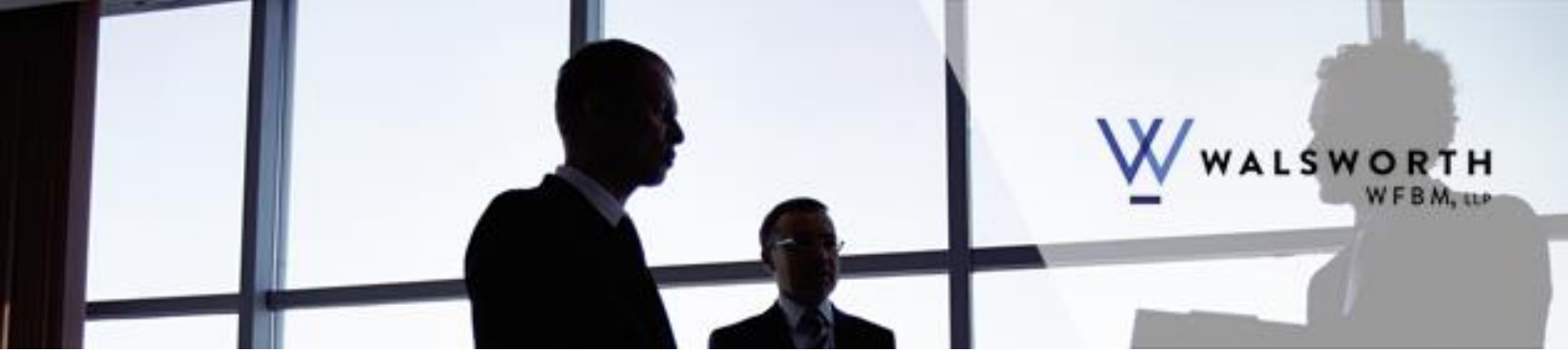


Employment Litigation

2019 Mid-Year Update

Walsworth is pleased to provide you with its mid-year update regarding employment law.

Recent Updates in Employment Law

Key Cases

- *Fort Bend County v. Davis*, 139 S.Ct. 1843 (June 3, 2019)

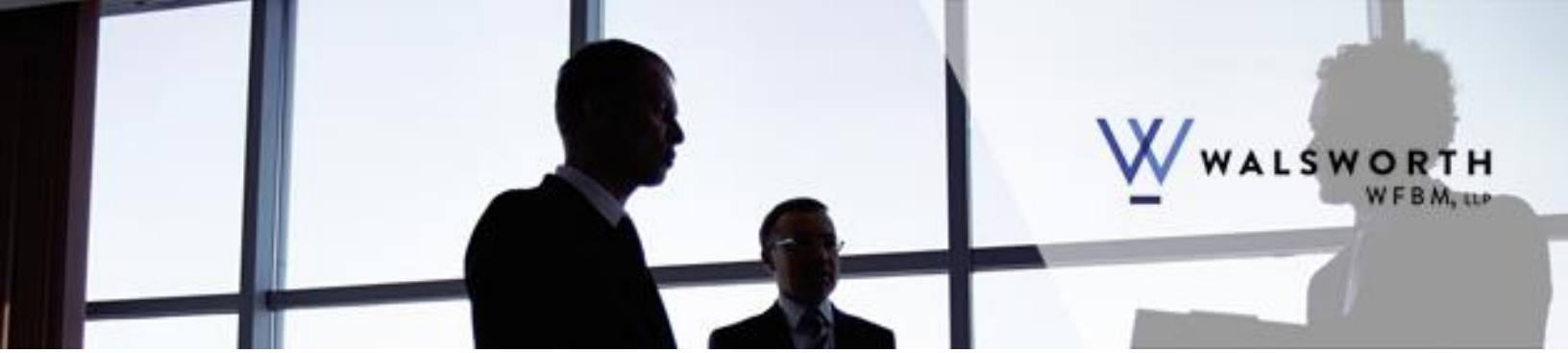
In this unanimous decision, the United States Supreme Court held that a plaintiff in an employment discrimination or harassment case need not exhaust his/her administrative remedies with the Equal Employment Opportunities Commission or a state administrative agency in order to bring an action in court for violation of Title VII of the Civil Rights Act of 1964. An employer may raise failure to exhaust administrative remedies as an affirmative defense to defeat a plaintiff's claim. However, the employer must raise such affirmative defense without delay via answer or motion to dismiss. Failure to timely raise the affirmative defense will result in a waiver of this defense.

- *Lamps Plus v. Varela*, 139 S.Ct. 1407 (April 24, 2019)

In this case, a Lamps Plus employee was tricked into disclosing tax identification information of 1,300 Lamps Plus employees. A fraudulent tax return was filed in employee Varela's name using the stolen tax identification number. Varela sued Lamps Plus on his own behalf and on behalf of a class of Lamps Plus employees whose personal information was also compromised. Lamps Plus moved to dismiss the lawsuit and compel individual arbitration based on an arbitration agreement that all employees were required to sign as a condition of employment. Varela opposed the motion to compel individual arbitration, arguing that the arbitration agreement was ambiguous as to whether it allowed class arbitration. In a five to four decision, the United States Supreme Court sided with Lamps Plus, holding that under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.

- *Vazquez v. Jan-Pro Franchising Int'l,* 923 F.3d 575 (9th Cir. May 2, 2019)

In this case, a group of janitorial franchisees sued Jan-Pro, alleging that they were improperly classified as independent contractors when, in fact, they were actually Jan-Pro employees. The District Court granted summary judgment in favor of Jan-Pro, finding, as a matter of law, that the franchisees were independent contractors. Thereafter, the California Supreme Court handed down the *Dynamex* decision that announced the new ABC test as the new standard in California for determining classification of independent contractors versus employees.



Plaintiffs appealed the District Court's order, arguing that the new ABC test should apply, and under that test, plaintiffs were clearly employees. Jan-Pro argued that the ABC test applied only to cases decided after the *Dynamex* decision and did not apply retroactively to the plaintiff's claims. Jan-Pro urged the court to apply the prior multifactor totality-of-circumstances test. The 9th Circuit Court of Appeals sided with the plaintiffs and held that the ABC test applies retroactively to cases and to the classification of independent contractors that predate the *Dynamex* decision.

- *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 243 Cal. Rptr. 3d 299 (2019)

The plaintiff included his employer's payroll processing company as a defendant in his wrongful termination lawsuit alleging he was not properly paid for hours worked. The California Supreme Court upheld the trial court's order sustaining the payroll company's demurrer without leave to amend. Even if there are errors in employees' pay or wage statements, the employer, not the payroll processing company, is solely liable to the employees. We recommend that employers insist that indemnity provisions are included in the terms of their contracts with payroll processing companies so that if the error is the fault of the payroll company, the employer has a basis to seek defense and indemnity under express indemnity principles in the event the employee sues the employer.

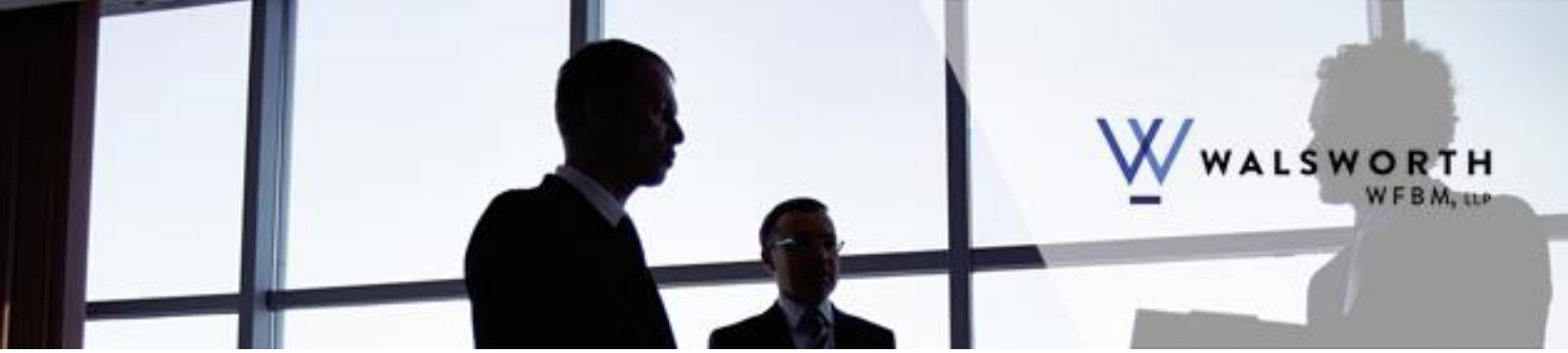
- *Furry v. East Bay Publishing, LLC,* 30 Cal. App. 5th 1072 (2018)

While this case was decided at the end of last year, we included it to highlight the importance of properly classifying employees as exempt and nonexempt, and keeping accurate records of all hours each nonexempt employee works. Here, the employee sued for unpaid overtime, rest and meal break violations, and failure to pay minimum wages, among other claims, alleging that his employer misclassified him as an exempt employee. The employer won summary judgment based on the court's finding that the plaintiff failed to produce sufficient evidence of overtime hours and meal and rest breaks that he claimed to have worked. The appellate court reversed, ruling that it is the employer's burden to produce detailed time records showing that the employee had been properly paid, and in this case, the employer failed to meet this burden. The court accepted the plaintiff's claims of unpaid work, despite evidence that the employee merely "guessed" at the number of hours he allegedly worked.

Key Legislation

- EEO-1 Component 2 Requirement

This Obama-era requirement that employers provide employee compensation information based on gender, race and national origin was tabled by the Trump administration. However, in a surprise ruling, a D.C. District Court panel revived the requirement in March of this year. The new EEO-1 Component 2 applies to government contractors with 50 or more employees and to all employers with 100 or more employees. Employers subject to the requirement must provide payroll information for the years 2017 and 2018 that shows how they paid employees of different genders, races and national origins. The purpose of the requirement is to determine whether there are pay disparities between employees of different genders, races and national origins.



According to a recent communication from the EEOC, its research contractor, NORC, will contact employers via email or U.S. Mail in early July with the procedures for completing the EEO-1 Component 2 survey, including providing log-in instructions. Employers then must report the required information between mid-July 2019 and September 30, 2019.

- California's expansion of anti-harassment training requirements

Since 2007, California employers with 50 or more employees have been required to provide at least two hours of sexual harassment training for supervisory employees every two years. SB 1343, which Governor Brown signed into law in September 2018, expanded training obligations. Under the new law, employers who employ five or more employees (including temporary and seasonal employees) must provide at least two hours of sexual harassment training to all supervisory employees and at least 1 hour of sexual harassment training to all nonsupervisory employees by January 1, 2020. Thereafter, these employers must renew such training every two years.

- Assembly Bill 1619 was passed unanimously by the California State Assembly on September 29, 2018. This bill effectively extends the statute of limitations for sexual assault from two years to 10 years after the assault occurred, or three years after the plaintiff discovered (or reasonably should have discovered) that his or her injuries resulted from an assault/attempted assault. This effectively allows more survivors of sexual violence to come forward and file a civil action against their abusers.

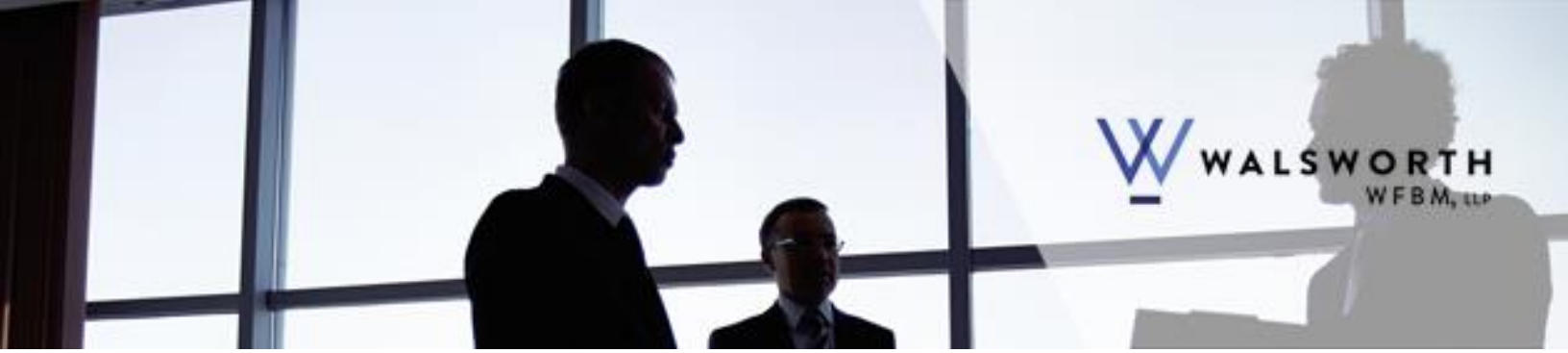
- California SB 1300, which was effective on January 1, 2019, includes five new policy pronouncements from the California Legislature regarding sexual harassment

A. In a workplace harassment lawsuit, an employee need not prove his/her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the employee did, that the harassment so altered working conditions as to make it more difficult to do his/her job.

B. A single incident of harassing conduct is sufficient to create a triable issue necessary to defeat a summary judgment motion regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the employee's work performance or created an intimidating, hostile or offensive working environment.

C. The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecision-maker, may be relevant, circumstantial evidence of discrimination. In this regard, the legislature proclaimed its rejection of the "stray remarks" doctrine.

D. The legal standard for sexual harassment should not vary between types of workplaces. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past.



E. Harassment cases are rarely appropriate for disposition on summary judgment. These policy proclamations are not binding precedent on courts, nor do they change existing law. However, we have already seen plaintiffs' lawyers using them in an effort to defeat employers' summary judgment motions. It is likely that these policy statements will give courts pause in considering employers' dispositive motions and may make the already high bar to obtain summary judgment in harassment cases that much higher.

- California SB 1300 also states that employers may be liable for the conduct of nonemployees

Specially, employers may be liable for acts of harassment (sexual, racial or based on any other protected class) by nonemployees if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

- California SB 1300 prohibits an employer from requiring an employee to sign a release of claim or right or a non-disparagement agreement in exchange for a raise or bonus or as a condition of employment or continued employment

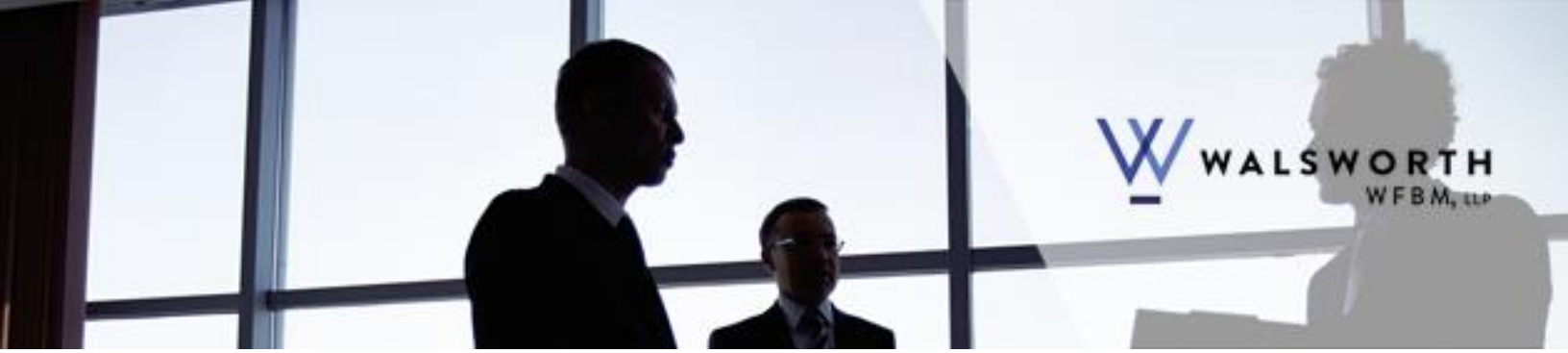
However, the law expressly exempts from this prohibition negotiated settlement agreements to resolve an underlying claim that the employee filed in court, arbitration, with an administrative agency, or through the employer's internal complaint procedure. In order for this exemption to apply, the settlement agreement must be voluntary, provide consideration of value to the employee and the employee must have had an opportunity to consult with counsel.

- California's limits on employers' use of statutory offers to compromise

Code of Civil Procedure Section 998 ("Section 998") states that if a plaintiff rejects a settlement offer made by a defendant, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his post-offer costs and shall pay the defendant's costs from the time of the offer. (The statute includes a similar provision addressing a defendant's rejection of a plaintiff's Section 998 offer.) SB 1300 amends Section 998 to state that an employer that succeeds in defeating a claim for discrimination, harassment or retaliation under the California Fair Employment and Housing Act ("FEHA") may not recover its costs or expert fees even if the employer made, and the plaintiff rejected, a statutory offer to compromise — unless the court finds the plaintiff's lawsuit was "frivolous, unreasonable or groundless when brought or the plaintiff continued to litigate after it clearly became so." Prior to enactment of this amendment, California case law required a court to find the plaintiff's lawsuit to be "frivolous" in order for Section 998 to apply. The amendment applies only to prevailing defendants seeking recovery of fees and costs. Plaintiffs may recover costs, attorneys' fees and expert witness fees as a prevailing party to a FEHA claim.

New York Passes Country's Toughest Anti-Harassment and Discrimination Laws

In June 2019, New York passed a tough new law governing workplace harassment and discrimination, which include the following key provisions: (1) Under the standard of proof established by the United States Supreme Court, a plaintiff must prove that



the harassment is sufficiently "severe and pervasive" to alter the conditions of employment and create an abusive work environment. The New York law eliminates the "severe and pervasive" standard, and requires that the plaintiff prove only that he/she was subjected to "inferior terms, conditions or privileges of employment because of his/her membership in a protected category." This is a significantly lower burden of proof than the severe and pervasive standard. (2) The law eliminates the employer's affirmative defense that the employee did not complain to the employer about the conduct in accordance with the employer's established complaint procedure. (3) The law provides a three-year statute of limitations for harassment lawsuits. (4) The law prohibits enforcement of mandatory arbitration agreements for all claims for harassment and discrimination. (5) The law prohibits the use of confidentiality provisions in settlement agreements relating to discrimination and harassment claims unless they are required by the plaintiff.

We expect other states may view the New York law as a template to reform their own harassment and discrimination laws in the future.

- The NLRB recently released several new advice memoranda, including the following:

A. Employer's policy prohibiting employees from posting critical or negative information on social media about the employer violated the National Labor Relations Act.

B. Employer's confidentiality policy that defined confidential information as "all information gathered by, retained or generated by the company" violated the National Labor Relations Act. Such a broad definition necessarily includes employees' working conditions and pay, which employees have a right to discuss and disclose.

C. Employer may not prohibit employees from using their personal cell phones and mobile devices while on breaks during the work day. However, employer may ban employees from using company-issued devices to post on social media.

NLRB advice memoranda are not binding precedent. However, they provide employers with guidance on these issues and reflect how the NLRB may rule in the future.

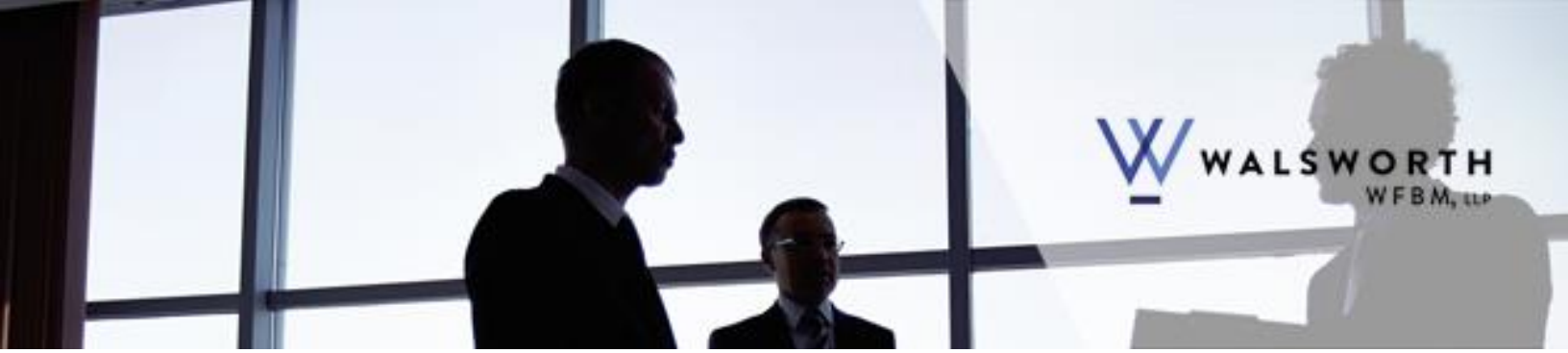
Pending Legislation

- California Assembly Bill 5

If passed, this law would codify the California Supreme Court *Dynamex* decision and require that the "ABC test" be used to determine whether a worker is properly classified as an independent contractor or an employee. The current version of the bill includes some exceptions for certain white collar professionals, including licensed insurance brokers, healthcare professionals, financial advisors and securities broker-dealers. The common law multifactor totality-of-circumstances standard would apply to these categories of exempted workers. The bill passed the Assembly in a 59 to 15 vote and is currently under consideration in the Senate Labor Public Employment and Retirement Committee.

- Elimination of arbitration agreements as condition of employment (California Assembly Bill 51)

California and other "blue states" are



introducing bills written to legislate around recent U.S. Supreme Court decisions favoring arbitration of employment disputes, including last year's *Epic Systems* case and this year's *Lamps Plus* decision. However, these bills, if passed, will meet legal challenges that they preempted by the Federal Arbitration Act. Governor Brown vetoed a similar bill last year based on the belief that such legal challenges would be successful. The most recent bill passed the California Assembly in a 47 to 20 vote and is now pending before the Senate Labor, Public Employment and Retirement Committee. In addition, there is a similar bill pending in the U.S. House of Representatives, but it is unlikely that it will pass the Republican-controlled Senate.

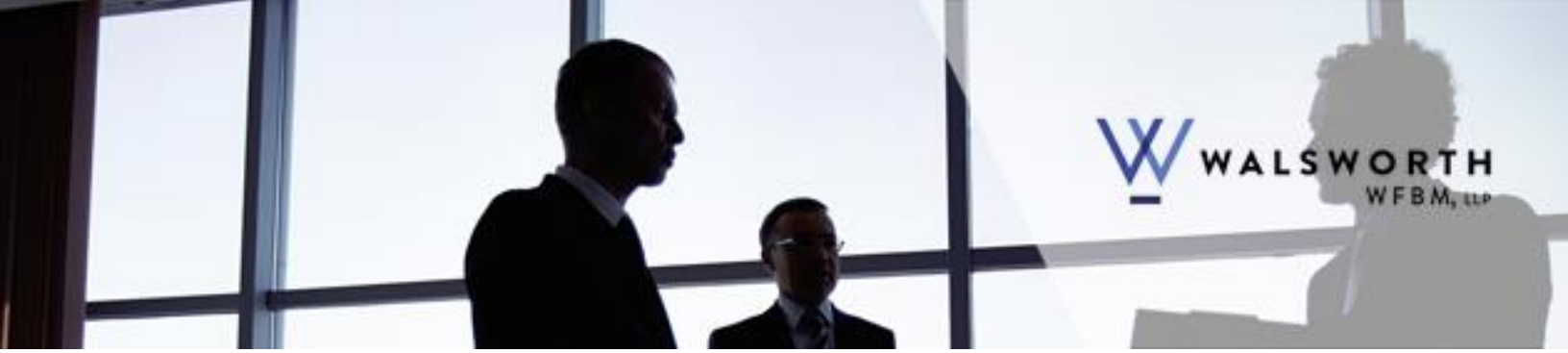
- Exempting employees from California Consumer Privacy Act

The California Consumer Privacy Act ("CCPA") is a sweeping privacy protection law designed to safeguard consumers from data breaches. The law requires businesses to disclose that they collect personal information regarding consumers, and allows consumers to request information about the types of data being collected, the methods used for collection, the purpose for the collection and whether the data is shared with others. The act further allows consumers to require businesses to delete their personal data. All businesses covered under the act must begin to comply by January 1, 2020.

AB 25 would amend the CCPA to clarify that the law does not apply to personal information of job applicants, employees, agents of a business or contractors ("a natural person providing services to a business pursuant to a written contract") provided that the individual's personal information is collected and used by the business solely in that context. This amendment passed the California Assembly in a 61 to 0 vote and is now being considered by the Senate Judiciary Committee.

- United States Department of Labor White Collar Exemption Rule

Under the Federal Labor Standards Act ("FLSA"), in order to qualify for a white collar exemption to the federal overtime rules, the employee's position must meet the "salary test" and the "duties test." The salary test presently requires workers to make at least $23,660 on an annual basis to be exempt from overtime. In 2016, the Obama administration proposed an increase in the salary test to $47,476 annually. Just weeks before it was to become law, a Texas judge issued an injunction barring the rule from going to effect. The Labor Department is now proposing to formally rescind the 2016 rule and adopt a new rule that: (1) raises the salary threshold to $679 per week ($35,308 per year); (2) allows employers to include "certain nondiscretionary bonuses and incentive payments" as up to 10% of the new $679 per week salary threshold; and (3) raises the total annual compensation requirement for highly compensated employees — which are subject to a minimal duties test — from $100,000 to $147,414. The proposed rule makes no changes to the duties test for executive, administrative and professional employees. The department intends to propose updates to the salary levels every four years. These new rules could take effect in early 2020, but are still under debate; competing bills, including one that would reinstate the 2016 Obama rule, are currently being considered. It is important to note that some state laws require a higher salary test for a white collar exemption to apply. For example, currently



in California, to qualify as exempt, an employee must make an annual salary of at least $49,920 for employers with more than 25 employees and $45,760 for employers with 25 or fewer employees. Also, under California law, there is no "highly compensated employee" exemption. Since these state laws are more protective of California employees than the current or proposed new federal laws, employers must comply with the state laws.

- Extension of Statute of Limitations for Fair Employment & Housing Act ("FEHA") Lawsuits

If passed, California Assembly Bill 9 would extend the statute of limitations for a lawsuit for discrimination, harassment or retaliation in violation of the FEHA from one year to three years. The bill passed the California Assembly in a 53 to five vote and is currently pending before the Senate.

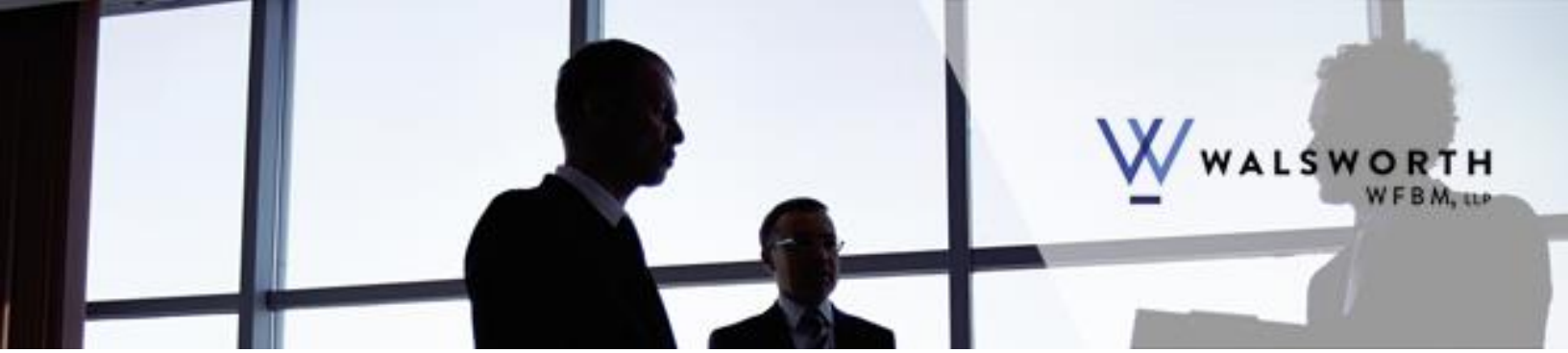
- Marijuana in the Workplace

Marijuana use is still illegal under federal law, but a growing number of states have legalized it for medical and recreational use. Currently, 33 states and the District of Columbia allow medical marijuana use. Eleven states and the District of Columbia allow recreational marijuana use. Governor Pritzker of Illinois just signed a law last week legalizing marijuana for recreational use in that state, effective January 1, 2020 (the state previously legalized medical marijuana). Clearly these laws create issues in the workplace. Courts in several states have ruled that employers are not obligated to accommodate employees who have been prescribed medical marijuana to treat disabilities and medical conditions. These states include California, Colorado, Michigan, Montana, New Jersey, New Mexico, Oregon and Washington. However, the current trend is for states to provide protection to workers who are prescribed medical marijuana and use it during off-duty hours. States where courts or state legislatures have upheld such worker protections include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island and West Virginia. These laws generally include exceptions for employees in certain safety-sensitive positions and federally regulated positions. As more and more states legalize the use of marijuana, we expect to see legislation and court opinions in more states that prohibit employers from discriminating against employees' off-duty use of marijuana and require employers to accommodate marijuana use for medical reasons. For example, last year the California Legislature considered such legislation. While the bill failed, we expect the issue to be raised again in the near future. However, despite these protections, we believe the law will continue to allow employers to prohibit employees from being under the influence of marijuana during work hours.

Administrative Filing Trends

- EEOC 2018 Complaint Filing Statistics

Consistent with recent years, there were more complaints alleging retaliation than any other category of grievance. In 2018, there were 39,469 retaliation complaints, compared to 41,097 retaliation complaints in 2017. Sex-based discrimination and pregnancy discrimination complaints were the next-highest category, with 27,445 such complaints filed in 2018, compared to 28,779 in 2017. In 2018, there were 13,055 sexual harassment complaints filed, versus 12,428 filed in 2017. Overall, EEOC filings were down in 2018, with 76,418 total EEOC



complaints versus 84,254 in 2017.

- California Department of Fair Employment & Housing ("DFEH") 2018

Complaint filing statistics are not yet available. We expect the DFEH to publish its 2018 data by the end of August.

Notable Verdicts

- *Chastity Jones v. Alki David*

$11 million plaintiff's verdict in sexual harassment and battery jury trial. The Plaintiff claimed that David, a renowned hologram creator, inappropriately touched her and showed her pornographic material on her work computer. In addition, plaintiff claimed that David brought a male stripper into the workplace to celebrate another employee's birthday and that plaintiff found this to be offensive. A Los Angeles jury determined that plaintiff was subjected to sexual harassment and battery. In addition, it found that plaintiff was fired for rebuffing David's sexual advances. The jury awarded $3.1 million in compensatory damages, including lost wages, medical expenses and emotional distress, and $8 million in punitive damages. During the trial, David insulted, swore and screamed at plaintiff's lawyer both during her opening statement and her cross-examination of David. His behavior during cross-examination was so outrageous that the bailiff removed him from the courtroom.

- *Meadowcroft and Brown v. Keyways Vineyard*

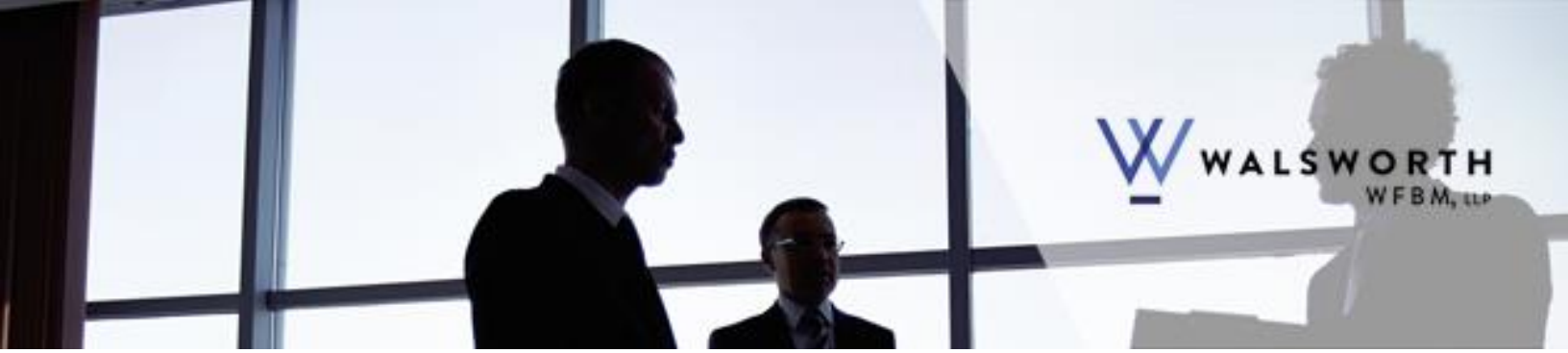
$11 million plaintiff's verdict in sexual harassment jury trial. The Plaintiffs alleged that their supervisor inappropriately touched them, used sexually explicit language and gestures and was drunk at work. They also alleged that the supervisor offered one of the plaintiffs a management position if she had sex with him. Plaintiffs claimed that after they complained about the supervisor's conduct, their employer removed them from the work schedule. They sued Keyways Vineyard for retaliation, sexual harassment and failure to prevent sexual harassment. A Los Angeles jury found the women had been subjected to unlawful harassment and awarded each plaintiff $1 million for past emotional distress, $1.5 million for future emotional distress and $3 million in punitive damages.

- *Bernstein v. Virgin America, Inc.*

$77 million plaintiff's verdict in wage-and-hour court trial. Plaintiffs were a class of Virgin America flight attendants. They alleged various California Labor Code violations, including failure to pay overtime and minimum wage, failure to provide rest and meal breaks, and failure to pay for training time, and sought penalties pursuant to the California Private Attorney General Act. U.S. District Court Judge Jon Tigar in the Northern District of California awarded $77 million in damages, penalties and interest. The court ruled that the California Labor Code applied to all work performed in California and to situations where employment policies were made by Virgin during the time its headquarters were located in California.

- *Hadsell v. City of Baldwin Park*

$7 million plaintiff's verdict in sexual harassment, discrimination and retaliation jury trial. Plaintiff was the police chief for the City of Baldwin Park. She alleged that during her tenure, she was harassed by male officers, and was undermined by a member of the city council who refused to refer to her as chief of police and told her



subordinates that a woman could not handle the job. Ultimately, she was terminated without cause. She sued the city for gender discrimination, harassment and retaliation, and alleged that she was paid less than her male replacement. A Los Angeles jury found in plaintiff's favor after deliberating for less than a day.

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About Walsworth

Walsworth was founded in 1989 with a commitment to establish a law firm focused on working collaboratively with clients to meet their unique objectives. The firm has since grown to more than 60 attorneys with offices in Orange, Los Angeles, San Francisco and Seattle, and is known for excellence in litigation and transactional matters. We are equally distinct in our long-standing commitment to diversity, which is recognized through our certification as a Women's Business Enterprise (WBE) by the Women's Business Enterprise National Council and the California Public Utilities Commission, and we are proud to be the largest certified WBE law firm in the United States. Walsworth is also a National Association of Minority and Women Owned Law Firms (NAMWOLF) member, the largest in California and the third-largest nationwide. For more information, visit www.wfbm.com.