Compliance is Key:
2018 Mid-Year Employment Update

Presented By: Treaver Hodson &
Casey Blanas

Palmer Kazanjian
Palmer Kazanjian Wohl Hodson LLP Attorneys

Dynamex Operations West v. Superior Court

(California Supreme Court)

Facts: Delivery drivers claimed they were misclassified by Dynamex as independent contractors but were actually employees.

Holding: Established the "ABC" test, which presumes all workers are employees. Independent contractor status requires that the worker:

A. Is free from the control and direction of the hirer in connection with the performance of the work, both under contract and in fact;
B. Performs work outside the usual course of entity's business; and
C. Is engaged in an independently established trade, occupation, or business of the same nature as the work performed for the employer. (i.e. has incorporated, gotten licenses, or purchased advertisements)

Significance: It is now more difficult to classify workers as independent contractors. Courts are deciding whether the case applies retroactively.

Janus v. American Federation of State, County, and Municipal Employees, Council 31

(U.S. Supreme Court)

Facts: A public employee refused to join a public union and was therefore required to pay agency fees to the union. The employee claimed having to pay the fees violated his First Amendment speech rights.

Holding: Requiring public employees pay agency fees or other dues to public unions violates the employees' First Amendment rights unless the employees consent.

Significance: Public employees do not have to pay any fees or dues to public unions unless the employees consent.

Alvarado v. Dart Container Corp. of CA

(California Supreme Court)

Facts: Employees brought a class action suit brought alleging Dart used an incorrect formula for calculating overtime wages.

Holding: The Court determined how an employee's overtime pay rate should be calculated when the employee has earned a flat sum bonus during a single pay period. Employers are required to calculate the regular rate using only non-overtime, regular hours worked.

Significance: Applies retroactively; therefore, employers may now be liable for past practices. However, this does not address other types of bonuses such as production or piece rate bonuses.

Epic Systems Corp. v. Lewis

(U.S. Supreme Court)

Facts: Court considered whether arbitration agreements that require individualized proceedings violate the National Labor Relations Act (NLRA).

Holding: Class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act and do not violate the NLRA.

Significance: Employers can now require that employees waive their rights to class or collective class actions and require that they arbitrate their claims on an individual basis.

NOTE: *This case did not address representative actions under PAGA.*

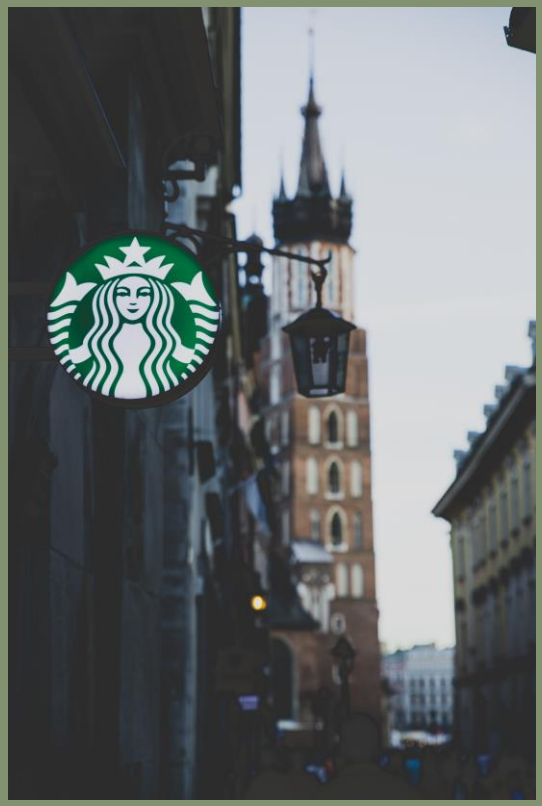
Troester v. Starbucks Corporation

(California Supreme Court)

Facts: Employee's job at Starbucks required he clock out before completing his "closing" duties. Employee claimed he needed to be paid for the off the clock work. Starbucks claimed Employee did not have to be paid under the *de minimis* exception which says that employees do not have be paid for trivial amounts of working time.

Holding: The Court determined the federal *de minimis* exception was not adopted by the California Labor Code. Further, the Court stated employers must pay employees for routinely working off the clock. However, the Court said it was not deciding if infrequent or brief off the clock time must be paid.

Significance: Employers must compensate employees for working off the clock.



Huff v. Securitas

(California Court of Appeal)

Facts: Employee brought suit alleging Labor Code violations against employees at Securitas, which did not apply to him because he was not a temporary employee.

Holding: Employees may bring suits under PAGA for Labor Code violations not personally affecting the employees bringing suit, as long as other employees experienced the violations.

Significance: Employers may see larger award amounts in PAGA suits because they will potentially be addressing even more alleged Labor Code violations.

Encino Motorcars, LLC v. Navarro

(U.S. Supreme Court)

Facts: "Service advisors" at a car dealership alleged they were non-exempt and were therefore entitled to overtime.

Holding: "Service advisors" at car dealerships are exempt. The Court rejected the narrow interpretation principle for FLSA exemptions.

Significance: Modified how overtime exemptions are generally interpreted. Because the Court rejected the narrow interpretation rule for FLSA exemptions, it could be more difficult for employees to argue that they are non-exempt.

Connor v. First Student, Inc.

(California Supreme Court)

Facts: Employer required Employee undergo a background check as part of her job. The background check notice given to the Employee complied with the Consumer Credit Reporting Agencies Act (CCRAA), but not the Investigative Consumer Reporting Agencies Act (ICRAA).

Holding: The Court held that both the CCRAA and the ICRAA applied to the background check at issue meaning both laws needed to be complied with.

Significance: Employers must comply with both the CCRAA and ICRAA for background checks looking into employee credit worthiness and character.

Regulations on National Origin and English Language Only Policies

The FEHC adopted new regulations for California effective July 2018.

"National Origin," for the purposes of discrimination, now includes, among other qualities, an individual's or ancestor's actual or perceived:

- physical, cultural, or linguistic characteristics associated with a national origin group.

Employers may not adopt an English-only policy unless

- (A) The language restriction is justified by business necessity;
- (B) The language restriction is narrowly tailored; and
- (C) The employer has notified its employees of the circumstances in which the language restriction is observed and the consequence for violations.

- **Significance:** Employers must remain careful when adopting policies that could be seen as based on national origin. Employers must be fully aware of and follow all requirements when adopting English-only policies.

AB 2282 – Clarification of the Salary History Ban Law

Background: AB 168, enacted in 2017, prohibits employers from asking applicants about salary history and relying on applicants' salary history when considering employment applications.

The New Law: AB 2282, enacted in July 2018, provides that:

- The salary history ban only applies to external applicants.
- Applicants can voluntarily disclose salary history and if so employers can rely on that information when considering employment applications.
- Employers may ask applicants about their salary expectations.

Tip Pooling

Background: In California, tips belong to employees and not to employers, but employers can mandate tip pools which distribute tips among employees.

Effective March 2018, a change in federal law now permits tip pooling with back of the house employees who are not directly engaging with customers, a change from previous California law.

Significance: Employers may now include back of the house employees, such as cooks or dishwashers, in tip pools.

NLRB Handbook Guidance

- On June 6, 2018, the NLRB General Counsel provided guidance on handbook rules in light of *The Boeing Co.*, a recent NLRB decision.
- The *Boeing* decision:
  - Set forth a new standard for evaluating workplace rules and handbook policies.
    - The NLRB will balance the rule's burden on employees' NLRA rights with the employer's right to maintain discipline and productivity when dealing with facially neutral rules.
  - Under *Boeing*, the NLRB will no longer find rules unlawful because they *could*, rather than *would*, cover protected activities.
  - Ambiguities in rules are no longer construed against the drafter.
- The memo then addresses three categories of rules.

Category 1 Rules – Generally Lawful

- Rules that:
  - Do not prohibit or interfere with employees' NLRA rights, or;
  - Any burden on NLRA rights is outweighed by business justifications.

- The memo notes that charges involving these types of rules should be dismissed.

- Category 1 rules include:
  A. Civility rules, such as rules prohibiting rude or inappropriate behavior;
  B. No photography or no recording rules;
  C. Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
  D. Disruptive behavior rules, such as rules prohibiting creating discord with coworkers;
  E. Rules protecting confidential, proprietary, and customer information or documents;
  F. Rules against defamation or misrepresentation;
  G. Rules against using employer logos or intellectual property;
  H. Rules requiring authorization to speak for the company; and
  I. Rules banning disloyalty, nepotism, or self-enrichment.

Category 2 Rules – Not Obviously Lawful or Unlawful

- Require case-by-case determinations.
  - Any determination requires analysis of whether the rule would interfere with NLRA rights.
  - If so - is that interference outweighed by legitimate justifications?
  - Often requires context.
  - Should be submitted to the NLRB's Advice Division.

- Examples of Category 2 rules include:
  A. Rules regulating use of the employer's name.
  B. Rules generally restricting speaking to the media.
  C. Rules against making false or inaccurate statements.

Category 3 Rules – Generally Unlawful

- Prohibit or limit NLRA rights and the adverse impact outweighs any justifications.

- Charges involving Category 3 rules should have complaints issued for them.

- Category 3 rules include:
  A. Confidentiality rules specifically regarding wages, benefits, or working conditions; and
  B. Rules against joining outside organizations or voting on matters concerning the employer.

Q & A