LABOR HOT TOPICS TREND REPORT

AB 1732: SINGLE-USER RESTROOMS

AB 1732: Single-User Restrooms

- Health and Safety Code 118600: All single-user toilet facilities in any business establishment, place of accommodation, or government agency must be identified as all-gender toilet facilities.
- The Department of Industrial Relations has clarified that this does not apply to non-plumbed toilets.
- There is no conflict with Cal-OSHA requirements for field sanitation. So in the field employers should continue having one toilet for every twenty workers with an additional toilet for females, if at least one member of that twenty member crew is a female.
- Plumbed, single-user toilets in packing shed facilities, office locations, or other places of business with indoor plumbing do need to have "all-gender" signage.
- Effective March 1, 2017.

THE DEATH OF ARBITRATION?

The Death of Arbitration?

- We advise having written arbitration agreements. If you have them, the arbitration agreements should:
  1. Be implemented/rolled-out properly to ensure they are enforceable;
  2. Be in the form of a stand-alone agreement and be included as a section of the handbook;
  3. Include a class/collective action waiver but not a PAGA waiver;
  4. Include carve-outs for claims arising under NLRA/ALRA and Workers Compensation and EDD claims;
  5. Detail the law governing procedural aspects of the arbitration;
  6. Consider an opt-out provision* (req'd for H-2A workers);
  7. Not require the arbitration to take place outside of California and must be under California law.

* Not required for non-H-2A workers, but increases likelihood argument will be enforced; though, some people may not sign.

AB 1066: OT FOR AG WORKERS

AB 1066: OT for Agricultural Workers

- Amends Labor Code Sections 554 and adds Sections 857- 864.
- Will ultimately require employers to pay Wage Order 14 employees overtime for any days where hours exceed 8 hours in a day or more than 40 hours in a week.
- Provides double time for work over 12 hours in a day.
- May have removed all exemptions to overtime under Wage Order 14.
- Effective January 1, 2017.

The 10-hour threshold will be reduced to: *(25 or less employees)

January 1, 2019	* January 1, 2022	over 9.5 hours per day or over 55 hours per workweek
January 1, 2020	* January 1, 2023	over 9.0 hours per day or over 50 hours per workweek
January 1, 2021	* January 1, 2024	over 8.5 hours per day or over 45 hours per workweek
January 1, 2022	* January 1, 2025	over 8.0 hours per day or over 40 hours per workweek

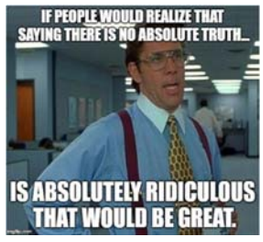
AB 1066 "Q & A"

AB 1066 "Q & A"

What is the Day's Rest Requirement?
No employer shall cause its employees to work more than six days in every seven days.

I have to work my employees more than 6 out of 7 days. What should I do?
Apply for a "hardship exception" from the DLSE. Claim "Nature of the Work" Exception. Have employees volunteer to work more than six out of seven days. No coercion.

Can salaried exempt foremen/supervisors be required to work on the seventh consecutive day of the workweek?
Yes. Salary-exempt employees are not covered under the provisions of Wage Order 14 for the purposes of overtime.
Make sure exempt employees are properly classified as such.
Does not apply to row bosses or other foremen who are paid on an hourly basis.



Should we use a Volunteer Form?
Permit employees to volunteer to work a seventh day as CA Law does not allow employers to "cause" seven consecutive days of work.

- Cannot cause duress or coerce employees to work a seventh day.
- Develop non-discriminatory selection criteria (i.e., seniority, first come-first serve, merit, required skill set) to select employees.
- Pay proper OT at 1½ times for first 8 hours and (2x) double time for over 8 hours.
- NOT AN ABSOLUTE DEFENSE – term "cause" up for CA Supreme Court review.

* Debate: whether those who are offered a day of rest but voluntarily agree in writing to accept work available on the 7th day.

LABOR HOT TOPICS TREND REPORT

TRUCK DRIVERS; MEALS AND BREAKS

Truck Drivers; Meals and Breaks

California employees are generally entitled to "off-duty" meal and rest breaks; but our truckers driving product may not leave the rig because of food safety concerns, short cut-to-cool windows/loading lines, unloading lines at coolers, etcetera. How can we be wage and hour compliant with truckers transporting product? **Are "On Duty Meal Periods" An Option?**

- Wage Order 14 allows on-duty meal periods when: (1) there is a written agreement between the parties; (2) the nature of the work prevents an employee of being relieved of all duty; AND (3) must be revocable under W.O. 9.
- Where the nature of the work prevents the Wage Order 14 employee being relieved of all duty, have the employee sign an on-duty meal period waiver, and pay them for an on duty lunch.
- BUT…the DLSE has said that on duty meal periods are an infrequent "LIMITED ALTERNATIVE" and the employer bears the burden of establishing the nature of the work exception applies.

Example: Cement Truck Drivers (Driscoll v. Granite Rock Company)

Problem: Employees were truck drivers who delivered cement to worksites who agreed to on duty meal periods. Defendant's drivers were required to manage a rolling drum of freshly batched concrete at any given time throughout their workday. One employee driver sued claiming he did not receive his off duty meal breaks.

Answer: 6th Appellate District held:

The Company's meal period policy was particularly appropriate in the context of the ready mix concrete industry, and that "off duty meal practices that will suffice will vary from industry to industry."

The concrete is a perishable product that cannot be stored.

Freshly batched concrete must be poured within 60 to 90 minutes to ensure its structural integrity.

Whether the driver was able to take a duty free lunch period is dependent upon the state of the concrete in the truck and the nature of the job that the driver is attending.

When the Driver is working with freshly batched concrete—on duty meal break is appropriate.

Do D.O.T. Regulations Override The Meal Break Requirement?

DOT advised and the 9th Circuit has agreed that Federal law does not supersede California law meal and rest break requirements. (See Dilts v. Penske Logistics, LLC 769 F.3d 637 (2014).)

Power to establish meal and rest breaks falls within the State's power to regulate worker health and safety.

California drivers are entitled to meal and rest breaks in accordance with California law.

What To Do With Uncertainty Regarding "On Duty Meal Periods?"

If an employer fails to provide a legally required meal period, the employer must:

Pay the employee an additional hour of pay at the employee's regular rate. This additional hour is not counted for purposes of overtime calculations. (See applicable IWC Order and Labor Code § 226.7); and

Have the employee sign a written agreement agreeing to an on-duty meal period.

OBAMA-ERA NLRB RULINGS TRUMP'S BOARD MAY STRIKE DOWN

Obama-Era NLRB Rulings Trump's Board May Strike Down

NLRB precedents that could be on the chopping block once a Republican board majority is in place.

Browning-Ferris

Perhaps the most controversial decision of the NLRB during Obama's presidency was its 2015 Browning-Ferris Industries of California Inc. ruling, which loosened its traditional standard for determining who qualifies as a joint employer that shares unfair labor practice liability and bargaining obligations with contractors. The decision drew praise from organized labor, ire from business groups and Republican lawmakers, and is currently being reviewed by the D.C. Circuit.

Specialty Healthcare

In a controversial 2011 decision in Specialty Healthcare and Rehabilitation Center of Mobile, the NLRB upped the standard for employers' challenges to narrow bargaining units. The Sixth Circuit affirmed the Specialty Healthcare bargaining unit test in 2013.

Under the Specialty Healthcare framework, an employer that fights a proposed bargaining unit on the basis that it improperly excludes certain employees has to prove that the excluded workers share "an overwhelming community of interest" with those included in the proposed unit.

Purple Communications

In late 2014, a split NLRB issued a 3-2 ruling that said workers could use work email for labor law-protected purposes, such as to join or assist unions or engage in concerted activity for workers' mutual benefit.

The ruling, which partially overruled a 2007 NLRB decision known as Register Guard, said workers given access to their employer's email system must be presumptively permitted to use it for NLRA-protected activity on nonworking time, though an employer may justify a complete ban on non-work use of email if it can point to "special circumstances" that make such a prohibition necessary.

Banner Health

In a July 2012 decision, the NLRB ruled that a HR consultant's routine practice of asking employees at Arizona's Banner Health System who were involved in investigations not to discuss them with co-workers ran afoul of the NLRA.

The ruling does permit employers to ask workers to keep investigations under wraps in some circumstances, but it held that the employer must justify the confidentiality by showing it has a legitimate business need for it that outweighs the employees' Section 7 rights.

D.R. Horton and Murphy Oil

Two of the NLRB's most seminal and wide-ranging recent rulings were its twin decisions involving homebuilder D.R. Horton and Murphy Oil USA Inc.

In Horton, the board ruled that the employer had violated the NLRA by implementing and enforcing an arbitration policy that required employees to waive their right to pursue class actions for any employment-related disputes. That position was reaffirmed in Murphy Oil, even though the Fifth Circuit ruled multiple times against the board.

The Seventh Circuit and Ninth Circuit, however, have agreed with the board's position, and the U.S. Supreme Court recently agreed to review the issue of class waivers in arbitration agreements in late 2017.

Lutheran Heritage

While many of the cases that could be on the NLRB's chopping block going forward were issued under Obama's watch, one precedent that attorneys mentioned could be endangered predates Obama — the NLRB's 2004 ruling in Lutheran Heritage Village. In that case, the NLRB rendered work rules and handbook provisions unlawful if employees "would reasonably construe" them to prohibit protected activities under Section 7 of the NLRA.