Bottom line

One of the biggest impacts of the new laws is going to be in the use of social media. Obviously, if your company currently has a policy requiring some disclosure of passwords or consent to viewing employees' or applicants' external social media sites, you will have to end the policy. More important, if your company has an informal practice of seeking social media information on employees or applicants, that practice may now be problematic and could cause potential liability. If your company seeks social media information anytime you conduct an internal investigation, you will have to narrow your search to make sure you're seeking only information relevant to the particular investigation. Finally, if you are considering an adverse employment action based on social media information, you will need to make sure the information was properly obtained and the action justified or you will face a heightened likelihood of litigation.

Another significant new law is the requirement for written commission agreements. Affected employers must provide each employee who is paid in whole or in part on a commission basis with a written commission agreement that satisfies the requirements of the new law.

You must also be aware of the religious dress and grooming standards under the FEHA. California employers have long known of the obligation to accommodate bona fide religious dress or grooming as part of the prohibition on religious discrimination. One of the natural tendencies of supervisors and managers when faced with religious dress issues is to take steps that may isolate or reduce the employee's contact with the public. The new law makes it clear that any isolation of an employee based on religious dress or grooming will not be tolerated. Given the more focused approach of the new protections, you should revisit any situation in which an employee has requested a religious accommodation and make sure the accommodation is consistent with the new standards.

The myriad of other laws are more focused in their application (e.g., human trafficking industries, prevailing wage jobs, and public employer health and welfare benefits). To the extent one of the new laws is applicable to your company, you should conduct a heightened review to ensure compliance. As with any new legislation, seek legal counsel if you have any questions about compliance.

The author can be reached at Sedgwick LLP in San Francisco, james.brown@sedgwicklaw.com. ✤

WAGE AND HOUR LAW

Employer prevails on reporting time and split shift claims, recovers its fees

by Joel Van Parys

The California Court of Appeal has provided guidance to employers on reporting time pay and split shift pay and when attorneys' fees will be awarded for successfully defending against such claims. The court also decided when a release signed by an employee is effective. Altogether, this case sheds light on some discrete areas of the law and provides guidance for how and when employers may obtain attorneys' fees in litigation.

Reporting time claim

California law provides that if an employee reports to work as scheduled and isn't put to work or is furnished with less than half of the scheduled day's work,

CALIFORNIA NEWS IN BRIEF

Hospital settles national origin discrimination claims. A San Joaquin Valley acute care hospital has agreed to pay $975,000 to settle a national origin discrimination lawsuit filed by a class of approximately 70 Filipino-American workers. The Delano Regional Medical Center workers claimed they endured ongoing harassment and discrimination by top-level hospital managers. The suit, filed by the Equal Employment Opportunity Commission (EEOC) and the Asian Pacific American Legal Center, contained allegations that supervisors, staff, and even volunteers were encouraged to berate and reprimand Filipino-American employees for nearly six years. According to the EEOC, staff made fun of the workers' accents and ordered them to speak English even when they already were.

Nursing home ordered to recognize union, hire previous workers. The National Labor Relations Board (NLRB) has adopted the recommendations of an administrative law judge (ALJ) and ordered the owner of Yuba Skilled Nursing Center in Yuba City to hire 50 employees it failed to hire after assuming operations of the center last year. Employees at the home had been represented by the Service Employees International Union (SEIU), United Healthcare Workers West, before it was bought by Nasaky, Inc. Under the National Labor Relations Act (NLRA), new owners of a union facility are obligated to recognize and bargain with the existing union as a successor employer, according to a statement from the NLRB. The union claimed in charges filed with the NLRB that the new owners failed to hire the longtime employees to avoid that obligation. ✤

he shall be paid for half of the scheduled day's work but in no case paid for less than two hours or more than four hours of work. In this case, employees of AirTouch claimed they were owed reporting time pay for having to attend store meetings. It was undisputed that the store meetings were scheduled, they always lasted at least half the time scheduled, and the employees were paid their regular wages for time spent attending the meetings (which were shorter than two hours long). Nonetheless, the employees claimed they were entitled to be paid for a minimum of two hours for every store meeting they had to attend, even if the meeting lasted only an hour.

The court rejected the claim, holding that California's reporting time pay law doesn't require employers to pay employees for a minimum of two hours of work every time they report to work. Rather, the focus is on whether the employee is furnished with at least half of the scheduled day's work. If a meeting is scheduled for an hour and lasts an hour (or even a half hour), the employee is entitled only to regular pay for time actually spent attending the meeting and isn't entitled to any additional reporting time pay.

Split shift pay claim

On certain occasions, the employees were required to attend a store meeting on the same day as a regular work shift. The store meeting and the sales shifts weren't back to back but were separated by a block of time. That constitutes a "split shift." Under California law, when an employee works a split shift, he is entitled to one hour of additional pay at the minimum wage in addition to the minimum wage required for that workday. The AirTouch employees claimed their employer failed to pay them the additional hour of pay when they worked split shifts. AirTouch argued that no additional pay was owed because every time the employees worked split shifts, they were paid more than the sum of minimum wage for all hours worked plus an additional hour at minimum wage.

The court agreed with AirTouch's analysis and rejected the employees' split shift claim. The employees had argued that the Wage Order simply means an employee must be paid an additional hour at his regular wage when a split shift is worked. Rejecting that argument, the court reasoned that the split shift provision refers not to "regular wages" but to "minimum wages." Moreover, the provision is contained in the "Minimum Wage" section of the Wage Order, making it clear that the regulation is directed solely at payment of minimum wages. Paying a total amount that covers the minimum wage plus an additional hour satisfies the Wage Order.

Release bars one employee's claims

In addition to providing favorable rulings on the split shift and reporting time pay requirements, the court held that one employee's claims were barred by virtue of the fact that he had previously signed a general release of claims in favor of AirTouch. Relying on Labor Code Section 206.5, the employee argued that the release couldn't bar claims for wages owed but unpaid. The court disagreed, holding that the release was valid and effective because Section 206.5 bars only a release of wages that are undisputedly owed. In this case, whether the employee was owed reporting time pay or split shift pay was disputed; therefore, the release was valid.

Court awards attorneys' fees to AirTouch

After prevailing on the merits of the case, AirTouch sought to recover its attorneys' fees. The court considered whether Labor Code Section 218.5 permits a prevailing employer to recover its attorneys' fees incurred to successfully defend reporting time and split shift pay claims. In consideration of the California Supreme Court's recent ruling on this subject in *Kirby v. Immoos*, the court held that AirTouch could recover its fees on the reporting time pay claim but not the split shift pay claim.

The court reasoned that the split shift pay claim was a minimum wage claim and was thus governed by Labor Code Section 1194, which has a one-way fee-shifting provision that doesn't allow a prevailing employer to recover its fees. However, the court held that the reporting time pay claim wasn't a minimum wage claim and therefore fell under Labor Code Section 218.5's two-way fee-shifting provision, which allows the prevailing party (whether it's the employee or the employer) to recover attorneys' fees. As such, the court held that AirTouch was entitled to attorneys' fees incurred to defend the reporting time pay claim. *Aleman v. AirTouch Cellular* (California Court of Appeal, Second Appellate District, 9/20/12).

Bottom line

While AirTouch prevailed on the reporting time claim, it's significant that the meetings at issue in this case were of a scheduled expected duration. The outcome might have been different (and a minimum of two hours' pay owed) if there was no expectation as to how long the meetings would last from which it could then be determined whether the employees "worked" at least half the scheduled time. Employers relying on this case should carefully review the reasons employees are reporting to work to determine whether it reduces the amount of reporting time pay owed. Additionally, you should carefully review any release agreements you execute with employees to ensure the language covers disputes between the parties about whether wages are due at all.

The author can be reached at Carothers DiSante & Freudenberger LLP in Sacramento, jvanparys@cdflaborlaw.com.