex," she failed to raise a triable issue of fact regarding a harassment claim.

The appellate court noted that to the extent Martinez was attempting to assert there was a triable issue of fact for a retaliation claim, she failed to demonstrate that the trial court erred in refusing to consider the issue after determining that no retaliation claim was pleaded in the operative complaint. Accordingly, the appellate court affirmed the dismissal of her case against Serenity. *Martinez v. Serenity Transportation, Inc.* (California Court of Appeal, 6th Appellate District, 11/21/19, unpublished).

Bottom line

Under the facts of this case, it isn't surprising that the court found the alleged conduct wasn't sufficiently severe or pervasive to create a hostile work environment. What is surprising is that Martinez didn't pursue her retaliation claim, which is generally easier to establish than harassment.

You should be aware that if you terminate or discipline an employee following a harassment complaint, she is likely to allege retaliation. So tread carefully, and consult with counsel before taking any adverse employment action.

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EMERGENCY PREPAREDNESS

Winter is coming: FLSA and your pay obligations during inclement weather

During the winter months, the threat of the weather turning frightful is on everyone's mind. No matter what business you may be in, inclement weather and treacherous road conditions can cause many headaches—including issues with employee payroll. Many employers grapple with the question of how to pay employees when the business is closed because of bad weather and whether deductions from pay for closures are allowed. Let's explore what the Fair Labor Standards Act (FLSA) requires of employers when Mother Nature wreaks havoc.

Partial business closures

When weather conditions cause you to either delay opening your business or to close early on a particular day, the FLSA doesn't require you to pay nonexempt employees during the partial closure. That's because employees are unable to perform work during that time frame.

On the other hand, if you close your offices for only part of the day because of inclement weather, you cannot make a deduction from an exempt employee's salary without risking the loss of his exemption.

Complete business closures

If you close your business for a full day because of severe weather, you aren't required under the FLSA to pay nonexempt employees for the day because they're unable to perform any work. That's the case even if they were scheduled to work that day.

Conversely, you may not take deductions from an exempt employee's salary for a full-day inclement weather closure, or you risk losing the individual's exempt status. You have more flexibility if the closure lasts for one week or more. In that case, you may choose not to pay exempt employees for that week.

Employee absences due to weather

If you have employees who commute significant distances or from rural areas, you may face the situation of the company being open but individual employees being unable to get to work.

Nonexempt employees. If you're open for business but inclement weather stops nonexempt employees from reporting to work, there is no requirement to pay them. You may dock their wages for a weather-related absence because they don't need to be paid for hours they don't work.

Exempt employees. When you're open for business but exempt employees cannot report to work because of inclement weather, the rule varies slightly. Specifically, you

no longer risk losing their exempt status if you make deductions from their wages in that situation. According to the U.S. Department of Labor (DOL), when an exempt employee is absent because of severe weather but the business is open, the absence will be considered an absence for "personal reasons." You may thus deduct the day's earnings from the employee's salary without losing the exemption.

Remember that exempt employees must take the entire day off because of severe weather for the modified rule to apply. Should they simply choose to come into work late or leave early because of the weather, no deduction should be taken from their salary because that would jeopardize the exemption.

Closing the business for bad weather

Some businesses that provide critical services, including healthcare employers, simply cannot close. Many of them have severe-weather policies requiring employees to stay after their shift is over to be ready for the next shift or to help cover the shift if other employees can't make it to work. Most prudent critical services employers allow their stranded employees time to relax or sleep. So, is their resting time compensable under the FLSA?

If nonexempt employees are required to stay at the worksite, determining whether you must pay them for the time is quite tricky:

- First, FLSA regulations state that an employee who is required to be on duty for less than 24 hours is "working" even though he is permitted to sleep or engage in personal activities.
- Second, an employee who is required to be on duty for 24 hours or more may agree to exclude from his compensable time any bona fide regularly scheduled sleeping periods of no more than eight hours so long as the employer furnishes adequate sleeping facilities.
- If there is no agreement, the entire sleeping period is compensable.

If the sleeping period is interrupted by a call to duty, the interruption is compensable. If the employee cannot get at least five hours of sleep, the entire eight-hour sleeping period is compensable.

Further, if the employee must spend his sleeping time with the proverbial "one eye and one ear open" to ensure the safety or well-being of people in his charge (e.g., hospital patients), the time is compensable. Obviously, stranded employees wouldn't spend their entire off-duty time sleeping. Is time simply spent "waiting" compensable? Much of the answer hangs on whether the employee is required to stay or chooses to do so of her own free will (e.g., because she is afraid to travel). Also

CALIFORNIA NEWS IN BRIEF

Subcontractor faces racial harassment lawsuit. The Equal Employment Opportunity Commission (EEOC) in November announced it is suing San Jose-based Air Systems Inc., an electrical subcontractor at the Apple Park construction project, alleging a violation of federal law by tolerating racial harassment of African-American workers. The EEOC claims the harassment included racist graffiti of swastikas and racial epithets drawn on the walls of the portable toilets at the Apple Park construction project as well as a noose hung at the worksite with a scrawled note containing racial insults, other expletives, and a threat of lynching. In addition, the suit says the company failed to act when notified by two African-American employees that a white coworker had taunted them with a racial slur and called one of them "boy."

Long Beach spa owner sentenced for healthcare plan fraud. The U.S. Department of Labor (DOL) announced on November 20 that the U.S. District Court for the Central District of California had sentenced Erica Carey, former owner of Long Beach Medi-Spa in Long Beach, to three years' probation and ordered her to pay $366,740 in restitution for defrauding a maritime union welfare plan. The sentencing followed an investigation by the DOL's Employee Benefits Security Administration. Investigators found Carey submitted fraudulent medical claims and allowed coconspirators and brothers Barry and Dalibor Kabov—who owned and operated Global Compounding Pharmacy in West Los Angeles—to use office space at the spa, where they wrote prescriptions for members of the International Longshore and Warehouse Union-Pacific Maritime Association Welfare Plan. Investigators found Carey helped the Kabovs bill the plan using participants who didn't know of or otherwise authorize the prescriptions.

Farm labor contractor ordered to pay back wages. Empire Farm Labor Contractor, based in Salinas, has paid $38,260 in back wages to 79 employees for multiple violations of the H-2A temporary agricultural worker visa program and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The contractor also paid $18,413 in civil money penalties for the violations found in Imperial County that occurred from December 2018 to May 2019. The payments followed an investigation by the DOL's Wage and Hour Division (WHD). The WHD announced the payments on November 25. Investigators found Empire rejected a qualified U.S. worker who applied for a job, an act that is a violation of H-2A requirements. The employer also failed to pay H-2A workers' transportation expenses for travel from their home countries and retained H-2A workers' passports and visas. Empire violated MSPA requirements by transporting farmworkers without the appropriate licensing. ✣

relevant is whether the employee can be asked to pitch in outside her regularly scheduled shift time (perhaps to help cover a short-staffing situation). If so, it's likely the employee would be considered on call.

Bottom line

Severe winter weather can cause a lot of chaos and confusion. The least opportune time to worry about FLSA liability is when you're in the midst of the mayhem. If you're uncertain about your employees' FLSA status or your obligations, consult competent employment counsel before you're left out in the cold. ✤

ADMINISTRATIVE AGENCIES

Looking back at 2019 and to what's ahead for federal agencies in 2020

The National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) all ramped up their enforcement endeavors in 2019. The NLRB has refocused its efforts on unionized businesses, the new EEOC chair is pushing to settle old cases, the OFCCP director is aiming to end the year with the largest settlement total in the agency's history by resolving or litigating old audits, and the WHD has filed a record number of enforcement cases against employers.

WHD releases overtime rule

The biggest news came out of the DOL this year when the WHD released its final rule updating the overtime eligibility requirements for workers under the Fair Labor Standards Act (FLSA). The new rule bumps up the minimum salary threshold required for workers to be considered exempt under the FLSA's "white-collar" exemptions. The new threshold of $35,568 is a significant increase over the previous threshold of $23,660, an amount that had not been revised since 2004. It fell short, however, of the $47,476 level proposed during the Obama era in 2016 but later scuttled by a Texas federal judge.

The final rule makes no changes to the current "duties test" for exemptions—a hotly debated subject during the rulemaking process. Nor does it call for an automatic update of the salary threshold, another controversial feature under the blocked Obama rule.

According to a WHD press release, the final rule will make 1.3 million American workers eligible for overtime pay. While it is set to go into effect January 1, 2020, worker advocate groups are expected to challenge it in the courts.

NLRB shifts into high gear

One thing is certain: The current NLRB is willing to take controversial actions. The general theme of the Board's moves is a return to the state of federal labor law before the days of the Obama administration, which means refocusing labor law on the union-management nexus and withdrawing its reach from non-union businesses. The results include:

- Limitations on union organizing opportunities, including access to businesses;
- Restrictions on the definition of "concerted activity";
- Reductions in the number of "employees" who can be organized; and
- Expansion of management rights.

Many of the NLRB's recent decisions have been criticized as undermining unions at the same time that public sentiment is said to have swung back to a more favorable view of unionization. Businesses, stressed by unpredictable federal trade and fiscal policies, are welcoming the Board's rulings as rare tangible relief from government mandates. Still to come: the Board's regulation on subcontractors, independent contractors, and franchisors.

EEOC balks at extending EEO-1 Comp 2, chips away at caseload

The EEOC announced it wasn't requesting an extension of the short-lived "Component 2" pay data collection for EEO-1 reports. Chair Janet Dhillon faced a hostile House Subcommittee on Civil Rights and Human Services in September when she defended the agency's decision not to ask the Office of Management and Budget (OMB) to renew the Comp 2 piece. She told the subcommittee the agency had determined the burden on employers to collect and provide the data is "actually more than 10 times higher than had been originally estimated." The period for collecting the pay data expired on September 30.

In the same session, Dhillon announced the agency had formed an internal task force to look at "vulnerable workers." She said she is committed to the EEOC's mission "to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace."

Dhillon also responded to complaints about the EEOC's slow resolution of its backlog of complaints. She said the agency has trimmed the backlog by focusing on charges "at the intake stage" and noted the smaller inventory allows it to "tackle the charges when they are new, and it's easier to do so; memories are clearer, evidence is more readily available."

OFCCP enforcement on the rise

At a National Industry Liaison Group (NILG) Conference, OFCCP Director Craig Leen revealed the number

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12-17 Fitness for Duty: Balancing Safety Obligations with the Changing Landscape on Drug Testing, Opioids, Marijuana, and More

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12-18 Hiring Metrics: What to Measure and Why for Better Results

12-18 Safety Culture Training for Supervisors: How to Equip Front-Line Jobsite Leaders With Methods and Skills to Motivate and Engage Workers

12-19 Building High Performance Teams: How to Lead and Inspire Employees to Work Together for the Best Results

12-19 What to Expect from OSHA in 2020: Enforcement Trends, Regulatory Developments, and How to Stay Off Its Radar

12-20 2020 Payroll Tax and Processing Updates: Understanding the Implications of the Redesigned Form W-4, Data Security, and More

1-7 FMLA Leave Is Exhausted: How to Address Transfer and ADA Accommodation Requests, Fitness-for-Duty Exams, and More

1-8 Behavior-Based Safety: Leveraging Human Factors to Drive Strong Safety Performance

1-8 Sex Discrimination: New Court Rulings and Legislative Updates on Gender Identity and the Practical Impact on LGBTQ Employees

1-9 2020 Form I-9 Recordkeeping Updates: How to Complete, Re-Verify, Store, and Destroy Paper and Electronic Files in Compliance with Federal Law

of agency audits finding discrimination had increased from 2% in 2016 to 5% in 2018. He also said he sees disability discrimination as being as important as race or gender discrimination.

Leen indicated the OFCCP will look at the type of parental leave contractors give employees because men should have the same access to such leave as women do. At a town hall in New York City, he expressed the agency's concerns about the lack of promotions for women and minorities in law firms. He also said all federal contractors should be looking at their promotion practices.

Based on concerns raised by a Government Accountability Office (GAO) report, Leen is continuing to develop processes allowing contractors to certify they have developed their affirmative action plans (AAPs). Ultimately, the agency wants to require contractors to submit their AAPs annually. Exactly what contractors will be required to submit is unclear, but the director is moving forward with his plan.

100,000-plus comments on religious exemption proposal

The OFCCP's proposal to substantially revise its religious exemption received more than 100,000 responses by the end of the comment period even though it lasted only 30 days (instead of the customary 60). The 107,295 comments were the highest number for any proposal brought by a civil rights agency since online comments began being accepted in 2003.

The OFCCP argued the proposal merely codifies existing law, but the American Bar Association urged the agency to withdraw it because the religious protections are too broad, to the disadvantage of other protected groups.

Democratic attorneys general (AGs) from 17 states and the District of Columbia also urged the rule's withdrawal, maintaining it "would open the door for large, for[-]profit organizations to claim the exemption at the expense of workers." While the AGs recognized the importance of respecting sincerely held religious beliefs, they contended the "proposed rule . . . would create a new version of the religious organization exemption, broader and less defined than any previous version."

A group of Democratic senators demanded the OFCCP withdraw the proposal, which they say would allow "taxpayer-funded employment discrimination." LGBT advocates also have publicly opposed the rule, believing it can and will be used against them, while religious advocates praised the proposal as bringing "welcome clarification." ✤