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Employment Law Bulletin

October 2018 - Special Halloween Edition

5 Scary Employment Issues Currently Haunting Employers

Over the last year, we have reported on a number of employment law issues that we anticipated would affect our clients in a substantial way. As it turns out, our predictions came true and our clients have been faced with attempting to navigate the frustrating labyrinth of legislative rules and court decisions that impact their daily business decisions. We have no doubt that these employment law issues are keeping employers awake at night, which made us think that the Halloween season would be a perfect time to touch on the "scariest" issues and let you know we are here to help alleviate your nightmares.

1. **Negative information discovered from criminal background checks and/or Megan's Law website.** Employers are continuing to struggle with what to do after receiving a post-offer criminal background check that contains information regarding a criminal conviction that is unseemly in nature, but otherwise has nothing to do with the job duties of the position. Other common situations involve another employee's discovery of criminal history information or information obtained from the Megan's Law website. The arduous analysis and notice process required by the California Labor Code, combined with the serious exposure to a discrimination claim by the applicant turned away based on a conviction, has placed employers in a bind that begs the question, "Do you really want to know an employee's criminal history if you cannot legally do anything about it?" For more information about this issue, see our November 2017 Employment Law Bulletin.

2. **Increased difficulty in classifying a worker as an independent contractor.** As many employers are finding out, the test the Supreme Court outlined earlier this year in the *Dynamex* decision has made it nearly impossible to legitimately classify a worker as an independent contractor. A worker is not an independent contractor unless the hiring party can prove that the worker (1) is free from the hiring party's control and direction in connection with the performance of the work; AND (2) performs work that is outside the usual course of the hiring entity's business;

AND (3) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. This conundrum has presented business owners with the difficult problem of figuring out how to continue operating a business efficiently and profitably while at the same time staying within the confines of the law. For more information about this issue, see our June 2018 Employment Law Bulletin.

3. **Rejection of the *De Minimis* Doctrine in California.** The California Supreme Court rejected the federal "*De Minimus* Doctrine," ruling that employers must track and pay for the minimal amounts of time employees spend performing work off-the-clock either before or after an employee's shift. The court made clear that no time spent performing work is too minor or trivial to be counted, which opened the door for a plethora of wage and hour claims where employees perform miniscule tasks before clocking in or after clocking out. Employers should be taking a hard look at their timekeeping practices and ensuring that their employees are paid for each minute worked to avoid liability for wage claims.

4. **Protecting employee records and employer premises from an unlawful search.** Beginning this year, employers are now under a new obligation to ensure that immigration enforcement agents are prevented from entering the non-public areas of the employer's facilities without a valid judicial search warrant. The new law also places the burden on the employer to protect employee documents from inspection before giving notice to the employees of the request. The notice process is no easy task and involves specific steps and time-sensitive deadlines in order to avoid fines and liability. The fallout of this legislation is that employers must educate themselves and create policies and procedures for how to deal with law enforcement in the workplace, which is no easy task. For more information about this issue, see our December 2017 Employment Law Bulletin.

5. **Final pay accuracy and waiting time penalties.** Employers continue to encounter difficulty in complying with California's final pay rules. Timing of the payment, the calculation of accrued and unused vacation, and clerical accuracy are all important factors to consider before cutting the final paycheck. As we saw in the *Nishiki* case, the California Court of Appeals made clear that even small clerical errors in an employee's final paycheck can lead to thousands of dollars in waiting time penalties. Taking the time to get it right is not only extremely important, it is necessary to prevent an award of damages that might seriously impair your business. For more information about this issue, see our September 2017 Employment Law Bulletin.

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SMT's employment attorneys can provide your company with employment policies, forms and employee disciplinary documentation in Spanish. Providing such important information to employees in the language they understand is critical to employee performance, providing a welcoming diverse work environment, and protecting your company against employment claims. Contact an SMT attorney today to get started.

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