



NEW NORMAL
JUST AHEAD

SDHR Forum Legal Update

Tuesday, December 15, 2020

100
HAHN + LOESER
1920-2020

Brent M. Douglas

- Partner, Labor & Employment
- 11 years of experience
- Defend companies against wrongful termination, harassment, & discrimination
- Advise HR departments on hiring, firing, training, and leaves of absence



Agenda

Wage and Hour Update

- Senate Bill 973
- McPherson v. EF Intercultural Foundation, Inc.
- Kim v Reins

Independent Contractor Update

- Prop 22

Senate Bill 973 – Annual Reporting Requirement

- Senate Bill 973 – aim is to reduce gender and racial pay gaps
- Applies only to employers that:
 - (a) Have 100 or more employees; and
 - (b) Must file an annual Employer Information Report (EEO-1) under federal law.
- Rule: must submit an annual report to the DFEH that includes the number of employees and the hours they worked, broken down by:
 - Race, ethnicity, and sex
 - Job category
 - Whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics Survey.
- Employers with multiple establishments must submit a report for each

Section D-EMPLOYMENT DATA

Employment at this establishment – Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

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Job Categories	Number of Employees (Report employees in only one category)														
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												Total Col A - N
			Male						Female						
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	
Executive/Senior Level Officials and Managers 1.1															
First/Mid-Level Officials and Managers 1.2															
Professionals 2															
Technicians 3															
Sales Workers 4															
Administrative Support Workers 5															
Craft Workers 6															
Operatives 7															
Laborers and Helpers 8															
Service Workers 9															
TOTAL 10															
PREVIOUS YEAR TOTAL 11															

1. Date(s) of payroll period used: _____ (Omit on the Consolidated Report.)

Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report.)

- What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

6-10-2020

McPherson v. EF Intercultural Foundation, Inc.

Unlimited Vacation Plans

- Default rule
- Administrative goal of unlimited plans

McPherson is a horror story for employers

Facts of Case

- No written vacation plan
- No oral vacation plan
- Plan only came up during individual discussions with supervisor; it was described as “unlimited”
- Former employee sued for payout upon termination

McPherson v. EF Intercultural Foundation, Inc.

Court held that payout was owed to former employees.

Ruling was expressly limited: "[w]e by no means hold that all unlimited paid time off policies give rise to an obligation to pay 'unused' vacation when an employee leaves."

Court offered advice for unlimited plans:

- Clearly provide that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule—including employees' ability to decide when and how much time to take off;
- Spell out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;
- Allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and
- Administer plan fairly so that it neither becomes a de facto "use it or lose it policy" nor results in inequities, such as where one employee is forced to work significantly more than another.

Kim v. Reins

California Supreme Court ruled that aggrieved employees with PAGA claims who settle the underlying, individual wage-and-hour claims may still proceed with representative claims under PAGA

Common fact pattern for employers with arbitration agreements

Strategies

- If possible, expressly mention PAGA in releases
- When settling lawsuits, negotiate a PAGA payout and it to the court for approval Labor Code section 2699(I)(2)

Questions Remain

- What about pre-suit?
- What about other employees (Pick-Up-Stix)?

Independent Contractor Update

Prop 22

- Classifies drivers for app-based rideshare and delivery companies as “independent contractors,” not “employees,” unless company:
 - Sets drivers’ hours
 - Requires acceptance of specific ride and delivery requests; or
 - Restricts working for other companies.
- Independent contractors are not covered by various state employment laws—including minimum wage, overtime, unemployment insurance, and workers’ compensation.
- However, the bill requires companies to pay certain minimum earnings, healthcare subsidies, and vehicle insurance.
- Restricts certain local regulation of app-based drivers

It was a major victory for company-sponsored ballot initiatives, and it only cost \$215,000,000.00.

Questions?



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