THE PERFORMANCE REVIEW – CALIFORNIA LABOR & EMPLOYMENT PODCAST – EPISODE 14

GREENBERG TRAURIG, LLP

Speaker 1 (00:06):

Welcome to the Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers with host Ryan Bykerk and Philip Person.

Philip Person (00:18):

Welcome back to the Performance Review. It's our last episode for the year. We plan to have fun, so much fun that we decided to do it in person. Ryan and I, we're going to have a good time. I promise you, this is just water in here but we'll have a good time today.

Philip Person (00:34):

We're going to talk about some of the major cases that happened in 2021. 2021 has been a crazy year. We're also going to talk about some of the upcoming legislation that's going to come out in 2022. So, this should be very informative. But the big elephant in the room before we get started, as I said, we're doing it here. And we're not in Ryan's garage, right?

Ryan Bykerk (00:55):

We are not in my garage. Yes, we do always dress like this when we do the podcasts but we're not in my garage this time. So, it's very exciting.

Philip Person (01:00):

There we go. There we go. There's no photo evidence of us dressing like this in your garage.

Ryan Bykerk (01:06):

There's no photo evidence disproving it.

Philip Person (01:08):

Okay. There we go.

Ryan Bykerk (01:10):

All right. Well, let's begin actually. I know this is about law. And we'll talk a lot about the law. But let's at least start by talking about just some big events that happened in 2021 because there were a lot of them. And some of them impacted a lot. Some of them maybe didn't. Some of them I just find personally interesting and I will force you to listen to it because we're talking about it.

Ryan Bykerk (01:29):

So, 2021 just it started. Really right out of the gates, we had all kinds of interesting things happen. Just in January of this year, we had the Capitol riot which, of course, was a big deal. We had the inauguration of President Biden as our 46th president. We had Kamala Harris who is the first female and Black vice president of the United States, obviously a huge deal.

Ryan Bykerk (01:51):

Moving into February, we had Tom Brady in the Tampa Bay Buccaneers won the Super Bowl.

Philip Person (01:55):

We could skip.

Ryan Bykerk (01:56):

I was going to say I'm fine on that because we don't want to be divisive, but they did win the Super Bowl. We talked a lot last year about COVID. Obviously, that continued to be relevant this year. But we also had the vaccines rollout this year which, of course, was a big deal.

Ryan Bykerk (02:12):

And even just now, we're talking just before we started about the Omicron variant which is going to make waves here at the end of 2021 and, of course, probably push us into 2022. And incidentally, it sounds like the bad guy in the Transformers movie. So, we'll see what that does for us in 2022.

Ryan Bykerk (02:33):

Microsoft finally pulled the plug on Internet Explorer in 2021. Derek Chauvin was found guilty on all three charges related to George Floyd's death and received 22-and-a-half-year sentence. We had the Tokyo Olympics. And this one is my personal favorite. It has nothing to do with the law. But on April 19, the Ingenuity Helicopter flew on Mars which I told my 10-year-old and he thought that was amazing.

Philip Person (03:01):

I was going to ask you why he found that so important.

Ryan Bykerk (03:06):

I mean, so we flew a helicopter all the way and have the first powered flight on another planet which is only 118 years after we did it for the first time here on Earth. So, I thought that was quite something. It has nothing to do with anything we're going to talk about tonight. But I just thought it'd be valuable for everyone to know.

Ryan Bykerk (03:22):

And of course this year, we are very proud that GT, among the 2,100 attorneys, we had a team of people who freed Brittany this year which has been great.

Philip Person (03:31):

Matt Rosengart.

Ryan Bykerk (03:32):

Yup. And Lisa McCurdy and Matt Gershman and Scott Bertzyk, again, a great team of folks worked together on that. So, we've been very proud of that.

Philip Person (03:40):

There we go. There we go.

Ryan Bykerk (03:41):

A little positive press for GT. So, that was 2021, just sort of generally what happened. But as Philip mentioned, we're going to start by talking about a case law update. And then we're going to move into talking about legislative update and go from there.

Ryan Bykerk (03:57):

So, let's start with the cases. We're not going to touch on all of even the major cases, we're just going to discuss a handful of them. We're going to start five. And the first one we're going to talk about is the Donohue case, Donohue vs AMN Services, LLC.

Ryan Bykerk (04:11):

We're going to just jump straight to the holding just so we can start with that. There really were two major holdings in that case. The first one was that employers can't engage in the practice of rounding time punches in a meal period context. That's a pretty straightforward holding.

Philip Person (04:28):

It's pretty straightforward. I don't think that's anything groundbreaking there. Just employers look out for the rounding issues.

Ryan Bykerk (04:36):

Exactly. So, after that case, look at your rounding policy, figure out what it's doing and make sure you're compliant there.

Ryan Bykerk (04:42):

The second one is way more interesting. And that is the rebuttable presumption of meal period violations which will now apply anytime you look at the time records and it shows either a late, short or missed meal period.

Philip Person (04:54):

Yeah. And that's probably a shift or a new expansion on a well-known in seminal case of Brinker, right?

Ryan Bykerk (05:02):

Right. Yeah. And Brinker in 2012 deals with exactly this issue. And it holds that employers have to provide but not police meal breaks, which is a really important distinction. You have to make them available, but employers don't have to require employees to then take them.

Ryan Bykerk (05:20):

So an employee could, under Brinker, decide, "Hey, I know it's my meal period time. I know I've been given this 30 minutes but I'm going to decide to work through it for whatever reason." Maybe they want to get paid for those 30 minutes. I don't know. There could be any number of reasons.

Ryan Bykerk (05:32):

And so, in Brinker, the question of why a meal period was not taken was really important as it was very relevant. And for that reason, the majority, in Brinker, did not sign on to the concurring opinion by

Justice Werdegar where she proposed that there should be a rebuttable presumption. The majority doesn't adopt that because that why inquiry I think is so important.

Philip Person (05:57):

Yeah. It's a big inquiry. The why you take a meal break or why you skip a meal period. As Ryan talked about, I could be provided the opportunity to take meal break but I'm out and I just want to skip that because you guys have lunch available. I'm just going to take the lunch to do my work here, whatever it is, or some other type of swag.

Philip Person (06:22):

It could be you guys are giving out pagers which I keep going back to these pagers because our tech team told us to turn off the pagers before we got on here.

Ryan Bykerk (06:30):

Which we did.

Philip Person (06:31):

Which we did. But there's various reasons but it is the why. It's very individualistic in why we have to look at it on an individual case-by-case basis.

Ryan Bykerk (06:41):

Right. So justice Werdegar proposes that in her concurrence. She's joined by one other justice which is Justice Liu. And Justice Liu ends up writing the Donohue majority opinion. So Donohue changes course and notwithstanding Brinker ends up holding that a rebuttable presumption of meal period violations is going to apply if the time records show a facially noncompliant meal period.

Ryan Bykerk (07:07):

So, what are the major takeaways? There's probably many of them. Let's just talk about a couple of them. One of them is that the opinion itself suggests that employers can consider using drop-down menus. So, we've seen this as Wage and Hour Law in California becomes more complex and varied.

Ryan Bykerk (07:25):

You see employers using technological solutions including attestations on time clocks, drop-down menus that may be explain, "Hey, if you didn't get a meal period, you can explain why." And so, the opinion actually suggests that as one of the potential takeaways.

Philip Person (07:41):

And that goes exactly to it is that we're still asking the question of why. It's the attestation whether we have that drop-down menu which is specifically discussed in Donohue, but there may be other variations but that's something that employers are probably going to start thinking about if they haven't done so already to make sure they have those drop-down menus.

Philip Person (07:59):

Why did you miss your meal period? Yes, I had to go get my pager fixed. I'm going to keep doing this.

Ryan Bykerk (08:05):

We shouldn't keep coming back.

Philip Person (08:07):

Why do I keep running with this? I had to get my pager fixed or something like that. But if you have that drop-down menu and that reason, that explanation, you can have that attestation that it was really your own volition that you chose to miss the meal period.

Ryan Bykerk (08:19):

Yeah. The second thing it does in this opinion is for the first time it holds that the question of why a meal period is not taken is a question of liability. And so, those of you who could practice in the ways in our spaces particularly in the class space are already two steps ahead of me on that. If it's a question of liability as opposed to a mere question of damages, that affects class certification.

Ryan Bykerk (08:44):

So, by casting the question as one of liability, now, there's a ton of individualized inquiries that should have to be made at the class certification stage. And so, this is really the first case that deals with that.

Philip Person (08:56):

And it certainly is an issue that comes up all the time is those who actually practice in the space, they know that a lot of times, a plaintiff's counsel is going to try to push that in, "It's not an issue of liability, it's an issue of damages."

Philip Person (09:08):

So here now with it being expressly an issue of liability, now we have a question, "Can you certify that class?"

Ryan Bykerk (09:16):

Right, because the court will overlook, in some cases, an individualized dispute over damages but not really so with liability for example. And then I think really the last one, at least the last one we're going to talk about here is the opinion states that the rebuttable presumption of a violation can be overcome by, and this is a quote, "presenting evidence the employees were compensated for noncompliant meal periods."

Ryan Bykerk (09:41):

This one's pretty important. This one's pretty important because it's never been particularly clear whether the payment of a meal period violation eliminates underlying liability. That's been argued. It's been argued both ways. But this is an opinion that seems to make pretty clear.

Ryan Bykerk (09:56):

Look, once you've paid it, that eliminates liability. And at least even arguably under PAGA, I would say that violation is no longer at issue. And so, that's important. I think that's something we'll see play out as the opinion becomes more part of the mainstream, but an important thing to find in this Donohue opinion.

Philip Person (10:17):

Tag me in. I'm next. Well, the next case we want to talk about is the Bernstein vs. Virgin America case. It was a Ninth Circuit case, pretty huge case dealing with PAGA. The main takeaway here is employers are not subject to heightened penalties for subsequent violations under PAGA until they are notified by a California labor commissioner or the California Court on that issue.

Philip Person (10:42):

Before this case, you would have plaintiff's counsel always saying, "Okay, we would look at the first violation, the initial violation in 2000 and we would look at the subsequent violations. In spite you not being on notice, we're going to tack in on as a $200 penalty. So, that case changed the course in the negotiation of cases going forward again with PAGA.

Philip Person (11:07):

But let's talk a little bit about the facts on what happened in that case. So in that case, that was a place where California flight-based flight attendants, they filed a wage-and-hour class action, had the whole kit and caboodle. And they also included PAGA claims in there. They sought the penalties. Among other things, they argued that it was subject to heightened penalties for subsequent violations under PAGA as we talked about.

Philip Person (11:34):

The district court rejected those arguments and found that the defendant violated the labor code and was awarded penalties for initial and subsequent violations under that labor code. So, it went to the Ninth Circuit. They held that. The district court erred in awarding the heightened penalties for the subsequent PAGA violations.

Philip Person (11:56):

It reasoned that the defendant was not notified by the labor commissioner or any court. And it was subject to California Labor Code until the district court partially granted the MSJ, the motion for summary judgment, there. Prior to that, defendant cannot be presumed to be aware that its conduct was in violation, and therefore the subsequent penalties.

Ryan Bykerk (12:23):

Before this, we had seen a lot of different approaches to initial and subsequent, right?

Philip Person (12:27):

Yeah.

Ryan Bykerk (12:28):

I mean, there were some I think courts who just said like, "Initial just means the first one. Subsequent just means everything that follows." And I think there were other ones that dealt with maybe the timing of receiving the PAGA notice. I mean, cases really were all over the boards on this issue.

Philip Person (12:44):

And how many times have you been in mediation and you've made this argument? You're on one side and the plaintiff's counsel on the other side. And then, lo and behold, as definite as the second coming up, they're going to argue, "No, the subsequent violation was that subsequent pay period. As soon as we hit that second pay period, I get the heightened penalties for the subsequent violation."

Philip Person (13:05):

And it's been going back and forth. You don't get to say this too often in California. And you don't get to say this too often with the Ninth Circuit. But we have a case that is supporting our position. And we get to follow up with them and say, "Look to Bernstein."

Philip Person (13:20):

So, the practical implications here, we talked about. They've been long split. But then, we have this Ninth Circuit Court opinion in Bernstein that we can point to. But please keep in mind that we still don't have a California Supreme Court opinion. So, it's a victory. But still stay tuned and get your popcorn ready. And if stuff comes up, you can tune into the Performance Review or check your bit.

Ryan Bykerk (13:45):

Yes, exactly. Oh, my goodness.

Philip Person (13:47):

That's the last [Beaver 00:13:48] joke. It's the last Beaver joke.

Ryan Bykerk (13:49):

No, fill up your commitment to the Beaver joke, guys. I appreciate it.

Philip Person (13:52):

And I wouldn't be doing it justice if I didn't say her name was Elizabeth. She can be found at [inaudible 00:13:57].

Ryan Bykerk (14:00):

No, it is. I mean, maybe we'll see something else on this in the future. But I mean, this is one of the frustrations because with that you come in to a mediation. And if you'll calculate it based on the initial penalties, it's $100. And if it's subsequent, it's 200. So you're talking about a 2x gap.

Philip Person (14:18):

Yeah.

Ryan Bykerk (14:18):

Or close to it.

Philip Person (14:19):

Close to it.

Ryan Bykerk (14:20):

So, yeah, this case hopefully provides something.

Philip Person (14:24):

Look, going into any type of mediation or any type of settlement conference dealing with PAGAs, the biggest issue is, "Are we doing the same math here? Are we calculating this?" So hopefully, this Bernstein case will at least get people calculating the penalties of initial and subsequent penalties in the same manner.

Ryan Bykerk (14:42):

Right. All right, so let's talk about the Ferra case. And this one, I mean, the main takeaway from the Ferra case is really pretty simple. Meal and rest break period premium payments under Section 226.7 have to be paid at the regular rate of pay use for overtime. This is something a lot has been unclear on for a very long time.

Ryan Bykerk (15:03):

And I should be clear, the regular rate of pay use for overtime as opposed to a base hourly rate.

Philip Person (15:07):

Correct.

Ryan Bykerk (15:08):

And that is really what this case was all about. So, at the trial court level, they looked at language in Section 226.7 that differs a little bit. The Section 226.7 which, man, that's the last time I'm going to try and say that one, but says that these premium payments have to be paid at the regular rate of compensation which, of course, is a little different from the regular rate of pay. And the question is, "Well, does that matter?"

Philip Person (15:37):

That was the entire case there, right?

Ryan Bykerk (15:39):

That was the case.

Philip Person (15:40):

It is really interpreting what regular rate of compensation meant. Did it mean base pay? Or did it mean regular rate of pay?

Ryan Bykerk (15:48):

Yeah. And the trial court said, "Look, the legislature knows what it's doing. It meant something different when it said regular rate of compensation as opposed to regular rate of pay," and held that base rate was acceptable for payment of these penalties under the code section I've stumbled over six times.

Ryan Bykerk (16:05):

The Court of Appeal agreed with the trial court. But then when it went to the Supreme Court, the Supreme Court ended up reversing. It found that the term regular rate of compensation was facially ambiguous and then it engaged in a really lengthy discussion and concluded that the legislature's original intent was for regular rate of compensation to have the same meaning as regular rate of pay.

Ryan Bykerk (16:27):

The Supreme Court opened that opinion by citing the maximum it often does when it's about to go against the employer saying, "The labor laws have to be construed in favor of protecting employees."

Philip Person (16:38):

And if I see that maxim one more time in the brief, I might pull out the little hair that I have. I just pulled it out. It's a favorite go-to [inaudible 00:16:48].

Ryan Bykerk (16:48):

Well, yeah, you can usually tell where the opinion is going to go by how many times that maximum is used in the first few pages. So, that's the Ferra case. In terms of what employers can and should be doing, if you're not already paying meal and rest break premiums at the regular rate of pay, this is a good time to look at what your policies are and make sure that you're in compliance with the Ferra opinion.

Philip Person (17:11):

And the other point that's interesting about it and maybe I missed it, maybe I wasn't listening well enough is it's retroactive.

Ryan Bykerk (17:18):

That's right.

Philip Person (17:20):

It's one of those opinions where they said, "You should have known so just keep that in mind that this could have some impact on liability going back a few years back."

Ryan Bykerk (17:32):

Yeah. It's interesting. And the basis for that was the court found that that was the reasonable way to interpret the statute. So, there's an implicit message to the trial court and the Court of Appeal there that they were not being reasonable. But we won't dwell on that implied the name calling. We're above that. We'll move on.

Philip Person (17:52):

Well, that's what made the case juicy. Since we want to move on, let's move on to Chamber of Commerce vs. Bonta. It's another Ninth Circuit case. It's dealing with AB 51. So, let's give a little backdrop of what AB 51 is.

Philip Person (18:07):

AB 51 was a statute that was supposed to go into effect in January 2020. And it dealt with arbitration agreements, mandatory arbitration agreements. It made it so that employers could not have arbitration agreements as a condition of employment.

Philip Person (18:24):

But in January 2020, a district court issued a stay. And so, employers were still acting on that and still issuing mandatory arbitration agreements. Then fast forward to now we get to September 2021 where the Ninth Circuit heard the appeal and they reverse in part. They vacated the order in part. And the reasoning there is pretty interesting.

Philip Person (18:54):

AB 51 deals with mandatory arbitration agreements. And we all know we have the Federal Arbitration Act, the FAA. And it's says that AB 51 is dealing with pre-contractual conduct here. So, the court reasoned that once the agreement signed, it's still going to be an enforceable and binding agreement but you'll still be in violation of AB 51 if your pre-contractual conduct required the employee to mandatorily enter into it.

Philip Person (19:30):

So, the good part is there's no penalties that are going to be associated with it directly from the statute because that part was in itself preempted by the FAA. So, where do we stand?

Ryan Bykerk (19:49):

I know. Yeah, this is one of those ones where I would say to you like, "Okay, take me through that one more time." And actually, Justice Ikuta does that in the dissent. And I think that might be worth reading. It is such a confusing opinion because it does ... The Ninth Circuit focuses on that pre-signing conduct.

Ryan Bykerk (20:12):

And Justice Ikuta ... I'll just read this from her. She says, "In case the effect of this novel holding is not clear, it means that if an employer offers an arbitration agreement to the prospective employee as a condition of employment, and the prospective employee executes the agreement, the employer may not be held civilly or criminally liable. But if the prospective employee refuses to sign, then the FAA does not preempt civil and criminal liability for the employer under AB 51s provisions."

Ryan Bykerk (20:42):

"In other words," and she puts this really well, "In other words, the majority holds that if the employer successfully forced employees into arbitration against their will, the employer is safe, but if the employer's efforts fail, the employer is a criminal," which is a really interesting thing.

Philip Person (20:59):

Yeah.

Ryan Bykerk (21:01):

Assuming she's characterizing that correctly, maybe the majority would dispute that but I think that that's a fair read of the majority opinion. So, what's going to happen with the subpoena?

Philip Person (21:11):

We don't know.

Ryan Bykerk (21:12):

Right.

Philip Person (21:13):

Nobody knows right now so it's still up in the air. And as a matter of fact, speaking of we don't know is that there was a petition for rehearing recently that the appellant issued and filed. And that petition is putting everything up in the air because they're asking for it to be heard en banc. And we're waiting to see if that rehearing is going to happen. And we're also waiting to see if it's going to go up to the US Supreme Court.

Philip Person (21:41):

But before we move on from this case, you mentioned Justice Ikuta in the dissent here. This is a quote that I kind of like. She says, "Like a classic clown, Bob Bag, no matter how many times California is smacked down for violating the FAA, the state bounces back with more creative methods to try to sidestep the FAA."

Philip Person (22:04):

So, in other words, California is going to do what California is going to do. And we're going to just keep on looking out for what's the next steps here. It's still unclear. We have the en banc rehearing, the petition for it at least. We don't know what's going to happen there. And also, no mandate has actually been issued as of the date of this recording. So, we'll wait and see.

Ryan Bykerk (22:29):

And who knows? I mean, so maybe it goes to en banc. Maybe it ultimately ends up in the Supreme Court. And the dissent Justice Ikuta points out that this also creates a circuit split with the First and Fourth circuits. And so, maybe that's something that would cause the High Court to take it up. But again, we don't know yet. We will see. So, stay tuned.

Philip Person (22:49):

How about something a little bit more clearer? You want to take Wesson?

Ryan Bykerk (22:52):

Okay. This one is a little bit more clear. So, let's talk about Wesson vs. Staples. So, let me just quickly give you the facts of this one. This is a former employee sued his employer alleging that, among other things, the employer had misclassified him. So, he was alleging he was actually a nonexempt employee who had been misclassified as an exempt employee and therefore was entitled to overtime and other protections under California's Wage and Hour Laws.

Ryan Bykerk (23:20):

And he brought a class, importantly, a class and a PAGA action together. So, after the employer defeated the employee's bid for class certification, the employer move to strike the PAGA claim as unmanageable.

And the important background here is that in a misclassification case, the prima facie case for the employee is fairly easy. All you have to show is, "I worked hours in excess of 40 in a week or 8 in a day. I worked overtime hours. And I wasn't paid for them."

Philip Person (23:50):

Yup.

Ryan Bykerk (23:50):

Then the burden shifts to the employer to show that all the elements for classification are met. So, it is an interesting fact pattern. And that, of course, played into the party's arguments. So, the employer argued the case was unmanageable particularly given the employer's affirmative defenses which are complex and individualized.

Ryan Bykerk (24:10):

The plaintiff countered by arguing, first of all, the court doesn't even have authority to ensure that a PAGA action is manageable.

Philip Person (24:17):

And that's always the risk in an argument when you tell the court, "You don't have authority."

Ryan Bykerk (24:20):

Right, exactly. But that was one of the main arguments. And the other one was that even if the court had that authority, the case was in fact manageable. And part of that argument was that the employee argued that the employee only had to show that the prima facie case was manageable and it really shouldn't matter that the employer's affirmative defenses might be individualized, might be complex, might be unmanageable.

Ryan Bykerk (24:43):

So, the trial court having heard these arguments invited the plaintiff to submit a trial plan and the plaintiff did do that. But again, laid out a plan only to show the prima facie case using common proof and declined to talk about how anyone would be able to show the employer will be able to establish those affirmative defenses.

Ryan Bykerk (25:04):

The court ultimately ended up agreeing with the employer. And it did so in part because in the discussion of all of this, the parties agreed that, "Look, if we're going to go into all these affirmative defenses," I think there were 364 or so general managers that were at issue.

Philip Person (25:19):

Yup.

Ryan Bykerk (25:19):

And they said, "Well, if we have to go into all the details on this, it's going to take us eight years to try the case," which would be a long, long, long trial. And so, the court said, "You know what? Even if it was

half of that that's just not manageable, we're not going to tie up the court for the next four years, eight years, however long it ends up taking in order to try this case."

Ryan Bykerk (25:45):

So, it struck the PAGA claim. The employee appealed. There was also a motion for summary adjudication which we won't get into.

Philip Person (25:52):

Before you even talk about, you said they struck it. So, it was a motion to strike which is interesting because that's ... You always wanted to know what's the kind of motion you would file up to challenge that, to challenge manageability. And at least with the Wesson's decision, it makes it clear that it is a motion. That's right, right?

Ryan Bykerk (26:14):

That's what it is. Yeah, that's right. And this is nerdy but you're watching a labor and employment podcast. So, yeah, the Code of Civil Procedure contemplates a motion to strike but only as to pleadings. So, a motion to strike doesn't make sense just abstractly in that you're trying to strike a particular claim or portion of a claim. It's just that there wasn't specific statutory authority for that. So, you're outside the bounds of the Code of Civil Procedure.

Ryan Bykerk (26:45):

Good news, the Court of Appeals clarified that that is the proper method for doing it. So, yeah, a good callout.

Ryan Bykerk (26:52):

So, yeah, just in terms of the rest of the court's holding, the court affirmed trial courts do have inherent authority to manage the proceedings before them. And of course, cases have to be manageable. We live on planet Earth. Humans are going to have to come into the courtroom and say things and then leave. Manageability matters.

Ryan Bykerk (27:09):

And so, that's an important key takeaway of that court holding. But the court also went a little bit further and said, "Look, if it isn't manageable, if it can't be efficiently managed at trial, a PAGA claim should be stricken. It should be taken out."

Ryan Bykerk (27:24):

This is one of those cases that like, "Okay, manageability matters, this is good. Now, we know it's a motion to strike." The next PAGA letter, you just get to wave away because in your opinion, it might be unmanageable. It takes a little bit more than that. Obviously, the facts are important.

Ryan Bykerk (27:44):

And the court was pretty clear about that. It said, "This holding doesn't mean that just by a wave of the hand, an employer can make a PAGA case go away just based on objection." And it even said, "If possible, a court should look for ways to make the PAGA claim manageable, maybe by limiting its scope or in some other ways."

Ryan Bykerk (28:05):

So, important case, manageability matters. Motion to strike is the method. Not a silver bullet but an important win for something that employer has been arguing for a long time.

Philip Person (28:16):

Correct.

Ryan Bykerk (28:20):

I think those are all of our cases.

Philip Person (28:22):

I think that's all the cases. So now, let's move on to what legislation is coming out in 2022. And before we get into that, we're not going to go through all of the legislation that's going to impact employers. We just picked some of the high-level ones to get more details on that.

Philip Person (28:38):

You can look at ... We have a GT California L&E blog that has a lot of resources there. And we're putting out material all the time so we should be discussing all those in further detail. But let's talk about the high-level ones.

Philip Person (28:53):

We have AB-1003. And that's an interesting one because it makes an employer liable for grand theft. Yes. I see everybody perked up. How are we liable for grand theft? The intentional theft of wages and this includes gratuities. And an amount that's greater than $950 for an individual or $2,350 in aggregate for two or more employees in a consecutive 12-month period is going to be considered grand theft.

Philip Person (29:27):

So, that's a big change here. And that's something that employers should just be aware of is that yes, you could be liable for grand theft there.

Ryan Bykerk (29:37):

Yeah, it's an interesting ... So, wage theft is a little bit of a newer term. It's an interesting way of conceiving of what happens when an employer fails to pay wages. So, it's starting to be characterized as wages theft some time ago. And now, it's a statute. It's being treated that way.

Philip Person (29:56):

Grand theft it is. We also have SB-646. So, we talked a lot about PAGA. But there's going to be certain janitorial employers will be exempt from PAGA coverage. They are exempt if they're represented by a labor organization that has represented janitors before January 1, 2021.

Philip Person (30:19):

And if they're covered by a CBA in effect before July 1, 2028 that expressly provides for several things, wages, hours of work, working conditions, provides premium wages rates for overtime and just certain other provisions. So, if those factors are met, then you could be carved out from PAGA.

Philip Person (30:44):

We also have AB-286. It prohibits food delivery platforms, and Lord knows I always use food delivery platforms, from retaining any portion of amounts that are designed to be tips or are designated as tips or gratuity. So, that has to be left for those employees.

Ryan Bykerk (31:06):

Yeah. If you've ever wondered because I have, does that go for anything? Now, we know.

Philip Person (31:12):

See, you actually think about those things. Maybe, I'm not as cynical as you. I'm like, "Oh, yeah, of course, it's [inaudible 00:31:18]."

Ryan Bykerk (31:20):

Well, now, we know.

Philip Person (31:21):

Now, we know it's a must.

Ryan Bykerk (31:22):

Whether you're a cynic or not, now, you know.

Philip Person (31:25):

What other ones we have in the Wage and Hour context? We have SB-62 which it prohibits piece rate compensation for garment manufacturing. The only caveat here we're talking about is unless there's a valid collective bargaining agreement in place. Compensatory damages for paying by piece rate is at $200 per employee per pay period. So again, this could add up pretty quickly.

Ryan Bykerk (31:50):

Right. Next, there are a couple of new provisions, new statutes that deal with quotas, new requirements for employers that use quotas. And I'll just start with who it applies to. There are two different groups but we'll start with the first one which is employers with either over 100 employees at any one warehouse or more than 1000 employees at two or more warehouse distribution centers in California, which is really where you see a lot more of these quotas being used. This is part of warehousing.

Ryan Bykerk (32:24):

And so, if an employer falls within those categories, there are a couple of new requirements. First, at the time of hire, employers meeting these qualifications have to provide nonexempt employees working at the warehouse with a written description of any of the quotas that are going to be in effect.

Philip Person (32:41):

And that's a big change because a lot of times, quotas sometimes change. They may change monthly. But this is causing a lot of employers to at least think about what quotas they're going to have for that specific employee or that specific position in advance.

Ryan Bykerk (32:56):

Right. I mean, as usual with legislation because that really does beg the question, "Well, which one? How do we do this? Do we have to have them all written out in advance throughout the menu?" As with all new legislation, that's something that's going to get worked out over time. And that's one of the reasons we like our job. There's always something new. There's always something that we're working to figure out and this is going to be one of them.

Ryan Bykerk (33:14):

So, anyway, what does that written quota look like? How does an employer go about complying with that? So, that's one requirement. And another new rule in these new pieces of legislation is that employers cannot take adverse action against an employee who fails to meet a quota that has not been disclosed or a quota that does not allow a worker to comply with meal or rest periods or occupational health and safety laws.

Philip Person (33:44):

And that's, again, another place where we could see some litigation is, well, how do we determine if a quota is not allowing me to take my meal period? Or we just talked about some of these other cases like Donohoe. Or it's conflicting with safety law. There's a lot of varying factors here. So, stay tuned. It's going to be a hotbed for litigation.

Ryan Bykerk (34:09):

Yeah. And you can see where the legislature is going. The legislature clearly thinks like, "Okay, one of the problems that this cause, maybe it's causing people to cut corners so maybe they're not complying with OSHA requirements or Cal/OSHA requirements. Maybe they're skipping meal and rest breaks." But yeah, as you point out, it's really going to be hard to tell or establish one way or the other I think whether a quota system is or is not doing one of those two things. But that will be an interesting thing to see.

Ryan Bykerk (34:36):

Before we leave quotas, there's another one. We've just been talking about warehousing. This one applies to chain pharmacies with 75 or more stores in California under the same ownership or management. So, it's anyone, you drive past more than two of these pharmacies on your way to work that they probably qualify.

Ryan Bykerk (34:56):

So, for those pharmacies, the employer can't establish a quota that relates to the duties of a licensed pharmacist. And here again, you can hear the legislature thinking this out. They don't want somebody just quick just thrown whatever pills in whatever bottle I guess. We're not scientists but that seems bad.

Philip Person (35:18):

I mean, it was educational for me because how many of you knew that pharmacists had quotas? But now, that's at least being legislated.

Ryan Bykerk (35:26):

Someone in Sacramento at least thinks they do. So, there we go.

Philip Person (35:31):

Well, let's also talk about the legislation that's impacting CFRA and DFEH, just highlighting some of the big ones. Before we get into that, it's right at the end of the year, we're talking about Thanksgiving just happened. We're looking at the holidays in December coming up. And the dreaded word "in-laws" comes up.

Philip Person (35:53):

Well, guess what? CFRA has a law for that. Typically, CFRA covers for serious conditions dealing with yourself or your immediate family member. But now, it's been expanded to include parent-in-law. So, if your parent-in-law has a serious health condition, it could qualify for a CFRA.

Ryan Bykerk (36:11):

Yeah. So that excuse is gone.

Philip Person (36:12):

It's gone.

Ryan Bykerk (36:13):

Sorry, I would care for you but I don't get state-protected leave.

Philip Person (36:19):

Well, or it could help you out here. You could say, "Oh, my in-law is sick and I have to go check on them. Give me some time-off." And then, you send your wife or husband but don't do that.

Ryan Bykerk (36:35):

I think they said on disclaimer, this is not legal advice.

Philip Person (36:37):

Not legal advice but I'm just saying that's ...

Ryan Bykerk (36:39):

Just checking.

Philip Person (36:40):

That's something that could be litigated. We're just saying yea or nay, we're saying it's interesting.

Ryan Bykerk (36:47):

But your parent-in-law probably doesn't know about this law. So, just to be clear, it depends ...

Philip Person (36:52):

That's where it could be a problem is if they're sick and they say, "I know you can get time-off. Come and take care of me here."

Ryan Bykerk (37:02):

Yeah, exactly. So yes, this is a state legislature sowing discord among families.

Philip Person (37:06):

There we go. There we go. I'm putting my foot down. Also, there is an update on the mediation program that applies to small employers. So, participation in the mediation program is now going to be a prerequisite for filing any CFRA civil action. Small employers are usually under CFRA anywhere between five and under 2019 employees.

Philip Person (37:31):

The employee has to contact the Department of Fair Employment and Housing to indicate whether or not they are requesting mediation. The department then notifies the employer of this inquiry, this request. And the interesting part here is if the employer did not receive the notification due to the employee's failure to make that request, the employer is entitled to a stay of the pending action until mediation is completed or deemed unsuccessful.

Philip Person (38:04):

So, that's something that's an interesting tool. It's kind of encouraging mediation for small employers through the ADR program.

Ryan Bykerk (38:13):

Right.

Philip Person (38:15):

Also, we have record keeping. So we have SB-807. That one creates procedural changes relating to the DFEH, the Department of Fair Employment and Housing we talked about. The deadline for filing a DFEH charge is tolled while the ADR is pending.

Philip Person (38:37):

Another important part about that legislation is that employers now must retain personnel records for four years, at least four years from the date they're created or from when an employee has taken action.

Ryan Bykerk (38:50):

Right. So yeah, a good opportunity just to, if you're an employer, look at what your retention policy is. Maybe dust it off. You're going to look at it in a while because it's now four years.

Philip Person (39:00):

And sometimes, it requires you to talk to your vendor, the vendor that's keeping your personnel records because I know a lot of employers out there, they don't maintain it themselves but they may have a third-party vendor or an administrator that does that. And just to make sure your administrator is doing its job and keeping up with the change in legislation.

Ryan Bykerk (39:21):

Right. Yeah, a good point. So, let's talk a little bit about settlement agreements. There is some new rules there under SB-331. So, these deal with settlement agreements and severance agreements as well. So, already, existing law restricts the ability to put a confidentiality clause in place as it relates to sexual harassment and retaliation-related claims.

Ryan Bykerk (39:46):

This new law, SB-331, expands on that. It provides that you can't have confidentiality in settlement agreements regarding the factual information relating to the claims as to acts of workplace harassment, workplace discrimination, retaliation as to any Fair Employment and Housing Act category. So, it really takes the first ... I mean, the existing law came out of the Me-Too Movement. This just expands that to [inaudible 00:40:14] ...

Philip Person (40:14):

Yeah, to all the categories.

Ryan Bykerk (40:15):

Yeah, to all the other categories. So, this law makes that clear. The other thing it makes clear is that if you've got other provisions restricting disclosure so for example, a non-disparagement provision. A non-disparagement provision is going to have to include language that makes clear the employee has a right to disclose the factual information about the unlawful acts occurring in the workplace.

Ryan Bykerk (40:39):

And then I think the last one here that's worth highlighting from SB-331 is that in severance agreements, you need to make sure that the settlement agreement itself should notify the employee that they have the right to go consult with counsel. And it has to provide the employee at least five days to do that. So, an important thing again starting January 2022, make sure you update those severance agreements.

Philip Person (41:05):

And we wouldn't be talking about new legislation and other pieces that are coming out in 2022 if we didn't talk about vaccine mandates briefly because as of right now, we're in a holding pattern. As most of you know, the Biden administration and OSHA has issued vaccine mandates even for private employers who have more than 100 employees.

Philip Person (41:29):

But a lot of this is on hold. There's a lot of cases that are out right now. Federal courts are actually issuing orders right now to stay or enjoin that from being enforced. So, stay tuned. We'll see what happens and report back, I almost said on a pager but didn't do it.

Ryan Bykerk (41:47):

No, because you were saying you are done with that.

Philip Person (41:47):

But me almost saying it. I didn't state it but ...

Ryan Bykerk (41:51):

I think that's okay. I don't think that counts.

Philip Person (41:52):

Okay.

Ryan Bykerk (41:54):

Okay. So that's ... Look, that's not all the new legislation but those are some of the highlights. For those of you who got the PowerPoint with the materials, you can look through those. We put most of that stuff in there. It's worth looking at just to keep in mind. So, all of that coming to an employer near you in 2022.

Ryan Bykerk (42:12):

So, let's talk a little bit about just the Performance Review this year.

Philip Person (42:17):

Yeah, it was a good year.

Ryan Bykerk (42:18):

It was a good year. So, it's a year in Review. And then we wanted to touch on that today briefly. So, first of all, I think we should probably get ... So, when we started the Performance Review in 2020, we started by giving 2020 grades.

Philip Person (42:33):

We did.

Ryan Bykerk (42:34):

2020 did not do well.

Philip Person (42:35):

No, it didn't. No, it got bad grades. Yeah.

Ryan Bykerk (42:37):

So what would you give ... Before we even start talking about the podcast itself, what would you give 2021?

Philip Person (42:43):

So, I'm trying to remember what I gave 2020. I've probably given like a D or an F. This 2021 was a little bit better. It was a little bit better. We got some clarity on some laws that we talked about. And then, the podcast has been flourishing. And we've had great guests on. So, I'm going to give it a bump up. I'll give it a B minus. I'm a tough grader. But that's where I stand. What about you?

Ryan Bykerk (43:10):

I do. And so, I don't remember what I gave 2020 either. 2021 still needs improvement. I'm looking for better things in 2022. But yeah, really a different year. I saw the world adapt to COVID a little bit. We

saw vaccines rollout. So yeah, certainly a much better year. It doesn't get the D or D minus or whatever that we gave it last year, it's so much better.

Ryan Bykerk (43:35):

And the podcast has been really fun. So thank you for all of you who have been listening this year. Yeah, just you had mentioned a couple things. So we had great guests from Virgin Orbit, Flynn Restaurant Group, eBay, SurveyMonkey. We had someone from the DFEH even come on and talk to us about the mediation program which was really cool. So, great guests which has been good.

Philip Person (43:55):

And I'm looking forward to 2022. So, all of our listeners out there, feel free to email us at the Performance Review at GTLaw.com. If there's a guest you want, guests you want us to reach out to, let us know. We'd love to reach out to them and just have them on.

Philip Person (44:09):

But also, the fun part was some of those crazy employment stories. I get a lot of feedback from our guests on at the end of the episode, we always have a crazy employment story. We've had stories about paranormal activity at a, I think it was a toy store.

Ryan Bykerk (44:25):

Yeah.

Philip Person (44:26):

And the employees were reporting paranormal activity. They went back to the head of HR and reported it. And the head of HR didn't know how to do this. Do I investigate this? What do I do?

Ryan Bykerk (44:39):

Yeah. And I think there were more than one employee who take part of this so it's very weird, but that was a great one. We also had the guest who talked about a supervisor requiring the subordinate to do their laundry.

Philip Person (44:54):

Yes.

Ryan Bykerk (44:54):

Not because it was like a laundry business but because it's just a regular job and they were requiring a subordinate to do that.

Philip Person (45:03):

And the employer had to explain to that person that this is not acceptable. I don't know why that was, but yeah.

Ryan Bykerk (45:10):

Yeah, fascinating stuff. So, I love the crazy employment story. So, Philip, it would not be right to finish 2021 without one. So, can you please share with us a crazy employment story to round out 2021.

Philip Person (45:22):

And it's going to be tough to beat those but we have a pretty good employment story. First off, this is not my personal story. I've found this online but I thought it was very interesting. It involved an analyst. A senior analyst was pretty upset that one of his buddies at the company was fired, good friend, coworker. He was so perturbed by it that he went into the conference room with the company's chief operating officer and chief information officer.

Philip Person (45:53):

He first confirmed that he didn't have a non-compete in his employment agreement that he wanted to go out after whatever he was about to do to compete against the company. They confirmed that there was no non-compete in place.

Ryan Bykerk (46:07):

Okay.

Philip Person (46:08):

And after that, he proceeded to drop his pants and mooned both of them, the chief operating officer and the chief information officer. He even testified in that case that he knew he was going to be fired for that. I would suspect so. And of course, after mooning the officers of the company, they terminated him.

Philip Person (46:33):

The kicker is in his employment agreement, it contained a termination for cause provision and that resulted in him forfeiting his severance package which was about $700,000. So, he asked for $700,000 in severance. The company refused.

Ryan Bykerk (46:52):

They said no?

Philip Person (46:52):

They said no, shocking. They said no. He proceeds to sue the company. This again shows that employees will sue for almost for anything. So, he sues them for breach of contract. And unsurprisingly, he lost that case. The court found that he was insubordinate, disruptive, unruly, abusive, etcetera. And it concluded that it justly terminated him for a cause. So, one more win for the employer and no recovery there for $700,000 severance.

Philip Person (47:29):

But the moral of the story, class, is don't moon your company's officers because it might not work out for you and they may be just cost you termination.

Ryan Bykerk (47:41):

This is the hard-hitting, need-to-know kind of news you got to come to the Performance Review for because we watch out for you.

Philip Person (47:47):

Yeah.

Ryan Bykerk (47:48):

Don't moon the executives at the company. These are important things.

Philip Person (47:51):

We're here to educate. If you ever had a question about that, you can email us and we can tell you probably not a good idea.

Ryan Bykerk (47:56):

Don't do it. That is a bad idea.

Ryan Bykerk (48:01):

Well, thank you. What a great way to end 2021 and to end this episode of the Performance Review.

Philip Person (48:07):

All right. Thank you, Ryan.

Ryan Bykerk (48:09):

We'll see in the New Year.

Philip Person (48:24):

All right.

Speaker 1 (48:27):

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