

SHOOK
HARRY & SACON

Employment Law Trends 2018

#MeToo Movement
The Gig Economy – Wage + Hour
California Employment Law

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#MeToo Movement: HOW TO AVOID THE HEADLINES AND CREATE A POSITIVE CULTURE

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How Has Workplace Changed?

- Discrimination and harassment laws have not changed
- No surge in claims yet
- What has changed?
 - New technology, new media climate
 - Movements aimed at eliminating stigma
 - Increased credibility for reports

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First Step:

Assess Your Company's Risk

- Some industries have more risk
- Anonymous survey of employees
- Benchmarking data of your industry

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EEOC-Identified Risk Factors

homogenous workforce	significant disparities in power among employees
minority of employees who don't conform to societal stereotypes or to the norms of the workplace	priority on customer service or client satisfaction
cultural and language differences	monotonous work or low-intensity tasks
many young employees	physical isolation
a subset of "high value" employees	tolerance or encouragement of alcohol consumption
decentralized management	occurrence of coarse social discourse outside the workplace

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Second Step:

Update Training

- Little evidence that legacy training programs have been effective
- Goals:
 - Educate re: prohibited conduct
 - Articulate culture, norms, and standards of behavior you would like to promote
 - Explain how reports should be made and investigations will be handled

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Third Step:
Institute Investigation Program

- Prompt, fair, and thorough investigations
- Confidential, if possible
- Credibility determinations must be made
- Internal or third-party investigator?
- Handle claims in arbitration?

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Fourth Step:
Punish Offenders

- Proportionate punishments are best
- Consider message sent by punishment
- Ensure no retaliation
- Confidentiality of settlements?

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Wage & Hour Trends
THE GIG ECONOMY AND
CHANGES IN STATE AND LOCAL
REGULATION

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Wage & Hour Litigation – Still on the Rise



- Exemption classification errors
- Misclassification of gig workers
- State and local law violations

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FLSA Coverage Basics



Exempt Employees

- Executive, Professional, Administrative, Sales, STEM
- Focus on task not title
- Paid salary, Not entitled to overtime pay

Non-Exempt Employees

- Must be paid minimum wage for all hours worked and overtime pay for all hours worked over 40 hours in a workweek
- Public sector may be able to offer compensatory time off in lieu of paid overtime

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New Efforts from State/Local Laws

- Federal regulatory and enforcement changes
- State and local laws bridging perceived gap
 - Minimum wage
 - Predictable scheduling
 - Salary history
 - Overtime thresholds
 - Tip pooling

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“Hours Worked” and “Off the Clock”

- Hours worked generally includes
 - Time employee must be on duty, on premises, or at specific place of work
 - Any additional time employee is allowed to work
- Off the clock rule
 - Employee performs work
 - More than *de minimis*
 - Employer knew or should have known about work

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Exceptions to FLSA Hours Worked

Two activities excepted from coverage under FLSA

- Time spent traveling to and from the place of principal activities
- Time spent on activities performed before or after principal work activities

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Mobile Devices and Off-the-Clock Availability

Allen v. City of Chicago, No. 16-1029 (7th Cir. Aug. 3, 2017)

- Off-duty police officers using BlackBerry devices for work purposes
- City had procedure to submit for time due
- Seventh Circuit held City not responsible for payment of time to officers who did not submit

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Remaining FLSA Compliant in Technology-Driven Times



- Develop compliant policy
- Implement and enforce policy
- Avoid using compensatory time off in lieu of paid overtime
- Maintain ongoing training and monitoring

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Overtime Rate Calculation for Bonus

Alvarado v. Dart Container Corp. of Ca., 4 Cal. 5th 542 (Cal. March 5, 2018)

- Employer paid attendance bonus on unpopular work days
- Cal. Supreme Court held that employers must divide compensation in pay period only by non-overtime hours worked
- Decision limited to flat sum bonuses

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The Rise of the Gig Economy

- Gig economy is comprised of
 - Independent workers paid by gig (i.e. task or project)
 - Consumers who need specific service (i.e. ride or deliver of product)
 - Companies that connect worker with consumer (often on app-based platforms)
- Temporary work arrangements
- Worker paid only for specific job



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State and Local Legislation

- Bills introduced to deem workers of "online digital marketplaces" as independent contractors
- Debating proposals for "portable" benefits for gig workers

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Gig Worker: Employee or Independent Contractor?

Lawson v. Grubhub, 15-cv-5128 (N.D. Cal. Feb. 8, 2018)

- Delivery driver for food ordering app
- Right to control manner and means of accomplishing desired result
- Plaintiff was independent contractor

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Gig Worker: Employee or Independent Contractor?

Dynamex Operations West, Inc. v. Superior Court,
4 Cal. 5th 903 (Cal. April 30, 2018)

- Courier and delivery service
- Converted all drivers to independent contractors in 2004
- Court framed decision by characterizing misclassification as harmful and unfair to workers
- Imposed “ABC Test” – worker is presumed employee

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New ABC Test in California

Dynamex Operations (Continued)

Worker is considered an employee unless hiring company establishes that the worker

- Is free from the control and direction of hiring company
- Performs work that is outside hiring company's business
- Is engaged in an independently established trade, occupation, or business of the same nature as hiring company

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California Update EMPLOYMENT CONTRACTS, PAGA CLAIMS, AND HIRING PRACTICES

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Employment Contracts

- Arbitration and Class Waivers
 - Recent Update on Validity:
 - Supreme Court holds NLRA does not bar employers requiring employees waive right to class or consolidated litigation as part of arbitration agreement. *Epic Sys. Corp. v. Lewis*, __ S.Ct. __, 2018 WL 2292444 (May 21, 2018)

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Employment Contracts

- California Pitfalls and Limits on Enforcing Individual Arbitration Agreements
 - Enforcement requires good recordkeeping
 - Limit on certain public claims and remedies
 - Statutory Rights to Public Injunctive Relief.
 - PAGA Claims.

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Employment Contracts

- Choice of Non-California Law or Venue
 - Cal. Labor Code § 925:
 - Generally, employees who reside and work primarily in California cannot be required to adjudicate claims outside California or lose protections of California law.
 - Effective as to contracts entered into, modified, or extended on/after January 1, 2017

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Update on PAGA Claims

- What is PAGA?
 - Allows “aggrieved employees” to recover penalties on behalf of the state of California
- No need to have been the subject of an alleged violation
- Actual injury is not required

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The Hiring Process

- Salary History
 - Don't ask prospective employees
 - Don't consider in offering employment or salary
- Provide a Pay Scale Upon Request
- Limitations on Criminal History

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