



Employer Advisory Council of Orange County, Inc.
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New Developments in Employment Law

Update 19-06

April 8, 2019

EAC Update April 2019 Employment Update By Jim Hart

Please see below for new developments in employment law during March, 2019.

1. Arbitration May Apply to Disputes that Arise Prior to Signing the Arbitration Agreement.

On March 25, 2018, in *Salgado v. Carrows Restaurants, Inc.* a California Court of Appeal found that an employee can agree to arbitrate disputes that existed before the agreement was signed and even after one party initiates a civil suit against the other. **Takeaway:** Employers should consider reviewing their arbitration agreements in light of this case and language that can apply to disputes that exist prior to agreements. For more information, please see <http://www.courts.ca.gov/opinions/documents/B285756.PDF>

2. DOL Issues Three Opinion Letters Regarding Employer Designation of FMLA Leave, Bonuses to Employee Volunteers, and Compensation of Residential Janitors.

As to the FMLA leave, the DOL opined that an employer may not delay designating leave as FMLA leave, even where the delay is to permit the employee to exhaust available paid sick or other leave prior to initiation of the FMLA-protected leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. **Takeaway:** Employers should review all three opinion letters to the extent they impact their workforces. Regarding the FMLA letter, employers should take care, particularly in the Ninth Circuit, where the court has reached a differing conclusion. For more information, please visit the <https://www.littler.com/publication-press/publication/dol-issues-three-opinion-letters-regarding-employer-designation-fmla>

3. California Supreme Court finds Payroll Service Provider Not Responsible for Accurate Documentation About Wages.

The California Supreme Court considered claims for breach of contract and negligence against a payroll provider in *Goonewardene v. ADP, LLC*, and concluded that an employee should not be viewed as a third-party beneficiary who may maintain an action against the payroll company for an alleged breach of the contract between the employer and the payroll company for payment of wages and could not sue under negligence as well. **Takeaway:** For more information, please see <http://www.courts.ca.gov/opinions/documents/S238941.PDF>

continued on next page



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Page 2 of 2

April 8, 2019

4. Arbitrability of Single Private Attorney General Act (PAGA) Claim Still In Flux. In *Zakaryan v. Men's Wearhouse, Inc.*, a California Court of Appeal recently held that although this issue is pending before our Supreme Court in *Lawson* (review granted Mar. 21, 2018, S246711), we analyze the issue differently than other courts by concluding that courts may not split a solitary PAGA claim and send it to two different fora. Accordingly, we affirm the trial court's order denying the motion to compel arbitration in this case. **Takeaway:** In determining how to handle a PAGA claim, employers should consider this new case law. For more information, please see <http://www.courts.ca.gov/opinions/documents/B289192.PDF>

If you have any questions regarding this update, please feel free to contact Jim Hart at jhart@littler.com or at (949) 705-3003.