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QUARTERLY LEGAL UPDATE

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CALIFORNIA *(cont.)*

Anticipated Changes in Labor Law Under the Biden Administration

With a new administration in place since January 20, 2021, companies can anticipate some significant changes in labor and employment law, mostly favoring employees over employers.

The National Labor Relations Board

President Biden has fired both the Trump-appointed General Counsel of the National Labor Relations Board and his Deputy after they refused to resign. The new acting General Counsel or his successor will likely seek to obtain reversals of Trump-era Board law. The Board itself will remain Republican-controlled while the terms of two Republican-appointed Board members expire. However, challenges will likely be made to Trump-era decisions restricting employees' use of employer e-mail systems for union activity, relaxing restrictions on employer work rules, allowing employers to withdraw recognition from unions based on evidence of loss of majority support, and restricting unions' ability to organize very small bargaining units.

President Biden has promised to sign the Protecting the Right to Organize (PRO) Act, which passed the House in February 2020. The PRO Act includes provisions that, among other things, ban employers from holding "captive audience" meetings with workers during a union campaign and codify a more expansive "joint employer" rule. The President has also signaled support for banning state "right to work" laws.

Minimum Wage

President Biden supports an increase in the minimum wage to $15 from the current $7.25 to be phased in over a few years. He also supports eliminating the subminimum wage for disabled workers and the federal "tip credit" that allows employers to pay tipped employees as little as $2.13 per hour in wages. Biden is also likely to oversee reinstatement of increases to the minimum salary for the overtime exemption, similar to those implemented in 2016 by the Obama administration. Under the 2016 rule, an employee's minimum salary to be exempt

from overtime would have initially doubled from $23,660 to $47,476.

Antidiscrimination Laws

President Biden has already committed to supporting the Paycheck Fairness Act, which would eliminate an employer's ability to pay a male employee more than a female employee doing the same work unless they can prove that the differential is accounted for by "factor other than sex." The Act limits an employer's available defenses to a discrimination claim to specific objective factors such as education, training, or experience. President Biden has also indicated support for an amendment that would bring proof of age discrimination into line with proof of other forms of discrimination. Currently, age discrimination must be proved by evidence that the complained-of action would not have occurred but for the employee's age. In contrast, most discrimination requires proof that the employee's protected classification was simply a "motivating factor" in the alleged discriminatory act.

Arbitration and Non-Compete Agreements

President Biden has indicated his support for the legislation that would invalidate pre-dispute arbitration agreements in employment, thus requiring employers to litigate such disputes in court. Biden has also shown support for legislation prohibiting employers from seeking class-action waivers in the employment context. He has stated that he would support restrictions on non-compete agreements except those "that are absolutely necessary to protect a narrowly defined category of trade secrets."

Miscellaneous

The President has also stated that he supports up to 12 weeks of paid family and medical leave, the addition of "wage theft" provisions to the Fair Labor Standards Act, and the adoption of the "ABC" test for distinguishing employees from independent contractors.

- A. Mizel

Department of Labor's New Rule on Independent Contractor Classification

On January 6, 2021, the Department of Labor ("DOL") announced its new final rule clarifying the standard for determining employee versus independent contractor under the Fair Labor Standards Act ("FLSA"). The final rule is set to take effect on March 8, 2021, unless blocked by the Biden administration.

The rule confirms the use of the established "economic reality" test. The rule explains that the term "suffer or permit" to work–the essential condition of employee status–requires a worker's economic dependence on the putative employer, measured primarily by two core factors, although three other factors may be considered if needed.

If the following two "core factors" point to the same classification, then there is a substantial likelihood that the classification is correct.

1. **Nature and degree of control over the work.** This factor weighs in favor of an independent contractor classification if the individual exercises substantial control over key aspects of performing the work rather than the potential employer. For instance, if the individual sets the work schedule, chooses assignments, works with little or no supervision, and is able to work for others (including a potential employer's competitors), the person is most likely an independent contractor. This is true even if the individual is not solely in control of the work.
2. **Opportunity for profit and loss based on initiative and/or investment.** This factor weighs in favor of independent contractor classification if the individual has an opportunity for profit or loss based on (1) the exercise of personal initiative, including managerial skill or business acumen, and/or (2) the management of investments in or capital expenditure on such items

as helpers, equipment, or material.

Three other factors are also relevant. These factors are less probative and thus should be evaluated in context with the two core factors.

1. **Skill required.** If the individual requires specialized skill or training that the potential employer does not provide, independent contractor classification is favored.
2. **Permanence of the working relationship.** Where the relationship is designed as definite or sporadic (versus indefinite or continuous) in duration, independent contractor classification is favored. The final rule provides that seasonal workers are employees and not contractors working for a limited duration or engaged in a sporadic relationship.
3. **Integrated unit.** Whether the work done by the potential employee is a part of an integrated unit of production. The rule explains that "integral" in this instance means the work is part of "an integrated process that requires the coordinated function of interdependent subparts working towards a specific unified purpose." It does not mean that the individual's work is important or central to the employer's business.

Additional factors are relevant only if such factors demonstrate whether the individual is in business for themselves, as opposed to being economically independent on the potential employer for work.

The final rule differs dramatically from many states' laws on the standard for classification of workers as employees or independent contractors. This rule also rescinds years of guidance from the DOL and conflicts with numerous court decisions on classifying workers under the FLSA. Employers should carefully analyze any classification questions under the laws governing the jurisdictions in

which they operate and should reach out to Stokes Wagner with any questions regarding classification issues.

- J. Fishman

Minimum Wage Updates for 2021

Employers should be mindful of 2021 increases to annual minimum wages and ensure that they have complied with recent wage increases. The following states have had minimum wage increases **on or about January 1, 2021**. For further information, including tip credits and local minimum wage ordinances, please visit the Economic Policy Institute Minimum Wage Tracker.

State	Min. Wage
Alaska	$10.34
Arizona	$12.15
Arkansas	$11.00
California	$14.00 *(large employers)* $13.00 *(small employers)*
Colorado	$12.32
Illinois	$11.00
Maine	$12.15
Maryland	$11.75 *(large employers)* $11.60 *(small employers)*
Massachusetts	$13.50
Michigan	$9.87
Minnesota	$10.08 *(large employers with annual gross revenues of at least $500K)* $8.21 *(all other employers)*
Montana	$8.75
Missouri	$10.30
New Jersey	$12.00 *(standard)* $11.10 *(seasonal, small employers)*
New Mexico	$10.50
Ohio	$8.80
South Dakota	$9.45
Vermont	$11.75
Washington	$13.69

If you have specific questions or concerns regarding your business and its wage requirements, contact your Stokes Wagner attorneys.

- C. Tantoy

AB 1876: Handwashing Breaks

The California Retail Food Code requires food employees to keep their hands and exposed portions of their arms clean. Food employees are employees who work in a food facility, which is any operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at retail value. Food employees are required to wash their hands prior to prepping food, after using the toilet, after coughing, sneezing, among other specified situations. A violation of these provisions is a misdemeanor.

On September 9, 2020, Governor Newsom signed AB 1867, which expanded the scope of the misdemeanor and requires food employees working at any food facility to be permitted to wash their hands every 30 minutes and additionally as needed. The purpose of the law is to ensure employees have sufficient break time to allow for frequent handwashing.

- Y. Ricardo

AB 1947: Time for Filing Complaints with California Division of Labor Standards Enforcement (DLSE) Extended to One Year

AB 1947, **effective January 1, 2021**, increases the time within which a claimant must file a complaint of retaliation or discrimination f**rom six months to one year**. Labor Code section 98.7 now provides that employees have one year from the date on which they were "discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner" to file a complaint with the Department of Labor Standards and Enforcement. Employers should take extra caution to ensure that employees are in no way retaliated against for bringing wage claims with the Labor Commissioner. Under AB 1947, the Labor Commissioner may award and collect attorney's fees, which may carry steeper penalties than the actual wage claims.

Additionally, AB 1947 amends Labor Code section 1102.5, which prohibits "whistleblower" retaliation against employees who report employer violations of local, state, or federal statutes, to now provide for recovery of attorney's fees and costs. Labor Code section 1102.5 does not require that an employer violate a statute or regulation; instead, the law protects employees who merely have "reasonable cause to believe" that their employer failed to comply with the law. This protection also extends against retaliation for disclosing information or for refusing to participate in illegal activity. The bill also allows prevailing plaintiffs in these retaliation claims to recover reasonable attorney's fees, adding to the already growing number of claims through which plaintiffs may recover costs.

- J. Santos

AB 2017: Employees Authorized to Designate Paid Sick Leave Taken for Kin Care

On September 28, 2020, Governor Newsom signed into law AB 2017 to revise Labor Code section 233, providing that an employee has the sole discretion to designate sick leave as being for kin care. Section 233, also known as the "Kin Care" law, requires employers to permit employees to take up to half of their accrued sick leave to care for a family member ("kin care"). For purposes of kin care, a "family member" is defined to include an employee's child, parent or guardian, spouse or registered domestic partner, grandchild, grandparent, or sibling.

AB 2017 specifically provides that employees hold the right to designate what type of sick days they are taking. Labor Code section 233 also provides that employers are prohibited from taking any discriminatory or retaliatory action against an employee for requesting or using sick leave under the Kin Care law. An employee who is retaliated or discriminated against is entitled to reinstatement and actual damages or one day's pay, whichever is greater. As such, employers should take note to revise existing sick leave policies. Employees must be aware of their new right to designate sick leave for kin care to avoid erroneous use of sick days as well as potential penalties for violation.

- J. Santos

AB 2143: Modifications to Prohibition on No-Rehire Provisions in Settlement Agreements

Last year, on January 1, 2020, California Code of Civil Procedure ("C.C.P.") § 1002.5 went into effect and prohibited provisions in settlement agreements that prohibit, prevent, or otherwise restrict a settling employee from obtaining future employment with the employer they filed a claim against. There was an exception if the employer had made a good faith determination that the settling employee engaged in sexual harassment and sexual assault.

On September 11, 2020, Governor Newsom signed AB 2143, which modified C.C.P. § 1002.5.

AB 2143 amended the statute to require the settling employee to have filed a claim in good faith for the prohibition to apply. In addition, AB 2143 expanded the exception to the prohibition to include a good faith determination that the settling employee engaged in any criminal conduct. However, for the exception to apply, the good faith determination that the settling employee engaged in sexual harassment, sexual assault, or criminal conduct must have been made and documented before the settling employee filed the claim.

- Y. Ricardo

AB 2257: A Revision to Workers Classification

On September 4, 2020, Governor Newsom signed AB 2257, which revised AB 5, the bill that codified the Supreme Court's ruling in Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903 regarding worker classification.

Who are employees?

With the passage of AB 2257, the ABC test codified by AB 5 remained unchanged. For purposes of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person who is providing labor or services for remuneration is presumed to be an employee, unless the hiring entity demonstrates all of the following:

1. The person is free from control and direction both under the contract and in the performance of the work;
2. The person performs work that is outside the usual course of the hiring entity's business; AND
3. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 2257 provided for and revised the many exceptions to the application of the foregoing ABC Test. In the event those exceptions exist, a workers' classification would be determined by the test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("Borello"). The *Borello* test was a multi-factor test that focuses primarily on the company's "right to control" a worker when determining the worker's classification.

What are the Exceptions to the ABC Test?

- **Business-to-Business Contracting Relationship.** The exception applies to a business that contracts to provide services ("business service provider") to another business, public agency, or quasi-public corporation ("contracting business"). There are a total of 12 factors that must be satisfied to fall under the exception including, the business service provider is free from control and direction, provides services directly to the contracting business, and the contract is in writing, specifying the payment amount, the rate of pay, and the due date for

payment.

- **Referral Agency and Service Provider.** The exception applies to a business that provides services to clients ("service provider") through a referral agency. The exception applies if eleven factors are satisfied, including but not limited to whether the service provider is free from control and direction, the service provider is required to hold a business license or business tax registration, and the service provider delivers services under its own name rather than under the name of the referral agency.
- **Professional Services.** The exception applies to a contract for "professional services." Professional services that the exception may cover include marketing, administration of human resources, travel agent services, graphic design, grant writing, fine artist, services by an enrolled agent licensed by the US Department of Treasury to practice before the Internal Revenue Service, services provided by a still photographer, photojournalist, videographer, or photo editor, freelance writer, translator, editor, copy editor, illustrator, newspaper cartoonist, content contributor, advisor, producer, narrator, or cartographer, licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, licensed cosmetologist, specialized performer, appraisers, professional foresters, among others. AB 2257 clarifies when each professional exception would apply.
- **Occupational Exception.** The *Borello* test also applies to surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, landscape architects, engineers, private investigators, accountants, securities broker-dealers or investment advisers, a person or organization licensed by the Department of Insurance, among others.
- **Single Engagement Event.** The exception applies to a contract where two businesses agree to provide services at the location of a single engagement event, defined as a stand-alone, non-recurring event in a single location or a series of events in the same location no more than once a week. Like all of the above, certain requirements must be satisfied in order for

the exception to apply, including control and direction, mutual freedom to negotiate pay, and a written contract that specifies the pay rate and the tools and materials to be provided by the worker.

- **Music Industry Exception.** The exception applies to music industry occupations in connection with creating, marketing, promoting, or distributing sound recording or musical compositions, including recording artists, songwriters, managers of recording artists, record producers and directors, musical engineers, and mixers engaged in the creation of sound recordings, vocalists, photographers working on recording photo shoots, and any other individual engaged in rendering any creative, production, marketing or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions, subject to exceptions.

Other exceptions include the services of a real estate licensee, home inspector, and a subcontract in the construction industry.

- M. Hernandez

AB 2399: California Expands State Paid Family Leave Benefits

On September 30, 2020, Governor Newson signed AB 2399, which expands state Paid Family Leave to include additional coverage for active military members and their families. Prior to AB 2399, Paid Family Leave provided wage replacement benefits to employees who take time off to care for a seriously ill family member or bond with a minor child within one year of birth or placement.

Effective January 1, 2021, Paid Family Leave adds participation in a qualifying exigency related to the active duty or call of active duty of an individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States as covered time off. The new law amends section 3302 and 3307 of the Unemployment Insurance Code and revises defined terms for paid family leave purposes.

The new law revises the definition of "care recipient" to include "the military member, or child or parent of the military member, who is receiving assistance, or the employee who is participating in a qualifying exigency." "Military member" means a child, spouse, domestic partner, or parent of the employee, where the military member is on covered active duty or call to active duty in the Armed Forces of the United States. AB 2399 requires certain documentation to be provided by the employee to the Employment Development Department ("EDD"). However, it does not require that the employee provide this documentation to the employer for wage replacement purposes.

As a reminder, Paid Family Leave is not a leave of absence entitlement but rather a wage replacement benefit that covered employees can use while out of work for a qualified reason. Employees may take leave of absence entitlements under the Family and Medical Leave Act ("FMLA") or the California Family Rights Act ("CFRA").

The full text of the bill can be found HERE.

- M. Hernandez

AB 2992: California Protections for Victims of Crime or Abuse

On September 28, 2020, Governor Newsom signed into law AB 2992, which expands job protections and leave entitlements for victims of crime and family members of homicide victims, **effective January 1, 2021**. The bill amends California Labor Code Sections 230 and 230.1 and provides that survivors of crimes can take unpaid leave without the employer discharging, discriminating, or retaliating against them for doing so, regardless of whether any person is arrested, prosecuted, or convicted of the crime.

Employees who are entitled to this protection are those who have been victimized by stalking, domestic violence, sexual assault, crimes that caused physical injury, crimes that caused mental injury and a threat of physical injury, as well as any person whose immediate family member is deceased as the direct result of a crime. "Immediate family member" is defined as any child, parent, sibling, and partner, and "any other individual whose close association with the employee is the equivalent of a family relationship."

Eligible employees must provide reasonable advance notice of time off unless it is not feasible. To be eligible for protected leave, an employee must provide documentation for the unscheduled absence that reasonably verifies that the crime or abuse occurred within a reasonable time after the absence. "Reasonable time" is not defined in the new law. Acceptable documentation includes police reports, a court order or other evidence from the court, documentation from a licensed medical professional, victim advocate, or victim counselors, or any other documentation that reasonably verifies that the crime or abuse occurred, including a written statement signed by the employee or an individual acting on the employee's behalf.

Employers with 25 or more employees have additional obligations under the new law. Employers cannot "discharge, or in any manner discriminate or

retaliate against, an employee who is a victim, for taking time off from work" for seeking medical attention for injuries caused by the crime or abuse, for obtaining services from a domestic violence shelter or victim services organizations as a result of the crime or abuse, for obtaining counseling or mental health services related to the crime, or for participating in safety planning to increase safety from future abuse.

Employees must disclose their status as a victim of crime or abuse to trigger the employer's responsibility to provide "reasonable accommodations" upon the employee's return to work. Reasonable accommodations may include a transfer, reassignment, modified schedule, changed work telephone, installed lock, an implemented safety procedure, or another adjustment to a job structure or workplace facility. Employers are expected to maintain the confidentiality of any employee requesting the protected leave.

Labor Code section 230.1 requires employers to "inform each employee of their rights" under that section and section 230. Employers should train supervisors, managers, and HR staff on these changes. Employers who violate Labor Code sections 230 or 230.1 may be ordered to reinstate the employee and reimburse the employee for all lost wages and benefits by the Labor Commissioner.

- M. Hernandez

AB 3075: Expansion of Successor Liability for Labor Code Judgments

On September 30, 2020, Governor Newsom signed AB 3075 amending the Labor Code to expand successor liability for Labor Code judgments. Specifically, AB 3075 allows employees to collect judgments for wage and hour violations not only from their employers but also from successor businesses that take over operations if the employing entity fails to pay the judgment. The legislative history of the bill notes that its purpose is to prevent business owners from avoiding liability by forming a new business entity that takes over operations.

The new law, codified as Labor Code section 200.3, provides that "a successor to any judgment debtor shall be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment." Notably, "successor" as defined under the law includes any business that uses substantially the same facilities or workforce to offer substantially the same services as the debtor business. The definition also expands to any business that employs a managing agent that controls the wages, hours, or working conditions of the workforce. Lastly, the definition includes "a business in the same industry [that] has an owner, partner, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor."

Given the expansive definition of successor businesses, employers should ensure that any wage and hour judgments are properly and timely paid to the aggrieved employee. AB 3075 also requires businesses to disclose and register a statement of information regarding any outstanding judgments or violations of any wage order or the Labor Code with the California Secretary of State. Although the law provides that the Secretary of State must implement these changes by January 1, 2022, employers

should continue paying and remedying any violations to avoid further penalties.

- J. Santos

SB 46: California Lawmakers Want Employees to Provide COVID-19 Test Results to Return to Work

California State Senator Henry Stern introduced SB 46, which states the California Legislature's intent to enact legislation that would require an employer to develop and implement contact tracing and safety policies for its employees. This would include requiring notice to the employer when an employee receives a positive COVID-19 test result.

"We have to find a way to ensure that essential workers who are in their workplaces don't just have to rely on blind trust to be safe," stated Senator Stern. "While the vaccine rollout will be a crucial risk mitigator, the testing and contact tracing systems we deploy in California need to be strengthened."

Existing law requires employers to furnish employment and a place of employment that is safe and healthful for their employees. Under the Emergency Temporary Standards adopted by the Division of Occupational Safety and Health (Cal/OSHA), employers may require employees to report COVID-19 symptoms. However, they may not require employees to report positive COVID-19 test results.

"In a deadly, global pandemic, a person's individual rights cannot trump the right of their co-workers to be in a safe work environment," concluded Senator Stern. "People deserve to go to work and be able to have the peace of mind that they can do so safely and aren't at risk of carrying COVID-19 back to their family."

COVID-19 remains an ever-present threat in California, and those working in the hospitality industry know all too well that working from the comfort home is simply not an option. Hotels and restaurants must have people onsite to stay in business. At the same time, hospitality and restaurant workers should also know that working on site is safe.

- K. Ellis

California SB 1159 Workers' Compensation Rebuttable Presumption

SB 1159, signed into law on September 17, 2020, codified Governor Newson's prior Executive Order and created a "disputable (rebuttable) presumption" that an illness or death from COVID-19 arises out of and in the course of employment and is therefore compensable pursuant to California's workers' compensation laws. The presumption applies **from July 6, 2020, through January 1, 2023**. The presumption applies to employers with five or more employees if an employee tests positive within 14 days of reporting to their specific place of employment during an "outbreak." This does not include an outbreak in an employee's home unless they provide home health care to another individual.

An outbreak exists:

- for employers with 100 employees or fewer, if 4 employees test positive within 14 days;
- for employers with more than 200 employees if 4% of the employees test positive within 14 days; or
- if the place of employment is ordered to close by a local health department, the State Dept. of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to risk of infection.

Employers may dispute the presumption with evidence such as the measures taken to reduce the potential transmission of COVID-19, the employee's non-occupational risks of COVID-19 infection, or any other evidence typically offered to dispute a work-related injury.

Employers must act quickly to gather any evidence they intend to use to dispute the presumption. If the date of injury is before July 6, 2020, the claim administrator has 30 days to deny the claim; if the date of injury is on or after July 6, 2020, the claim administrator has 45 days to deny, or the injury is presumed compensable. The presumption is rebuttable only with evidence discovered subsequent to the applicable investigation period. If the employee is an "essential

employee" as specified in Labor Code Section 3212.87 (including but not limited to certain firefighters, peace officers, frontline healthcare providers, and healthcare facility workers), the 30-day denial period applies regardless of the date of injury.

The bill requires an employer who knows or reasonably should know that an employee has tested positive for COVID-19 to submit a report to their workers' compensation claims administrator within three business days (via fax or email), and include: the date the employee tested positive, the address of the employee's place of employment during the 14-days before the positive test, and the highest number of employees who reported to work at the place of employment in the 45-day period preceding the employee's last day worked. (Employees should not be identified in the report unless they claim the infection is work-related or have already filed a claim). Failure to report or the reporting of false or misleading information may subject the employer to a civil penalty of up to $10,000.

- S. Gauvin

California SB 1383 Expansion of California Family Rights Act

SB 1383, signed into law on September 17, 2020, and **effective January 1, 2021**, expands the application of the California Family Rights Act ("CFRA") to employers with **five or more employees**. To be eligible for leave, employees must be employed for at least one year and have worked 1250 hours during the preceding 12 months (may be non-consecutive).

The new law includes additional "family members" for whom employees can take leave to provide care (including siblings, grandparents, grandchildren, domestic partners, and adult children). Employers who employ both parents of a child must grant separate leave to each parent, either at the same time or back-to-back, as requested.

As with FMLA, qualifying employees who need time off related to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States may be granted protected leave.

Employers may no longer exempt the highest 10% earners. A qualifying employee who uses 12 weeks of leave available only under the CFRA may remain eligible for an additional 12 weeks under the FMLA for a different qualifying reason.

Pregnancy disability leave for up to four months will be a right separate from the CFRA. Thus, a California employee with a pregnancy disability could be entitled to pregnancy disability leave under the FMLA and an additional leave under the CFRA for a different qualifying reason. Note: The law expressly repeals California's New Parent Leave Act (NPLA) since SB-1383's expansion to CFRA renders the NPLA redundant.

- S. Gauvin

Regular Rates and Paying Premiums

On October 9, 2019, the Second District of the California Court of Appeal defined "regular rate of compensation" for the purposes of paying premiums for meal, rest, and recovery periods in *Ferra v. Loews Hollywood Hotel, LLC, 40 Cal.App.5th 1239 (2019)*.

Plaintiff Ferra alleged that Defendant Loews improperly calculated her premium payment when she was not provided with her meal and/or rest breaks. The parties stipulated that Loews paid meal and rest break premiums to hourly employees at their base rate of compensation. The issue before the court of appeal was whether the required "additional hour of pay at the employee's *regular rate of compensation*" for missed meal and rest breaks was calculated at the employee's base hourly rate or weighted hourly wage, which would take into account Ferra's nondiscretionary quarterly bonus.

The Court held that an employee's regular rate of compensation is calculated at the employee's base hourly rate. The ruling is now on appeal to the California Supreme Court and will remain good law until the Supreme Court reaches a decision.

- Y. Ricardo

Rounding Meal Breaks is Prohibited by the California Supreme Court

On February 25, 2021, the California Supreme Court issued an opinion further clarifying the "dos and don'ts" of meal breaks. In the *Donohue v. AMN Services, LLC*, case, the Court (1) condemned the practice of rounding clock-in/out times for meal breaks, and (2) explained that if an employer's records show meal break violations (short, late, or missed beaks), a rebuttable presumption of liability applies.

The case is a standard class action for improper meal breaks. The employer, AMN, rounded meal break time punches to the nearest 10-minute increment. This means that some meal breaks were under 30 minutes but were being rounded to 30. A review of records showed that, as a whole, employees were overpaid for meal breaks using the rounding policy, yet the Court was not convinced.

As the nation begins the long road back to normalcy, employers are recalling employees to work. Now is the perfect time to ensure compliance with wage and hour issues. If a time-keeping system rounds meal breaks, that practice should stop immediately. Stokes Wagner also recommends annual wage and hour audits to ensure compliance with the labyrinth of wage and hour laws in California.

- D. Lerma