IT'S TIME TO PREPARE FOR 2023

# WORKPLACE & EMPLOYMENT LAW UPDATE 2022

Shield Your Business

November 17th 8 AM - 4:30 PM
December 6th 8 AM - 4:30 PM

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# PARTICIPANT GUIDE

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Payactiv is offering a $10 Starbucks card to **attendees that schedule and attend a 15 minute demo with Payactiv by January 31st.** You can schedule a demo here: Book a meeting with Ryan Farias or e-mail rfarias@payactiv.com

All of Richard's latest publications are available today at WELU at special discounted rates. Please visit the Castle Publications virtual booth from 11:30-2:30 today!

https://us02web.zoom.us/j/87315483690

2022

# NOT A MEMBER?

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- ·WELU registrations
- ·An HR diagnostic and summary review with our consulting team

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# 8:00

# Top Litigation Issues for 2023

**Moderator: CEO Mark Wilbur**
**Panelist: T. Warren Jackson, (Mediator at Signature Resolution)**
**Panelist: Robert Roginson (Office Managing Shareholder, Ogletree Deakins, L.A)**
**Panelist: Julie Dunne (Partner at DLA Piper)**

The new year always brings a unique abundance of concerns, cautions and considerations for business leaders and human resources professionals. Is 2023 and exception? Absolutely not – and that should prove to be the easiest question tackled at the Workplace & Employment Law Update.

As is our WELU tradition, we dive right into the deep end with our opening panel. In this high-level discussion, our panel of top employment attorneys will provide invaluable insights on the most critical issues employers will need to be prepared for in the coming year. The panel is hosted by CEO Mark Wilbur and also provides an opportunity for attendees to interact with the experts.

Grab your coffee and get ready to start your morning with guidance from our panel of employment law movers and shakers!

# Mark Wilbur
President & CEO

Since joining Employers Group in March, 2007 as the youngest CEO in the association's 116-year history, Mark Wilbur has brought an extraordinary level of innovation and leadership to transform the organization and re-establish it as the industry leader in human resources professional services; further, he has set new standards in member care and assistance.

Mark has led the development of national strategic relationships to enhance member benefits and services. He has transformed EG's online training offerings and has enhanced the technology infrastructure to respond to the demands of running a business in the 21st century. Externally, he sits on many boards, including the Board of Directors for NAM (National Association of Manufacturing) and was the 2011 Chair for the Los Angeles County Business Federation (BizFed). In 2012, he served as the BizFed Institute Chair and in 2013 is serving as the Co-Chair of the BizFed Healthcare Committee.

**Prior Experience:**
Before joining Employers Group, Mark was the Associate Dean of the Marshall School of Business at the University of Southern California (USC) for three years, leading many efforts from external affairs, corporate development and executive education, which included customized solutions for companies to help meet the critical needs of their employees and executives.

Prior to USC, Mark was a Partner in Business Consulting at Arthur Andersen, developing solutions for clients across the U.S., Asia, and Europe. Mark's professional experience and expertise are in strategic planning, business process design, customer relationship management, organizational change, customer service design and enhancement, as well as global operations and service integration. He's served some of California's most prized companies, including most of the major entertainment companies.

SIGNATURE
RESOLUTION

# T. Warren Jackson

**MEDIATOR | ARBITRATOR | SPECIAL MASTER**

Century City | Los Angeles | Virtual Services

"I bring engagement, preparation, optimism, and a mix of active listening, empathy and humor to mediations. My General Counsel experience, diversity, and expertise in the field brings a credible and persuasive perspective. Through perseverance and motivating parties to 'trust the process,' I deliver the settlement results you expect at Signature Resolution."

## BIOGRAPHY

Prior to joining Signature Resolution, T. Warren Jackson, Esq. served as Senior Vice President and Associate General Counsel of DIRECTV, now part of the AT&T family. He oversaw internal investigations into allegations of discrimination, retaliation, and sexual harassment, and resolved highly sensitive cases, involving alleged whistleblower and executive departures.

Since joining the Signature Resolution panel, Mr. Jackson has settled wage and hour class actions, has facilitated collective bargaining negotiations for a health care employer, and has been appointed as an external adjudicator for Title IX matters with a private university.

Mr. Jackson began his career at O'Melveny & Myers in the Labor & Employment Law Department. Since then, he has specialized in class, collective and representative actions, counseling on all phases of the employment relationship such as employee discipline and termination, employment discrimination, wage and hour, employee benefit issues, non-compete matters, union negotiations and campaigns, and internal investigations.

Mr. Jackson has counseled clients and provided strategic litigation support for labor and employment law

matters. He also served as vice president of workforce diversity and chief ethics officer.

He has lectured extensively in the field and served on several legal associations: California Employment Law Council, College of Labor and Employment, and the Legal Committee of the Employers Group; and on the Boards of the Constitutional Rights Foundation, the Riordan Programs at UCLA Anderson, and the Ronald Reagan UCLA Medical Center. Mr. Jackson has been consistently active in matters of importance to Los Angeles, ranging from service on the Police Commission, the Civil Service Commission, and the Webster Commission reviewing the LAPD’s response to the civil disturbance following the Rodney King trial, to current service on LA County’s Economy and Efficiency Commission.

## PRACTICE AREAS

- Business / Commercial
- Civil Rights
- Class Action
- Employment
- Wage & Hour

## EDUCATION

- Human Resource Executive Development Program, Cornell University
- Executive M.B.A., UCLA Anderson School of Management
- J.D., Harvard Law School
- B.A., Cornell University

## EXPERIENCE

- **Senior Vice President**, Associate General Counsel, DIRECTV (AT&T) (1984–2016)
- **Associate**, O’Melveny & Myers, LLP (1976–1984)

## PROFESSIONAL ACHIEVEMENTS AND MEMBERSHIPS

- **Member**, Economy and Efficiency Commission, Los Angeles County (2017–Present)
- **Member**, Los Angeles Police Commission (1996–2001)
- **Member**, Los Angeles Civil Service Commission (1994–1996)
- **Member**, California Fair Employment and Housing Commission (1992–1999)

Ogletree Deakins

# Robert R. Roginson

Office Managing Shareholder || Los Angeles

Robert Roginson is the managing shareholder of the Los Angeles office and Chair of the firm's Trucking and Logistics Industry Group. His practice focuses on all aspects of California and federal wage and hour and pay practice counseling and class action defense.

Mr. Roginson represents employers in administrative agency investigations and state and federal class action litigation. Mr. Roginson has defended dozens of employers, motor carriers, and other companies in class actions and PAGA lawsuits involving a variety of allegations, including worker misclassification, meal and rest period violations, reimbursement claims, off-the-clock claims, and record keeping violations. He also counsels employers and companies on California and

Ogletree Deakins

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From November 2007 until March 2010, Mr. Roginson served as Chief Counsel for the California Division of Labor Standards Enforcement (DLSE). Appointed by Governor Arnold Schwarzenegger, Mr. Roginson represented and advised the California Labor Commissioner and her staff in all aspects of enforcement and interpretation of California's labor and wage/hour laws, licensing requirements, and retaliation statutes. He also managed and directed the Division's litigation and handled matters involving meal and rest period and wage and hour compliance and enforcement, public works and prevailing wage requirements, the Talent Agency Act, and the Private Attorney General Act (PAGA). As Chief Counsel, Mr. Roginson authored the DLSE amicus brief in the landmark California Supreme Court *Brinker* case, and his brief set forth the standard adopted by the Court for what constitutes lawfully providing a meal period under California law. Mr. Roginson also authored several significant DLSE opinion letters clarifying and explaining California law. They include opinion letters affirming California's on-duty meal period requirements, affirming an employer's right to take deductions for vacation and sick time for partial-day absences for exempt employees, affirming an employer's right to implement proportionate salary and work schedule reductions for exempt employees, authorizing the use of debit pay cards and convenience checks, and approving temporary alternative workweek schedules. Mr. Roginson has also served as an expert witness and consultant in several wage and hour and public works matters.

Employment Law, Litigation, Wage and Hour, Traditional Labor Relations, Governmental Affairs

Industry Groups

Construction Law, Trucking and Logistics

Mr. Roginson focuses a significant portion of his practice to counseling and representing contractors, developers, and companies regarding state and federal prevailing wage laws, including the Service Contract Act and Davis-Bacon Act. Mr. Roginson counsels national employers on steps to achieve multi-state compliance with state prevailing wage laws. Mr. Roginson regularly defends contractors and subcontractors against DLSE Civil Wage and Penalty Assessments, seeks public works coverage determinations, and analyzes and counsels clients on complex public works coverage issues. While Chief Counsel of the DLSE, Mr. Roginson co-wrote and edited the DLSE's Public Works Manual. Before becoming an attorney, Mr. Roginson worked in the industrial relations department for a multi-employer construction trade where he represented construction contractors in labor grievance and arbitration matters in addition to the negotiation of the Southern California building trades master labor agreements.

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- **Member**, Los Angeles Civil Service Commission (1994–1996)
- **Member**, California Fair Employment and Housing Commission (1992–1999)

Julie Dunne
**Partner**
julie.dunne@dlapiper.com

**San Diego (Downtown)**
T: +1 619 699 2690
F: +1 619 764 6690

For more than two decades, Julie has represented leading employers and management, particularly in the retail industry, in a wide range of employment-related matters. She frequently defends employers in wage-and-hour class, collective and private attorney general representative actions under California laws and the Fair Labor Standards Act (FLSA). Julie also advises employers on compliance with California wage-and-hour laws and the FLSA.

- Employment

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- Currently defending a national discount retailer in a class and representative action for alleged failure to pay for all hours worked (time spent in health screenings and rounded time), failure to correctly calculate the regular rate of pay, failure to provide meal and rest periods, and failure to pay sick leave at the regular rate of pay
- Currently defending a national specialty fashion retailer in a representative action for failure to pay for all hours worked (health screenings), failure to accurately calculate the regular rate of pay, failure to pay sick leave at the regular rate of pay, failure to provide meal and rest periods, and failure to provide suitable seats
- Currently defending a national restaurant chain in multiple, overlapping class and representative actions for failure to pay for all hours worked, failure to provide meal and rest breaks, failure to pay reporting time, and derivative wage statement and final pay penalty claims; obtained voluntary dismissal of class claims based on the parties' arbitration agreement
- Currently defending a national car-care company in a class and representative action for failure to pay for all hours worked, failure to provide meal and rest breaks, and failure to correctly calculate the regular rate of pay; obtained voluntary dismissal of the class claims based on the parties' arbitration agreement and moving to compel arbitration of the representative claim as well
- Currently defending an advertising agency in a class and representative action for failure to accurately calculate the regular rate of pay, failure to provide meal and rest periods, and failure to timely pay final wages for talent appearing in a commercial
- Defended a national delivery service company in a collective action in 2021 for alleged misclassification of Hub Supervisors; obtained voluntary dismissal of the collective claims and settled on an individual basis
- Defended a national discount retailer in 2021 in a class and PAGA representative action for failure to pay for all hours worked and failure to provide meal periods; obtained voluntary dismissal of class and representative claims and settled on an individual basis



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- Defended a national fashion retailer in a PAGA representative action for alleged violation of California's day of rest laws through trial and obtained a complete defense verdict in 2012; affirmed on appeals to the Ninth Circuit and the California Supreme Court in 2017
- Defended a global technology company in a PAGA representative action for alleged violation of California's meal, rest and final pay laws through trial and obtained a complete defense verdict in 2016
- Defended a global technology company in a wage and hour class action for alleged violation of California's meal, rest and final pay laws and obtained a defense verdict as to all claims except the meal period claim of one subclass in 2016
- Defended a national restaurant chain in a class action regarding failure to pay for all hours worked and failure to provide meal periods and rest breaks and defeated class certification; affirmed on appeal in 2016
- Defended a national fashion retailer in a class action for failure to pay for time spent in bag checks and defeated class certification in 2015
- Defended a national fashion retailer in a class and representative action regarding failure to provide suitable seats and defeated class certification in 2014

## CREDENTIALS

### Admissions

- California

### Recognitions

- Recognized as 2023 "Lawyer of the Year" for Litigation – Labor and Employment in San Diego, *Best Lawyers*, 2022
- Named to Best Lawyers in America for work in Employment Law – Management, and Litigation – Labor and Employment, *Best Lawyers*, 2011-2023
- Recommended for Labor and Employment Disputes (Including Collective Actions): Defense, *The Legal 500 United States*, 2021 - 2022
- Recognized as "Labor & Employment Star" by *Benchmark Litigation*, 2021 - 2022
- Named Top Lawyer – Labor & Employment, *San Diego Magazine*, 2013-2022
- "BTI Client Service All-Stars," *BTI Consulting Group*, 2020 and 2022
- Named as Women in the Law, Top Peer Nominated Lawyers, *Best Lawyers*, 2017
- Awarded AV Preeminent Peer Review Rating, *Martindale-Hubbell*, 2002-present

### Education

- J.D., University of San Diego School of Law
- B.A., Comparative Literature, University of Michigan

### Memberships

- Member, National Retail Federation's Committee On Employment Law, Chair of its Wage and Hour Subcommittee
- Member, Legal Committee, Employers Group
- Former co-chair, Labor and Employment Law Section, San Diego County Bar Association

## INSIGHTS

### Publications

**California Supreme Court holds that failure to pay meal and rest period premium wages can support derivative claims**


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26 May 2022
Key details and implications for employers.

## Events

## Upcoming

**Employment issues in the entertainment and retail industries**

November 16, 2022 | 2:00 pm - 3:00 pm EST
Consumer Goods and Retail speaker series
Webinar

## Previous

**Employment law trends in the Media, Sport and Entertainment sector**

May 26, 2022 | 12:00 - 1:00 pm EST
Webinar

**The Department of Labors New Regulations Bring Back a Strict and Confusing Regulatory Regime**

22 Mar 2022

**Navigating the arbitration landscape and mitigating employment litigation risks**

16 March 2022 | 1:00 - 2:00 ET
Webinar

**Annual California employment law briefing**

20 October 2021
Annual California employment law briefing
Webinar

**Tips for California employers: Three court decisions and what they mean for your wage statement compliance**

11 August 2021 | 12:00 - 1:00 PT
Webinar


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**Policing meal periods: The impact of *Donohue v. AMN Services* on California law and other high-risk wage and hour developments**

23 March 2021 | 12:00 - 1:00 PT
Webinar

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**Employment in the consumer goods, food and retail sectors in 2021 – what to expect**

16 February 2021
Webinar

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- Employment Issues in the Entertainment Sector, National Retail Federation, July 2022
- Navigating the Arbitration Landscape and Mitigating Employment Litigation Risks, March 2022
- Wage and Hour Developments, DLA Employment Law Briefing, October 2021
- Tips For California Employers: Three Court Decisions and What They Mean for Your Wage Statement Compliance, August 2021
- Covid-19 and the ABC Test – Issues Affecting The Insurance Industry, July 2021
- Are Covid-19 Health Screenings Considered Work Under Federal and California Law, National Retail Federation, March 2021
- Meal Periods in California: New Rules for California Employers, March 2021
- Employment In the Consumer Goods, Food and Retail Sectors in 2021 - What to Expect, February 2021
- The Privilege Implications of Using Online Collaboration Tools, September 2020
- Remote Work Challenges for The California Tech Industry, August 2020
- Wage Statements, Littler Executive Employer, Phoenix, May 2018
- Retail Industry Roundtable, 2018 Executive Employer Conference, Phoenix, May 2018
- Retail Industry Roundtable, 2017 Executive Employer Conference, Phoenix, May 2017
- Wage-and-Hour Class Action Avoidance: Lessons from Trial Attorneys, 2017 Executive Employer Conference, May 2017
- California Wage-and-Hour Update for Retailers, August 2016
- Retail Industry Roundtable, 2016 Executive Employer Conference, Scottsdale, Arizona, May 2016
- Keeping Track of Meal Periods in California, February 2016

## NEWS

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**BTI Consulting Group recognizes 18 DLA Piper lawyers for providing superior client service**

10 February 2022

DLA Piper is pleased to announce that BTI Consulting Group has recognized 18 of its lawyers for providing superior service to clients in the BTI Client Service All-Stars 2022 report.

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**Nine DLA Piper lawyers recognized by BTI Consulting Group for superior client service**

10 December 2020
DLA Piper is pleased to announce that BTI Consulting Group has recognized nine of its lawyers for providing superior service to clients.


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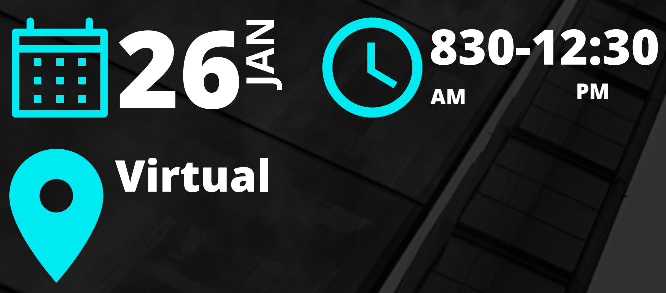
# LEADERSHIP ACADEMY 2023




Is the virtual Leadership Academy Right For Your Leaders (or yourself)?

- Are leaders self-aware of their behavioral and leadership tendencies?
- Are leaders effectively able to lead out of a crisis, and do they have the special skills to lead remotely?
- Are leaders familiar with supervisory laws & practices, including leave requests?
- Are leaders effectively communicating and collaborating for results?
- Are coaching and performance discussions engaging and goal-oriented?
- Are leaders able to navigate teams through change and turmoil?

**WELU SPECIAL: Register 4 and get 50% off all subsequent registrations for the same program**

## Contact Us For Registration:

**800-748-8484**
**training@employersgroup.com**

## SESSION START DATES

JAN 26TH
APR 20TH
JUL 27TH
OCT 12TH

## Session Times

**830-12:30**
**AM PM**

## SESSION TIME PERIOD

**8 WEEK SESSIONS**

**Pricing:**
**Member (Regular) = $975**
**Early Bird = $750**
**Non-Member (Regular) = $1,175**
**Early Bird = $950**

## 9:10-10:20

## We're in a New Year's State of Mind- the 2023 Employment Law Update!

## Jon Light/Karen Gabler

Staying abreast of new employment law legislation for the upcoming year, as well as the prior year's cases and administrative opinions impacting future workplace activity, is critical to the employer's protection.

In this informative program, employment law attorneys Jonathan Fraser Light and Karen L. Gabler will present the 2023 employment law update. Attendees will receive a detailed handout providing insights into 100+ new laws, regulations and cases, along with practice tips for employers and human resource professionals.

Topics on the horizon for the 2023 New Year include:

- 2023 new legislation
- 2022 case law and administrative opinions
- Arbitration status – Viking River (PAGA)
- Fast food restaurant sector council established
- Board of director quotas found unconstitutional
- CFRA changes – "designated persons"
- Mandatory unpaid bereavement leave
- Off-duty cannabis use discrimination prohibited
- COVID-19 updates – SPSL and required
- Minimum wage increases notice extensions
- Expanded pay data reporting and job ad pay scale requirements
- Meal/rest period premium pay = wages (more penalties)
- Emergency conditions retaliation prohibited
- Franchisor discrimination rules established
- Handbook updates for 2023
- And much more!

*We Make Business Work®*

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Camarillo, CA 93010
805.248.7208 ■ Fax: 805.248.7209
LightGablerLaw.com

# "We're in a New Year's State of Mind"

# The 2023 Employment Law Update!

## Presented by:

Jonathan Fraser Light
(805) 248-7214
jlight@lightgablerlaw.com

Karen L. Gabler
(805) 248-7207
kgabler@lightgablerlaw.com

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## JONATHAN FRASER LIGHT

Jon Light has over 40 years of experience in the field of employment law, is AV-rated by Martindale Hubbell, and has been named multiple times as one of Southern California's "Super Lawyers" by *Los Angeles* magazine. As the managing attorney at LightGabler, Jon and his team members consult with over 2,500 companies, non-profits and public agencies throughout California regarding their day-to-day employment law needs.

Jon has successful jury trial, court trial, appellate, Labor Commission and binding arbitration results in lawsuits and administrative claims involving wrongful termination, sexual harassment, race discrimination, class action, wage and hour, and other employment-related matters. He has also appeared on behalf of employers with the federal Equal Employment Opportunity Commission ("EEOC") and Labor Department, the California Civil Rights Department ("CRD"), the National Labor Relations Board ("NLRB"), and other governmental agencies involved with employment law issues.

Jon frequently speaks to employer and human resources groups, including the Ventura County Employer Advisory Council ("EAC"), Professionals In Human Resources Association ("PIHRA"), National Human Resources Association ("NHRA"), and numerous business associations such as CPA forums, manufacturers' associations, dental and medical societies, and chambers of commerce. He lectures on topics such as avoiding sexual harassment claims, wage and hour issues, business and employment law pitfalls, supervisor strategies, disability leaves, drug testing and marijuana, employment law updates, and preparing employee handbooks.

Beyond frequently lecturing to business groups and civic organizations on employment issues, Jon serves the community where he lives and works, as evidenced by his past and present participation in the following organizations: CSUCI Business School Advisory Council; Oxnard College Foundation Board; Ventura County Fair Political Practices Commission; Ventura County Bar Association (past president); volunteer legal services and court-appointed mediator; Footworks Youth Ballet (board member and former production manager); Channel Islands Ballet (past chair and former board member); Ventura County Medical Resource Foundation (past chair); United Way Allocations Cabinet; Ventura County Taxpayers Association; Ventura County Boy Scout Council (past president); as well as for several years with the (2009 County champion) Newbury Park High School Mock Trial Team (assistant coach); and Camarillo Academic Olympics (Superquiz chair and board member). He is also a Life Member of the National Eagle Scout Association.

Jon is a graduate of the UCLA School of Law, where he was a member of the Law Review. He is the author of two editions of the nationally acclaimed and award-winning book, *The Cultural Encyclopedia of Baseball*. He resides in Camarillo with his wife of 39 years, Angela, a retired public school teacher. Their 31-year-old twin daughters live and work on the east coast and abroad after attending Yale and Georgetown.

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## KAREN L. GABLER

Karen L. Gabler is an attorney and co-founder of the LightGabler employment law firm in Camarillo. For over 30 years, she has counseled employers of all sizes and industries throughout California on virtually every aspect of employment law, concentrating on proactive employment strategies her clients can implement to foster workplace productivity and prevent future legal problems.

Karen provides day-to-day advice to hundreds of management clients on workplace disputes and employee issues. She assists clients with their employment policies and practices to ensure strategic compliance with current laws, and investigates workplace complaints regarding harassment, discrimination, employee theft or other misconduct. She conducts numerous training programs on a variety of management, supervision and compliance issues. When litigation is unavoidable, Karen defends her clients against employment law claims in the state and federal courts as well as administrative hearings, arbitrations, and mediations. She is a skilled litigator and negotiator, having successfully resolved hundreds of claims on behalf of her clients.

Karen is a sought-after speaker on a wide variety of employment law topics for multiple industry groups and business associations. She is a regular presenter at LightGabler's complimentary monthly webinars for clients, business owners and managers on a myriad of employment law issues. Karen has published numerous articles and has served as an expert commentator on employment law topics for a variety of business and legal publications. She also has served as an adjunct professor of employment law at the Pepperdine University School of Law, and has been a guest lecturer at California Lutheran University and the Ventura College of Law.

For eleven consecutive years, Karen has been selected as a Southern California Super Lawyer, a premier rating awarded to less than five percent of the outstanding lawyers in California. She was named the "Woman of the Year" by the Greater Conejo Valley Chamber of Commerce. She has been recognized as one of the "Who's Who in Professional Services" for the Santa Barbara, San Luis Obispo and Ventura counties for successive years and has been nominated for multiple years as one of the San Fernando Valley's "Most Trusted Advisors." She has been recognized as one of the "Top Fifty Women in Business" and the "Editor's Choice in Professional Services" by the Pacific Coast Business Times. She also was recognized as a "Top Attorney in Client Service" and a "Top Attorney in Innovation Leadership" by the San Fernando Valley Business Journal.

Karen is also a long-standing active community member, participating in more than a dozen business and civic groups and serving as an officer or board member of numerous non-profit organizations. She has received the United Way of Ventura County's Milton M. Teague Award for volunteer service, and was recognized by 805 Living magazine with its "Giving Back" award.

Karen obtained her law degree from the William S. Richardson School of Law at the University of Hawaii, where she received numerous awards for academic excellence. She was the Managing Editor of the University of Hawaii Law Review, and practiced law at one of Honolulu's largest law firms for five years before moving to California in 1996. She is licensed to practice in the state and federal courts of Hawaii and California.

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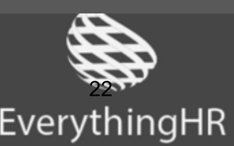
# Employment Law Update

Presented by:
Jonathan Fraser Light, Managing Attorney, LightGabler
Karen L. Gabler, Attorney & Co-Founder, LightGabler



# Summary of 2022/2023 Legislation (#1)

a. Governor signed 997 bills (85.6%)

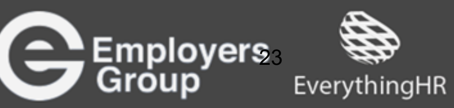
b. Vetoed 169 bills (14.4%)

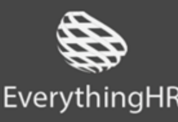
c. Approximately 10% are employment-related

d. Bills go into effect January 1, 2023, except where noted

e. One emergency legislation and a few extended to 2024 or 2025

f. All are California laws except where noted





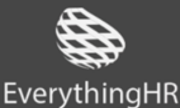

# Agriculture (AG) Overtime (Reminder) (AB 1066) (#2)

a. Phase-in of overtime over seven years

b. 26+ employees = regular daily/weekly overtime now applies (8/40)

c. 25 or fewer employee = 9/50 still in effect for 2023

d. Meal periods now apply to all AG workers with limited exceptions (e.g., irrigators)




# Arbitration (AB 51 update) (#3)

a. AB 51 prohibits use of arbitration in employment relationships

b. Litigation ensued in federal court (9th Circuit)

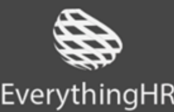
c. *Viking River* case – SCOTUS allows arbitration of PAGA

d. In 8/22, 9th Circuit withdrew its prior approval of AB 51; rehearing pending

e. Injunction prohibiting enforcement of AB 51 still in effect

f. Likely petition to SCOTUS for final decision

g. “Mandatory” arbitration now possible for new hires; "voluntary” still advisable



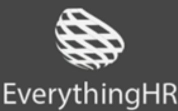

# Arbitration - Federal Ban on Sex Harassment/Sex Assault Disputes (HR 4445) (#4)

a. Modifies the Federal Arbitration Act ("FAA")

b. Cannot force arbitration of certain employment disputes

c. Applies to any "dispute or claim that arises or accrues" on or after March 3, 2022

d. Applies exclusively to sex-related cases (not harassment or discrimination generally)




# Background Checks: Sealed Convictions (SB 731) (#5)

a. Effective July 1, 2023

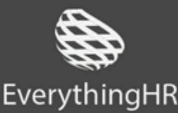
b. Allows quicker sealing of convictions and arrest records

c. Cannot be convicted of another felony within a certain number of years (varies by conviction)

d. Excludes serious and violent felonies

e. Doesn’t apply to school districts as to teachers

f. Usual seven-year look-back now may not include certain convictions




# Business Restroom Access (AB 1632) (#6)

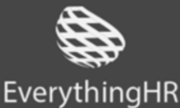
a. “Restrooms for patrons or employees only” may not be enforceable

b. Person showing certain medical conditions can access restroom

c. Crohn’s, colitis, IBS, etc., requiring immediate access to restrooms

d. Business can request proof

e. Dept. of Health to create standardized form




# Business Restroom Access (AB 1632) (#6) (cont'd)

f. Five criteria for access

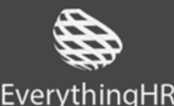
i. Individual has eligible condition or uses an ostomy device

ii. At least three employees are working on site at the time

iii. Facility is not in an employee changing area or creates health or safety risk to the business

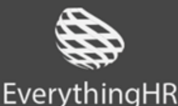
iv. Use of the facility would not create an obvious health or safety risk to the requesting individual

v. A public restroom is not immediately accessible




# Bereavement Leave (AB 1947) (#7)

a. Amends California Family Rights Act (CFRA)
b. Allows five days of unpaid bereavement leave
c. Must be employed for at least 30 days
d. Applies to private employer with 5+ employees and all public employers
e. No restriction on how many times a year
f. "Family members" – spouse, domestic partner, child, parent, siblings, grandparents and grandchildren




# Bereavement Leave (AB 1947) (#7) (cont'd)

g. Does not include CFRA "Designated Person" (see #27 below)

h. Can use PTO, vacation or sick leave benefits to cover unpaid days

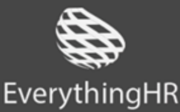
i. Need not be taken consecutively, but must be used within three months after death

j. If employer already provides paid days, they can apply to the unpaid days (not cumulative)

k. Employer may request proof of death within 30 days of the leave (funeral notice, etc.)

l. Information must be kept confidential

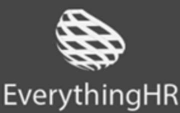
m. Exceptions for union employees who already have bereavement leave (additional conditions apply)




# Board of Director Quotas (SB 826 and AB 979) (#8)

a. Public company boards required to add women and people of color

b. Declared unconstitutional by court rulings



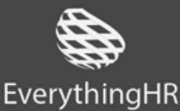

# CalSavers – Employer Size Expanded for 2025 (SB 1234) (#9)

a. California's retirement plan system required if no private plan in place

b. Currently applies to employers with 5+ employees

c. As of 1/1/26, will apply if only one non-owner employee on payroll

d. Penalties are up to $750 per employee for failure to comply




# COVID-19 Emergency Temporary Standards Update (#11)

a. Third and final ETS remain in effect through 12/31/22

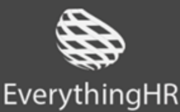
b. Apply to all employees regardless of vaccination status

c. Less stringent test for masks (no light test, e.g.)

d. Testing for "returned case" (new term) not required if returning within 90 days of initial onset of symptoms or after first positive test if no symptoms

e. Cal/OSHA working on permanent non-emergency standards commencing 1/1/23

f. Governor says COVID-19 state of emergency will end on 2/2/23




# COVID-19 Exposure Notice – 1 Year Extension (AB 2693) (#12)

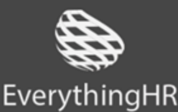
a. Extends notice and posting requirements to 1/1/24

b. Extends Cal/OSHA's ability to shut down business

c. Individual notices no longer required

d. Can post notice of exposure in prominent place

e. Requirements for posting more comprehensive than an individual notice to each employee




# COVID-19 Exposure Notice – 1 Year Extension (AB 2693) (#12) (Cont'd)

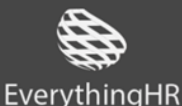
f. Post for 15 days with date, specific location, contact info to learn about COVID-19 benefits (e.g., COVID-19 sick time), contact info to receive cleaning/disinfection plan (no specific names)

g. Posted within one business day of employer's receipt of notice

h. Must keep a log of postings

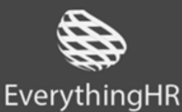
i. Employer can still provide individual notice

j. Doesn't align with Cal/OSHA, but that should be remedied shortly




# COVID WORKERS COMP REPORTING (AB 1753) (#13)

a. Extended through 1/1/24
b. Requires reporting of worker Covid positive cases – rebuttable presumption it was contracted at work
c. Employer "knows or reasonably should know" of positive test
d. $10,000 fine if no compliance
e. Additional coverage for police, fire, state entities




# COVID-19 Supplemental Sick Leave (AB 152) (#14)

a. COVID-19 sick leave now available through 12/31/22

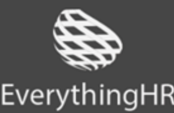
b. Emergency legislation effective 9/29/22

c. Change in testing requirement

   i. Before, employer could require test on or after five days following the initial positive test

   ii. Now, employer also may require a second test within no less than 24 hours after the first test. If positive, may require a third test within 24 hours (employer must pay)

d. Other rules regarding COVID-19 sick pay remain in effect through 12/31/22

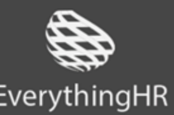



# COVID-19 – PPE Stockpile for Health Care (SB 275) (Reminder) (#15)

a. Bill passed a year ago to be effective 1/1/23

b. Health & Safety Code section 131021 and Labor Code section 6403.1

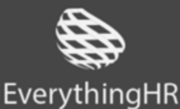
c. Certain PPE must be stockpiled by health care industry employers




# DFEH Now California Civil Rights Department (CRD) (AB 2662; SB 189) (#17/18)

a. CA Dept. of Fair Employment and Housing has rebranded itself

b. Related Fair Employment and Housing Council, which issues regulations, is now the Civil Rights Council (CRC)




# Gender Pricing Prohibition Expansion (AB 1287) (#19)

a. Adds Civil Code section 51.14 to expand scope of Gender Tax Repeal Act of 1995

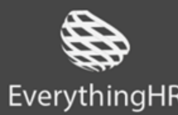
b. So-called "Pink Tax" on goods more expensive simply because they are marketed to women (women pay 7% more)

c. Written disclosure of pricing required

d. Now expanded to goods and not just services and would cover California-based manufacturers and distributors

e. Must show business justification for differential pricing

f. Penalties up to $10,000 for a first violation

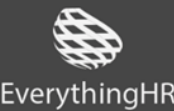



# Franchisor Discrimination Prohibited (AB 676) (#20)

a. Expands Unruh Act prohibiting business discrimination

b. Prohibits franchisor from refusing a franchise or financial assistance to franchisee based on a protected characteristic (sex, race, etc.)

c. Expands the civil liability against franchisors for violations (previously no private right of action)




# Emergencies – Workers Stay Home (SB 1044) (#21)

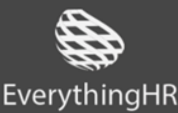
a. "Emergency condition" will enable an employee to refuse to report to work

b. Defined as conditions of disaster, extreme peril to safety, criminal acts, etc., at the workplace (e.g., active shooter); or an order to evacuate a workplace, worksite, worker's home or child's school due to natural disaster or criminal act

c. Expressly does not include a "health pandemic"

d. Employee's "reasonable belief" required

e. Employer must notify employees of emergency condition

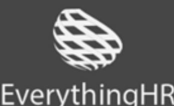



# Emergencies – Workers Stay Home (SB 1044) (#21) (cont'd)

f. Employee must return to work after emergency situation has ended

g. Excludes several business categories, including first responders, health care facilities, military or defense sector, utilities, fire prevention, banks, correctional facilities and others

h. Employer can't retaliate again a worker acting under this statute




# Fast Food Employees (AB 257) (#22)

a. Fast Food Accountability and Standards Recovery Act (FAST Recovery Act)

b. Bill of Rights created for such workers

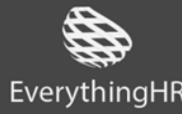
c. New Fast Food Council (FFC); authorized to set minimum wage and safety standards

   i. Minimum wage of $22 is ceiling for 2023 (not set yet), with escalators for the future

   ii. No authority over benefits (vacation, etc.) or “predictable scheduling”

   iii. FFC currently “sunsets” on January 1, 2029

   iv. Local government can create its own minimum



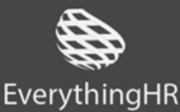

# Fast Food Employees (AB 257) (#22) (Cont'd)

d. Applies to "chains" with 100 or more establishments nationally

e. "Primarily provides food or beverages" among other criteria (Starbucks, McDonald's)

f. Does not make franchisor liable for franchisee conduct

g. Excludes bakeries that sell bread on premises or restaurant within a grocery store (and the grocery employs the workers – e.g., Starbucks inside a Vons)




# Marijuana – off-duty use protected (AB 2188) (#23)

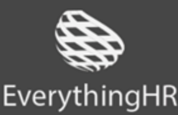
a. 7th state to protect off-duty use as of 1/1/24

b. Can test for THC (active ingredient) to show impairment; but not metabolites to show evidence of prior use and still in the system

c. Treats marijuana more like alcohol

d. Other prohibitions still in effect as to on-duty possession, use, impairment, etc.

e. Exempts workers in building and construction trades, some government agencies and businesses receiving federal funds or federal contractors

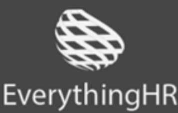



# Independent Contractors (extending exclusions) (AB 1561; AB 1506) (#25)

a. Exclusions for manicurists, construction contractors and newspaper carriers

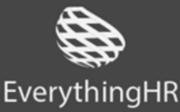
b. Extension to 2025 instead of 2022

c. Commercial fishing – exclusion extended to 2026




# Jobs: Posting and Pay Scales (SB 1162) (#26)

a. Applies to employers with 15+ employees (unclear if all must be in CA)
b. Disclose pay scale for a position in which employee is currently employed
c. "Pay scale" defined as low and high end of what employer "reasonably expects" to pay
d. Unclear if that includes bonuses or other incentive compensation



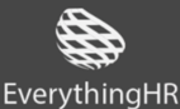

# Jobs: Posting and Pay Scales (SB 1162) (#26) (cont'd)

g. Must include this info in job postings (even if using third parties)

h. Records retention – job titles and wage history for three years after departure

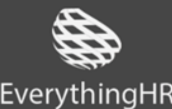
i. Penalties $100 to $10,000 – Assessed by Labor Commission

j. Unclear how this affects non-California remote employees




# Jobs – Pay Data (SB 1162) (#26 Continued)

a. Adds state obligations to current pay data requirements (like EEO-1 filing)
b. Must have 100 or more employees (or hired through labor contractors)
c. Reports are due second Wednesday in May (not March 31)
d. Pay data now requires “mean” and “median” hourly rate by race, ethnicity, and sex in each job category (not just by job category alone)
e. Separate report for each business location in the state (can’t consolidate)
f. Labor contractor must supply data to the host employer to file
g. Penalties $100-$200 per employee



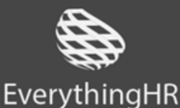

# Leaves of Absence (AB 1041) (#27)

a. Amends CFRA and CA Paid Sick Leave to add “Designated Person” (doesn’t have to be family member or equivalent)

b. One designation in a 12-month period

c. Designated at the time employee requests the leave

d. Could create separate leave time for FMLA and then CFRA in same year because FMLA doesn’t allow for “Designated Person”




# Local Ordinances (#28; #29)

a. LA/Glendale – 60-room hotel workers - panic buttons

b. West Hollywood

   i. PTO 96 hours for F/T workers, P/T workers prorated

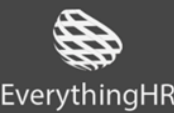
   ii. Unpaid 80 hours sick/vacation/personal

c. LA/Downey – Health care worker minimum wage (on hold/referendum)

d. SF – Public Health Emergency Leave -- COVID-19/Poor Air Quality

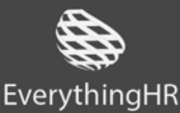
   i. 100+ employees anywhere

   ii. 80 paid hours as of 2023




# Meal/Rest Periods – Public Health Care (SB 1334) (#30)

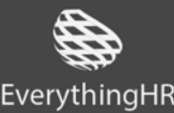
a. Adds Labor Code section 512.1
b. Meal/rest break rules cover city, state, University of California, etc.
c. Covers public healthcare workers providing direct patient care
d. Equal access to meal/rest breaks that private sector receives
e. Exception if covered by CBA




# Live Event Worker Training (AB 1775) (#32)

a. Cal/OSHA requires new training for workers who set up and tear down live event venues (concerts, etc.)

b. Vendor must certify to the venue operator that training occurred

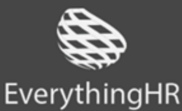



# PFL/SDI Rates Higher for Low-Income Workers (SB 951) (#33)

a. Paid Family Leave and State Disability Insurance benefits increased

b. Phased-in increases up to 90% for lowest income workers

c. No more cap on wage tax at $145,600; now unlimited taxation to pay for the increased benefit




# Privacy: CCPA/CPRA Compliance Reminder (#35)

a. Prior exclusion for employee data is gone as of 1/1/23

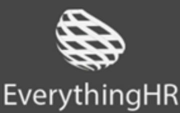
b. Data protection applies to virtually all employers

c. “Delete my files” request?

   i. Employer still has a duty to maintain files under various code sections

   ii. May deny if records must be maintained under other statutes (e.g., LC 433; LC 226; LC 1174)

d. Most burdensome provisions only apply to for-profit companies with $25M in sales or handle data collection and sharing of information of at least 100,000 California households

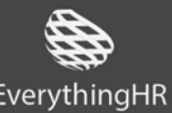



# FEHA Expansion of Protection – Reproductive Health (SB 523) (#36)

a. California’s response to *Roe v. Wade* being overturned

b. No discrimination allowed for “reproductive health decision-making”

c. Presumably includes contraception, *in vitro* fertilization, abortion




# Sexual Assault – Statute of Limitations (AB 2777) (#39)

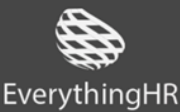
a. “Sexual Abuse and Cover Up Accountability Act”

b. In effect until 12/31/26

c. Expands current 10-year statute of limitations

d. Victims after 1/1/2009 may bring claims

e. Can’t re-litigate old claims

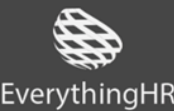



# Human Trafficking (AB 1161; AB 2160; AB 1788 (#40; #41; #42)

a. Requires postings in barber and cosmetology facilities

b. EMTs must be trained in identifying trafficking

c. Hotel workers must report; hotel liable for activities in hotel and failure to report



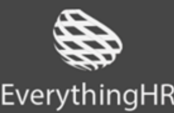

# Union Card Check (AB 2183) (#44)

a. Labor Unions can use card check instead of secret ballot vote

b. “Labor Peace Agreement” (“LP”) v. “Non-Labor Peace Agreement” (“NLPA”)

c. LP allows secret ballot election but must give full access to property and other concessions (no meetings with employees) [not recommended]

d. NLPA means “business as usual” for owners fighting union, but no election option (card check is enough) [recommended]



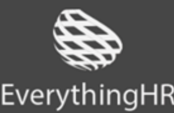

# Minimum Wage Hike (SB 3 Reminder) (#46)

a. Inflation trigger in SB 3

b. $15.50/hour for all employers (size irrelevant) as of 1/1/23

c. Salaried exempt minimum to be $64,480 (minimum wage x 2 x 2080)

d. Use state minimum wage, not higher local minimum wage, to determine exempt salary minimum

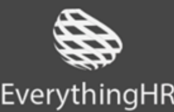



# Hourly Wage Increase – Computer Programmers and Physicians/Surgeons (#47; #48)

a. Computer Software and Systems Analysts – If paid $112,065.20 annually or $53.80/hour, then no entitlement to overtime

b. Don't confuse (a) above with company's IT support personnel

c. Physicians and surgeons – If paid $97.99/hour, no entitlement to overtime




# CA WARN Act – Call Center Employee Protections (AB 1601) (#49)

a. All California call centers covered – no minimum 75 employee standard as in regular California WARN Act requirements

b. Triggered if certain % of call center work is moved to a foreign country

c. 30% of call center's operating unit's total volume of calls over previous 12 months, or within a unit of call center

d. If standards met, then must give 60-day California WARN Act notice

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## NEW LEGISLATION AND OTHER KEY TOPICS

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### 1. A SUMMARY: THE 2022 LEGISLATIVE SESSION (10/2022)

The California State Legislature convened its 2022 Legislative Session on January 3, 2022, and by the August 31, 2022 deadline, the Legislature sent 1,166 bills to Governor Gavin Newsom. As of the September 30, 2022 signing deadline, Governor Newsom signed 997 of those bills into law (85.6%) and vetoed only 169 bills (14.4%). Of the signed bills, approximately ten percent related to labor and employment law topics. A summary of many of those bills is contained below. As in years past, several of the bills that did not make the cut in this year's session may resurface when the next legislative session resumes on December 5, 2022 (see #45 for a few key bills).

Other than AB 152 (see #14 below), which was an urgency measure effective immediately upon the Governor's signature (September 29, 2022), most of the other bills noted below will go into effect on January 1, 2023, although some bills or portions of those bills may become effective on later dates. Bills with future effective dates are noted.

Additional information on each of the bills listed below can be found at: https://leginfo.legislature.ca.gov (enter the bill number into the search box).

### 2. AGRICULTURE: OVERTIME (2016-2025) (Reminder)

On September 12, 2016, Governor Jerry Brown signed AB 1066 into law. This bill, over time, phases out the overtime exemption under IWC Wage Order No. 14 for agricultural workers, and correspondingly, phases in overtime according to the following schedule:

**25 or fewer employees:**

| YEAR | DAILY OVERTIME | WEEKLY OVERTIME |
|---|---|---|
| **2023** | **9** | **50** |
| 2024 | 8.5 | 45 |
| 2025 | 8 | 40 |

**26 or more employees:**

| YEAR | DAILY OVERTIME | WEEKLY OVERTIME |
|---|---|---|
| 2022 | 8 | 40 |

The sitting Governor has the ability to temporarily suspend or delay implementation of this bill (this has not happened yet and it is unlikely to happen in the future).

Take note that most of the other overtime provisions of Labor Code Section 510 began to apply to agricultural workers on January 1, 2019, and the double overtime provisions on January 1, 2022. Note also that other provisions of the Labor Code, including meal period provisions, now also apply to formerly exempt agricultural workers. For a copy of IWC Wage Order 14, see: https://www.dir.ca.gov/IWC/IWCArticle14.pdf.

## 3. ARBITRATION: AB 51 UPDATE (10/2022)

AB 51 is a bill from 2019 that attempted to prevent mandatory arbitration of FEHA and Labor Code claims in California as of January 1, 2020, for any contracts for employment entered into, modified, or extended after that date. Implementation of AB 51 was stalled through a last-minute injunction in favor of the Chamber of Commerce of the U.S. ("Chamber"). On September 15, 2021, a divided federal Ninth Circuit panel (2-1) reversed part of the federal district court's AB 51 injunction. The Ninth Circuit majority held that AB 51 did not violate the Federal Arbitration Act ("FAA"), because it dealt with pre-employment behaviors and it allowed employees and applicants to choose to enter into arbitration agreements based on mutual consent. The majority, however, determined that the district court was correct to have enjoined the criminal and civil sanctions attached to a violation of AB 51, which the panel held were preempted by the FAA, because they presented an obstacle to the "liberal federal policy favoring arbitration agreements." On October 21, 2021, the Chamber filed a petition for rehearing en banc by the Ninth Circuit. In February 2022, Ninth Circuit panel deferred its decision on rehearing the matter until after the Supreme Court's decision in *Viking River Cruises* (issued in June 2022). In August 2022, the Ninth Circuit panel withdrew its prior opinion (September 15, 2021) which upheld, in large part, AB 51, California's law banning mandatory arbitration agreements as a condition of employment, and it granted the Chamber's request for a panel rehearing on the matter to occur sometime in the future. So long as the Chamber's petition is pending, the district court's injunction against the enforcement of AB 51 remains in effect. Regardless of the outcome, we expect the Chamber or Bonta to file a petition for review by the U.S. Supreme Court (during which time we also would expect the U.S. Supreme Court to continue to stay enforcement of AB 51).

**PRACTICE TIP:** Although employers technically may continue to require applicants to sign mandatory arbitration agreements as a condition of employment pending the courts' final decisions on AB 51, it is possible that AB 51 could be enforced and these agreements may become unenforceable. Given the continued uncertainty of the enforcement of AB 51, employers may wish to take a cautious approach and refrain from presenting mandatory arbitration agreements to applicants, and instead present mutual and voluntary arbitration agreements to employees during the onboarding process, as an agreement of this nature will be enforceable regardless of the outcome of this case. This approach may require an update to company offer letters and employment agreements, as well as revisions to current arbitration agreements to ensure compliance with AB 51.

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Remember also that employers should always retain all previously signed arbitration agreements in the employee's personnel file. It is possible that one version may be enforceable even if another version is not, depending upon the current state of the law. In addition, the fact that the employee has signed multiple arbitration agreements throughout employment may tend to demonstrate the employee's knowing and voluntary cooperation with the agreement to arbitrate, if challenged.

## 4. ARBITRATION: PRE-DISPUTE SEXUAL HARASSMENT BAN (10/2022)

On March 3, 2022, President Biden signed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" ("HR 4445") into law. **HR 4445** significantly changes the FAA to allow individuals or named representatives in a class or collective action alleging a "sexual harassment dispute" or a "sexual assault dispute" to invalidate an existing pre-dispute arbitration agreement or joint-action waiver that would otherwise force such claims into arbitration.

Specifically, HR 4445 amends the FAA as follows: "… at the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal or State law and relates to the sexual assault dispute or the sexual harassment dispute."

HR 4445 contains the following key definitions: (1) it defines "predispute arbitration agreement" as, "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement." (2) It defines a "predispute joint-action waiver" as, "an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement." (3) It defines a "sexual assault dispute" as, "a dispute involving a nonconsensual act or sexual act...including when the victim lacks capacity to consent." (4) It defines a "sexual harassment dispute" as, "a dispute relating to conduct that is alleged to constitute sexual harassment under Federal, Tribal, or State law."

HR 4445 also requires civil courts, not arbitrators, to determine whether an arbitration agreement is valid or enforceable as to sexual harassment or sexual assault claims. Civil courts will make the determination even if the arbitration agreement is challenged, "specifically or in conjunction with other terms of the contract containing such agreement," or if the arbitration agreement contains a clause that purports to delegate that determination to the arbitrator.

HR 4445 applies to any "dispute or claim that arises or accrues" on or after the date on which the legislation is enacted (March 3, 2022). The legislation does not apply retroactively to already pending claims for sexual harassment or sexual assault, and it does not affect parties already engaged in arbitration of these claims. Notably, HR 4445 still allows parties to agree mutually to arbitrate any claims of sexual harassment or

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assault, so long as the parties voluntarily enter into a written agreement to arbitrate the dispute after the dispute has arisen. HR 4445 also does not preclude pre-dispute arbitration agreements, or class or collective action waivers of other claims, including claims of discrimination, retaliation, or wage-and-hour-related claims. The full text of HR 4445 is viewable at:

https://www.congress.gov/bill/117th-congress/house-bill/4445/text.

**PRACTICE TIP:** Because the application of HR 4445 to an existing arbitration agreement will be determined only when a dispute or claim for sexual harassment or sexual assault arises, employers should evaluate their current arbitration agreements for compliance with HR 4445 and consult with their employment counsel to determine if HR 4445-related revisions are necessary.

## 5. BACKGROUND CHECKS: SEALED CONVICTIONS (10/2022)

Effective July 1, 2023, **SB 731** amends multiple Education Code and Penal Code Sections to, among other changes, seal certain conviction and arrest records for most ex-offenders that were not convicted of an additional felony within a certain number of years of completing a sentence, and so long as they are not currently serving any probationary sentence. Records of arrests that did not lead to convictions will also be sealed. This bill excludes convictions for serious and violent felonies, and felonies requiring sex offender registration; it would also still require records to be disclosed to school districts to assist in making decision regarding teacher credentialing and employment. According to the bill's author, SB 731 is necessary, "Due to the widespread usage of background checks in today's society, the availability of these records activate thousands of barriers for one quarter of the state's population resulting in chronic housing insecurities, long-term unemployment, and widespread lack of civic participation. These collateral consequences disproportionately affect Black and Latino communities and have become one of the leading drivers of multi-generational poverty." Many types of criminal incidents can remain on an individual's record until they are 100 years old. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB731.

**PRACTICE TIP:** SB 731 furthers California's push to provide equal opportunity to those with past criminal histories by now limiting the scope of searchable history available for background screenings. Recall that in 2018, through AB 1008 (the "ban-the-box" bill), California created the Fair Chance Act ("FCA"). Under this law, for employers with five or more employees, the FCA restricted the ability to make hiring decisions based on an applicant's criminal history until after a conditional offer of employment is made. Even then, if the basis for retracting the conditional offer of employment is the applicant's criminal history, the employer must conduct a detailed reassessment and review process. Several local cities and counties have also enacted their own Fair Chance Ordinances.

## 6. BATHROOMS: PUBLIC ACCESS & MEDICAL CONDITIONS (10/2022)

**AB 1632** adds Health and Safety Code Article 6 (commencing with Section 118700) to Chapter 2 of Part 15 of Division 104, to require that businesses open to the general public and that have employee-only restrooms (not generally accessible to the general public), allow non-employee individuals lawfully onsite to use the business' employee restroom during regular business hours for certain medical reasons. Eligible medical conditions include, "Crohn's disease, ulcerative colitis, other inflammatory bowel disease, irritable bowel syndrome, or another medical condition that requires immediate access to a toilet facility."

This special access exception applies only to individuals if all of the following conditions are met: (1) the individual has an eligible medical condition or uses an ostomy device [businesses can request presentation of reasonable evidence]; (2) three or more employees of the place of business are working onsite at the time that the individual requests use of the employee toilet facility; (3) the employee toilet facility is not located in an employee changing area or an area where providing access would create an obvious health or safety risk to the requesting individual or would create an obvious security risk to the place of business; (4) use of the employee toilet facility would not create an obvious health or safety risk to the requesting individual; and (5) a public restroom is not immediately accessible to the requesting individual.

As to criteria (1) above, the Department of Health has been tasked with creating a standardized form that can be used to present reasonable evidence, if requested by a business. The bill also contemplates that a signed statement issued to the individual by a physician, nurse practitioner, or physician assistant is sufficient for purposes of presenting reasonable evidence.

Lastly, willful or grossly negligent violations of AB 1632 can result in a civil penalty of $100, although AB 1632 does not create a private right of action. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1632.

## 7. BEREAVEMENT LEAVE: AT LEAST FIVE UNPAID DAYS (10/2022)

After numerous past unsuccessful attempts to pass similar legislation, **AB 1949** amends the California Family Rights Act ("CFRA") (amending Government Code Sections 12945.21 and 19859.3 and adding Government Code Section 12945.7) to make it an unlawful employment practice for private employers with five or more employees, and "the state and any political or civil subdivision of the state … cities and counties", to refuse to grant a request by an eligible employee to take up to five days of unpaid bereavement leave upon the death of an eligible family member. The days of bereavement leave do not need to be taken consecutively but they must be "completed within three months of the date of death of the family member." Note that under AB 1949 bereavement leave can potentially be taken multiple times per year.

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Eligible employees are those that have worked for the employer for at least 30 days. Eligible family members include spouses, domestic partners, children, parents, parents-in-law, siblings, grandparents, and grandchildren. Although probably a drafting error, this bill does not encompass the "designated person" category within the eligible family member list (see the CFRA/PSL amendments in #27 below).

AB 1949 bereavement leave is unpaid unless the employer has an existing policy that provides for paid bereavement leave. If an employer's existing bereavement leave policy provides for less than five days of bereavement leave, eligible employees will now be entitled to no less than five days of unpaid bereavement leave. For example, if an employer offers three days of paid bereavement leave, under AB 1949, the employer must now also offer an additional two days of unpaid bereavement leave. Eligible employees may elect to use available vacation, sick leave, PTO or compensatory time off, to cover any lost wages during their periods of unpaid bereavement leave.

Employers have 30 days from the first day of the leave to request documentation supporting the need for leave. The allowable types of documentation are very broad and include, among others, "a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency." Employers must, "maintain the confidentiality of any employee requesting leave… [and] any documentation provided to the employer … shall not be disclosed except to internal personnel or counsel, as necessary, or as required by law."

Although AB 1949 amends CFRA, the bill is clear that, "An employee's right to leave under this section shall be construed as separate and distinct from any right under Section 12945.2." AB 1949 also expressly states that it does not apply to any employee, "who is covered by a valid collective bargaining agreement if the agreement expressly provides for bereavement leave equivalent to that required by [AB 1949] and for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30 percent above the state minimum wage." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1949.

**PRACTICE TIP:** Make sure to update your handbook and other company policies to reflect this change. If you already have a bereavement leave policy, make sure you now offer at least five days (most companies offer three).

## 8. BOARD OF DIRECTORS: QUOTAS FOUND UNCONSTITUTIONAL (10/2022)

SB 826 and AB 979 are bills that made it mandatory for certain publicly held domestic or foreign corporations to have female and underrepresented community directors on their boards. Lawsuits were filed against each bill in state and federal court seeking declaratory relief (the bills are unconstitutional) and also injunctive relief to halt further implementation. The pending cases have now been initially resolved and the

courts have agreed that the bills are unconstitutional. Specifically, the holdings indicate that the bills violate the Equal Protection Clause by treating similarly situated individuals differently based on protected characteristics. Appeals of these matters are ongoing and there may not be a final resolution for a number of years.

## 9. CALSAVERS: EMPLOYER DEFINITION EXPANDS (10/2022)

SB 1234 (2016) created the California Secure Choice Retirement Savings Program ("CalSavers"). CalSavers is a state-managed retirement savings program for private-sector employees whose employers do not already provide a retirement savings program. There are no fees for employers to facilitate the CalSavers program, and employers are not required to make contributions. Instead, the employer's role is that of a facilitator – registering with the state, and then submitting employees' contributions. Although there have been various legal challenges to the CalSavers program, it has persisted (see #56 below).

SB 1234 defined an "eligible employer" (one required to participate if it did not already provide a retirement savings program) as one with five or more employees (excluding certain federal, state, and local governmental entities).

As of December 31, 2025, **SB 1126** will amend Government Code Sections 100000 and 100032 to expand the definition of an "eligible employer" to include any person or entity, that has at least **one eligible employee**. Of note, the term "eligible employer" does not include any sole proprietorship, self-employed individual or any other business that only employs the business owner. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1126.

**NOTE:** Employers with one to four employees that do not already offer retirement plans to their employees are strongly encouraged to contact their benefits broker or administrator with questions so that they can avoid potential penalties of up to $750 per eligible employee. Relevant information can also be located on the CalSavers website:

https://employer.calsavers.com/?language=en#.

## 10. COMPLIANCE: HUMAN RESOURCES REVIEW (10/2022)

It can be daunting for California employers to keep up with the myriad of ever-changing employment laws in a "typical" year. In 2022, employers were bombarded with a host of muddled changes to local, state and federal laws. This coming year promises more of the same, as our California courts and legislature have imposed a number of sweeping changes and a few hidden traps for employers. With lawsuits on the rise, now more than ever before, focusing on compliance with local, state and federal rules is absolutely critical. We recommend that companies conduct a human resources compliance audit at least annually. To assist our clients in their compliance efforts, LightGabler offers a human resources compliance audit that covers over 120 potential hotspots that have regularly tripped up even the most well-intending employers.

## 11. <u>COVID-19: CAL/OSHA EMERGENCY TEMPORARY STANDARDS (10/2022)</u>

On April 21, 2022, Cal/OSHA's Standards Board met and approved its third re-adoption of the COVID-19 Emergency Temporary Standards ("ETS"), with revisions. This ETS remains in place through December 31, 2022. Below are just a few of the most important changes in this third and final re-adoption of the ETS:

1. The revised ETS states that, "… Executive Order N-84-20 … in certain circumstances, replaces, for the duration of the Executive Order, the exclusion periods and requirements of this ETS with the California Department of Public Health's ("CDPH") isolation and quarantine periods and requirements." Meaning, the operative standard that employers must follow for isolation and quarantine periods comes from the CDPH (or stricter local rules).

2. Cal/OSHA removed several former staples from past ETS versions. <u>First</u>, the term "fully vaccinated" was completely removed from the ETS, meaning that the ETS provisions apply to all employees regardless of their vaccination status. <u>Second</u>, the current ETS removes the former requirement that a return-to-work COVID-19 test, "May not be both self-administered and self-read unless the testing is observed by the employer or an authorized telehealth proctor". This allows employees to use over the counter COVID-19 tests with no need for real-time observation by the employer or an authorized proctor. <u>Third</u>, the definition of "COVID-19 hazard" no longer includes any reference to "objects or surfaces that may be contaminated with SARS-CoV-2," removing the former requirements for cleaning and disinfecting procedures related to COVID-19.

3. The ETS has less stringent standards for masks (no more light test!). Regardless, if face coverings are required in an employment setting, employers must still ensure that masks, "fit snugly over the nose, mouth and chin with no large gaps on the outside of the face", and masks must, "completely cover the nose and mouth" with "no slits, visible holes, or punctures" in the mask material.

4. The ETS added the term "returned case" = testing not required. A "returned case" means a COVID-19 case who returned to work and did not develop any COVID-19 symptoms after returning. A person will only be considered a returned case for 90 days after the initial onset of COVID-19 symptoms or, if the person never developed COVID-19 symptoms, or for 90 days after the first positive test. Notably, an employer is not required to make COVID-19 testing available to returned cases in a workplace COVID-19 exposure situation.

Importantly, the currently approved ETS expires on December 31, 2022. Cal/OSHA is in the process of creating non-emergency COVID-19 standards to take effect on the expiration of the current ETS. Cal/OSHA intends that these non-emergency standards will remain in effect for two years (until December 31, 2024). To that end, on September 15, 2022, the Cal/OSHA Standards Board held a public hearing on its

proposed non-emergency COVID-19 standards. On October 13, 2022, Cal/OSHA issued a revised version of its proposed non-emergency regulations for public comment. The comment period closed on October 31, 2022. Although nothing is final yet, it is expected that by its next meeting on December 15, 2022, Cal/OSHA will vote to approve some final version of its proposed non-emergency COVID-19 standards, and that those standards will take effect on January 1, 2023. See:

https://www.dir.ca.gov/oshsb/oshsb.html.

**PRACTICE TIP:** Once Cal/OSHA issues its non-emergency COVID-19 standards, employer should be prepared to update their COVID-19 prevention plan ("CPP"), their Injury and Illness Prevention Plan ("IIPP"), or other COVID-19 documentation and policies. It is expected that Cal/OSHA will also modify its own model CPP.

**RELATED COVID-19 NOTE:** On October 17, 2022, Governor Newsom's office issued a statement declaring that California plans to end California's COVID-19 state of emergency on February 28, 2023 (after nearly three years). The statement indicated that the four-month delay is intended to give the "health care system needed flexibility to handle any potential surge that may occur after the holidays in January and February."

## 12. COVID-19: ONE-YEAR EXTENSION EXPOSURE NOTICE (10/2022)

**AB 2693** amends Labor Code Sections 6325 and 6409.6 to extend for an additional year (through January 1, 2024) the COVID-19 posting and notice requirements (AB 685). AB 2693 also extends Cal/OSHA's COVID-19 powers to shut down a business based on a COVID-19 risk of imminent hazard for an additional year.

Depending on what happens with Cal/OSHA's non-emergency COVID-19 standards by year end, as of January 1, 2023, AB 2693 may lessen employers' current burden to provide individual written COVID-19 workplace exposure notices to affected individuals by, "authoriz[ing] an employer to satisfy the notification requirements by prominently displaying a notice in all places where notices to employees concerning workplace rules or regulations are customarily posted." This posting is done in lieu of the employer-provided individual written notice (the former requirement under AB 685). Although posting a single notice is certainly easier than issuing numerous individual notices, the actual informational requirements for a compliant posting under AB 2693 are greater than those required for the individualized written notices.

To be compliant, the posted notice must list: (1) "the dates on which an employee or employee of a subcontracted employer with a confirmed case of COVID-19 was on the worksite premises within the infectious period; (2) the location of the exposures, including the department, floor, building, or other area, but the location need not be so specific as to allow individual workers to be identified; (3) contact information for employees to receive information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave

provisions, as well as anti-retaliation and anti-discrimination protections of the employee; and (4) contact information for employees to receive the cleaning and disinfection plan that the employer is implementing per the guidelines of the federal Centers for Disease Control and Prevention and the COVID-19 prevention program per the Cal-OSHA COVID-19 Emergency Temporary Standards."

This notice must also be posted in English and the language understood by the majority of employees. It must be posted within one business day of when the employer receives notice of the potential exposure, and it must remain posted for 15 days. Employers must keep a log of the dates on which the various notices were posted and give access to the Labor Commissioner upon request. For employers with hybrid remote workers, be sure to check if those employees were onsite and in the exposed work area during the high-risk exposure period. If so, either email them a copy of the notice you post at the worksite or provided them with an individualized written notice.

AB 2693 also still allows employers to provide individual written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual confirmed to have COVID-19. This would be the same type of notice employers were previously providing for the past couple years, and still would need to be done within one business day of receiving notice of a COVID-19 case in the workplace. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2693.

**TWO IMPORTANT NOTES:** (1) Under AB 2693, employers will no longer be required to provide outbreak notice to local public health agencies. (2) Cal/OSHA's current ETS requires employers to provide individualized written notice to employees of a potential COVID-19 exposure in the workplace. We expect, however, that Cal/OSHA's non-emergency COVID-19 standards will align with the AB 2693 posting option discussed. Until Cal/OSHA does so, employers must continue to comply with Cal/OSHA's current ETS requirements.

## 13. COVID-19: ONE-YEAR EXTENSION WC NOTICE (10/2022)

**AB 1751** amends Labor Code Sections 3212.86, 3212.87, and 3212.88 to extend existing workers' compensation provisions relating to COVID-19 injuries and reporting for an additional year (until January 1, 2024). These provisions include, among other provisions: (1) continuing the disputable presumption that COVID-19 injuries sustained in the course of employment arose out of and in the course of the employment; (2) the procedures for filing a claim for workers' compensation, including filing a claim form; (3) that an injury is presumed compensable if liability is not rejected within 90 days after the claim form is filed; (4) if the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer must report to their claims administrator in writing via electronic mail or facsimile within three business days (failure to do so can result in a $10,000 penalty). AB 1751 also expands its protections to now cover firefighters and police officers, including "active firefighting members of a fire department at the State Department of State Hospitals, the State Department of

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Developmental Services, the Military Department, and the Department of Veterans Affairs and to officers of a state hospital under the jurisdiction of the State Department of State Hospitals and the State Department of Developmental Services." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1751.

## 14. COVID-19: PAID SICK LEAVE THREE-MONTH EXTENSION (10/2022)

Although **AB 152** (an urgency measure effective immediately on September 29, 2022) extends SB 114 and employees' ability to use California's COVID-19 Supplemental Paid Sick Leave ("SPSL") benefits for an additional three months (through December 31, 2022), AB 152 does not create a new bank of SPSL, nor does it create any new qualifying reasons for taking SPSL. Rather, if covered employees have already used their available SPSL for 2022, no additional SPSL is required under AB 152. For employees who have not used up their available 2022 SPSL, they now have until the end of the year to do so.

Other than the three-month extension, the other main change created by AB 152 deals with COVID-19 testing. Before AB 152, an employer could require the employee to take a test after five days have passed since the employee initially tested positive. If the employee continued to test positive after day five, there was uncertainty about whether the employee had to remain out for a full 10 days. AB 152 clarifies that an employer may also require that the employee submit to a second diagnostic test within no less than 24 hours after the first test (take after day five). If the second diagnostic test is positive, employers may require a third test within no less than 24 hours after the second test. If the employee does not submit to the additional tests, the employer is not required to provide additional SPSL. The employer, of course, must pay the costs of any employer-mandated testing. This new clarity on the SPSL testing provisions may help employers to return employees to work sooner than the tenth day.

Below is a quick summary of some of the key SPSL details:

When does SPSL end? December 31, 2022, unless otherwise extended again.

Who is a "covered employer"? All employers with 26 or more employees.

Who is a "covered employee"? Any employee who "is unable to work or telework" for any one of the qualifying reasons (see below). This applies to both full- and part-time employees, and there is no length of service requirement to be eligible for the SPSL.

Does AB 152 grant covered employees additional SPSL time? No. If covered employees have already used all available SPSL between January 1, 2022, and September 28, 2022, AB 152 does not grant them additional SPSL benefits.

How much SPSL is available? Full-time covered employees are entitled to two buckets of SPSL. The first bucket contains up to 40 hours of SPSL for any of the seven reasons listed below; the second bucket entitles covered employees to an additional 40 hours of SPSL if they show proof that they tested positive for COVID, or proof that a family

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member for whom they are providing care tested positive for COVID. There is no requirement that employees exhaust the first SPSL bucket before using the additional leave provided in the second SPSL bucket for testing positive or caring for a family member that tests positive. Part-time and variable hour employees also are entitled to both buckets of SPSL. However, the amount of leave to which they are entitled under either bucket will be prorated based on their schedules

Does AB 152 grant covered employees new SPSL qualifying reasons? No.

What are the qualifying uses for SPSL? A covered employee is entitled to SPSL if they are unable to work or telework due to any of the following seven reasons: (1) the covered employee "is subject to a quarantine or isolation period related to COVID-19"; (2) the covered employee has been advised by a health care provider to isolate or quarantine due to COVID-19; (3) the covered employee is personally attending an appointment or attending with a family member to receive a vaccine or a vaccine booster for protection against COVID-19; (4) the covered employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster that prevent the employee from being able to work or telework. Note that employers may limit the total sick leave related to each vaccination or booster to three days or 24 hours, unless the employee provides verification from a health care provider that they or their family member is continuing to experience symptoms related to a COVID-19 vaccine or COVID-19 vaccine booster; (5) the covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (6) the covered employee is caring for a family member who is subject to a quarantine or isolation period or who has been advised by a healthcare provider to isolate or quarantine due to COVID-19; or (7) the covered employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

Does SPSL still have to be on the wage stubs? Yes. SPSL must appear as a separate line item on the employee's itemized wage statement, or in a separate writing provided on the designated pay date. The amount of SPSL that has been used by a covered employee must be listed. For example, if a covered employee used no SPSL in 2022, the statement should list zero hours used. If the employee has used 10 hours of SPSL in 2022, the statement should list 10 hours used.

Additional information on SPSL: The DLSE SPSL FAQs can be found at:

https://www.dir.ca.gov/dlse/COVID19Resources/2022-SPSL-FAQs.html.

Lastly, AB 152 also creates the California Small Business and Non-Profit COVID-19 Relief Grant Program to help qualified small businesses and non-profits (26-49 employees that submit an affidavit, signed under penalty of perjury, attesting to that fact) to cover the costs associated with SPSL, up to $50,000. The determination of the number of employees is accomplished by looking back at the number of full-time employees that have worked for the employer, without any break in employment, for the past 24 months. A qualified small business or nonprofit is one that began operating before June 1, 2021,

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and is currently still active and operating, and that is either: (1) a “C” corporation, “S” corporation, cooperative, limited liability company, partnership, or limited partnership; or (2) a registered 501(c)(3), 501(c)(6), or 501(c)(19). For further details, employers are encouraged to consult with their CPA or tax professional. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB152.

**NOTE:** As of October 2022, several local cities currently maintain local supplemental paid sick leave rules, including but not limited to, Long Beach, Los Angeles, the unincorporated areas of Los Angeles County, and Oakland. As well, Exclusion Pay under the Cal/OSHA ETS remains in force through at least December 31, 2022.

## 15. COVID-19: PPE STOCKPILE FOR HEALTH CARE (10/2021)(REMINDER)

Every employer in California has a general legal obligation to provide and maintain a safe and healthy workplace for employees. There can also be heightened obligations in certain safety-sensitive professions. SB 275 adds California Health and Safety Code Section 131021 and California Labor Code Section 6403.1 regarding available PPE. Effective January 1, 2023, certain health care employers, including clinics, health facilities, and home health agencies, will be required to maintain an inventory of new, unexpired PPE for use in the event of a declared state of emergency. Notably, the health care employer definition excludes, “an independent medical practice that is owned and operated, or maintained as a clinic or office, by one or more licensed physicians and used as an office for the practice of their profession, within the scope of their license.” The stockpile must be sufficient for at least 45 days of surge consumption. Civil penalties can be assessed for failure to comply, unless Cal/OSHA “determines that supply chain limitations make meeting the mandated level of supplies for a specific type of PPE infeasible and the health care employer has made a reasonable attempt to obtain PPE, or if the health care employer has made a showing that they are not in possession of the mandated level of supplies due to reasons beyond their control.” A small health care employer (25 or fewer employees) can also apply for waiver of “some or all of the PPE inventory requirements … by writing to the department, which may approve the waiver if the facility has 25 or fewer employees and the employer agrees to close in-person operations during a public health emergency in which increased use of PPE is recommended by the public health officer until sufficient PPE becomes available to return to in-person operations.” See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB275.

## 16. COVID-19: RECALL RIGHT & CERTAIN INDUSTRIES (6/2021)(REMINDER)

SB 93 established Labor Code Section 2810.8 to require covered employers in specific industries to provide former employees that were “laid off due to a reason related to COVID-19,” with information about their “right to recall.” It also requires covered employers to rehire laid-off employees based on a seniority preference system. For covered employers, this bill essentially eliminates the flexibility to decide which employees to bring back, and the order in which to return laid-off employees to work.

SB 93 was an urgency measure that was immediately effective upon its signing on April 16, 2021, and it remains in effect until December 31, 2024. SB 93 followed closely on the heels of several local jurisdictions instituting their own "right to recall" ordinances, including San Francisco, Los Angeles, and Sacramento, among others. For any cities that have already implemented (or those that choose to implement in the future) "right to recall" ordinances, SB 93 explicitly states that it does not preempt local law; rather, local "right to recall" ordinances are permissible so long as they offer greater or different rights to impacted employees than those created by SB 93.

The bill does NOT apply to every California employer. SB 93 applies generally to the hospitality, travel and business services sectors. Specifically, SB 93 applies to: (1) airports (including airport hospitality operations and airport service providers); (2) building services (janitorial, building maintenance, or security services); (3) hospitality enterprises of a certain size (hotel, private club, event center, airport hospitality operation, airport service provider, or the provision of building services to office, retail, or other commercial buildings); and (4) event centers (50,000 square feet or 1,000 seats that are used for the purposes of public performances, sporting events, or business meetings).

SB 93 also does NOT apply to all laid-off employees. It only applies to, "Laid-off employee[s] … whose most recent separation from active service was due to a reason related to the COVID-19 pandemic …." The term laid off "due to a reason related to the COVID-19 pandemic," is defined broadly and deemed to include any form of separation from employment related to "a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic." To be eligible under SB 93, the laid-off employee also must have been "employed by the employer for six months or more in the 12 months preceding January 1, 2020."

Once a covered business starts to reopen, within five business days of reopening the positions, the business must offer the laid-off employees all job positions for which the laid-off employees are qualified. "A laid-off employee is qualified for a position if the employee held the *same or similar* position at the enterprise at the time of the employee's most recent layoff with the employer." The position must also be one that was eliminated due to "a reason related to the COVID-19 pandemic." Note that for the purposes of SB 93, a business day is defined to mean any calendar day except Saturday, Sunday, or any official state holiday.

SB 93 states that notice of reopening must be given to the employees "… in writing, either by hand or to their last known physical address, and by email and text message to the extent the employer possesses such information." The bill also provides that, "If more than one employee is entitled to preference for a position, the employer shall offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire for the enterprise." You must follow the seniority-based right to recall rules established by SB 93. If you choose not to do so, and you hire someone other than the most-senior laid off employee, then you are required to, "… provide the laid-off employee a written notice within 30 days including the length of service with the employer of those hired in lieu of that recall, along with all reasons for the decision."

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After notice is given, the qualified laid-off employees then have five business days (from the date they receive the notice) to accept or decline the offer. Presumably, if the most senior employee does not respond, or declines the position, the covered employer can move to the next most senior employee. In an effort to minimize delays, the law also provides that an employer can, "… make simultaneous, conditional offers of employment to laid-off employees, with a final offer of employment conditioned on application of the preference system …." If multiple former employees accept the offer, then the position must be given to the former employee with the greatest seniority, based on initial dates of hire.

Thankfully, SB 93 does not create private right of action for former employees. Rather, the DLSE is tasked with adjudicating complaints and enforcement. That said, the law does provide for injunctive relief, back pay and civil penalties, so covered employers must take this seriously.

Employers are required to keep SB 93-related records for three years, measured from the date of the written notice regarding the layoff. For each laid-off employee, the covered employer must retain the following: (1) "[T]he employee's full legal name; (2) the employee's job classification at the time of separation from employment; (3) the employee's date of hire; (4) the employee's last known address of residence; (5) the employee's last known email address; (6) the employee's last known telephone number; and (7) a copy of the written notices regarding the layoff provided to the employee and all records of communications between the employer and the employee concerning offers of employment made to the employee." Recall rights under SB 93 end on December 31, 2024. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB93.

## 17. CRD: DFEH REBRANDS AND ITS POWERS EXPAND (10/2022)

Through **SB 189**, which amends a laundry list of code sections, the Department of Fair Employment and Housing ("DFEH"), has now rebranded itself the California Civil Rights Department ("CRD"). The CRD is updating its website content, posters and brochures with its new name and logo, and it has indicated that it will launch a public education campaign over the next several months, so that Californians will know that the CRD does same work as the DFEH, just under a name that better captures the services provided. Relatedly, the former Fair Employment and Housing Council ("FEHC") is now called the California Civil Rights Council ("CRC"). See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB189.

The CRD's new website is: https://calcivilrights.ca.gov.

**PRACTICE TIP:** Company policies, including handbooks and other documents that named the DFEH, should be updated to reflect the CRD name change. Employers should also watch the CRD website for revised posters and brochures.

**RELATED BILL: AB 2960**, among many other changes, tolls the CRD right-to-sue notice deadlines during a mandatory or voluntary dispute resolution proceeding. The tolling commences on the date the CRD refers the case to its dispute resolution division and ends on the date the CRD's dispute resolution division closes its mediation record and returns the case to the referring division (usually enforcement). See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2960.

## 18. CRD: REPRESENTING CA'S INTERESTS (10/2022)

**AB 2662** amends Government Code Sections 12930, 12965, and 12981, to expressly state that, by the performing its functions and duties and exercising the powers set forth in the FEHA, the CRD represents the interests of the State of California and it effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of the FEHA. According to AB 2662, this statement is simply declarative of existing law. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2662.

## 19. GENDER: PRICING BASED ON SEX, A COSTLY MISTAKE (10/2022)

Setting different pricing for the same goods or services, based solely on a person's gender or sex, is risky business for any company. State law already requires that businesses charge the same price for the same services (or services of similar kind) regardless of the customer's gender or sex (see the Unruh Civil Rights Act and the Gender Tax Repeal Act of 1995). As well, for certain businesses like tailors, barbers, hairdressers, dry cleaners, etc., state law also requires clear and conspicuous disclosure to customers, in writing, of the pricing for each standard service provided. **AB 1287** adds Civil Code Section 51.14 to expand the Gender Tax Repeal Act of 1995's coverage to the sale of goods. By so doing, the bill attempts to eliminate the "Pink Tax" and to prohibit an individual or business from charging a different price for substantially similar (or identical) products based on the customer's gender.

For purposes of this bill, a "Business" means any business acting within the State of California that sells goods to any individual or entity, including, but not limited to, retailers, suppliers, manufacturers, and distributors. "Goods" means any consumer products used, bought, or rendered primarily for personal, family, or household purposes. "Substantially similar" means two goods that exhibit all of the following characteristics: (1) no substantial differences in the materials used in production; (2) the intended use is similar; (3) the functional design and features are similar; and (4) the brand is the same or both brands are owned by the same individual or entity." The bill notes that a simple difference in color is not a substantial difference, but that a business can still price products differently, if it can prove there was substantial difference in the time or cost of production.

According to the legislative history this bill is necessary because, "There are studies showing that women pay, on average, seven percent more for products marketed to

women, than men pay for a similar product marketed to them. Over time, this adds up. This gender tax, or the 'pink tax' as it is sometimes known, has been estimated to cost women over $1,000 per year. Combined with the wage gap, the pink tax acts as a double whammy, working systematically against the financial success of women." The bill allows the attorney general to seek an injunction for violations and to seek penalties of up to $10,000 for a first violation and increased penalties for additional violations. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1287.

## 20. DISCRIMINATION: UNRUH ACT FRANCHISOR DISCRIMINATION (10/2022)

**AB 676** amends and adds numerous sections to the Business and Professions and Corporations Codes to, among other things, expand the Unruh Act ("Act") to cover and prevent a franchisor from refusing to grant financial assistance to a franchisee or prospective franchisee based on the various protected characteristics outlined in the Act (*i.e.,* sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status). These protections extend not only to the franchisee personally, but also to the geographic location of a franchise or the composition of the neighborhood where the franchise is located, if protected by the Unruh Act. This bill generally applies to franchise agreements entered into or amended on or after January 1, 2023, although there are some exceptions. According to the author, this bill is necessary because it is possible that, "a franchisor will act prejudicially in its willingness to grant a franchise or provide financial assistance to franchisees based on their protected class. For example, two prospective franchisees seeking to open a franchise in the same geographic area may be treated inequitably based on factors such as race or sexual orientation. This bill would explicitly prohibit franchisors from failing or refusing to grant a franchise or provide financial assistance to a prospective franchisee based on any characteristic protected under the Unruh Civil Rights Act." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB676.

## 21. EMERGENCIES: CAN YOUR WORKER STAY HOME? (10/2022)

**SB 1044** adds Labor Code Chapter 11 (commencing with Section 1139) to Part 3 of Division 2, and deals with emergency conditions and employees' rights to refuse to report to work, or employees' rights to leave work, during those emergencies. SB 1044 defines an emergency condition as either: "(1) conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act; or (2) an order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act." The bill is clear, however, that an "emergency condition does not include a health pandemic." Instead, the bill is targeted at other types of emergencies such as natural disasters or criminal acts, *e.g.*, wildfires, mudslides, active shooter situations, etc.

When an emergency condition exists, or an employee has a "reasonable belief" that an emergency condition exists, then an employer is prohibited from taking or

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threatening to take "…adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe." In an emergency situation, an employer is also prohibited from "prevent[ing] any employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety." A reasonable belief is one "…that a reasonable person, under the circumstances known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises."

If an emergency condition exists, the employee must, "When feasible ... notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite prior to leaving or refusing to report… When prior notice … is not feasible, the employee shall notify the employer of the emergency condition that required the employee to leave or refuse to report to the workplace or worksite after leaving or refusing to report as soon as possible." When the emergency condition ends, the employee must return to work: "This section is not intended to apply when emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker's home have ceased."

This bill does not apply to the following types of businesses: (1) a first responder; (2) a disaster service worker; (3) an employee required by law to render aid or remain on the premises in case of an emergency; (4) an employee or contractor of a health care facility who provides direct patient care, provides services supporting patient care operations during an emergency, or is required by law or policy to participate in emergency response or evacuation; (5) an employee of a private entity that contracts with the state or any city, county, or political subdivision of the state, including a special district, for purposes of providing or aiding in emergency services; (6) an employee working on a military base or in the defense industrial base sector; (7) an employee performing essential work on nuclear reactors or nuclear materials or waste; (8) an employee of a company providing utility, communications, energy, or roadside assistance while the employee is actively engaged in or is being called upon to aid in emergency response, including maintaining public access to services such as energy and water during the emergency; (9) an employee of a licensed residential care facility; (10) an employee of a depository institution; (11) a transportation employee participating directly in emergency evacuations during an active evacuation; (12) an employee of a privately contracted private fire prevention resource and operating as a qualified insurance resource; (13) an employee whose primary duties include assisting members of the public to evacuate in case of an emergency; (14) an employee of a depository institution; or (15) an employee of any correctional facility.

Although AB 1044 violations create the potential for penalties under PAGA, importantly, the bill also explicitly states that employers have the right to cure alleged violations in the manner set forth in Section 2699.3. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1044.

**PRACTICE TIP:** Covered employers may need to add a section to their IIPP or to their employee handbook to address the requirements of AB 1044.

## 22. FAST FOOD: FAST FOOD EMPLOYERS BEWARE (10/2022)

On Labor Day, Governor Newsom signed **AB 257**. This bill amends Labor Code Section 96, and adds Part 4.5.5 (commencing with Section 1470) to Division 2, creating the Fast Food Accountability and Standards Recovery Act or FAST Recovery Act, a fast food workers' bill of rights and a Fast Food Council ("FFC") authorized to "set minimum standards for workers in the industry, including for wages, conditions related to health and safety, security in the workplace, the right to take time off from work for protected purposes and protection from discrimination and harassment." According to the bill's legislative declarations, the bill is necessary because, "For years, the fast food sector has been rife with abuse, low pay, few benefits, and minimal job security, with California workers subject to high rates of employment violations, including wage theft, sexual harassment and discrimination, as well as heightened health and safety risks … In addition, fast food companies have profited during the pandemic, while California's one-half million fast food workers have been hard hit, both medically and financially."

Which businesses are covered? The Act applies to fast food chains, which are defined as, *"…* a set of restaurants consisting of 100 or more establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services." A fast food restaurant covered by the Act is "any establishment in [California] that is part of a fast food chain and that, in its regular business operations, primarily provides food or beverages in the following manner: (1) for immediate consumption either on or off the premises; (2) to customers who order or select items and pay before eating; (3) with items prepared in advance, including items that may be prepared in bulk and kept hot, or with items prepared or heated quickly; and (4) with limited or no table service. Table service does not include orders placed by a customer on an electronic device. "Fast food restaurant franchisee" means a person to whom a fast food restaurant franchise is granted. "Fast food restaurant franchisor" means a person who grants or has granted a fast food restaurant franchise. The DLSE and the courts will determine questions as to whether a restaurant is a "fast food restaurant" within the meaning of AB 257.

Notably, the Act does not extend liability to franchisors, for acts of franchisees. The Act also excludes the following two businesses: (1) bakeries that sell bread on premises, but "only where the establishment produces for sale bread as a stand-alone menu item, and does not apply if the bread is available for sale solely as part of another menu item"; and (2) a restaurant [that] is located and operates within a "grocery establishment," … and the grocery establishment employer employs the individuals working in the restaurant.

What is the FFC? The FFC is part of the Department of Industrial Relations ("DIR") and will be comprised of 10 members as follows: one DIR representative; two fast food franchisor representatives; two fast food restaurant franchisees' representatives; two fast

food restaurant employee representatives; two advocate representatives for fast food restaurant employees; and one representative from the Governor's Office of Business and Economic Development. The FFC serve four-year terms and are appointed by the Governor primarily, and to a lesser extent, the Speaker of the Assembly and the Senate Rules Committee. No FFC member can serve more than two consecutive terms. The FFC's purpose is to "…establish sector-wide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of proper living to, fast food restaurant workers and to ensure and effect interagency coordination and prompt agency responses regarding issues affecting the health, safety, and employment of fast food restaurant workers." However, to do so [the DIR] must first, "receive a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees…" and then, six members of the 10-member FFC must vote in the affirmative to approve the proposal – this means that a proposal can pass even if all four franchisor/franchisee FFC members vote against a proposal. Once a proposal is approved, the FFC must submit it to the proper labor committees of both houses of the legislature by January 15 of the applicable year. If passed, the proposal becomes effective on October 15 of that year. Relatedly, and in addition to establishing new standards, the FFC may also "… amend, or repeal any other rules and regulations as necessary to carry out its duties .... To the extent there is a conflict between standards, rules, or regulations issued by the [FFC] and the rules or regulations issued by another state agency, the standards, rules, or regulations issued by the [FFC] shall apply to fast food restaurant workers and fast food restaurant franchisees and franchisors, and the conflicting rules or regulations of the other state agency shall not have force or effect with respect to fast food restaurant workers, franchisees, or franchisors." Two important notes: (1) the Act says that the FFC can establish a minimum wage of not more than $22 to be effective January 1, 2023. Thereafter, annual wage increases will be governed, "…by no more than the lesser of one of the following, rounded to the nearest ten cents: (i) 3.5 percent; or (ii) the rate of change in the averages of the most recent July 1 to June 30, inclusive, using the United States Bureau of Labor Statistics nonseasonally *adjusted United States Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. CPI-W)*"; and (2) any city or county with 200,000 residents is authorized to create its own local FFC, and to create different (likely higher or stricter) local rules for fast food employers and employees. The FFC is currently slated to exist until January 1, 2029. As of that date, the FFC must cease operations and the Act becomes inoperative, unless extended.

What the FFC cannot do. The FFC is not empowered to promulgate any new paid time off benefits (vacation, sick leave, PTO, holidays, etc.), nor to create rules about predictable scheduling. The FFC, depending on the circumstances, also cannot supersede collective bargaining agreements. OSHA, and not the FFC, has primary jurisdiction over its covered areas, and if the FFC wants to make proposals in those OSHA-covered areas, it must petition OSHA to take action.

No Retaliation. As a general rule, do not retaliate against employees that raise complaints about wages, hours or working conditions. To do so is to walk right into a lawsuit. The Act strengthens these protections for fast food employees. It states that,

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"A fast food restaurant operator shall not discharge or in any manner discriminate or retaliate against any employee for any of the following reasons: (1) the employee made a complaint or disclosed information or the fast food restaurant operator believes the employee disclosed, or may disclose, information to the franchisor, to a person with authority over the employee or another employee who has the authority at the fast food restaurant to investigate, discover, or correct the violation or noncompliance, to the media, to the Legislature, or to a watchdog or community based organization, or a governmental agency regarding employee or public health or safety; (2) the employee instituted, caused to be instituted, testified in, or otherwise participated in a proceeding relating to employee or public health or safety, or any council or Local Fast Food Council proceeding; (3) the employee refused to perform work in a fast food restaurant because the employee had reasonable cause to believe that the practices or premises of that fast food restaurant would violate worker or public health and safety laws, regulations, or any other section in this code…any occupational safety and health standard, or any safety order of the division or standards board, or would pose a substantial risk to the health or safety of the employee, other employees, or the public."

The Act gives employees a "private right of action" to bring a lawsuit with potential damages of, "reinstatement, and treble the lost wages and work benefits caused by the discrimination or retaliation, and the employee's reasonably incurred attorneys' fees and costs. Note also that, "if a fast food restaurant operator discharges or takes any other adverse action against one of its employees within 90 days following the date when the operator had knowledge of that employee's action or actions," then there will be, "a rebuttable presumption of unlawful discrimination or retaliation."

**NOTE:** One day after the Governor signed AB 257 into law, the Protect Neighborhood Restaurants coalition, which is run by the International Franchise Association and the National Restaurant Association, filed a referendum with the State Attorney General's office seeking to have the matter added to a future ballot in hopes of delaying and later overturning the bill. If the referendum is successful, the implementation of AB 257 would be stalled until such time as the State's voters could have their say. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB257.

## 23. FEHA: OFF DUTY, OFF-SITE CANNABIS USE PROTECTED (10/2022)

By passing **AB 2188**, and adding Government Code Section 12954, California becomes the seventh state to protect off-the-clock, off-site use of cannabis. Effective January 1, 2024, AB 2188 will make it unlawful for employers, "… to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person … based upon either of the following: (1) The person's use of cannabis off the job and away from the workplace … (2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids." This bill covers almost all employers with five or more employees, and it amends the Fair Employment and Housing Act ("FEHA") making off-duty, off-site cannabis use a protected category.

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The Legislative declarations state, "Tetrahydrocannabinol ("THC") is the chemical compound in cannabis that can indicate impairment and cause psychoactive effects. After [THC] is metabolized, it is stored in the body as a nonpsychoactive cannabis metabolite. These metabolites do not indicate impairment, only that an individual has consumed cannabis in the last few weeks." The Legislature continued, "The intent of drug tests is to identify employees who may be impaired [but] … when most tests are conducted for cannabis, the results only show the presence of the nonpsychoactive cannabis metabolite and have no correlation to impairment on the job." This results in applicants and employees failing drug tests without being impaired at the time of the testing, resulting in no workplace safety improvements.

Notably, the bill is clear that, "Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace… or any other rights or obligations of an employer specified by federal law or regulation. The bill also clearly states that it, "… does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites."

The bill's author believes AB 2188 creates a "balanced solution," that allows employers to maintain safe workplaces by testing for THC (impairment), while also allowing "California to continue being a progressive leader on cannabis issues …" by banning testing for metabolites (no proof of impairment). The Legislature stated its belief that this [THC but not metabolite testing] is possible because, "…employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites. These alternative tests include impairment tests, which measure an individual employee against their own baseline performance and tests that identify the presence of THC in an individual's bodily fluids." Unfortunately, the legislature did not specify what these "alternative tests" are, or who provides them.

There are a few types of employment positions that are exempt from AB 2188, including: "(1) employee[s] in the building and construction trades… (although this bill does not explicitly define what businesses fit within that category); and (2) applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense… or equivalent regulations applicable to other agencies…." AB 2188 also, "…does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the way they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2188.

**NOTE:** Proposition 64 makes recreational marijuana illegal for any person under age 21. AB 2188, however, protects all employees regardless of their age. Note also that marijuana remains an illegal schedule one drug under federal law, although that could certainly change in the near future.

**PRACTICE TIP:** Although this bill is not effective until January 1, 2024, employers should begin the process of reviewing their onboarding materials and drug-free workplace policies with employment counsel to ensure that they will be ready for AB 2188 compliance once that bill goes live. Consider also implementing training for the management team on recognizing and documenting signs of impairment. For companies that perform pre-employment drug screening, reasonable suspicion, safety-sensitive job, or post-accident drug testing, be sure to also begin working with a reputable testing provider or clinic that will provide compliant THC testing modalities to applicants and employees. Federal contractors (or other excluded businesses) should review their forms to makes sure they clearly tell applicants and employees upfront that AB 2188 does not apply to their workplaces.

## 24. HERDERS: GOAT AND SHEEP HERDER CHANGES (10/2022)

**AB 156,** among other changes, adds Labor Code Section 2695.3, and through January 1, 2024, extends the wage and hour protections applicable to sheepherders, to also cover goat herders. As well, the bill expressly now prohibits an employer from crediting meals or lodging against the minimum wages owed to herders. AB 156 also requires employers of herders to provide each herder with not less than the minimum monthly meal and lodging benefits required under the provisions of the H-2A Visa program. Violations of herder rights can result in civil penalties of $100 for the first violation and $250 for any subsequent violation. The DIR has been tasked with updating Wage Order No. 14-2001 accordingly. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB156.

## 25. INDEPENDENT CONTRACTORS: SUNSET EXTENSIONS (10/2022)

As a reminder, California law exempts certain (and very specific) occupations from the ABC test for independent contractors. For those occupations, whether an individual is an employee or independent contractor is determined by applying the multifactor test from the case of *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.

The first three provisions below (added in last year's legislative session) continue specific occupational exemptions through the dates indicated:

1. Section 2778 is amended to grant a three-year reprieve to licensed manicurists making the ABC test operative on *January 1, 2025*, instead of January 1, 2022.
2. Section 2781 is amended to grant a three-year reprieve for the construction industry and contractor/individual subcontractor relationships making the ABC test operative on *January 1, 2025*, instead of January 1, 2022.

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3. Newspaper carriers are granted a three-year reprieve making the ABC test operative on *January 1, 2025*, instead of January 1, 2022.

This year, **AB 2955** amends Labor Code Section 2783 to also grant commercial fishers working on an American vessel an additional three-year reprieve from having to comply with the rigors of the ABC test. The exemption will now expire on *January 1, 2026*, instead of January 1, 2023. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2955.

**PRACTICE TIP:** Maintaining independent contractor relationships within a business has become increasingly treacherous. Employers are strongly cautioned to consult with counsel of record to make employee versus independent contractor decisions. Ultimately, the burden will fall squarely on employers to prove each prong of the ABC test weighs in favor of independent contractor status, or that there is an applicable exemption.

## 26. JOBS: POSTINGS, PAY SCALES & PAY DATA REPORTS (10/2022)

**SB 1162** amends Labor Code Section 432.3 to provide more pay transparency to applicants and current employees. Current pay transparency laws provide, among other transparency protections, that employers cannot ask applicants about their salary history, and upon an applicant's request, employers must disclose the job's pay scale. Effective January 1, 2023, for employers with 15 or more employees (unfortunately, the law does not specify if this means 15 or more employees in California, or 15 or more companywide), SB 1162 expands the pay transparency rules as follows:

1. All employers (regardless of size) must now disclose to an employee, the pay scale for the position in which the employee is currently employed.
2. "Pay scale" is defined as the salary or hourly wage range that the company "reasonably expects" to pay for the particular position. This requires employers to post both the low and high ends of the pay range, and not simply, for example, "$15.50 and up". Notably, there is no indication in the current bill's language to clarify whether a pay scale must also include bonuses or other forms of incentive compensation.
3. Employers must include a pay scale for a position in any job posting that they do directly.
4. If an employer uses any sort of third party (ad agency, etc.) to "announce, post, publish, or otherwise make known a job posting," the company must provide the pay scale to the third party and the third party must include the pay scale on the job posting.
5. SB 1162 also creates a new records retention requirement, meaning that companies must now keep records of job titles and wage rate history for each employee for the duration of their employment, plus three years after the end of employment. SB 1162 also gives the DLSE the right to inspect these records. If a company fails to keep records as required, a rebuttable presumption is created that a violation occurred.

6. SB 1162 states that aggrieved persons can "file a written complaint with the Labor Commissioner within one year after the date the person learned of the violation." They can also seek injunctive relief through the civil courts.
7. Penalties for violations can range from $100 to $10,000 per violation. However, the Labor Commission will not assess a penalty for the first violation if the company demonstrates that all job postings for open positions have been updated to include the required pay scale information.
8. Currently, there is no guidance about how SB 1162 may impact remote employees. However, we anticipate that California may follow the national trend and require employers to post pay scales for any remote job that could be performed in California.

SB 1162 also amends Government Code Section 12999 to expand large employer (100 or more employees or 100 or more employees hired through labor contractors) pay data disclosure requirements. Remember that the 100 or more employee count captures employees anywhere in the U.S., as long the employer has at least one employee in California. The current (and amended) pay data reporting rules are located in Government Code Section 12999. SB 1162 makes the following changes:

1. Reports are now due on the second Wednesday in May of each year, which falls on May 10, 2023 this coming year (formerly due March 31).
   a. Recall that the pay data report must include information on the number of employees by race, ethnicity, and sex in each of the following job categories: (i) executive or senior level officials and managers, (ii) first or mid-level officials and managers (iii) professionals; (iv) technicians; (v) sales workers; (vi) administrative support workers; (vii) craft workers; (viii) operatives; (ix) laborers and helpers; (x) service workers; and
   b. The report must also list the number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the various pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey.
2. As well, for each job category, SB 1162 will require the pay data report to include <u>the median and mean</u> hourly rate for each combination of race, ethnicity, and sex within each job category.
3. For any business that has multiple establishments in California, SB 1162 clarifies that a separate report must be filed for each establishment (previously a consolidated report was also required).
4. Any private employer that has 100 or more employees hired through labor contractors within the prior calendar year must submit a separate contractor pay data report disclosing the names of all labor contractors used to supply employees (this could result in a company submitting two reports if they also have 100 or more direct hire employees). The law expressly states, "A labor contractor shall supply all necessary pay data to the private employer."

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5. SB 1162 allows a civil court to assess civil penalties against an employer for failures to report, "… not exceed one hundred dollars ($100) per employee upon any employer who fails to file the required report and not to exceed two hundred dollars ($200) per employee upon any employer for a subsequent failure to file the required report." These penalties are paid to the Civil Rights Enforcement and Litigation Fund. Of note, if a company cannot timely submit a complete and accurate report, "because a labor contractor has not provided the pay data as required, the court may apportion an appropriate amount of penalties to any labor contractor that has failed to provide the pay data to the employer." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1162.

**PRACTICE TIPS:** (1) Look for the CRD to issue administrative guidance and FAQs in the coming months. (2) If you decide to conduct a pay equity audit for your Company, be sure to do so under attorney-client privilege.

## 27. LEAVES OF ABSENCE: CFRA/PSL & "DESIGNATED PERSONS" (10/2022)

**AB 1041** amends Government Code Section 12945.2, the California Family Rights Act ("CFRA"), and Labor Code Section 245.5, part of the California Paid Sick Leave law ("PSL"), to add "designated person[s]" to the list of covered family members for whom an eligible employee may take CFRA leave or PSL time off work. This bill is the legislature's attempt to recognize non-traditional family dynamics.

1. For CFRA, a designated person is defined as "… any individual related by blood or whose association with the employee is the equivalent of a family relationship."

2. For PSL, the definition of a designated person is much broader. It can be any "… person identified by the employee at the time the employee requests paid sick days."

Under both the CFRA and PSL revisions, the bill also states that, "The designated person may be identified by the employee at the time the employee requests the leave. However, an employer may limit an employee to one designated person per 12-month period…."

Recall that CFRA provides qualifying employees with up to 12 weeks of time off work per 12-month period for certain qualifying reasons. To be eligible to take CFRA leave, in addition to having a qualifying reason, the employee must also have more than 12 months of service with the employer and have worked at least 1,250 hours in the 12-month period before the leave begins. Historically, CFRA leave and leave taken under the federal Family and Medical Leave Act ("FMLA") had run concurrently in most instances (except for pregnancy disability leave ("PDL").) With the passage of SB 1383

from a couple years ago, and now AB 1041, the expanded allowable reasons for CFRA leave and the increased number of covered family members, means that it is possible for a qualifying employee to stack CFRA and FMLA leave; *i.e.,* to take 12 weeks of CFRA leave for reasons not covered by the FMLA (*e.g.*, designated person), and then separately, to take 12 weeks of FMLA leave. Note that this potential leave stacking would apply only to employers with 50 or more employees, because smaller employers are still not covered under the FMLA.

**PRACTICE TIP:** Small and large employers must update their paid sick leave and CFRA policies to reflect this change before the law goes into effect on January 1, 2023. For larger employers, due to the broadening divergence between CFRA and FMLA, strongly consider revising your leave policies to incorporate the changes to CFRA, but also to create separate policies for FMLA and CFRA, if you have not already done so. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1041.

## 28. LOCAL RULES: LOS ANGELES AREA (10/2022)

Although Los Angeles passed an ordinance to make the minimum wage $25 per hour for certain health care workers at private healthcare facilities, the ordinance is presently on hold due to a filed referendum petition. Los Angeles must either repeal the ordinance or place it on the ballot for the next election cycle. Further information can be found here:

https://www.govdocs.com/minimum-wage-for-healthcare-workers-in-los-angeles/.

There were also several hotel-related ordinances. Los Angeles for example, enacted the Hotel Worker Protection Ordinance (August 2022) which, among other things, requires hotels with 60 or more rooms to provide panic buttons to workers. See:

https://wagesla.lacity.org/sites/g/files/wph1941/files/2022-07/Hotel%20Worker%20Protection%20Ordinance.pdf.

On July 1, 2022, West Hollywood's ordinance on minimum wages and time off took effect. Under this ordinance, full-time employees are entitled to accrue paid time off up to 96 hours per year and separately, unpaid time off up to 80 hours per year for sick leave, vacation, or personal needs. Part-time employee accrual rates are prorated based on hours worked. City guidance can be viewed here:

https://www.weho.org/home/showpublisheddocument/53124/637879708613130000 and https://www.weho.org/business/operate-your-business/minimum-wage.

The required poster is here:

https://www.weho.org/home/showpublisheddocument/53023/637872784272800000.

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**NOTE:** The section above contains only a few brief summaries of the many local rules specific to the Los Angeles area. It is NOT an exhaustive list of all of the applicable local rules for that area.

## 29. LOCAL RULES: SAN FRANCISCO (10/2022)

Effective October 1, 2022, the Public Health Emergency Leave Ordinance ("PHELO") requires that private employers with 100 or more employees worldwide, and that have workers working within the geographical boundaries of the City, provide "public health emergency" paid leave (emergencies like COVID-19 and extremely poor air quality). As to the amount of PHELO, through the end of 2022, full-time and fixed schedule employees are entitled to the number of hours they would normally work over a one-week period (not to exceed 40 hours). Starting in 2023, that number doubles (two weeks of pay), but cannot exceed 80 hours. For part-time and variable hour employees, the PHELO allotment equals the average number of hours the employee would work over a one-week period, and the look-back period for the determination is the previous calendar year. This allotment also doubles in 2023 (two weeks of pay). Employers that provide SPSL are permitted to reduce the PHELO allotment for every hour of SPSL that the employee takes after October 1, 2022. The Office of Labor Standards Enforcement ("OLSE") issued a Frequently Asked Questions which can be viewed here:

https://sfgov.org/olse/sites/default/files/PHEL%20FAQ%20-%20updated%2010.01.22_Final_0.pdf.

As of July 1, 2022, San Francisco amended its Family Friendly Ordinance, which gives certain employees working in the City the right to request flexible or predictable work arrangements to assist them with availability for providing caregiving responsibilities. Among other changes, the amendments: (1) expand the persons for whom an employee can provide care to persons aged 65 or older and with whom the employee has a family relationship; (2) provides potential coverage for remote workers outside the boundaries of the City; and (3) requires approval of a flexible or predictable work schedule barring an undue hardship, and if a hardship exists, the employer is required to engage in the interactive process. OLSE issued a Frequently Asked Questions, which can be view here:

https://sfgov.org/olse/sites/default/files/FFWO%20Rules_FINAL.pdf.

**NOTE:** The section above contains only a few brief summaries of the many local rules specific to San Francisco City. It is NOT an exhaustive list of all of the applicable local rules for that area.

**PRACTICE TIP (#28 and #29):** Employers must always review all relevant local (city and county), state and federal rules to ensure they remain in compliance with all applicable laws. This is particularly true when it comes to minimum wages and paid sick leave, although a number of local jurisdictions have passed other employment-related rules in the recent past. As a general rule of thumb, if you are ever in doubt as to which law takes precedence, always apply the law that is most generous to employees.

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## 30. MEAL AND REST PERIODS: PUBLIC HEALTHCARE (10/2022)

**SB 1334** adds Labor Code Section 512.1 to provide "public health employees who provide direct patient care or support direct patient care" with equal rights to meal and rest breaks, comparable to those of their private sector counterparts. Covered employees include any "employee who provides direct patient care or supports direct patient care in a general acute care hospital, clinic, or public health setting." Covered employers include "the state, political subdivisions of the state, counties, municipalities, and the Regents of the University of California." This bill does not apply to any "employee directly employed by an employer who is covered by a valid collective bargaining agreement that provides for meal and rest periods, and, if the employee does not receive a meal or rest period as required by the agreement, includes a monetary remedy that, at a minimum, is equivalent to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided." See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1334.

## 31. OSHA: EMPLOYEE NOTICES TOP SEVEN LANGUAGES (10/2022)

The Division of Occupational Safety and Health ("DOSH") has jurisdiction over places of employment, and has the power necessary to enforce occupational health and safety laws and standards. When those laws and standards are violated, DOSH can issue citations, orders, notices, and often, those are required to be posted prominently in the workplace. **AB 2068**, which amends Labor Code Sections 6318 and 6431, now requires DOSH to provide and employers to post these employee notifications not only in English, but also "…in the top seven non-English languages used by limited-English-proficient adults in California, as determined by the most recent American Community Survey by the United States Census Bureau. If Punjabi is not included among these languages, the division shall also make the employee notification available in Punjabi." A violation of the posting requirements is enforceable by a civil penalty. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2068.

## 32. OSHA: LIVE EVENT WORKER TRAINING & SAFETY (10/2022)

The Legislature has declared that, because California residents enjoy live music, theater, dance, cultural, and other live event, the show must go on. But that cannot happen when, "The workers that set up and tear down staging, including lighting systems, sound systems, video walls, and other scenic elements for live events at arenas, stadiums, fairgrounds, and outdoor venues, face serious workplace hazards that can risk the safety of the workers, performers, and the public". To remedy this, **AB 1775** adds Labor Code, Division 5, Part 14 (commencing with Section 9250), "to promote safety standards and certifications that ensure that all live events and programming are safe for workers, performers, and the public." This bill requires a contracting entity, to require an entertainment events vendor to certify that its own employees, and employees of its subcontractors "… have complied with specified training (the Cal/OSHA-10, the OSHA-

10/General Entertainment Safety training, or the OSHA-10 as applicable to their occupation), certification, and workforce requirements, including that employees involved in the setting up, operation, or tearing down of a live event at its public events venue have completed OSHA training." OSHA can enforce this bill by issuing a citation and a notice of civil penalties. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1775.

## 33. PFL/SDI: LOW-EARNER RATES TO INCREASE IN 2025 (10/2022)

As of January 1, 2025, **SB 951** amends Unemployment Insurance Code Sections 2655 and 3301, and amends and repeals Section 985, to extend the currently increased Paid Family Leave ("PFL") and State Disability Insurance ("SDI") wage replacement rates; these rates were set to expire on January 1, 2023 – and return to 55% of a worker's wages. Under this bill there will be a phased-in increase in benefits, and by 2025, workers earning less than the state's average wage (about $57,000 a year) could receive up to 90% of their regular wages while taking leave. This increased benefits calculation will make taking a leaves of absence like FMLA, CFRA or PDL more doable for lower income earners. Upon signing the bill, the Governor stated, "California families and our state as a whole are stronger when workers have the support they need to care for themselves and their loved ones … California created the first Paid Family Leave program in the nation 20 years ago, and today we're taking an important step to ensure more low-wage workers, many of them women and people of color, can access the time off they've earned while still providing for their family." Notably, the increase in benefits will be proportionally smaller for higher wage earners. SB 951 also removes the cap on payroll tax contributions, meaning higher-income earners pay more into the system (currently earnings above $145,600 are shielded). See:

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220SB951&showamends=false.

## 34. PREVAILING WAGE: HAULING MATERIALS INCLUDED? (10/2022)

**AB 1851** amends Labor Code Section 1720.3 to expand the definition of "public works". Prevailing wages now include the on-hauling of materials used for paving, grading, and fill onto a public works site if the individual driver's work is integrated into the flow process of construction. This bill derived from the Legislature's intent to "restore … the holding of *O. G. Sansone Co. v. Department of Transportation*, and its subsequent interpretations, as it relates to the on hauling of materials." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1851.

## 35. PRIVACY: CCPA/CPRA COMPLIANCE (10/2022)

The California Consumer Privacy Act ("CCPA") was enacted in 2018 and went into effect on January 1, 2020 (with the Office of the Attorney General beginning enforcement in July 2020). In general terms, the CCPA created new "consumer" (including employees) rights relating to the access, deletion of, and sharing of, personal information collected by

for-profit businesses. For example, the CCPA granted a consumer the right to request that a business disclose the personal information it had collected, or to have the personal information held by that business deleted. In November 2021, through Proposition 24, the California Privacy Rights Act ("CPRA"), California voters voted to temporarily amend the CCPA to provide consumers with an even higher-level rights, and to allow consumers to control what businesses collect and do with their (the consumers') personal information. The definition of "consumer" is very broad and includes any natural person who is a California resident. For employers this means the definition captures applicants, employees, contractors and other individuals associated with the employer's business.

Through January 1, 2023, the CPRA contained a time-limited exemption for employers related to their collection of California applicant/employee/contractor data. The exemption meant that covered employers were only required to give their California applicants/employees/contractors notice of the data they collected, the uses to which the data would be put, and to also reasonably safeguard the data collected against unauthorized access or disclosure. The other more onerous provisions of the CCPA were held in abeyance through the end of 2022. Although bills were submitted and considered during this past legislative session that sought to extend the applicant / employee / contractor data exemption through January 1, 2026, unfortunately no bill made it to Governor Newsom's desk for signature.

Thus, as of January 1, 2023, and barring further legislative action, the CCPA will apply to all covered employers, and their collected applicant/employee/contractor data will be treated like any other consumer data. There is a 12-month lookback period, which means the CCPA obligations will also apply to data collected in 2022.

Notably, most of the CCPA provision apply only to certain types of for-profit companies that meet at least one of the following criteria: (1) gross annual revenue in excess of $25 million in the preceding calendar year; (2) annually buys, sells, or shares the personal information of 100,000 California consumers or households; or (3) generates 50% or more of its annual revenue from selling or sharing personal information. Companies that are controlled by another CCPA-covered business, or that operate in partnership with a CCPA-covered business, may also need to comply with the CCPA.

The full scope of the CCPA requirements for covered businesses is too expansive at topic to cover in this limited update. However, for covered businesses, some of the important CCPA requirements include, among others, the employees' right to: (1) limit use and disclosure of their "sensitive personal information"; (2) request that an employer give them or send their personal information to some other entity; (3) correct their personal information, (4) be informed about any personal information an employer has, sells, or discloses; and most problematic (5) the right to request that an employer delete personal information it has collected.

**REMINDER:** (1) All employers must disclose to job applicants and employees the categories of sensitive information the employer collects and how the employer uses the information. The disclosure must also state how long personal information is retained and whether personal information is sold to third parties. (2) Employees may sue if the

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employee's personal information is stolen or is accessed or disclosed without the employee's authorization.

**PRACTICE TIP:** Employers also have other statutory obligations under the Labor and other California Codes to maintain accurate employment records. If an employee demands deletion of key documents needed to process payroll, provide benefits, or to belatedly "correct" disciplinary documentation, an employer may still need to deny such a request. This should be done in writing with the statutory or other reasons for the denial clearly delineated. Do this in conjunction with your counsel of record.

## 36. PROTECTED CATEGORY: FEHA EXPANDS (10/2022)

**SB 523** amends and adds various Sections to the Government Code, the Health and Safety Code, the Insurance Code, and the Public Contract Code, relating to reproductive health. Importantly, SB 523 adds "reproductive health decision-making," to FEHA as a new protected category. "Reproductive health decision-making" includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB523.

**PRACTICE TIP:** Be sure to update your handbook protected category lists to include reproductive health decision-making.

## 37. REIMBURSEMENT: MILEAGE RATES FOR 2022 (10/2022)

New mileage rates paid to employees to reimburse them for work-related travel typically change each calendar year. Historically, these changes are not available until December for the following year. However, recognizing the significant surge in gasoline prices, the Internal Revenue Service ("IRS"), as of July 1, 2022, and for the remainder of 2022, made "a special adjustment" to its optional standard mileage rates. For the final six months of 2022, the special mileage rates are:

1. 62.5 cents per mile for business miles driven;
2. 22 cents per mile driven for medical or moving purposes; and
3. 14 cents per mile driven in service of charitable organizations (same as before).

You can find more information on the special rates here:

https://www.irs.gov/pub/irs-drop/a-22-13.pdf.

Note that the "special" rates have no impact on miles driven between January 1, 2022, and June 30, 2022 (the special rates will apply only to the final six months of 2022). The optional IRS standard mileage rates for miles driven during the first six months of 2022 remain:

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1. 58.5 cents per mile for business miles driven;

2. 18 cents per mile driven for medical or moving purposes; and

3. 14 cents per mile driven in service of charitable organizations (same as before).

Effective January 1, 2023, the standard mileage rates for cars, vans, pickups or panel trucks will be changed as follows:

1. ___ cents per mile driven for business use, a change of ___ cents from the rate for 2022;

2. ___ cents per mile driven for medical or moving purposes for qualified active-duty members of the Armed Forces, a change of ___ cents from the rate for 2022; and

3. ___ cents per mile driven in service of charitable organizations. The charitable rate is set by statute and remains unchanged from 2022.

**PRACTICE TIP 1:** Remember that employers are required to reimburse employees for work-related mileage, other than the usual commute to and from the regular place of work. Employers may choose to pay rates lower than the IRS standard if the chosen rates fully compensate the employee for travel-related costs (including fuel, insurance, repairs, and depreciation); the employer bears this burden of proof. However, payment of the IRS standard rates will be deemed to be reasonable and sufficient reimbursement as a general rule. If an employer pays a rate higher than the IRS rate, the difference could become taxable income to the employee.

**PRACTICE TIP 2:** Some employers provide employees with a stipend or allowance to cover personal vehicle costs incurred by the employee. Keep in mind that unless the employer requires those funds to be part of the employee's wages and takes proper taxes and withholdings, employees still need to submit to their employer a mileage/personal vehicle use log to justify the stipend or allowance. The federal government has cracked down on the taxation of automobile stipends/allowances if there is no backup to prove the personal vehicle use. Employers should consult with their CPA or other tax professional about this issue.

**RELATED BILL: AB 984** amends Vehicle Code Sections 4463 and 4853 and adds Vehicle Code Section 4854, to require disclosure of vehicle location technology on any fleet vehicles. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB984.

## 38. REMINDERS: POSTER UPDATES AND TRAININGS (10/2022)

### Update Your All-In-One Posters

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Every year in our office, we take down our required postings and we put up the latest and greatest (worst). Because the laws change so frequently, this is an annual must-do. One of the simplest ways to be compliant with posting requirements is to purchase and post a new all-in-one poster each year. Remember that employers must fill in the blanks on the poster to include information specific to their workplace. Employers also must separately post their Wage Order and may be required to post other additional items specific to their industry or workplace (Prop 65, etc.).

**NOTE:** On October 19, 2022, the U.S. Equal Employment Opportunity Commission ("EEOC") released a revised 'Know Your Rights' poster, which must replace the previous "EEO is the Law" poster. Covered employers are required by federal law to prominently display the poster at their work sites. The poster can be found at:

https://www.eeoc.gov/poster.

**Sexual Harassment Prevention Training**

California law requires that companies with five or more employees provide two hours of supervisory training and one hour of staff training every two years on harassment, discrimination, bullying and retaliation. There are also special timing requirements for certain industries (*e.g.*, temporary staffing, agriculture, janitorial, etc.).

**PRACTICE TIP:** When safe to do so, it is recommended that training be provided in person by qualified trainers, to ensure the most effective training program. In-person training may not be feasible for all companies. As such, LightGabler offers in-person (live) trainings, quarterly live Zoom trainings, and online training video options for supervisors as well as non-supervisory staff. See:

https://www.lightgablerlaw.com/training/.

## 39. STATUTE OF LIMITATIONS: SEXUAL ASSAULT = LONGER SOL (10/2022)

Until December 31, 2026, **AB 2777** amends Code of Civil Procedure Section 340.16 and creates the "Sexual Abuse and Cover Up Accountability Act". Among other amendments, AB 2777 expands the statute of limitation ("SOL") and allows individuals from January 1, 2023, to December 31, 2023, to bring claims in civil court seeking to recover damages suffered as a result of a sexual assault that occurred since January 1, 2009 (expanding the current 10-year SOL for these claims). Many of these claims would otherwise be time-barred solely because the SOL expired. This bill can also revive sexual harassment and wrongful termination claims. Notably, AB 2777 does not revive "A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023… [or] A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023". The Legislative declarations and findings provide staggering facts about the need for AB 2777. For example, "Every 68 seconds, an American is sexually assaulted … According to the Rape, Abuse and Incest National Network, only about 300 out of every 1,000 sexual assaults are reported to police. That means more than two out of three go unreported… when these data are combined with widespread news reports of major companies being accused of covering

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up sexual assaults by their employees it is self-evident that statutes of limitation for sexual assault need to be crafted in a way that does not cause the covering-up company to enjoy the fruits of their cover-up solely because our statutes of limitation permit, and thus motivate, such behavior".

**PRACTICE TIP:** A couple years back, the Stop Harassment and Reporting Extension ("SHARE") Act (AB 9) extended the deadline to file a complaint alleging "practices made unlawful" under the Fair Employment and Housing Act (FEHA) with the CRD from one year to three years. This gave employees a longer period of time to initiate employment discrimination-related claims. Employees will also have one additional year after the receipt of a CRD Right-to-Sue letter in which to file a civil action in court. This means that employers may now find themselves defending claims for FEHA-related workplace incidents up to *five or more years* after the incident occurred. These delays and the expanded SOLs could make it very hard for an employer to uncover accurate facts about a complaint, given the potential gap of several years. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2777.

## 40. TRAFFICKING: BARBER/COSMETOLOGY POSTINGS (10/ 2022)

**AB 1661** amends Civil Code Section 52.6 to add barbering and cosmetology (hair, nail, electrolysis, skin care and other related businesses) to the list of business types that are required to post a Department of Justice notice containing "information relating to slavery and human trafficking, including information regarding specified nonprofit organizations that a person can call for services or support in the elimination of slavery and human trafficking." Failure to post can result in a civil penalty of $500 for a first offense, and $1,000 for each subsequent offense. You can find additional information here:

https://oag.ca.gov/human-trafficking.

A sample notice is also included in the bill. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2662.

## 41. TRAFFICKING: EMT TRAINING REQUIREMENTS (10/2022)

Effective July 1, 2024, **AB 2130** amends Health and Safety Code Sections 1797.170, 1797.171, and 1797.172, to require that at the time they are licensed, all EMT-I, EMT-II, and EMT-P, must complete at least 20 minutes of human trafficking-related training. According to the author, as front-line emergency workers, EMTs and paramedics are uniquely situated to interact with trafficking victims as they respond to emergencies. For that reason, it is important to train them to recognize the signs of trafficking. Brave first responders that are trained "to recognize the signs of trafficking will save [even more] lives." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2130.

## 42. TRAFFICKING: HOTELS MUST REPORT SEX TRAFFICKING (10/2022)

Through **AB 1788**, which adds Civil Code Section 52.65, a hotel will be liable if either of the following occurs: "(1) Sex trafficking activity occurred in the hotel, a supervisory employee of the hotel either knew of the nature of the activity, or acted in reckless disregard of the activity constituting sex trafficking activity within the hotel, and the supervisory employee of the hotel failed to inform law enforcement, the National Human Trafficking Hotline, or another appropriate victim service organization within 24 hours…; [or] (2) an employee of the hotel was acting within the scope of employment and knowingly benefited, financially or by receiving anything of value, by participating in a venture that the employee knew or acted in reckless disregard of the activity constituting sex trafficking within the hotel." A hotel is defined as "… a motel, or any other operator or management company that offers and accepts payment for rooms, sleeping accommodations, or board and lodging and retains the right of access to, and control of, a dwelling unit that is required to provide training and education regarding human trafficking awareness pursuant to Section 12950.3 of the Government Code." Violation penalties are as follows: $1,000 for the first violation in a calendar year; $3,000 for the second violation within the same calendar year; and $5,000 for the third and any subsequent violation within the same calendar year. A court can also increase the penalty to $10,000 for a fourth violation and beyond. A "city, county, or city and county attorney may bring a civil action for injunctive and other equitable relief against a hotel if there is reasonable cause to believe there has been a violation of AB 1788." Notably, there is a five-year statute of limitations on any such claim (from the date of violation or from the date a minor reaches the age of majority). See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1788.

## 43. TRAINING: IMPLICIT BIAS TRAINING (10/2019) (REMINDER)

**AB 241** amends Sections 2190.1 and 3524.5 of the Business and Professions Code and adds Section 2736.5, and creates new continuing education ("CE") and training requirements on implicit bias in treatment for physicians, surgeons, physician assistants and nurses. According to the *Stanford Encyclopedia of Philosophy*, "implicit bias" can be described as "a term of art referring to relatively unconscious and relatively automatic features of prejudiced judgment and social behavior."

Beginning January 1, 2023, the bill will require CE providers to "comply with these provisions and would require the board to audit education providers for compliance." The bill summary notes that these changes are necessary because "… 'most health care providers appear to have implicit bias in terms of positive attitudes toward whites and negative attitudes toward people of color.' Additional studies have been published suggesting that implicit bias in regards to gender, sexual orientation and identity, and other characteristics has resulted in inconsistent diagnoses and courses of treatment being provided to patients based on their demographic." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB241.

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Related Statute: AB 1407 is a similar bill authorizing schools of nursing or nursing programs to include direct participation by students in one hour of implicit bias training as a requirement for graduation. Effective January 1, 2023, this bill will also require any new nursing licensee, immediately following their initial licensure, or any nurse that is still within the first two years of holding their license, to complete one hour of direct participation in an implicit bias course. Lastly, the bill requires hospitals that hire and train new nursing program graduates to implement an evidence-based implicit bias program in its new graduate training program. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1407.

Related Statute: AB 242 is a similar bill authorizing the Judicial Council to develop training on implicit bias and to require all court staff who interact with the public to complete two hours of any training developed every two years. AB 242 also requires the California State Bar to adopt regulations to require the MCLE curriculum to include training on implicit bias and the promotion of bias-reducing strategies. Licensees of the State Bar will be required to meet the requirements for each MCLE compliance period ending after January 31, 2023. See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB242.

## 44. UNION: CARD CHECK ELECTIONS (10/2022)

In a surprising about-face, and due to apparent pressure from President Biden, Governor Newsom signed **AB 2183** into law. Governor Newsom and the two previous Governors had vetoed similar bills in the past. AB 2183 makes voting on unionization easier for employees and labor organizations. AB 2183 adds Labor Code Sections 1160.10 and 1162 to, and amends/repeals Sections 1156.35, 1156.36, and 1156.37 of, the Labor Code, to add an "an alternative procedure to the polling place election process set forth in Section 1156.3." For now, "a labor organization may be certified as the exclusive bargaining representative of a bargaining unit through either a labor peace election [mail-in ballots] or a non-labor peace election [card checks] … to summarily select a labor organization as its representative for collective bargaining purposes without holding a polling place election." Notably, as the Governor signed this bill into law, he also announced that he has reached an agreement with the UFW and the California Labor Federation to repeal portions of AB 2183 and add new provisions during the upcoming legislative session. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2183.

## 45. VETOED BILLS: SOME KEY BILLS THAT DID NOT PASS (10/2022)

**AB 1761**, like its predecessor bills, sought to allow non-exempt employees to request an employee-selected flexible work schedule of up to 10 hours per workday or 40 hours per workweek with no overtime paid for the ninth and tenth hours of daily work. We can expect a similar bill in the coming legislative session.

**AB 2932** sought to create a 32-hour workweek, with overtime owed after eight hours in a workday or 32 hours (instead of 40 hours) in a workweek.

**SB 1262** would have overturned the holding of *All of Us or None of Us. v. Hamrick*, which currently prevents California Superior Courts from allowing defendants in criminal cases from being searched through electronic indexes by driver's license number and date of birth. This has significantly slowed background check processes.

## 46. WAGES: CA'S MINIMUM WAGE HIKE CONTINUES (2017-2023)

Under SB 3 (2016), codified in Labor Code Section 1182.12, for large employers (26 or more employees), the minimum wage increased to $15.00 per hour in 2022. As of January 1, 2023, for small employers (25 or fewer employees and certain non-profit employers), the minimum wage correspondingly increases to $15.00. With the $15.00 minimum wage marker being attained across all employers, a clause in SB 3 is triggered that creates an annual *inflation-related* increase tied to the U.S. Consumer Price Index (not to exceed 3.5% in a year, with the resulting amount rounded to the nearest $0.10). Effective January 1, 2023, because of the currently high inflation rates, this "inflation" increase will result in the minimum wage for all California employers, large and small, being $**15.50 per hour** (not $15.00). The minimum wage increase also **impacts California's exempt workers**. Labor Code 515 requires exempt employees to meet a "salary basis test", and that "salary basis test" requirement is directly tied to the State's minimum wage – an exempt employee must earn at least twice the State minimum wage. Due to the inflation-related increase in the minimum wage, as of January 1, 2023, the minimum salary requirement for exempt employees will be $64,480 annually ($1,240 weekly or $5,373.33 monthly) (not $62,400).

While it is possible that the annual increases could be temporarily suspended by the Governor or his successors as the result of economic downturns, based on certain specified criteria (*i.e.,* decreases in total non-farm employment, downturns in retail sales, or if the Director of Finance finds that an increase would push the State budget into a deficit in the current fiscal year or in either of the two following fiscal years), such a suspension is unlikely, since it has not happened since the bill's inception.

**IMPORTANT NOTE**: Many California cities and counties are considering (or have passed) similar local minimum wage hikes. Employers can find the current minimum wage rates for any of these cities, along with those of other states throughout the United States, at the UC Berkeley Labor Center. See:

http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/.

## 47. WAGES: INCREASE FOR COMPUTER SOFTWARE EXEMPTION (10/2022)

Effective January 1, 2023, the Department of Industrial Relations ("DIR") will adjust the computer software employees' minimum hourly rate of pay exemption from $50.00 (the 2022 rate) to $53.80. The minimum monthly salary exemption will also increase from $8,679.16, (the 2022 rate) to $9,338.78 and the minimum annual salary exemption will

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be increased from $104,149.81 (the 2022 rate) to $112,065.20. This change reflects a **7.6%** increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. See:

https://www.dir.ca.gov/oprl/ComputerSoftware.htm.

## 48. WAGES: INCREASE FOR PHYSICIAN EXEMPTION (10/2022)

Effective January 1, 2023, the California Department of Industrial Relations ("DIR"), will adjust the licensed physician and surgeon employee's minimum hourly rate of pay exemption amount from $91.07 (the 2022 rate) to $97.99. This change reflects a **7.6%** increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. See:

https://www.dir.ca.gov/OPRL/Physicians.htm.

## 49. WARN: CALL CENTER EMPLOYEES PROTECTIONS (10/2022)

**AB 1601** amends Labor Code Sections 1406 and adds Article 1 (commencing with Section 1400) and Article 2 (commencing with Section 1409) to Chapter 4 of Part 4 of Division 2, to extend and expand the protections of the California Worker Adjustment and Retraining Notification ("Cal-WARN") Act to cover call centers and call center employees, and to authorize the Labor Commissioner to enforce Cal-WARN notice requirements and to investigate and take steps to mitigate and cite alleged violations of the Cal-WARN Act by call centers. Call center employers are advised to review these new requirements in detail, as they are more expansive than the regular Cal-WARN requirements, particularly with regard to the relocation standards. A call center is "a facility or other operation where employees, as their primary function, receive telephone calls or other electronic communication for the purpose of providing customer service or other related functions." This bill prohibits call center employers from ordering a relocation of its call center, or one or more of its facilities or operating units, within a call center, unless proper Cal-WARN Act notice is given to employees, the EDD and the required local civic leaders. Relocation of a call center occurs when an "… employer intends to move its call center, or one or more facilities or operating units within a call center comprising at least 30 percent of the call center's or operating unit's total volume when measured against the average call volume for the previous 12 months… to a foreign country." In addition to other penalties, call centers that violate the law will be ineligible to be awarded or have renewed state grants or state-guaranteed loans for five years, and the call center would also be ineligible to claim a tax credit for five taxable years. According to the Legislative history, this bill is necessary because, "Over the past few years, corporations have benefited from millions of dollars in State subsidies while funneling call center jobs out of California. Continuing to subsidize corporations that export call center jobs only serves to incentivize this behavior and hurts California workers and communities."

**NOTE:** A "covered establishment" under Cal-WARN is any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons. For larger employers, Federal WARN may also apply. Federal WARN, applies to a business with 100 or more full-time workers (not counting

workers who have less than 6 months on the job and workers who work fewer than 20 hours per week).

## 50. WORKERS' COMPENSATION: STRUCTURAL PEST CONTROL (10/2022)

**SB 1064** adds Business and Professions Code Section 8693 and requires structural pest control operators to file with the Structural Pest Control Board "…a current and valid Certificate of Workers' Compensation Insurance, or a statement certifying that they have no employees and are not required to obtain or maintain workers' compensation insurance." If not done, the Structural Pest Control Board is prohibited from "issuing, reinstating, or continuing to maintain any structural pest control operator company registration." Willful or deliberate disregard for these rules will result in disciplinary action by the Structural Pest Control Board. Note also that the insurers themselves are required to report to the Structural Pest Control Board each company name, registration number, policy number, and dates that coverage is scheduled to commence and any lapse or cancellation date, if the policy is canceled. See:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1064.

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# NEW CASE LAW

## 51. ADA: MULTIPLE LOCATIONS = EMPLOYEE MINIMUM (6/2022)

The Americans with Disabilities Act ("ADA") applies to employers with 15 or more employees. This seems like a fairly straightforward concept, though there are scenarios in which the law will combine employees from multiple establishments to get over that 15-person threshold, if the different businesses are so interconnected as to form an "integrated enterprise". This "integrated enterprise doctrine" was illustrated in *Buchanan v. Watkins & Letofsky, LLP* (April 2022), in which an employee of a Nevada LLP alleged claims under the ADA against her employer, a law firm with under 15 employees. The LLP also operated a separate law firm in California, but the two firms shared a website, toll-free number, email template footer (which identified both offices), and IRS taxpayer ID number, and the same individuals managed all significant employment matters. The Court in *Buchanan* remanded the case back to the lower court to perform a full analysis as to whether these two establishments should be considered integrated enterprises for purposes of applying the ADA.

**PRACTICE TIP:** The 15-employee threshold under the ADA generally does not provide any reprieve for smaller employers. Remember that the California FEHA applies in most instances to employers that have five or more employees and as few as one employee for harassment claims.

## 52. ARBITRATION: DO'S AND DON'TS (NEW CASES) (2022)

**See the AB 51 update at #3 above regarding mandatory arbitration agreements.**

**a. DO keep track of key developments.** The law in California surrounding pre-employment arbitration agreements remains very much in flux. Recall that HR 4445 (March 2022) amends the Federal Arbitration Act to ban pre-dispute agreements to arbitrate sexual assault and sexual harassment claims (See # 3 above). The outcome of *Chamber of Commerce v. Bonta* and AB 51 is still to be determined as to whether California can prohibit requiring applicants or employees to sign arbitration agreements as a condition of employment. In late August 2022, the Ninth Circuit Court of Appeals' three judge panel withdrew its 2021 opinion which upheld, in large part, California's AB 51 law banning mandatory arbitration agreements as a condition of employment. The Ninth Circuit granted a panel rehearing on the matter to occur sometime in the future. In the meantime, employers who wish to use arbitration agreements in the workplace are strongly encouraged to consult with their employment counsel immediately and on a regular basis regarding implementing, reviewing or modifying their arbitration agreements to comply with the ongoing developments.

**b. DO update your arbitration agreement to take advantage of key developments.** On June 15, 2022, the United States Supreme Court ruled in favor of the employer in *Viking River Cruises, Inc. v. Moriana*, holding that Viking River was entitled to enforce its arbitration agreement and compel a former employee to arbitrate

her claims for individual wage and hour violations brought under the California Labor Code Private Attorneys General Act ("PAGA"). The Court also held that once the former employee's individual claims were subject to arbitration, she no longer had standing to pursue her PAGA representative action on behalf of other aggrieved employees in court, resulting in the dismissal of those claims. This was a huge win for employers, however, the ability to take advantage of the Viking River Cruises case will depend on whether the employer's arbitration agreement is enforceable and contains language like that found persuasive by the Court in *Viking River Cruises*.

California courts have continually held that wholesale PAGA waivers are not enforceable, however. (*Najarro v. Superior Court* (October 2021)—an arbitration agreement can be substantively unconscionable if it requires workers to waive the right to bring representative suits under PAGA since "an employee's right to bring a PAGA action is unwaivable".) The holding in *Viking River Cruises* does not change this.

The benefits of the *Viking River Cruises* decision might be short-lived. The California Supreme Court and/or Legislature may establish new law providing that an individual employee still has standing to act as a PAGA representative, even if their individual claims have been compelled to arbitration. The California Supreme Court is considering this particular issue in *Adolph v. Uber Technologies, Inc.* (April 2022).

The California courts historically have found that a plaintiff will maintain standing to pursue representative claims in similar circumstances, which does not bode well for the expected outcome of the Adolph case. In *Johnson v. Maxim Healthcare Services, Inc.* (July 2021), the court found that even though an employee's individual PAGA claim was time-barred, she could still pursue a representative claim under PAGA on behalf of other employees in the company. In *Howitson v. Evans Hotels* (July 2022), an employee who settled her individual claims against her employer for alleged Labor Code violations was not precluded from subsequently bringing a PAGA action with the same allegations. In *Gavriiloglou v. Prime Healthcare Mgmt., Inc.,* (September 2022) a former employee arbitrated her individual claims, and the arbitrator found that no Labor Code violations occurred. Despite this finding, the employee was still permitted to move forward with her representative PAGA claim against her former employer, alleging the same violations.

**c. DO fairly draft and implement arbitration agreements.** Remember that a court will not enforce an arbitration agreement if it is procedurally or substantively unconscionable, *i.e.*, unfair. Procedurally unconscionable means that the agreement was the result of unfair surprise or oppression due to unequal bargaining power between the parties. Substantively unconscionable means that the agreement is unfair in its terms. **Also remember the *Armendariz* factors.** Under *Armendariz* (2000), California employment-related arbitration agreements must also meet the following requirements to be enforceable under California law: (1) require neutral arbitrators; (2) allow for more than minimal discovery; (3) require a written decision by the arbitrator; (4) allow for all types of relief otherwise available in court; and (5) not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration process (other than the initial filing fee).

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As they have in prior years, in 2022 the Courts have found arbitration agreements to be substantively unconscionable and unenforceable when the agreement: (1) limited written discovery and depositions; (2) shortened the statute of limitations; (3) included a provision that the employer would recover fees and costs for bringing a successful motion to compel arbitration (employment arbitration agreements may not alter fee-shifting provisions provided by statute); (4) lacked mutuality in only requiring arbitration of claims normally brought by an employee, and excluding claims normally brought by the employer; and (5) provided for the recovery of attorneys' fees against the losing party in arbitration. Courts have also found procedural unconscionability when: (1) the employee was required to sign the agreement as a precondition to employment; (2) the agreement is presented to an employee while they are working and they are asked to sign on the spot; (3) the agreement was presented in a language in which the employee was not proficient; and (4) employees were directed to sign it as a requirement of continued employment without the employer answering questions about the clause's meaning. Multiple defects in an agreement can indicate "a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior form that works to the employer's advantage." (see *De Leon v. Pinnacle Property Management Services, LLC* (November 2021); *Najarro v. Superior Court* (October 2021); *Nunez v. Cycad Mgmt. LLC* (March 2022); *Ramirez v. Charter Communications* (February 2022).) Conversely, arbitration was compelled on an agreement that was entered into voluntarily and the employee could have refused to sign without any repercussions *Martinez-Gonzales v. Elkhorn Packing* (February 2022).

**THE CALIFORNIA SUPREME COURT HAS GRANTED REVIEW OF *RAMIREZ V. CHARTER COMMUNICATIONS*. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

**d. DO carefully draft arbitration agreements with qualified employment counsel.** Valid arbitration agreements are a great way to effectively (including cost-effective) and expeditiously work to resolve employee complaints when they arise. That being said, there are very specific and even minor nuances that can make an arbitration agreement enforceable versus not. In *Najarro v. Superior Court* (October 2021), the court found that the parties' delegation clause, which let the arbitrator decide arbitrability questions, was rendered ambiguous and ineffective by a subsequent severance clause that referred to an arbitrator *or court* finding any portion of the arbitration unenforceable. (See prior LightGabler updates for a history of other cases resulting in unintended consequences due to poor drafting.)

**e. DO reference all entities in the agreement.** In *Ahlstrom v. DHI Mortg. Co., Ltd* (December 2021), an employer (subsidiary company) was not able to enforce an arbitration agreement between its employee and the employer's parent company, where the subsidiary was not specifically identified anywhere in the arbitration agreement. Best practice is for staffing agencies, host employers and any respective related business entities to cross-reference each other in all arbitration agreements in order to make their

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enforcement as broad as possible. (see *Garcia v. Expert Staffing West* (December 2021).)

**f. DO reference both the Federal Arbitration Act ("FAA") and California Arbitration Act ("CAA") in arbitration agreements.** In *Evenskaas v. California Transit, Inc.* (July 2022), the Court of Appeal found that the FAA applied and preempted California case law because paratransit services involved interstate commerce for the purposes of the FAA. Whereas the trial court refused to compel arbitration under the CAA, the appellate court did compel arbitration once it was established that the FAA applied. The FAA is more favorable to arbitration. Employers should include references to both the FAA and the CAA to increase the likelihood that the agreement will be enforced under one or both Acts.

**g. DO have a stand-alone arbitration agreement that is not buried in the handbook.** In *Mendoza v. Trans Valley Transport* (February 2022), the Court refused to compel arbitration based upon an arbitration policy that was contained in the employee handbook where neither the specific policy nor the handbook contained the employee's signature. This was the result even though the employee had signed two separate stand-alone acknowledgement forms indicating that he acknowledged receipt of the handbook and agreed to abide by all company rules and policies.

**h. DO track details re: distribution and signatures.** When an employer moves to compel enforcement of an arbitration agreement, employees often claim they do not remember ever reviewing or signing the agreement, or, straight out deny that they signed the agreement. The burden is on the employer to establish with admissible evidence that a valid arbitration agreement exists between the parties. A declaration from the manager or HR director stating that the employee had signed the agreement may not be enough. (*Gamboa v. N.E. Cmty. Clinic* (November 2021).) Employers are encouraged to document the details surrounding the distribution and execution of arbitration agreements (*e.g.*, keep emails to/from each employee regarding distribution and signatures, have the employee confirm in an email that they signed the agreement or send them an email confirming their signature and asking them to let you know if they have any questions, include a line in the arbitration agreement, either above or below the signature line, where the employee prints their own name).

Note that although parties can agree who will decide arbitrability, the Court will decide if there is a binding agreement in the first place. In *Ahlstrom v. DHI Mortgage Co.* (December 2021), the Ninth Circuit Court of Appeals found that the parties cannot delegate issues of whether an arbitration agreement is valid or properly formed to the arbitrator. In particular, when a party to the arbitration agreement challenges the very existence of the agreement, a court is required to address that challenge and determine whether such an agreement existed before it can grant a motion to compel arbitration.

**i. DO keep separate documentation to support electronic signatures.** Courts have declined to enforce arbitration agreements that were electronically signed when the employee denied signing and the employer was unable to produce sufficient extrinsic evidence to prove otherwise. In *Trinity v. Life Insurance Company of North America* (May

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2022), employer's motion to compel arbitration denied when the arbitration agreement was contained within an employee handbook that was emailed to all employees and accompanied by an electronic box that the employee had to check acknowledging their consent to the policies, including the agreement to arbitrate. The employer testified that the agreement had to be signed using a unique username and password and produced an auto-generated acknowledgement showing that the employee had signed. The employer also testified that an automatically generated email confirming the employee's signature on the agreement would have been sent to the employee, but the employer was unable to locate or produce said email. (See also *Bannister v. Marinidence Opco, LLC* (May 2021) motion to compel arbitration denied for lack of evidence to support electronic signature.)

**PRACTICE TIPS FOR E-SIGNATURES:** If you must use them, minimize risks by implementing safeguards:

1. The procedures used in any online orientation platform should fully comply with all the statutory requirements of California's Uniform Electronic Transactions Act and the federal E-SIGN Act;
2. Employers should ensure that employees affirmatively agree to complete the employment documents using an electronic signature;
3. Each employee should have a unique username and password to access the Human Resources system, which should require all users to create a private password before signing electronic documents. Only the employee should know the employee-created password. This will allow the employer to show that the electronic signature on any particular agreement is the "act of" the employee;
4. Employers should inform their employees of the need to review every document and provide them with sufficient time to do so before employees electronically sign the document;
5. Employers should inform employees of their right to ask questions about the process and provide them the opportunity to do so before employees electronically sign the document;
6. Employers should ensure that each electronic signature is accompanied by an accurate date and time stamp, along with the IP address of the device the employee used to sign the document; and,

**j. Before implementing any system** that provides for the use of electronic signatures, the employer should prepare a sample declaration that includes all the above safeguards. The sample declaration should also include a detailed description of the steps taken to ensure that the employee is the only individual who can affix his or her electronic signature on a document and verification from the online platform provider that the contents of the sample declaration are true and correct.

**k. DO make sure an authorized company representative signs the agreement**. To be enforceable, *both parties* must sign an arbitration agreement. An agreement can be deemed invalid if signed only by the employee and not the employer. (*Najarro v. Superior Court* (October 2021).)

**l. DON'T delay in seeking to enforce your agreement.** A Court may refuse to enforce an arbitration agreement if the employer knowingly relinquished the right to arbitrate by acting inconsistently with that right. It is not necessary that a delay actually prejudiced the other side. (*Morgan v. Sundance* [a Taco Bell franchise] (SCOTUS May 2022).) Waiver of the right to enforce arbitration is often found when the employer engages in litigation in court and proceeds with discovery before seeking to enforce the arbitration agreement. At least one recent case may help the employer enforce their agreement after some delay, but employers should not rely on this case to save the day and instead should notify their counsel if there is an arbitration agreement and discuss enforcement as soon as possible after a claim or lawsuit is received. (*Quach v. California Commerce Club, Inc*. (May 2022)—court enforced an arbitration agreement following a 13-month delay by the employer.)

**THE CALIFORNIA SUPREME COURT HAS GRANTED REVIEW OF *QUACH V. CALIFORNIA COMMERCE CLUB, INC*. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

**m. DO pay your filing fee on time**. Once an employer successfully moves an employee's claim into arbitration, it must pay its filing fee on time, or the employee can move their claim back to civil court. This happened in *Gallo v. Wood Ranch USC, Inc*. (July 2022), wherein the employer's attorney did not alert the employer of an arbitration payment deadline, and in *Espinoza v. Superior Court of Los Angeles County* (September 2022), wherein the employer paid the arbitration fee after the 30-day deadline had passed, due to a clerical error. California's Labor Code has specific sections that prohibit payment delays on the part of the employer, to prevent a scenario in which an employer can keep an employee's claim in limbo simply by failing to pay the arbitration fee. In both of these cases, the employers waived their rights to keep the matter in arbitration, and the employees were able to litigate their claims in civil court and in front of a jury.

**n. DON'T try to force arbitration of CRD or Labor Commission claims.** The arbitration process does not displace the independent authority of the Labor Commissioner to investigate an employee's complaint, seek interim relief and render a determination (which may include citations and remedies including directing the reimbursement of lost wages plus interest, payment of penalties, and even rehiring or reinstating employees). (*Crestwood Behav. Health, Inc. v. Lacy* (October 2021).) Also, remember that although arbitration agreements are useful to limit potential exposure on a civil court case, employers are better off in the Labor Commission arena as compared to arbitration because attorneys' fees are not available to the employees in that forum.

When an employee files a complaint with the California Civil Rights Department ("CRD") (formerly known as the Department of Fair Employment & Housing), the CRD investigates the complaint and, if it believes the allegations have merit, attempts to reach an informal resolution with the employer. If they cannot reach a resolution, the CRD has the discretion to bring a civil action on behalf of the employee claiming to be aggrieved. When this occurs, the affected employee can participate in the lawsuit as a plaintiff, but isn't required to. In *Dep't of Fair Emp. & Hous. v. Cisco Sys., Inc.* (August 2022), the

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DFEH (now CRD) brought suit against Cisco on behalf of an employee. The employee opted not to participate in the suit. Cisco moved to compel the action brought by the DFEH to arbitration, on the grounds that the affected employee had signed an arbitration agreement. The court denied the motion, leaving the case in court. Arbitration is a matter of consent, and the DFEH never consented to resolve disputes with Cisco by arbitration.

A similar line of reasoning resulted in the same conclusion in *People v. Maplebear* (July 2022). In that case, the San Diego City Attorney brought an unfair competition action against the shopping app Instacart, alleging that it unlawfully misclassified its workers as independent contractors. Instacart attempted to push the case into arbitration, as the workers at issue had signed arbitration agreements. The court held that the case could *not* be compelled to arbitration. The City Attorney is not standing in the employees' shoes for purposes of bringing this case. Rather, it is exercising its authority to enforce state law on behalf of the People of California.

**o. DO keep in mind that there are exemptions from the FAA for certain transportation workers.** The FAA transportation worker exception exempts from coverage "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Carmona v. Domino's Pizza, LLC* (December 2021), the Ninth Circuit Court of Appeals found that a class of Domino's Pizza employee drivers were engaged in interstate commerce where their job was to deliver supplies, such as mushrooms, from Domino's supply center in California to various Domino's franchisees, also in California. Even though the plaintiffs did not themselves cross state lines, they were found to be similar to Amazon package delivery drivers who picked up packages at (in-state) Amazon warehouses in California and transported them for the last leg, to their eventual destinations in California. Because the Amazon packages, and similarly Domino's supplies, had previously crossed state lines, the employees engaged in "interstate commerce" under the FAA. Although arbitration will not be compelled under the FAA when this exemption applies, such agreements may still be enforceable under the California Arbitration Act, which is not as favorable to arbitration as federal law.

Which employees fit into this exemption has not always been clear, and the Supreme Court's latest holding on the issue in *Southwest Airlines Co. v. Saxon* (June 2022) further muddies the waters. It seems to show a continued pattern of expansion of those that fall into the exemption, however. In *Saxon*, the Court held that an airline employee who supervised others that physically load and unload cargo on and off planes (and sometimes engaged in this practice herself when she filled in for other employees) fits into this exemption. By loading and unloading cargo, the employee was part of a class of workers "directly involved in transporting goods across state or international borders". Accordingly, the airline could not compel the employee's class action suit into arbitration.

## 53. ATTENDANCE ABUSE: HANDLING CHRONIC CALL-OUTS (1/2022)

Employers often question when they can discipline and terminate for attendance abuse or for any other possible disciplinable violation. *Wilkin v. Community Hospital of the Monterey Peninsula* (October 2021) provides a good example of the best practices for employers to follow when documenting and considering discipline for excessive

absenteeism or other matters. In *Wilkin*, the employee, a registered nurse, violated policies regarding the handling and documentation of patient medications. She was also chronically absent over the 14 months before her employment was terminated. In particular, the hospital (employer) had evidence of prior executed disciplinary notices regarding her attendance issues from November 2016, December 2016, and February 2017, additional meetings in September 2017 and November 2017 to discuss her ongoing attendance issues, as well as additional warnings over the course of the year prior to being terminated that provided notice that if she failed to improve her attendance, her employment could be terminated.

To complicate matters, the employee was on intermittent Family and Medical Leave ("FMLA") and other medical leave during the 14-month period preceding her termination. However, and as documented by the employer, her absences far exceeded the availability of what is provided under such leave. The employer's documentation regarding counseling and warnings was key. They could also show that they had made the decision to terminate and even delayed the actual termination for further investigation after receiving a request for reasonable accommodation in the form of a medical leave of absence.

This employer's careful handling and diligent documentation showed legitimate, nondiscriminatory reasons for the discipline and termination and defeated the employee's wrongful termination lawsuit.

**PRACTICE TIP:** Keep diligent and up-to-date documentation regarding employee discipline problems (if they exist). When dealing with attendance abuse, employers are encouraged to let employees exhaust their available sick time (or PTO, if applicable), before instituting formal discipline or termination for attendance abuse. Employers should objectively investigate the reasons for termination to make sure termination is the best course of action and is supported with documentation. Remember, employers cannot engage in disability discrimination, deny reasonable accommodations that do not cause undue hardship, or retaliate against employees for taking CFRA or FMLA.

## 54. ATTORNEYS' FEES: ANOTHER LOSS FOR EMPLOYERS (10/2022)

In *Vines v. O'Reilly Auto Enterprises, LLC* (January 2022), the California Court of Appeal overturned the trial court's substantial reduction of the plaintiff's attorneys' fees. Vines sued his former employer for FEHA violations including race- and age-based discrimination, harassment and retaliation. After a jury found in his favor on his claims for retaliation and failure to prevent retaliation, Vines requested $809,681.25 in attorneys' fees. The trial court awarded only $129,540.44, based in part on its determination the unsuccessful discrimination and harassment claims were not sufficiently related or factually intertwined with the successful retaliation claims.

The employer's victory in reducing attorneys' fees was short-lived, however. The Court of Appeal found that the claims were intertwined because evidence of the facts regarding the alleged underlying discriminatory and harassing conduct about which Vines had complained was relevant to establish, for the retaliation cause of action, the

reasonableness of his belief that conduct was unlawful. Since the basis for his causes of action were intertwined, the reduction was inappropriate even though he prevailed only on some causes of action. In addition, employee Vines was awarded his costs on appeal.

**PRACTICE TIP:** This case illustrates why settlement is often the best option to resolve cases, especially if you have undesirable facts and do not have an arbitration agreement. The costs of litigation can be astounding. The verdict discussed above does not include the employer's own attorneys' fees and costs that the employer spent to try the case and defend against the appeal.

## 55. ATTORNEYS' FEES: NOT FOR MEAL & REST BREAK CLAIMS (6/2020)

In *Betancourt v. OS Restaurant Services, LLC* (May 2020), the Court of Appeal (2nd District) reiterated the holding of *Kirby v. Immoos Fire Protection, Inc.*, finding that attorneys' fees are not available to a prevailing plaintiff in a lawsuit brought solely for failure to provide rest breaks or meal periods (Labor Code Section 226.7), because that type of lawsuit is not "an 'action brought for the nonpayment of wages'." As the *Kirby* court held, "… the Legislature intended section 226.7 claims to be governed by the default American rule that each side must cover its own attorneys' fees." Here, the plaintiff brought claims only for rest break and meal period violations, and derivative claims for penalties based on those violations. After plaintiff prevailed at trial, the trial court awarded over $280,000 in attorney fees. OS Restaurant appealed. The appellate court sided with OS Restaurant and concluded the trial court had abused its discretion by awarding attorney fees to plaintiff. Accordingly, it reversed the judgment as to the attorneys' fees.

**THIS DECISION HAS BEEN VACATED AND WILL BE RECONSIDERED IN LIGHT OF *NARANJO V. SPECTRUM SECURITY SERVICES, INC.* (See # 73 below). THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

**PRACTICE TIP:** The Labor Code mandates an award of reasonable attorneys' fees to the prevailing party in any action brought for the nonpayment of wages, if any party requests attorney fees at the initiation of the action. (Lab. Code, section 218.5, subd. (a).) This mandatory award of attorneys' fees is the pressure point that often drives settlement of wage disputes in California. Based on the holding in *Naranjo* that premium pay is in part considered wages, it is anticipated that the issue in *Betancourt* will now be decided the other way, giving employees even broader grounds to recover attorneys' fees.

## 56. CALSAVERS IS APPROVED (6/2021)

In *Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program* (May 2021), the Ninth Circuit Court of Appeals held that the Employee Retirement Income Security Act ("ERISA") does not preempt the California law that created CalSavers. The United States Supreme Court denied review (February 2022). Accordingly, the Ninth Circuit's decision stands.

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**PRACTICE TIP:** Employers who are not exempt from CalSavers should promptly register, if they have not already done so. See #9 above for additional information about CalSavers.

## 57. CLASS ACTION: MISCLASSIFICATION ≠ CERTIFICATION (10/2022)

In *Bowerman v. Field Asset Services, Inc. ("FAS")* (July 2022), the Ninth Circuit Court of Appeals evaluated class certification on a misclassification case. FAS is in the business of pre-foreclosure property preservation for the residential mortgage industry. FAS uses "independent contractor" vendors to perform pre-foreclosure property-preservation services for its clients. Some vendors are sole proprietorships; others are corporations. Vendors have varying numbers of employees. Some of the vendors work exclusively for FAS and others perform work for other companies.

When evaluating the failure to pay overtime claims, the Court noted that the vendors in this case performed work well within the usual course of defendant's business (thereby resulting in a failure of prong (B) of the ABC test and the test in general). There remained a triable issue of material facts as to whether the business-to-business exception to the ABC test applied, and if it did, whether the vendors were employees or independent contractors under the *Borello* test.

When a federal court determines whether to certify a class, it must determine if "questions of law or fact common to class members predominate over any questions affecting only individual members". The requirement for individualized *calculations* of damages is not itself enough to defeat certification. In this case, however, certification was defeated because "FAS's *liability* to any class member for failing to pay them overtime wages or to reimburse their business expenses would implicate highly individualized inquiries on whether that particular class member ever worked overtime or ever incurred any 'necessary' business expenses." The plaintiff failed to establish the threshold issue that the whole class suffered damages traceable to their alleged misclassification as independent contractors.

## 58. CONFIDENTIALITY: MUST PROVE ACTUAL DAMAGE (1/2022)

Many employers use confidentiality and non-disclosure agreements ("NDA") to protect their confidential business information. In *Elation Systems, Inc. v. Fenn Bridge, LLC* (November 2021), a software developer signed an NDA in which he agreed to hold all confidential information in strict secrecy and that he would not disclose or use the information without the company's written authorization. After the employee left his job to start his own company, the former employer sued for breach of the NDA after it learned that the former employee breached the NDA by using confidential information to develop a product that he ended up selling to a third party.

The Court held that in order to recover lost profits for breach of an NDA, the employer needs to demonstrate a reasonable probability that profits would have been earned but for the prohibited conduct. Without making that showing, the employer would

be limited to nominal damages at best for a breach of the agreement without actual damages.

**PRACTICE TIP:** Employers should implement safeguards to the extent possible to protect their confidential business information. If information is truly confidential, it should be treated as such at all times. For example, if your price list is posted on your website and/or routinely passed out to customers, it is not going to be considered confidential. On the other hand, your methodology for calculating cost estimates or a secret product formula that is kept secret to every extent possible would likely be treated as confidential. In addition, employers may want to consider if they want to further protect their company information by issuing company cell phones, laptops or other electronic devices to employees rather than allowing them to use their personal devices and providing a reimbursement. If an employee is using their personal cell phone and regularly communicating with your clients, for example, you may not be able to recover that information from their personal devices when they leave. Also, if you save confidential information electronically, make sure it is saved in a location with restricted access.

## 59. DETRIMENTAL RELIANCE: ALLOW TIME TO PERFORM (1/2022)

In *White v. Smule* (January 2022), the California Court of Appeal addressed the question of whether California Labor Code section 970, which prohibits employers from inducing employees to relocate and accept employment by way of knowingly false representations regarding the kind, character or existence of work or the length of time such work will last, clashed with the right to terminate employees at-will. An employee can recover damages under section 970 if they can establish: (1) the knowingly false representations above; (2) that they reasonably relied on the representations; and (3) changed their residence for purposes of the employment and suffered harm as a result of the employer's inducement. The consequences of violating Section 970 are severe and include double damages resulting from such misrepresentations.

Here, the employee alleged that the employer had made (1) false assurances of long-term employment, as well as (2) misrepresentations regarding the role of Lead Project Manager that he would fill at the company. The Court concluded that the employer's at-will provision negated the employee's first claim that he could rely on long-term employment, since generally employees at-will can resign or be terminated without notice at any time and with or without cause. The court stated that, "[a]n at-will employer does not have carte blanche to lie to an employee about any matter whatsoever to trick him or her into accepting employment." Accordingly, the employer was held accountable for misrepresentations that it made regarding the role the employee would fill at the company.

**PRACTICE TIP:** Employers often face situations in which an employee, especially higher-level employees, are hired with the understanding that they will be relocating to fill a job position, but then it is quickly realized that they are not able to perform to the level expected, or, other circumstances at the company have changed thereby eliminating the need for the specific employee. Often these employees have left another job, relocated

their family and have incurred out-of-pocket moving expenses to take the job. If you are considering terminating an employee who has relocated to work for you, the best practice is to give them sufficient warnings and plenty of time to show whether they can adequately perform the essential functions of the job.

## 60. DISCRIMINATION: CHECK YOUR SOURCES (6/2022)

A situation arose in *Ndiaye v. Air Canada* (February 2022) that is commonplace: a decision-maker terminated the plaintiff, and in doing so, relied on facts supplied by a supervisor, without independently evaluating the employee's situation. The problem here was that the plaintiff alleged that the supervisor providing the facts to the decision-maker had a discriminatory motive. When this occurs, the employer may be liable for discrimination, even though the decision-makers themselves had no discriminatory animus. This is called the "imputed motivation doctrine". To avoid liability here, the decision-maker would need to have independently evaluated the employee's situation, instead of relying on the facts supplied by the discriminatory supervisor. In the *Ndiaye* case, plaintiff's supervisor falsely told the decision-maker that plaintiff had been out of work and hadn't returned or otherwise communicated with the employer, but failed to mention that he had submitted doctors' notes throughout this leave.

**THIS CASE IS UNPUBLISHED. THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

## 61. DISCRIMINATION: LEGITIMATE BASIS FOR ACTION (6/2022)

*Dept. of Corrections & Rehabilitation v. State Personnel Bd*. (February 2022) provides a good reminder regarding the employer's burden of proof when accused of discrimination. The McDonnell Douglas test provides for a three-part analysis of discrimination claims: (1) the plaintiff employee must state a prima facie case of discrimination; (2) the employer must rebut that prima facie showing by providing a legitimate, non-discriminatory basis for the employment action; and (3) the burden then shifts back to the plaintiff employee to show that the employer's proclaimed non-discriminatory basis was pretextual for discrimination.

In this case, the Court held that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor was it enough for the employer to cobble together after-the-fact possible nondiscriminatory reasons. While the stage-two burden of production is not onerous, the employer must clearly state the actual nondiscriminatory reason for the challenged conduct.

**PRACTICE TIP:** Bottom line, this case demonstrates once again what we have been advocating for years; detailed and thorough documentation showing your efforts will be your best defense. This includes documentation of the legitimate business reasons for the actions you have taken. Do this even when terminating brand-new employees and selecting employees for a group layoff; at-will is not a defense to discrimination,

harassment or retaliation claims. Documentation of your efforts to identify and discuss alternative available job positions with the disabled employee are also key for your defense of these claims. It is also important for employers to document their non-discriminatory reasons for ending a temporary staffing assignment, as the employer will face the same burden if a claim of discrimination is made.

## 62. EMPLOYMENT AGREEMENTS ≠ ELIMINATE CA LAW (6/2022)

California has a strong public policy in preventing employers from contracting around its labor laws. For example, Labor Code section 925 prohibits employers from requiring California employees (who are not represented by counsel during negotiations) to agree to litigate/arbitrate disputes outside California and to give up the protection of California laws. This section also allows an employee (who was not represented by counsel during the contract negotiation) that has been bound by such a provision to declare this provision void. This statute was tested in *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.* (March 2022), in which the plaintiff lived and worked as a sales associate in California. Plaintiff and his employer entered into an employment contract wherein they agreed that should any litigation between them arise, it would take place exclusively in New Jersey. After the plaintiff resigned to work for a competitor, litigation ensued, and his former employer tried to enforce this provision of the employment contract, which is referred to as a "forum selection clause". The court applied Labor Code section 925 and the case stayed in California.

**THIS CASE HAS BEEN APPEALED TO THE SCOTUS. WHILE THE REVIEW PROCESS IS PENDING, THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

## 63. FAIR CREDIT REPORTING ACT: UTILIZE AGENCIES (6/2022)

Under the Fair Credit Reporting Act ("FCRA"), an employer must provide a job applicant with a standalone disclosure stating that the employer may obtain the job applicant's consumer report when making a hiring decision. Problems arise, like they did in *Hebert v. Barnes & Noble, Inc.* (April 2022), where extraneous information is included in the disclosure. In *Barnes & Noble*, the California Court of Appeal held that a reasonable jury *could find* that Barnes & Noble willfully violated the FCRA where there was at least one technical violation in the form (a legal disclaimer at the bottom of the notice that was included when drafting the notice with counsel and inadvertently not removed), that at least one employee knew the extraneous language was there, and Barnes & Noble may have failed to properly train its employees on FCRA compliance.

**THIS CASE IS UNPUBLISHED. THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

**PRACTICE TIP 1:** Avoid adding any language to the required forms beyond what is required under the FCRA disclosures and/or similar state-mandated disclosures. If you want to provide additional information, do it in a separate document. Remember also that California employers are subject to the Investigative Consumer Reporting Agencies Act

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("ICRAA"), as well as other local and state privacy rules. Under the ICRAA, the information that may be included in a background report is limited. California generally only allows an inquiry into public records that go back seven years (ten for bankruptcy filings). Public records information (including civil lawsuits, tax liens and outstanding judgments) cannot be included in the report unless a background checking agency has verified the accuracy of the information within 30 days prior to issuing the report. There are various caveats and exceptions that go along with the general rules above.

**PRACTICE TIP 2:** Also, under the California FCA (the "ban-the-box" law), remember that employers must consider the nature and gravity of the conviction(s), the amount of time that has passed since the conviction and the nature of the job (including whether there is any particular risk or relation between the prior conviction(s) and the job sought). Then there are specific steps that must be followed as far as notifying the potential employee of the finding, allowing a chance for them to respond, etc. Given the complexity of the rules, best practice is for employers to work with a reputable background checking company to make sure you are using the correct forms and obtaining only legally permitted information.

## 64. FREE SPEECH: IT'S NOT ABSOLUTE (10/2022)

In *Hernandez v. City of Phoenix* (August 2022), the Ninth Circuit Court of Appeals addressed free speech protection for off-duty social media posts made by a Phoenix, Arizona police officer. The Police Department maintained social media policies that prohibited employees from engaging in speech on social media that would be "detrimental to the mission and functions of the Department," "undermine respect or public confidence in the Department," or "impair working relationships" of the Department. The Department concluded that four posts made by a sergeant on his personal Facebook account that denigrated Muslims and Islam violated the Department's policies.

For a government employee to support a claim for improper infringement or retaliation based on free speech, the employee must first show that the speech at issue was made in the employee's private capacity on a matter of public concern. The Ninth Circuit found that Hernandez met this standard, although minimally as to the speech being tied to a matter of public concern. Next, the Court evaluates whether the public employer's policy has an adequate justification for treating its employees differently from other members of the general public, *i.e.*, is the targeted speech that which would undermine the employer's mission or hamper the effective functioning to the government employer's operations. That the speech may merely be embarrassing to the employer is not enough to overcome the right to free speech. The Ninth Circuit found that the Department's policy against social media posts that were detrimental to its mission and functions was not facially overbroad, although other policies could be. This case was remanded to the District Court for further proceedings.

**PRACTICE TIP:** Although the *Hernandez* case relates to public employers, the issues and considerations raised affect private employers as well. Although employers are not prohibited from enacting policies and disciplining based upon off-duty social media posts, it is a complicated and fact-specific area to navigate. There are protections for

employees including those related to off-duty political activity, political association, speaking about employment conditions and about potential legal violations. If a concern about a social media post arises, employers should ask whether there is an actual risk that the employee's posts may harm the business, whether it violates company policy, whether that policy is up to date and valid, and whether the company has consistently followed the policy with regard to social media posts. Remember that just because the post may be objectionable, unsavory or embarrassing, does not in and of itself warrant action by the employer. Employers are encouraged to work with their employment counsel when evaluating the competing interests in this area.

## 65. FREE SPEECH: DON'T DO THIS (10/2022)

*Lawler v. Guillon Enterprises, Inc.* (June 2022) is a cautionary tale to keep in mind when emotions are high. In *Lawler,* a jury trial on gender and pregnancy discrimination, sexual harassment and wage and hour violation claims ended in a verdict against the employer and the employer's manager for over half a million dollars. After judgment was entered, the employer sent a letter to all current employees indicating that the three employees who had prevailed at trial "conspired" to sue the company in a "classic[] #MeToo case", that they lied on the witness stand, that their "crooked" attorney's "only accomplishment" was to "teach witness[es] how to lie in court" had culminated in a verdict against the employer. The employer claimed this financial strain prevented the company from reopening. A second lawsuit for defamation ensued based on the contents in the letter. The court denied the employer's early motion to dismiss the case (an Anti-SLAPP motion), finding that the statements were not protected speech that required immediate dismissal of the case. The court noted that the statements did not relate to a public issue and appeared to have been made to incite other employees and turn them against the plaintiffs and plaintiffs' attorney. The case was allowed to proceed for a determination as to whether the statements reached the level of defamation.

**THIS CASE IS UNPUBLISHED. THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

## 66. HARASSMENT: FAILURE TO ACT MAY = LIABILITY (1/2022)

In *Fried v. Wynn Las Vegas, LLC* (November 2021), the Ninth Circuit Court of Appeals held that a manager's lack of response to an employee's complaints about customer harassment may be sufficient to hold the employer liable for hostile work environment harassment under Title VII of the Civil Rights Act of 1964 (federal law). In addition to doing nothing about the employee's complaint, the manager also made a comment to the employee that he might want to work somewhere else since his current work environment working at the nail salon was a female-oriented work environment. Additionally, two of the employee's co-workers made comments about how the male workers should wear wigs if they want to get more customers or to make more money. On the comments alone, the Court held that they were insufficiently severe or pervasive to create a hostile work environment. However, the comments, coupled with the manager failing to take immediate corrective action, could have a cumulative effect on the employee's working conditions.

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**PRACTICE TIP:** As LightGabler discusses in its annual harassment prevention trainings, employers should maintain legally compliant anti-harassment, discrimination, retaliation and abusive conduct policies. Employees should be made aware of the policies and should have more than one option in management to go to if they have an issue. Investigating and handling harassment complaints and other issues internally is the far better option compared to the employee feeling like they must pursue the complaint through a lawsuit or agency. If an employee brings any complaint to your attention, you should promptly investigate and communicate with the employee, so they know their complaint is being taken seriously. If it is your responsibility to pass the complaint to another person, make sure you follow through to do so.

While employers are, generally, aware of the consequences of harassment in the workplace by co-workers, this case also serves as a good reminder that harassment claims can also arise from the conduct of a third-party nonemployee and should be handled similar to an employee-on-employee claim. Moral of the story: If comments (or actions) are being made about purported harassment, discrimination, or retaliation, the employer cannot disregard them. Act promptly and be thorough.

## 67. IMMIGRATION STATUS: GENERALLY IRRELEVANT (10/2022)

In *Manuel v. Superior Court* (August 2022), the appellate court held that pursuant to California Labor Code section 1171.5, a person's immigration status is generally irrelevant to the issue of liability for violation of state labor laws, except where the person seeking to make such an inquiry has shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law. This is the case even when questions of workers' compensation benefits and employment or termination are concerned.

**PRACTICE TIP**: Although irrelevant when defending a wage and hour case, confirmation of an employee's authorization to work in the United States is still allowed and required. The Immigration Reform and Control Act of 1986 ("IRCA") makes it unlawful for an employer to hire any individual knowing that the individual is not authorized to work in the United States. IRCA also requires employers to comply with a federal employment verification system, using E-Verify or Form I-9 (make sure you are using the correct I-9 edition. Look for the edition date at the bottom of the page).

## 68. INDEPENDENT CONTRACTORS: ABC'S & MOTOR CARRIERS (6/2021)

In *Parada v. East Coast Transport, Inc.* (March 2021), truck operators performing work for a drayage company, who transported shipping containers to and from the port of Los Angeles using their own trucks and supplied their own labor to load and unload the trucks, were found to be employees of that company rather than independent contractors. At issue was whether the Federal Aviation Administration Authorization Act ("FAAAA") preempted application of the ABC test. The court held it did not, calling the ABC test "a law of general application." The appellate court remanded the case back to the trial court to apply the ABC test, though the appellate court noted it was "unlikely" that the drayage

company could meet its burden under the ABC test, since it was a trucking company that must have truck drivers to operate.

In August 2022, following the *Parada* decision, the International Brotherhood of Teamsters and the Universal Intermodal family of companies settled seven separate cases that included various unfair labor practice charges. As part of the private global settlement, the companies agreed not to misclassify drivers as independent contractors and to pay millions in back pay to the affected drivers. This is just another example of the significant risks of misclassification in California.

## 69. INDEPENDENT CONTRACTORS: ABC'S & TRUCKERS (6/2022)

The Supreme Court of the United States declined to hear the California Trucking Association's lawsuit that claims California's AB 5 legislation violates federal law. This means that AB 5 will apply to the trucking industry and it will have serious impact to not only the independent owner-operators but for general employer staffing practices as well.

AB 5 codified and expanded the pro-employment "ABC test" for determining independent contractor status first outlined in the Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*. The ABC test provides that: "A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all the following conditions are satisfied:

(A) [CONTROL] The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) [USUAL COURSE] The person performs work that is outside the usual course of the hiring entity's business.

(C [ESTABLISHED TRADE] The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

The ABC test – in particular Prong B – makes it much harder for an individual worker in California to be classified as an independent contractor. Remember also that under the ABC test the worker in question is "presumed" to be an employee unless the hiring entity can prove all three prongs of the ABC test.

**PRACTICE TIP:** Impacted employers should: (1) review your "independent contractor" potential exposure with competent counsel – if you use "independent contractors" currently, they may be "employees" under the ABC or Borello tests. Prepare a list of those contractors and review them with your employment counsel; (2) review your vendor relationships – business-to-business, personal services or other types of contractual relationships should also be reviewed to ensure compliance with the law, and to make sure the ABC test is not applicable. Remember that if the vendor does not have

a separate business location, or has no other clients, these are red flags; and (3) make corrections ASAP – work with employment counsel to review whether you need to reclassify contractors as employees to comply with the law and avoid significant liability.

## 70. INDEPENDENT CONTRACTORS: DELEGATE CONTROL (10/2022)

A person or entity that hires an independent contractor to do work generally is not liable for on-the-job injuries to the independent contractor's workers. This is because there is a presumption that the hirer delegates to the contractor the responsibility to do the work safely. This is well-settled law, and referred to as the "Privette Doctrine". Exceptions to this doctrine exist when the hirer provides unsafe equipment that contributes to the employee's injury, or when the injury arises because of a concealed hazard. These exemptions were tested in *Miller v. Roseville Lodge No. 1293* (September 2022) when an entity hired an independent contractor to move an ATM. The independent contractor's employee failed to bring a ladder, so instead climbed up scaffolding that was already in place at the hirer's location. The wheels of the scaffolding were not locked, and the employee fell and injured himself when the scaffolding moved. The court found that the hirer was not liable here. The hirer delegated to the independent contractor the duty to identify whether the wheels were locked, and the unlocked wheels were not a concealed hazard, as it was reasonably ascertainable that they were not locked.

Similarly, in *McCullar v. SMC Contracting* (August 2022), the Court of Appeal found that an injured worker was barred from suing a company that contracted with his employer to perform work under the Privette Doctrine. SMC Contracting Inc. hired Tyco Simplex Grinnell Inc. to install an automatic fire sprinkler system for a development in South Lake Tahoe. A Tyco employee arrived at work and found the floor covered in ice. While trying to use a ladder on the ice, the employee slipped and suffered injuries. He sued SMC seeking damages. The Court explained that the Privette Doctrine is based on the idea that a hirer typically has no right to control the manner of a contractor's work and hires a contractor precisely because of the contractor's greater ability to perform the work safely and successfully. This matter affirms that the employer's scope of liability is generally limited when it contracts with another employer who performs work for it.

**PRACTICE TIP:** When contracting with independent contractors, employers must be mindful of the amount of control they exercise over the contractor's employees in the performance of their job duties for the contractor (low level of control = lower risk of liability for independent contractor's employees), and they must also take all necessary steps to mitigate any known, concealed or unexpected hazards.

## 71. INTERACTIVE PROCESS: DON'T STOP DIALOGUE (1/2022)

In *Zamora v. Security Industry Specialists* (September 2021), an employee sued his employer under the FEHA for disability discrimination, failure to make a reasonable accommodation, failure to engage in the interactive process, retaliation, wrongful termination, and other claims. The lawsuit came after he was laid off as part of a wider reduction in force while he was temporarily disabled and on a workers' compensation leave of absence. Prior to the layoff, the company had identified a temporary position as

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an administrative supervisor for which Zamora likely could have been trained and performed, with work restrictions, during time periods when his doctor had released him from leave. Although the administrative supervisor position was discussed internally, it appears the ball was dropped within the company and it was never actually presented to Zamora as an option. Zamora was one of four supervisors that were later laid off. The company found other positions for two of the four supervisors and retained them, albeit in demoted roles.

In overturning the trial court's grant of summary adjudication in favor of the employer on most of the employee's causes of action, the California Court of Appeal determined that the evidence raised triable issues of fact as to whether the employee could have worked in another position at the company with his restrictions and whether he was discharged because of his disability. The Court of Appeal noted that there were multiple times when Zamora had been released with restrictions when there were vacant positions with lighter duties that Zamora could have performed. The other positions were never discussed with Zamora. The Court found substantial evidence that the employer failed to perform its "affirmative duty" to engage in the interactive process with him by not advising him of other suitable job opportunities before the layoff took place. The Court of Appeal found that a reasonable jury could find that had Zamora been offered the administrative supervisor position before it became apparent that a reduction in force was needed, he might have returned to work at that time with restrictions and been insulated from the later layoff.

## 72. INTERSTATE EMPLOYEES: WHEN CA LAWS APPLY (1/2022)

In *Gunther v. Alaska Airlines, Inc.* (December 2021), the California Court of Appeal held that when California qualifies as the principal place of work for flight attendants, pilots and others who work in interstate transportation, the employees are entitled to wage statements that comply with California laws. This decision follows earlier cases on the subject. In particular, in *Ward v. United Airlines, Inc.* (February 2021), the Ninth Circuit held that employees who work across the country must still be provided with compliant wage statements when their principal place of work is in California (regardless of where the employee lives or even if they have entered into a collective bargaining agreement).

**REMINDER:** California qualifies as an employee's principal place of work if: (1) the employee works a majority of the time in California; or (2) with respect to interstate transportation workers who do not work a majority of the time in any one state, "the worker has his or her base of work operations in California." (*Ward*)

**PRACTICE TIP:** Even though the *Gunther/Ward* cases were brought by airline workers, the cases have ramifications for any employer who has interstate employees. In *Sullivan v. Oracle*, the court applied California law to employees who traveled to California for required training periods. We have also seen California law applied to employees who temporarily traveled to other states to perform work outside of California. Bottom line, California will get you coming and going. Employers with or planning to have workers working in different states as well as California should consult with their employment counsel to determine and ensure compliance on the subject.

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## 73. MEAL PERIODS: NO PREMIUM PAY = PENALTIES (6/2022)

In May 2022, the California Supreme Court reversed the prior employer-friendly decision in *Naranjo v. Spectrum Security Services, Inc.* and found that premium pay is both a legal remedy and wages. Accordingly, the employer's failure to pay meal and rest break premium pay when appropriate triggers derivative claims for wage statement violations and waiting time penalties.

**REMINDER:** Employees are entitled to an uninterrupted meal break of at least 30 minutes that must begin before the end of the fifth hour of work. If they work a shift that exceeds 10 hours, the employee is entitled to a second uninterrupted meal break of at least 30 minutes that must begin before the end of the tenth hour of work. An employee may voluntarily waive the first meal break if their total shift does not exceed six hours. An employee may voluntarily waive their second meal break if their total shift is more than ten hours, but does not exceed twelve hours, and they took their first meal break. Employees must take their second meal break if they work more than twelve hours in a shift.

**PRACTICE TIP 1:** The best practice for employers is to carefully draft policies and forms, enforce your meal and rest break policies and audit time records to make sure you are not exposed for meal break violations in the first place. Meal breaks should be tracked. If an employee does not clock out for a meal break, or otherwise track it, the employer should follow up with the employee to determine if the employee took a break, and if not, why not – *e.g.*, was a break missed due to business reasons or personal choice. The reason should be documented. Employers should promptly pay premium pay when appropriate. If an employee is simply not tracking their break despite a company policy that requires them to do so, they should be given a reminder and then disciplined if the problem continues. Dutiful legal compliance and documentation are essential for employers to protect and defend themselves in meal break cases.

**PRACTICE TIP 2:** Recall that the California Supreme Court held in *Ferra v. Loews* (July 2021) that premium pay for noncompliant meal, rest and recovery periods must be compensated at the employee's "regular rate of pay," which must take into account not only the base hourly rate of pay but also all other forms of non-discretionary compensation (*e.g.*, non-discretionary bonuses, commissions, shift differentials, etc.) earned during the same pay period. Further, employers must calculate overtime and sick time pay in the same manner. The ruling is retroactive (meaning employers face potential past liability for up to four years for missed meal or rest break premium payments that were not calculated with the correct "regular rate of pay"). Depending upon the employer's compensation model, the math involved in calculating an employee's "regular rate of pay" can be complicated. Employers who pay quarterly or annual bonuses, for example, must review the entire bonus period and retroactively recalculate premium payments made during that time.

**PRACTICE TIP 3:** Do not confuse "on-duty" meal agreements with meal break waivers. Very few employers will be able to utilize on-duty meal agreements. Even when

on-duty meal agreements are valid, they do not waive the obligation to provide timely and uninterrupted meal periods of at least thirty minutes.

## 74. MEAL/REST PERIODS: TRUCKERS, GIVE ME A BREAK (1/2022)

The Federal Motor Carrier Safety Administration ("FMCSA") regulates the hours of service for drivers of certain commercial motor vehicles. In the 2021 case *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration*, the Ninth Circuit Court of Appeals held that the FMCSA preempted California law for covered drivers, meaning that covered drivers do not need to follow California's meal and rest break laws. In *Espinoza v. Hepta Run, Inc.* (January 2022), the California Court of Appeal added that in addition to long-haul drivers, FMCSA-covered short-haul drivers (150 air-mile radius) also are not subject to California's meal and rest break rules.

In *Garcia v. The Superior Court of Los Angeles County; Haralambos Beverage Co.* (June 2022), the California Court of Appeal held that the FMCSA's December 28, 2018 Order preempting California's meal and rest break claims under the Motor Carrier Safety Act is not retroactive. Therefore, drivers of certain covered motor vehicles can maintain California meal and rest break violation claims that arose before the December 28, 2018 order.

**PRACTICE TIP:** These holdings do not exempt all drivers from California's meal and rest break laws. There are specific requirements for the FMCSA to apply, including that the vehicle must be operated in interstate commerce and must meet certain weight, passenger or cargo requirements. Employers are encouraged to consult with their employment counsel if they are unsure about which rules apply to their drivers.

## 75. NEGLIGENT HIRING/SUPERVISION: BE DILIGENT (6/2022)

In *Doe v. Anderson Union High School District* (April 2022), a negligent supervision and hiring case, the California Court of Appeal found that the school district did not know or have reason to know that one of its teachers was going to initiate a sexual relationship with a 17-year-old student, and therefore it had no duty to review alarm data and video recordings to constantly monitor teachers, students and visitors. Importantly, as soon as the district learned of the relationship, it immediately investigated, obtained the teacher's resignation, notified the student's parents and notified law enforcement. The teacher also went through a background check at the time of hire and had completed sexual harassment training.

**THE CALIFORNIA SUPREME COURT ORDERED THE THIRD DISTRICT COURT OF APPEAL TO REVIEW THIS CASE. WHILE THE REVIEW PROCESS IS PENDING, THE CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

**PRACTICE TIP:** Employees and third parties can sue an employer for negligent hiring and supervision. To establish liability, the plaintiff must show: (1) that the bad actor posed a risk of harm; and (2) that the employer knew or should have known of the risk.

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The question is whether the harm was reasonably foreseeable to the employer. In order to avoid liability, employers are encouraged to run background checks (although they need to be careful and follow certain protocols before withdrawing a job offer), require all employees to participate in harassment prevention training, and if there is any complaint or indication that an incident has occurred, investigate and take appropriate action.

## 76. OFF-THE-CLOCK WORK: DOMINO'S DELIVERS (6/2022)

In *Silva v. Domino's Pizza, LLC* (February 2022), the Ninth Circuit Court of Appeals upheld partial summary judgment in favor of Domino's. The court noted that in California, there is a presumption that if an employee is clocked out the employee is not working and, therefore, is not entitled to compensation. To rebut the presumption, the employee must come forward with evidence that the employer "knew or should have known off-the-clock work was occurring." Here, the employer was able to show: (1) it had a written policy prohibiting off-the-clock work; (2) it enforced the policy by way of routine driver audits; (3) it terminated the employee for working while he was clocked out during a meal period; (4) it was not aware that the employee engaged in other off-the-clock work; (5) no manager or supervisor directed the employee to work off the clock; and (6) when the employee recorded additional time on his driving logs, it paid him for this time.

**PRACTICE TIP:** Employers often have a policy preventing off-the-clock work but run into problems combatting a claim or lawsuit for unpaid time when they do not follow through to audit what the employees are actually doing and discipline if necessary. To avoid wage and hour violations, employers need to be vigilant in reviewing them to ensure compliance with the law and best practices. The *Domino's* case provides a good illustration for best practices.

## 77. OFF-THE-CLOCK WORK: SECURITY CHECKS (10/2022)

In *Huerta v. CSI Electrical Contractors* (July 2022), the Ninth Circuit stayed the case (*i.e.*, to stop or suspend the proceedings) and asked the California Supreme Court to answer the following three questions (for the purposes of this legal update, we will only address no. 1 and no. 2 below):

(1) Whether time spent in a personal vehicle waiting to scan an identification badge, have security guards look into their vehicle, and then exit a security gate is considered hours worked;

(2) Whether time spent driving between a security gate and an employee parking lot is considered hours worked; and

(3) Whether collectively bargained-for meal-time, when workers cannot leave the premises but are not required to engage in employer-mandated activities, count as payable work hours.

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The California Supreme Court has not yet agreed to answer these questions; however, the Court has had a recent practice of agreeing to do so whenever the Ninth Circuit has asked so there is no reason to believe that the Court will decline to do so.

With few exceptions, California's wage and hours laws define "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether or not required to do so." The key question in such cases is usually whether the employee is subject to the employer's control.

Recall that in *Frlekin v. Apple, Inc.* (2020), the California Supreme Court answered similar questions regarding security screening and Apple, having exercised sufficient control over employees such that the time spent waiting for such screens to take place should be compensated. However, in *Huerta*, the Ninth Circuit found that the employer's level of control is less than the control exercised by Apple.

As it concerns drive time between the security gate and the employer's parking lot being considered "hours worked," the Ninth Circuit found that no "controlling California precedent has answered the certified question of whether Wage Order No. 16 requires compensating workers for time spent driving between the entrance/exit of the employer's premises and the location where the shift begins/ends." While there are California cases concerning transportation such as *Morillion v. Royal Packing* (2000), and *Hernandez v. Pacific Bell Telephone Co.* (2018), those cases deal with employer-provided vehicles and not employee vehicles, such as in *Huerta*.

**PRACTICE TIP:** Employers should consider methods to ensure that any search process is streamlined and moves quickly to avoid excessive overtime and other wage and hour issues. In most cases, employers should compensate employees for time spent waiting for security checks or processes after clocking out or before clocking in.

## 78. PRIVATE ATTORNEYS GENERAL ACT ("PAGA")

**a. Arbitration of PAGA claims.** The employer-friendly decision in *Viking River v. Moriana* held that on specifically worded arbitration agreements, an employee's individual claims may be compelled to arbitration and they lose standing to pursue a representative case in court. Please see # 52(a and b) above for more detail on this important decision and the anticipated further developments from the California Supreme Court or Legislature.

**b. Collective Bargaining Agreement ("CBA") can include waiver of representative PAGA claims.** In *Oswald v. Murray Plumbing & Heating Corp.* (September 2022), the Court of Appeal upheld the construction industry CBA exemption to PAGA. In order to apply, this exemption requires the CBA to provide for the wages, hours and working conditions, set forth a grievance and arbitration remedy for Labor Code violations, allow the arbitrator to award all remedies authorized by the Labor Code, and it must clearly waive the right to sue under PAGA. The employee in *Oswald* worked for the employer in 2019 and 2020. He was terminated in 2020 and then filed a PAGA action.

The employer moved to compel arbitration, citing the CBA's arbitration provision. The trial court denied the motion and the employer appealed. Three days after filing the appeal, the union and employer signed a "Memorandum of Understanding Waiver of PAGA and Class Action Claims" which replaced the original arbitration clause in the CBA. Notably, it waived the right to bring PAGA claims and stated that it was retroactive to 2017. The Court of Appeal found that the CBA met the requirements necessary for the exemption and that the claims (including PAGA) should be ordered to arbitration.

**c. Constitutionality of PAGA**. In *California Business & Industrial Alliance v. Becerra* (June 2022), a lobbying group for small and midsized businesses filed an action seeking judicial declaration that PAGA is unconstitutional. The court affirmed the dismissal of the lawsuit and found that PAGA does not violate the principle of separation of powers in the California Constitution.

**d. Manageability**. Whether a claim is "manageable" focuses on whether a court can fairly and efficiently try the claims on a representative basis. Last year in *Wesson v. Staples the Office Superstore, LLC* (September 2021) the Second District Court of Appeal granted a rare victory for employers and held that the court had inherent power to ensure the manageability of PAGA claims, meaning that employers could challenge PAGA claims on that basis. Unfortunately, other cases found to the contrary. In *Hamilton v. Wal-Mart Stores Inc*. (June 2022), the Ninth Circuit Court of Appeals found that imposing a manageability requirement in PAGA actions "would…contradict the purposes of PAGA by undermining the key features of a PAGA action, rendering it an improper exercise of a court's inherent powers." In *Estrada v. Royalty Carpet Mills, Inc*., (March 2022) the Fourth District Court of Appeal disagreed with the prior *Wesson* holding, stating that a court cannot strike a PAGA claim based on manageability. Instead, a court may limit the evidence admitted at trial if there are manageability concerns. The court also encouraged plaintiffs to work with the court to define a workable group of aggrieved employees, for example, by narrowing alleged violations to employees at a single location or department. The California Supreme Court granted review in *Estrada v. Royalty Carpet Mills, Inc*. (June 2022) to resolve a split of authority regarding whether trial courts can strike or limit PAGA claims they determine are unmanageable.

**WHILE UNDER REVIEW, *ESTRADA* MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY**.

**e. No jury trial.** In *LaFace v. Ralphs Grocery* (February 2022), a PAGA case based on the alleged failure to provide suitable seating, the California Court of Appeal held that there is no constitutional right to a jury trial under PAGA. The Court indicated that PAGA is an administrative enforcement hybrid, and that if tried to a jury, the parties would gain a jury trial right not otherwise available to either the agency or employers. The Court relied upon a similar court case which had ruled that claims brought under California's Unfair Competition Law in false advertising law are likewise not entitled to a jury trial.

**f. Relation back**: The elimination of a representative plaintiff does not necessarily mean an end to the case or the liability period. In *Hutcheson v. Superior*

*Court* (February 2022), the First District Court of Appeal found that if one employee submits a PAGA notice to the Local Workforce Development Agency ("LWDA") and files a PAGA lawsuit, the court may allow a second employee to substitute in as the represented plaintiff later on even if the second employee did not submit their own LWDA notice until a much later date. Where the two claims rest on the same general set of facts, involve the same injury, and refer to the same instrumentality as the claims, then the liability period can relate back to the original notice and filing date, even though a second representative plaintiff has substituted in for a prior representative.

In the ongoing pattern of contrary PAGA rulings however, the Fourth District Court of Appeal in *Hargrove v. Legacy Healthcare, Inc*. (June 2022), affirmed a trial court decision dismissing a PAGA lawsuit for lack of proper plaintiff and denying leave to substitute a different plaintiff. The *Hargrove* court found that the requested substituted party did not have standing and that the relation-back doctrine did not apply "because the doctrine cannot be used to frustrate the intent of the Legislature to require compliance with administrative procedures as a condition to filing an action." In particular, for standing, "a PAGA action is subject to a one-year statute of limitation and the requested substituted party was not an aggrieved party at the time the plaintiff filed her original complaint." In distinguishing the *Hutcheson* decision, the *Hargrove* Court noted that the proposed new representative plaintiff had no separate PAGA action at the time the motion to amend was filed. Further, the amended complaint did not rest on the same set of general facts or involve the same injury where the two representatives were employed approximately four to five years apart, had different positions and the new plaintiff asserted a new alleged injury.

**g. Settlement of one PAGA claim *might* eliminate other claims.** In *Uribe v. Crown Bldg. Maint. Co.* (September 2021), the parties settled a PAGA action wherein a number of claims were released, including unreimbursed use of employees' personal cell phones for work purposes. Because this claim was not included in the plaintiff's original PAGA notice sent to the LWDA, however, the plaintiff failed to "preserve" this claim as a basis for his PAGA cause of action. Accordingly, because the plaintiff had no basis to sue on that ground, the court found that the settlement reached between the parties could not include the settlement of PAGA claims for unreimbursed cell phone costs.

Where two or more employees file separate PAGA claims, the employer's settlement with one may eliminate the others to the extent they arise from the same underlying facts and claims. In *Moniz v. Adecco USA, Inc.* (November 2021) the First District Court of Appeal held that a deputized aggrieved employee challenging a PAGA settlement did have standing to challenge another PAGA settlement that would wipe out their ability to pursue a PAGA claim.

In *Turrieta v. Lyft* (September 2021), however, the Second District Court of Appeal found that representative plaintiffs in other cases did not have standing to intervene in settlement proceedings or to vacate the judgment approving the PAGA settlement that would eliminate their claims. Similarly, the Ninth Circuit Court of Appeals in *Callahan v. Brookdale Senior Living Communities* (June 2022) found that an employee who sought intervention in a fellow employee's PAGA action was not entitled to intervene as a matter

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of right because despite her claim that her interests were inadequately represented and her portion of the settlement was too small, she provided no basis for her calculations and no basis that the valuation of penalties was incorrect. Further, the same legal rights and interests were already represented in the first PAGA action. In *Saucillo v. Peck* (February 2022), the Ninth Circuit Court of Appeals found that a plaintiff with a separately pending PAGA case lacked standing to appeal approval of the PAGA settlement in *Saucillo.*

**THE CALIFORNIA SUPREME COURT HAS GRANTED REVIEW OF *TURRIETA V. LYFT*, WHICH WILL HOPEFULLY PROVIDE ADDITIONAL GUIDANCE ON THE CURRENT SPLIT OF AUTHORITY AMONGST OTHER COURTS. THE *TURRIETA* CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

Make sure to notify your employment counsel of PAGA claims early, and to disclose all PAGA letters or complaints that you have received (including suits/letters served on different locations). Parties have an obligation to notify courts of related cases. There are also strategic actions you may be able to take including seeking to have cases stayed and/or eliminating all cases through a settlement with one. (See *Shaw v. The Superior Court of Contra Costa County* (May 2022).)

**h. Standing to pursue representative claims.** In *Howitson v. Evans Hotels* (July 2022), an employee who settled her individual claims against her employer for alleged Labor Code violations was not precluded from subsequently bringing a PAGA action with the same allegations. In the first lawsuit, that the employee settled her individual claims, it was the employee, "who possessed the primary right for her to be free from Labor Code violations as a former employee of Evans Hotels." In the second lawsuit, the plaintiff possessing the primary right is the state, as if the LWDA itself had brought the PAGA action. Last year in *Johnson v. Maxim Healthcare Services, Inc*. (July 2021), the court found that, even though an employee's individual PAGA claim was time-barred, she could still pursue a representative claim under PAGA on behalf of other employees in the company.) In *Gavriiloglou v. Prime Healthcare Mgmt., Inc.* (August 2022), a former employee arbitrated her individual claims, and the arbitrator found that no Labor Code violations occurred. Despite this, the employee was still permitted to move forward with her representative PAGA claim against her former employer, alleging the same violations, even though the arbitrator held she did not suffer any violations. The court reasoned that although the arbitration and PAGA action had identical parties, the employee was acting in different capacities in each: in her capacity as an individual in her arbitration, and in the capacity of the Labor Commission in the PAGA suit.

## 79. PIECE RATE: ARE DOMINO'S PIECES BIG ENOUGH? (6/2022)

In *Silva v. Domino's Pizza, LLC* (February 2022), a Domino's truck driver claimed that Domino's improperly compensated him for piece work by paying him a flat rate for non-productive time rather than an hourly rate. Domino's paid truck drivers $20 per hour for some non-driving activities, including some pre- and post-trip tasks. Silva was paid $20 when he recorded more than 30 minutes of time on pre- and post-trip tasks. The trial

court and Ninth Circuit determined that there was a triable issue of fact as to whether Domino's complied with the piece-rate statute and paid the plaintiff an hourly rate for non-productive time rather than a flat rate.

**PRACTICE TIP:** Employees who are paid a piece rate must be separately compensated for rest and recovery periods, and other nonproductive time, separate from the piece-rate compensation. Employers must compensate employees for "other nonproductive time" at an hourly rate that is no less than the applicable minimum wage. Employees must also be compensated for the rest and recovery periods at a regular hourly rate that is no less than the higher of: (1) an average hourly rate (dividing total compensation for the workweek, exclusive of compensation for rest and recovery periods and overtime premium pay, by total hours worked during the workweek, exclusive of the rest and recovery periods); or (2) the applicable minimum wage.

## 80. PRE-EMPLOYMENT DRUG TEST NOT COMPENSABLE (6/2022)

In *Johnson v. WinCo Foods, LLC* (June 2022), an employer's practice was to make employment offers to applicants contingent upon a drug test. The employer pays the testing facility's fees, but does not compensate for the travel expenses or time required to undergo the testing. The Ninth Circuit Court of Appeals held that it does not need to compensate these applicants for their time or travel expenses, because the applicants are not employees when they take the drug test.

## 81. RELIGIOUS EXPRESSION: ALLOWED AT 50-YARD LINE (6/2022)

In *Kennedy v. Bremerton School District* (June 2022), a public high school's football coach led players in a public prayer at the 50-yard line immediately following games, while he was still on duty and in uniform. Players were not obligated to participate, though most of the team did. As such, the coach then began incorporating motivational speeches with his prayer, such that the practice became a hybrid pep-talk and religious prayer. The school district requested that the coach stop this practice, out of concern that this appeared to a reasonable observer as government-endorsed religion, in violation of the Constitution's Establishment Clause. When the coach refused to stop, he was placed on leave, and not re-hired the following season. He sued the district, alleging violations of his free speech and free exercise. The lower and appellate court agreed with the school, but the U.S. Supreme Court sided with the coach. The Supreme Court held that the coach's practice of leading students in prayer on the 50-yard line while he was on duty was properly categorized as an employee engaging in private speech, not government speech attributable to the school district. The Court also held that the coach's suspension burdened his rights under the Free Exercise Clause.

Prior to this case, religious activity in schools was not allowed when the activity coerced student participation, or if it could reasonably be interpreted as school-endorsement of religion. The Supreme Court criticized this test, but offered no clear alternative, instead simply saying that the analysis should focus on "original meaning and history". This case puts certain activities into a gray area when students may feel pressure to participate in teacher-led religious activities but are not required to do so.

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## 82. REMOTE WORKER: CAN SUE IN HOME COUNTY (10/2022)

The county in which an employee files a lawsuit, particularly when requesting a jury trial, can have large impacts on the case. When an employee works remotely in one county for an office located in another, in which county can she file a lawsuit? This was the issue in *Malloy v. Superior Court of Los Angeles County* (September 2022), when a remote employee working from home in Los Angeles County sued her employer in Los Angeles County, though her employer was located in Orange County. The claims at issue will affect where the case can be "venued", *e.g.*, which court is proper. In *Malloy*, the plaintiff sued her former employer under the FEHA, California's anti-discrimination statute, alleging that her employer violated this statute when it demanded that she return to in-person work following the birth of her child. The court held that venue is proper in FEHA cases where the allegedly unlawful practice had its harmful impact. Here, that was in Los Angeles County, where the plaintiff would have continued to work, but for the allegedly unlawful practice. Accordingly, plaintiff was permitted to file her suit in Los Angeles County.

**PRACTICE TIP:** Remote work has become more commonplace due to the COVID-19 pandemic. If you continue to allow employees to work from home, make sure you have safeguards in place to lower the risk of wage and hour claims. Non-exempt remote employees should continue to track their actual time worked and accurately record all meal breaks. Make sure they are encouraged (in writing) to continue to observe all meal and rest break and timekeeping policies and audit their time records to make sure they are doing so. Employees should also be provided a reasonable reimbursement for use of their personal equipment for work-related purposes. This should not only include the use of personal cell phones but also other "screens" (laptops, monitors, etc.) We have also seen claims for reimbursement for services such as electricity and home internet. Employers are encouraged to use terms like "screen reimbursement" or "personal equipment reimbursement" on wage statements to indicate that the use of multiple items is included within the reimbursement.

**PRACTICE TIP:** Local rules have proliferated at a tremendous rate over past decade. If your remote worker is located in a city or county with local rules, those rules apply to your employee (*e.g.*, minimum wage, sick leave, flexible scheduling, etc.).

## 83. RESTRAINING ORDER: CONSIDER IT AS NEEDED (10/2022)

An employer can seek a workplace violence restraining order ("WVRO") against any individual, if their employee has suffered either unlawful violence or a credible threat of violence. In *Technology Credit Union v. Rafat* (August 2022), a credit union applied for and received a WVRO against a customer ("member") following an "overly aggressive" interaction he had with a credit union employee in which the member became agitated, was sarcastic and demeaning, and video recorded the employee despite her repeated requests for him to stop. The member then posted the video on YouTube showing the employee's face and her business card with full name. He also emailed the employee's supervisor, demanding that she be terminated. The appellate court found that while the

member was “rude, impatient, sarcastic and intimidating”, there was not sufficient evidence to support a finding that he made a credible threat of violence. Accordingly, the court reversed the WVRO.

**PRACTICE TIP**: Sometimes workplace violence or threats, whether from an employee or third party (customer, etc.) may be enough to warrant the retention of private security, an application for a restraining order, or both. These types of situations are very fact-specific and difficult to navigate. If you are dealing with a potentially violent situation, you may be obligated to file for a temporary restraining order. Consult your employment counsel as soon as possible and contact authorities, if appropriate.

## 84. RETALIATION: ADVERSE ACTION TAKES MANY FORMS (10/2022)

In *MacIntyre v. Carroll College* (September 2022), the Ninth Circuit ruled that the failure to renew a coach’s discretionary contract may be an actionable adverse employment action subject to a Title IX retaliatory termination claim. The employee in *MacIntyre* became aware of and raised the issue to his employer of an improper disparity in the amount of money spent on men’s versus women’s athletic programs at the college. After raising these issues, he received negative performance reviews for the first time since he started working at the college. Additionally, his contract, which was subject to renewal at the discretion of the college, was not renewed.

**PRACTICE TIP**: While *MacIntyre* addressed Title IX claims specifically, there are important takeaways for all employers. Ensure that if an employee complains about discrimination, harassment, etc. that you take it seriously and investigate the complaint. Be mindful in how you treat subsequent employment actions for that individual. Employers should not retaliate or engage in actions that have the appearance of retaliation. If there are adverse job actions, employers should ensure those decisions are supported by legitimate and non-retaliatory reasons.

## 85. RETALIATION: DOCUMENTATION SAVES THE DAY (6/2022)

In *Vatalaro v. County of Sacramento* (May 2022), an employee asserted that she was wrongfully terminated after reporting that she was performing work below her service classification. The California Court of Appeal held: (1) that the employee failed to make a prima facie case for whistleblower retaliation where she could not show that she had a reasonable belief that the complained-about conduct was a violation of the civil service rules or any other law; and (2) that the employer (County) established by clear and convincing evidence that the action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the whistleblower retaliation statute (Labor Code section 1102.5). The County maintained that Vatalaro was terminated because she had been “insubordinate, disrespectful, and dishonest.” The County was able to credibly support these reasons because they had documented “various specific incidents” in a written memorandum and the employee was not able to dispute that there were performance problems.

**PRACTICE TIP:** Employers must be vigilant to prevent all forms of discrimination, harassment and retaliation in the workplace. This process starts with up-to-date policies and procedures, the implementation of safeguards, proper and ongoing training and instituting a practice of documentation on an ongoing basis. When thinking about terminating a poor performer, ensure that you have clear and detailed documentation of the termination reasons. Also, begin the documentation process sooner than later: if an employee claims a disability or some other discrimination, harassment, etc., subsequent discipline may look like retaliation. Preserve all documentation in the employee's personnel file.

## 86. ROUNDING: STILL PERMITTED UNDER CA LAW (1/2022)

In *Cirrincione v. American Scissor Lift* (December 2021), the California Court of Appeal upheld that an employer in California can round the start and end of its employees' work time if the rounding is done in a "fair and neutral" manner. This means, that over a period of time, the rounding does not result in a failure to properly compensate an employee for all of the time they have actually worked. The court also held that there is nothing in California case law that indicates that the "absence of a written rounding policy constitutes a violation of California law where an employer has a practice of rounding its employees' worktime."

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**PRACTICE TIP:** Recall that while an employer is entitled to use a rounding policy for start and end times (see above), the employer should never – ever- round meal periods. *Donahue v. AMN Services, LLC* (February 2021) held that: (1) "…employers cannot engage in the practice of rounding time punches…in the meal period context…"; and (2) "…time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations…." Unfortunately, we often find that the employer's rounding practice regularly favors the employer rather than the employee.

For example, an employee clocks in a minute or two early so as not to be "late". At the end of the day, the employee clocks out a minute or two after the appointed end of the day, so as not to be perceived as "leaving early". As a result, each day the employee loses a couple of minutes on both ends of the shift. Over a week that could be 10-20 minutes or more, and over the 50 weeks worked in the year, the loss would be 500-1,000 minutes. Over four years (within the statute of limitation), the loss would be 2,000-4,000 minutes per employee. It is easy to see how the percentages under this type of scenario wildly favor the employer and harm the employees. That is the significant downside to a rounding practice – and the potential exposure to litigation for the couple of minutes lost per workday.

Remember also that rounding is a payroll function, not a timekeeping function. For example, if employees clock in at 6:58 a.m. and then takes their meal at 11:59 a.m., that is five hours and one minute later, which is a technical (time keeping) violation that violates the meal break rule. This is true, even though you have rounded the employees'

time 7:00 a.m. (payroll function), because the actual punch occurred two minutes before 7:00 a.m. Given the issues noted above, and other rounding complications, our best advice, and our strong preference, would be for employers to use actual time punches and to refrain from rounding practices.

## 87. SEATING: WHAT IS REQUIRED? (10/2022)

Under most California Wage Orders, employers are required to provide suitable seating for employees whose job duties require them to stand as follows:

(A) Provide all working employees suitable seating when the nature of the work reasonably permits the use of seats; and

(B) When an employee is not engaged in the active duties or their employment, provide an adequate number of seats in reasonable proximity to their work area and allow employees to use such seats when it does not interfere with the performance of their duties use

In *Meda v. AutoZone* (July 2022), in reversing the granting of a motion for summary judgment, the California Court of Appeal concluded that employers may need to do more than just simply have seats available in the workplace. The employer in *Meda* had chairs that the employees had to leave their workstations to retrieve by walking down a hallway into the manager's work area and then bring back to their workstations. The Court concluded "that where an employer has not expressly advised its employees that they may use a seat during their work and has not provided a seat at a workstation, the inquiry as to whether an employer has 'provided' suitable seating may be fact-intensive and may involve a multitude of job- and workplace-specific factors."

In *LaFace v. Ralphs Grocery* (February 2022), a PAGA case based on the alleged failure to provide suitable seating, the California Court of Appeal held that Ralphs was not required to provide seating for its cashiers. The Court noted that the California Code of Regulations, Title. 8, section 11070, subd. 14(B) does not require seats to be provided if doing so would interfere with employees' performance of their duties. An employer does not have to provide seating where the employer's expectation for employees is to keep busy and not stand around, meaning there is no functional "lull" in duties that would require the employer to provide seating.

**PRACTICE TIP:** Where feasible, employers should consider having seats at, close to, or within visible proximity to employees. Employers can and should also update their written policies and practices to reflect appropriate suitable seating requirements and should do so with the consult of their employment attorney.

## 88. SETTLEMENT AGREEMENT: INCLUDE ALL EMPLOYERS (6/2022)

In *Grande v. Eisenhower Medical Center* (June 2022), the California Supreme Court held that an employee who brings an employment class action against a staffing agency, and executes a settlement agreement releasing the agency and its agents, may

bring a subsequent class action against the staffing agency's client based on the same violations.

The employee was assigned to work as a nurse at Eisenhower Medical Center by FlexCare, LLC ("FlexCare"), a temporary staffing agency. The employee filed a class action against FlexCare, alleging wage and hour violations. The employee and FlexCare settled the claims and employee agreed to a general release of claims. Several months after the court approved the settlement and entered judgment, the employee filed another wage and hour class action against Eisenhower Medical Center (*i.e.*, the staffing agency's client). FlexCare moved to intervene arguing that the employee was precluded from suing Eisenhower Medical Center because the employee settled the claims against FlexCare in the earlier case.

The trial court and California Supreme Court held that Eisenhower Medical Center was not a released party under the settlement agreement and the legal principle that a matter that has been adjudicated by a competent court may not be pursued further by the same parties did not apply because Eisenhower Medical Center was not a party to the prior litigation and was also not in privity of contract with FlexCare (*i.e.*, the staffing agency). The Court noted that FlexCare and Eisenhower Medical Center did not have "an identity or community of interest" in the first lawsuit and that they could not rely on the indemnification provision in their contract or the agency relationship between FlexCare and Eisenhower Medical Center.

**PRACTICE TIP**: Even though the California Supreme Court notes the decision in *Grande* is fact-specific, employers that utilize staffing agencies should ensure that their contract with the staffing agency contains sufficient indemnity and specific provisions regarding each party's role. Additionally, if/when it is necessary to pursue a settlement agreement and general release, host employers and staffing agencies should ensure the language in the agreement adequately covers all potential joint employers.

Host and staffing employers are strongly advised to consult with their employment counsel on staffing agreements and settlement agreements to avoid pitfalls like the one in *Grande.*

## 89. SOCIAL MEDIA POSTS ≠ DISCRIMINATORY MOTIVE (6/2022)

In *Wade v. Starbucks* (February 2022), a transgender Starbucks employee alleged that Starbucks harassed and discriminated against her while she was transitioning from male to female. The plaintiff introduced evidence that her former supervisor had made numerous social media posts on his personal accounts over a number of years, which expressed a conservative view on various topics, including gender identity. The posts were mainly memes and re-posts, but also contained tweets of statements such as: "Gender is not now, nor has it ever been a preference." The plaintiff was not aware of these posts when the alleged harassment and discrimination occurred, and found them only after she resigned. At trial, plaintiff argued that these posts constituted direct evidence that her supervisor acted with a discriminatory motive. The court rejected this, finding instead that these posts related to the supervisor's personal life, and did not refer

to any Starbucks employee or Starbucks itself. Thus, these posts did not directly show a discriminatory motive. For these same reasons, even if the social media posts could constitute *circumstantial* evidence of a discriminatory motive, it was weak evidence at that.

**PRACTICE TIP:** Employees are entitled to express their opinions on social media, although they are not entitled to defame the company, publish confidential information, or engage in other unlawful actions. While employers' frustration with negative content posted by employees is understandable, the ability to discipline or terminate employees for such conduct depends upon a variety of factors, including whether the employee has mentioned the company, whether the posts are harassing or otherwise unlawful, and similar considerations. Employers should work with employment counsel to address any concerns regarding social media content by employees before taking formal action.

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## 90. TENANTS: "ODD JOBS" = EMPLOYEE AND WAGES (6/2022)

In *Seviour-Iloff v. LaPaille* (June 2022), tenants of an apartment building suggested a barter system under which they would perform certain maintenance tasks in lieu of paying their $650 monthly rent. The landlord agreed, and all parties treated the exchange as an independent contractor relationship rather than an employee–employer relationship. After some time, the landlord terminated this relationship when it suspected that the tenants were not performing their work, stealing equipment, and using the landlord's water rights for a private venture. The tenants then sued for unpaid wages. The court not only awarded the wages, but held that the landlord company was also liable for waiting time penalties, and that the landlord's CEO could be held personally liable for the unpaid wages under Labor Code Section 558.1.

**PRACTICE TIP:** For residential managers, if you are going to offset wages through rent credits, you must have a written and signed agreement in place. The maximum amount of the rent credit offset is set forth in the IWC Wage Orders. Remember also, that workers in California cannot agree to waive their protections under the Labor Code (even if they tell you they want to do so).

## 91. UNEMPLOYMENT BENEFITS: LET THE EDD DECIDE (10/2022)

In *Johar v. California Unemployment Insurance Appeals Board* (September 2022), the Court of Appeal held that the employee was eligible for unemployment benefits because she left her job under emergency circumstances with the employer's approval (*i.e.*, "good cause"). An employee who leaves work for good cause is entitled to the presumption that they have not voluntarily quit. This presumption may be overcome, but only upon showing that the employee affirmatively and clearly refused to return.

**PRACTICE TIP:** In some circumstances, the best practice for employers is to refrain from intervening or objecting to an employee's claim for unemployment benefits.

If you are dealing with a disgruntled employee, or even one that you believe has left on good terms, an objection to their unemployment claim may give them a reason in their mind to seek counsel and file a claim or lawsuit. The EDD will make the ultimate decision either way, and it can be better for the employer to simply allow them to do so.

## 92. USERRA: REMINDER TO PROTECT SERVICE MEMBERS (6/2022)

In *Belaustegui v. International Longshore & Warehouse Union* (June 2022), the Ninth Circuit held that the district court erred in granting summary judgment in favor of the employer. The employee asserted claims of discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") based on the employer's alleged failure to reinstate the employee to the position he was reasonably certain to have attained absent his military service.

The employee left his job as an entry-level employee to enlist in the U.S. Air Force. After nine years of active duty in the Air Force, he returned to work and requested a promotion to the position he claims he likely would have attained if he had not served in the military. When his employer denied the request, he filed suit alleging discrimination under USERRA. The Ninth Circuit here did not render a final decision on liability. It did allow the case to proceed, however.

**REMINDER:** USERRA is a federal law that protects service members in their reemployment following service in the armed forces. In particular, it is intended to ensure that service members: (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon return from duty; (3) are not discriminated against in employment based on past, present, or future military service. USERRA applies to all public and private employers in the United States, regardless of size. Under USERRA, an eligible service member whose period of service exceeded 90 days is entitled to reemployment in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay. The intention is that a returning service member should not be denied the progress of their career trajectory. California Labor Code Section 394 *et seq.*, also provides military leave protections.

## 93. VICARIOUS LIABILITY: SCOPE OF EMPLOYMENT (10/2022)

California deems employers to be vicariously liable for the torts committed by their employees if, but only if, the employee is acting within the scope of employment. This issue arose in *Musgrove v. Silver* (August 2022), when a Hollywood producer's assistant drowned after taking cocaine supplied by the producer's personal chef while all had accompanied the producer on a trip to Bora Bora. The question for the court was whether the chef was acting within the scope of his employment when giving the assistant cocaine. The court found that he was not, as the producer had no control over his chef related to this tragic accident, and the chef's furnishing of drugs to the assistant was wholly unrelated to his work duties as the producer's chef.

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**PRACTICE TIP:** Vicarious liability often comes up when an employee injures a third party while driving. Under the "going and coming" rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work, because employees are said to be outside of the course and scope of employment during their daily commute. As noted in this case, there are certain limited exceptions to this general rule. As an example of another exception, the beyond the "work spawned risk" exception applies when an employee endangers other with a risk arising from or related to work. For example, where an employee gets into a car accident on the way home after drinking alcohol at a work function, courts have carved out an exception to the going and coming rule. Case law provides, "… if the employer expressly or impliedly makes the commute a part of the workday, or derives an incidental benefit from a particular employee's commute beyond that of the other members of the work force, then the employer's vicarious liability will continue during the course of the commute." Also, note that if an employer provides a company vehicle, but restricts the employee's use of that vehicle, the commute time may be paid time.

## 94. VOLUNTEERS: NONPROFITS CAN HAVE VOLUNTEERS (1/2022)

In *Woods v. American Film Institute* (December 2021), the plaintiff sued American Film Institute, a 501(c)(3) tax-exempt organization, on the basis that she and other volunteers for the organization were legally employees who were denied employee benefits including wages and meal breaks. The California Court of Appeal held that persons may volunteer for nonprofit entities without becoming employees under California law. The Court reasoned that expectation of compensation is key in making its decision.

**PRACTICE TIP:** Employers of any type of business or organization are encouraged to consult with their employment counsel when utilizing volunteers. The circumstances where someone is a true volunteer are rather limited and the consequences of misclassifying someone as a volunteer can be significant. Employers should also consult with their insurance carriers about how volunteers are covered under their plans.

## 95. WAGE STATEMENTS: NINE REQUIREMENTS IN CA (1/2022)

In *Gunther v. Alaska Airlines, Inc.* (December 2021), the California Court of Appeal held that the heightened penalties for wage statement violations under Labor Code Section 226.3 ($250 per employee for initial citation and $1,000 per employee for each subsequent citation) are available only when an employer fails to provide a wage statement or keep records at all (*i.e.*, it is not available when the wage statement is merely inaccurate). This is a good decision for employers to use to push back on employee claims. Best practice is to make sure that your wage statements are legally compliant in the first place, however.

**REMINDER:** Under California Labor Code Section 226(a), employers are required to provide employees with a detailed, itemized wage statement with the employees' checks or separately if wages are paid by personal check or cash. The statements must include all of the following types of information:

- Gross wages earned;
- Total hours worked by the employee;
- Number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- Deductions;
- Net wages earned;
- Pay period dates;
- The name of the employee and only the last four digits of their social security number or an employee identification number other than a social security number;
- Name and address of the employer; and
- All applicable hourly rates in effect during the pay period and corresponding number of hours worked at each hourly rate by the employee.

Remember to also include paid sick leave (and SPSL through 12/31/22, if applicable) on the pay stub or issue a separate writing containing this information along with the pay stub.

## 96. WAGE STATEMENTS: PAPER NOT REQUIRED (6/2022)

In *Valdivia v. The Ticket Clinic* (March 2022), the CEO for the Ticket Clinic advised employee Valdivia that he would be terminated effective December 14, 2016, but also offered to pay him for the last two weeks of December. Later that day, the CEO and employee got in an argument and the CEO rescinded the offer to pay the employee two weeks' additional pay and handed him his final paycheck. The employee filed a lawsuit against his employer asserting wrongful termination in violation of public policy, failure to pay all wages at termination, unfair competition and breach of an oral contract to pay him two weeks of additional wages.

The trial court and appellate court dismissed the claim that the employer failed to provide accurate wage statements in violation of Labor Code section 226(a) by only providing wage statements through its online payroll system. The Court found that the employer was not required to provide paper copies and that the online portal that was accessible to the employee sufficed. The Court rejected the argument that the employer had the obligation to provide him with a hard copy of his final wage statement as a detachable part of the check. The Court further noted that there was no "knowing and intentional failure" to provide the employee with a paper copy of his wage statement as part of his final paycheck when the employer's payroll processor made a clerical mistake when she provided a final check without a corresponding wage statement. (The court noted that the employee was new and this was an isolated incident.) Finally, the Court held that the employer's severance offer was merely a "gift" and not a contract since there was no underlying consideration for the severance pay. Accordingly, the employer could rescind the offer and did not have to pay for the last two weeks of December as promised.

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## 97. WAGE STATEMENTS: TRUE-UP OVERTIME PAYMENTS (6/2022)

Remember that when non-discretionary bonuses are paid to employees, the bonus amount needs to be taken into consideration when calculating the regular rate of pay for purposes of determining an employee's overtime rate, and rate at which meal, rest, and recovery period premiums, and paid sick leave, are paid. When an employer makes overtime "true up" payments based on these calculations, the question becomes what needs to appear on the employee's wage statement reflecting the hours worked and rate at which those hours were worked. The court addressed this question in *Meza v. Pacific Bell Telephone Company* (June 2022), finding that an employer may include on a wage statement an employee's overtime true-up payment, and leave the "rate" and "hours" columns blank. The Labor Code requires wage statements to provide hours worked and wage rates *for the current pay period*, not rates or hours for prior pay periods. Because the issue was a true-up payment (which was the result of a complex calculation involving bonus amounts and hours from prior pay periods), no hours or rates needed to be listed.

**THIS CASE IS UNPUBLISHED. THIS CASE MAY NOT BE USED OR CITED AS PRECEDENT. THIS CASE IS INCLUDED FOR INSTRUCTIONAL PURPOSES ONLY.**

## 98. WAITING TIME PENALTIES: GOOD FAITH MATTERS (6/2022)

Waiting time penalties of up to 30 days' worth of wages can be assessed when an employer "willfully" fails to timely pay all wages due to an employee upon the employee's separation from employment. The imposition of waiting time penalties is precluded when there is a good faith dispute that any wages are due. In *Hill v. Walmart Inc.* (April 2022), a model who had modeled in Walmart fashion shoots a total of 15 days over the course of one year claimed that Walmart owed her waiting time penalties for not paying her immediately after each shoot. While not deciding one way or the other whether the classification was correct, the Ninth Circuit Court of Appeals recognized the employer's good faith, objective belief that plaintiff had been properly classified and that, accordingly, waiting time penalties were not appropriate.

Note that the work at issue in this case occurred in 2016 and 2018, before the ABC independent contractor test was codified. In analyzing the reasonableness of Walmart's belief that the model was an independent contractor, the Court used the *Borello* test and found that, based upon key factors, including: (1) the infrequency of the shoots; (2) the sporadic nature of the model's work; (3) the length of time of her total engagement with Walmart; (4) the fact that she had also worked for other companies at the same time; and (5) that Walmart's regular business was retail and it used modeling services only for its marketing, Walmart's belief that the model was an independent contractor and was not owed any wages directly after each shoot was objectively reasonable. The result may be different if this case is analyzed under the current law.

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**PRACTICE TIP:** The DLSE and many courts in California would not reach the same result as the court in *Hill v. Walmart, Inc.* Although the DLSE recognizes on its website that "[a]ssessment of the penalty is not automatic [ ], as a "good faith dispute" that any wages are due will prevent imposition of the penalty." It also states on its website that: "Assessment of the waiting time penalty does not require that the employer intended the action or anything blameworthy, but rather that the employer knows what he is doing, that the action occurred and is within the employer's control, and that the employer fails to perform a required act."

## 99. WHISTLEBLOWERS: LOW BAR FOR EMPLOYEES (1/2022)

The California Supreme Court, in *Lawson v. PPG Architectural Finishes, Inc.* (January 2022), clarified that the whistleblower retaliation cases should be analyzed under the employee-friendly framework set out in Labor Code Section 1102.5 (as opposed to the burden-shifting approach used for other FEHA claims). This framework creates a lower burden for employees to establish whistleblower claims, because they do not need to show that the employer's stated reason for acting adversely against the employee was "pretextual." Instead, they only need to show that retaliation was a *contributing factor* to the adverse employment decision. This framework also imposes a high standard on employers trying to rebut whistleblower claims: they need to present clear and convincing evidence that the action taken against them by the employer would have been taken for legitimate reasons even if the employee did not engage in a protected activity.

In *Scheer v. Regents of the University of California* (March 2022), a California Appellate Court held that this same framework should also be applied to retaliation claims brought under Government Code section 8547.10, which pertains to University of California employees.

**REMINDER:** Labor Code section 1102.5(b), provides: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

## 100. WORKERS' COMPENSATION RULING ≠ BAR FEHA CASE (10/2022)

In *Kaur v. Foster Poultry Farm* (September 2022), an employee of Foster Poultry Farms (a.k.a. Foster Farms) was terminated after suffering a work-related injury in a chicken processing facility. The employee brought a 132a claim in the workers compensation system. While that claim was pending, he also filed a civil action for discrimination and retaliation under the FEHA and related claims. The Worker's Compensation Appeals Board ("WCAB") denied Kaur's 132a claim.

The California Court of Appeal held that the WCAB decision denying Kaur's claim for disability discrimination under Labor Code section 132a did not have res judicata or collateral estoppel effect on the civil case. (When res judicata or collateral estoppel

applies, it means the issue has already been litigated and decided and therefore eliminates the second action.) Accordingly, the civil case was allowed to proceed even though the WCAB had already made a decision on at least one of the same issues.

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# Leaves of Absence – What Employers Need to Know

**Jacqueline Beaumont**
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Ellen Connelly Cohen earned her undergraduate degree from Harvard University, where she graduated cum laude. She received her law degree from Georgetown University Law Center in 2006. Ms. Cohen's practice focuses on employment litigation and counseling.

Ms. Cohen has litigated a broad array of employment matters in state and federal courts, as well as before administrative agencies such as the California Division of Labor Standards Enforcement and the Department of Fair Employment and Housing. Ms. Cohen represents corporate employers in single-plaintiff litigation as well as class actions and representative matters under California's Private Attorneys General Act. She has successfully defended clients against charges of discrimination, retaliation, harassment, failure to accommodate disabilities, unfair competition, wrongful termination, and misappropriation of trade secrets, as well as a host of wage and hour claims.

Ms. Cohen's practice also includes employment counseling. She assists clients with questions about leaves of absence, proper classification of employees, reductions in force, and employee discipline. She prepares and reviews arbitration agreements, separation agreements and releases, and confidentiality agreements. Ms. Cohen also has extensive experience preparing employee handbooks and other employment-related policies. She regularly conducts internal workplace investigations, interviews witnesses, and prepares position statements on behalf of employers.

Ms. Cohen enjoys lecturing on current topics in employment law and conducting seminars and anti-harassment training for diverse audiences.

Prior to joining Call & Jensen, Ms. Cohen was a Litigation and Employment Senior Associate in the Los Angeles and Washington, D.C. offices of Pillsbury Winthrop Shaw Pittman. She also practiced at an employment defense boutique in Irvine. Ms. Cohen is admitted to practice in state and federal courts in California, Maryland, and the District of Columbia.

Before becoming an attorney, Ms. Cohen spent eight years in the field of higher education, serving as a residential adviser at Harvard University and an Undergraduate Admissions Officer at UCLA.

## Recent Speaking Engagements

- May 24, 2019: "Overview of Intersecting State and Federal Leave Laws," The Hartford Financial Services Group (Brea, CA)
- April 8, 2019: "Case Updates – Defense Perspective," Orange County Bar Association – Labor & Employment Section (Irvine, CA)

- November 12, 2018: “Workplace & Harassment Investigations: Tips for HR,” Workplace & Employment Law Update (Burbank, CA)
- November 9, 2018: “Workplace & Harassment Investigations: Tips for HR,” Workplace & Employment Law Update (San Diego, CA)

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Jacqueline Beaumont focuses her practice on the representation of clients in complex employment matters. She represents clients at the forefront of wage-and-hour class action disputes, wrongful termination allegations, and discrimination claims under Title VII and California's Fair Employment and Housing Act. Ms. Beaumont has broad expertise in all areas of employment law and advising, including drafting and implementing workplace policies, guiding employee investigations and terminations, overseeing reductions in force, handling employee raiding and trade secrets matters, and negotiating executive agreements.

Ms. Beaumont is well-versed in the business concerns and practical needs of her clients, having spent a long-term assignment in the in-house employment law department of a large public company. Her litigation results include successful jury and bench trial verdicts, summary judgment victories, and injunctions and dismissals secured for her clients. Super Lawyers has recognized Ms. Beaumont as one of Orange County's "Top 25 Up-And-Coming Attorneys" and one of Southern California's "Up-And-Coming 50 Women." She has been named as a "Rising Star" for six consecutive years, and as a "Super Lawyer" for the past three years. She was honored as a "Women in Business" nominee in the Orange County Business Journal, and has received the Wiley W. Manuel pro bono award. Ms. Beaumont serves on the Board of Directors for the Orange County Women Lawyers Association, is a member of the Orange County Bar Association Labor & Employment Section, and is the former Co-Chair of the OCBA Mommy Esquire Committee.

Ms. Beaumont received her Juris Doctorate in 2007 from the University of California, Berkeley (Boalt Hall). In law school, Ms. Beaumont served as a Judicial Extern for the Honorable John T. Noonan, Jr. on the United States Court of Appeals for the Ninth Circuit, clerked for the United States Attorney's Office for the Eastern District of California, was a senior editor of the Berkeley Journal of International Law, and was a member of the Western Regional Championship-winning team in the Philip C. Jessup International Moot Court competition.

Ms. Beaumont obtained a Bachelor of Arts in International Relations, cum laude, from the University of California, Davis, and studied at the Institut d'Études Politiques in Paris, France. She holds a Master's degree in Public Policy from the University of California, Berkeley. Prior to joining Call & Jensen, Ms. Beaumont was an associate with Morrison & Foerster LLP and worked at public relations firms in San Francisco and Beijing, China.

### Recent Speaking Engagements

- March 19, 2021: "Defense of Discrimination Claims: Covid-19 and Beyond," University of California, Irvine, School of Law (Irvine, CA)
- December 8, 2020: "Workplace Investigations in the DEI Era," Employers Group Workplace Employment Law Update (WELU) (remote conference)

- March 13, 2020: “Counseling, Evaluating, and Defending Discrimination Claims,” University of California, Irvine, School of Law (Irvine, CA)
- November 14, 2019: “Recent Changes in California’s Employment Law,” Fashion Industry Human Resources Association (Newport Beach, CA)
- November 7, 2019: “Class Action and Litigation Settlements: Perspectives from the Plaintiff and Defense Bar,” University of California, Irvine, School of Law (Irvine, CA)
- April 9, 2019: “Women Lawyers Career Paths,” Chapman University, School of Law (Orange, CA)
- December 7, 2018: “Dynamex and the Future of the On Demand/Gig Economy and Joint Employer Issues,” Bridgeport Wage & Hour Conference (Los Angeles, CA)
- November 2, 2018: “Workplace and Harassment Investigations: Tips for HR,” Employers Group Workplace Employment Law Update (WELU) (Anaheim, CA)
- April 10, 2018: “The U.S. Women’s Soccer Team Equal Pay Negotiations: A Lookback One Year Later” Orange County Women Lawyers Association (Orange, CA)
- March 7, 2018: “Work-Life & Career Management: Creating the Right Blend for Your Goals and Life,” Women in Law & Leadership Summit (Costa Mesa, CA)
- December 6, 2017: “Keynote: Employment Law Year End Update,” NBI – National Business Institute (Pasadena, CA)
- December 5, 2017: “Human Resource Law From A to Z: Discrimination and Harassment,” NBI – National iness Institute (Santa Ana, CA)
- October 30, 2017: “Conducting a Job Analysis for Legal Risks,” Employers Law Group WELU (Workplace Employment Law Update) (Anaheim, CA)
- September 22, 2016: “Maternity Leave for Attorneys,” Orange County Bar Association (Newport Beach, CA)
- September 15, 2016: “The Basics 2016: Employment Law, Wage and Hour Compliance,” CEB – Continuing Education of the Bar (Newport Beach, CA)
- June 14, 2016: “Leveraging Social Media Policies: Mitigating NLRB Enforcement Actions in 2016,” The Knowledge Group (national webinar broadcast)
- May 24, 2016: “Top 10 Human Resources Mistakes That Land Companies In Litigation (And How to Avoid Them),” Call & Jensen (Newport Beach, CA)
- May 9, 2016: “Key Case Developments,” Orange County Bar Association Labor & Employment Section (Newport Beach, CA)
- October 12, 2015: “Executive Agreements: Perspectives From Both Sides,” Orange County Bar Association – Labor & Employment Law Section (Newport Beach, CA)
- July 30, 2015: “An Introduction to Mediation,” University of California, Irvine, School of Law (Irvine, CA)
- November 6, 2014: “Work/Life Balance: What Does It Mean To The Workplace?,” Fashion Industry Human Resources Association (Los Angeles, California)
- October 8, 2013: “Employees v. Independent Contractors,” Public Law Center (Santa Ana, CA)
- July 18, 2013: “Hot Topics In Nonprofit Employment Law,” California State University (Fullerton, CA)

Recent Publications

- Contributing author, CEB Practitioner, Employment Law, 2020 ed. – “Summary Judgment in Employment Matters”
- “4 Takeaways from Female Law Profs’ Equal Pay Settlement”, Law360, June 25, 2018
- “Would Ellen Pao Still Lose Under New California Fair Pay Act?”, Law360, May 26, 2017
- “Labor and Employment Law Roundtable: What Owners And Executives Need to Know,” Los Angeles Business Journal, May 2, 2016

- “Exclusive Q&A on Labor & Employment,” Corporate LiveWire, February 2015
- e Rising Contingent Workforce: Are You Prepared?,” Corporate LiveWire, May 2013
- “Social Media: 10 Legal Guidelines for Business Executives,” Orange County Business Journal, March 18, 2013

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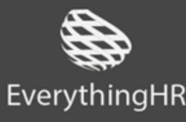



# Leaves Of Absence: What Employers Need To Know

Jacqueline Beaumont, Esq. Shareholder, Call & Jensen
Ellen Connelly Cohen, Esq. Shareholder, Call & Jensen

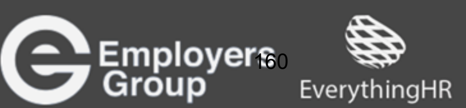
November 17, 2022

# Agenda

- Overview of different types of LOA
- Biggest LOA mistakes employers make
- Interactive process best practices
- What questions can employer ask/what documentation can employer ask for
- The importance of well-drafted job descriptions

# Quick Caveat

- Leaves of absence are complex and highly fact-specific
- This presentation is a high-level general overview, not legal advice
- Consult your employment attorney for advice specific to your situation



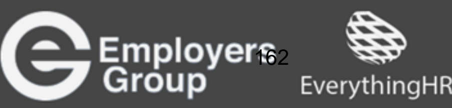
# Different Types Of Leaves Of Absence

1. FMLA/CFRA
2. Pregnancy Leave
3. State-Mandated Paid Sick Leave
4. Supplemental Covid Leave
5. Employer-Provided Leave
6. Workers' Comp. Issues
7. Leave As Accommodation Under ADA/FEHA

# Different Types Of Leaves Of Absence

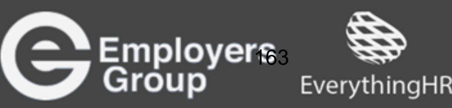
## 1. FMLA/CFRA

- Allows up to 12 weeks of leave in 12-month period for “serious health condition” of EE or EE’s “immediate family member”
- Be aware of differences between FMLA and CFRA, including:
  - Covered ER (FMLA = 50 EEs; CFRA = 5 EEs)
  - Definition of “immediate family member” is broader under CFRA
  - NEW: Effective Jan. 1, 2023, “Designated Person” under CFRA
  - Differences in reasons leave can be taken (e.g., pregnancy; leave to care for servicemembers)
- See handout materials for comparison chart



# Different Types Of Leaves Of Absence

1. FMLA/CFRA (con’t)
    - ER has obligation to timely respond to requests for FMLA/CFRA (5 business days)
    - ER may require medical certification to support the need for leave and also to RTW – more about certifications below
    - FMLA/CFRA leave may be intermittent
    - Continuation of benefits during LOA
    - Posting requirements



# Different Types Of Leaves Of Absence

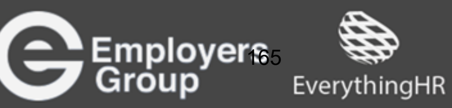
## 1. FMLA/CFRA (con't)

- FMLA/CFRA leave is generally unpaid, but other sources of income may be available:
  - State Disability Insurance ("SDI") & Paid Family Leave ("PFL") through EDD
    - Currently provides 60-70% of income, depending on earnings
    - In 2025, will go up to 90% for low-income workers (<$57,000/yr) and 70% for all others
    - PFL provides up to 8 wks of income replacement
    - Up to 52 wks of SDI, depending on period of disability as certified by dr.
  - Paid Sick Leave/PTO

# Different Types Of Leaves Of Absence

## 2. Pregnancy Disability Leave ("PDL")

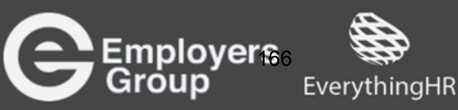
- Applies to ERs of 5 or more EEs
- No waiting period; EE eligible upon hire
- Up to 17 1/3 weeks *per pregnancy*
- Actual amount of leave is determined by doctor. EE must be disabled by pregnancy = unable to perform essential functions without undue risk
- PDL is unpaid, but income supplementation may be available through State Disability Insurance and/or PTO/ER-provided benefits



# Different Types Of Leaves Of Absence

## 2. Pregnancy Disability Leave (“PDL”) (con’t)

- Runs concurrent with FMLA, but not with CFRA
- ER may require medical certification to support the need for PDL and also to RTW – more about certifications below
- Obligation to reasonably accommodate EE “affected by” pregnancy (e.g., temporary transfer, more frequent breaks, modified schedule)
- Posting obligations



# Different Types Of Leaves Of Absence

## 3. State-Mandated Paid Sick Leave

- Applies to all ERs, regardless of size
- EE must be employed for at least 30 days to be entitled to paid sick leave
  - ER may impose 90-day waiting requirement before EE can use paid sick leave
- Applies to part-time EEs, temps, staffing agency EEs (joint ER issues)
- At least 3 days/24 hrs of paid sick leave per year (whichever is greater)
  - Accrual method
  - Lump-sum method

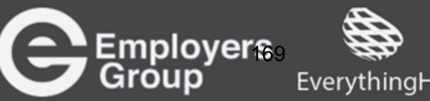
# Different Types Of Leaves Of Absence

## 3. State-Mandated Paid Sick Leave

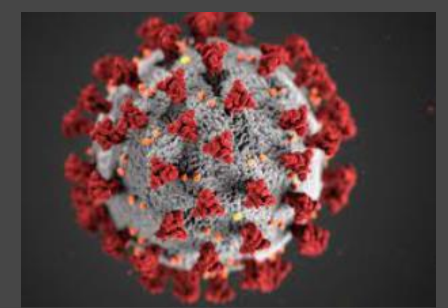
- Paid sick leave is available for:
  - Diagnosis, care, or treatment of existing condition of EE or family member
  - Preventative care for EE or family member
  - EE who is a victim of domestic violence, sexual assault, or stalking
- NEW: Effective 1/1/2023: "Designated Person"

# Different Types Of Leaves Of Absence

3. State-Mandated Paid Sick Leave (con't)
   - Need for sick leave may be unforeseeable
   - Use caution with automatic points-based attendance systems; possible retaliation claim
   - Paid at "regular rate" for OT purposes
   - No right to cash out unused paid sick leave upon termination
   - Posting obligations; provide balance on wage statements
   - Many cities & counties have their own paid sick leave laws

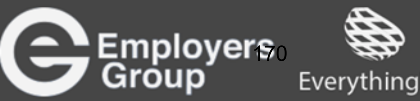


# Different Types Of Leaves Of Absence



4. Supplemental Covid Sick Leave

- Up to 40 hrs for care for EE or family member advised to quarantine, experiencing symptoms & seeking diagnosis, vaccine side effects, school closures
- Up to 40 hrs for positive test for EE or family member
- Extended through 12/31/2022 -- Not a new bank of leave
- Required posting; balance on wage statements



# Different Types Of Leaves Of Absence

5. Employer-Provided Leave

- Examples: PTO, vacation, personal leave
- ER can define eligibility, terms
  (but should treat similarly-situated EEs similarly)
- Important to have clear written policies
  drafted with assistance of legal counsel

# Different Types Of Leaves Of Absence

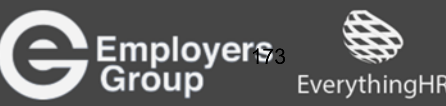
6. Workers' Compensation Issues

- WC drs. frequently advise that EEs remain out of work and/or be provided certain accommodations upon return

# Different Types Of Leaves Of Absence

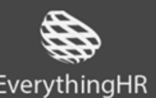
7. Leave Of Absence As ADA/FEHA Accommodation

- Even if EE has exhausted all statutorily-available leave under CFRA/FMLA etc., the EE may be entitled to *additional* LOA as an accommodation under ADA/FEHA.
  - No automatic termination policies!
- How much extra LOA to provide?
  - Each situation is highly-fact specific; no bright-line rules.
  - Consult legal counsel.



# Biggest LOA Mistakes Employers Make

- Using leave as option of first resort
  - Under FEHA, it is unlawful to put an EE on leave if another reasonable accommodation is available that would keep the EE at work.
  - Consider reassignment, modified hours, assistive equipment, etc.
  - Don't be too quick to reject alternate accommodations as causing undue burden



# Biggest LOA Mistakes Employers Make

- Failing to train supervisors
  - Supervisors should be trained to loop in HR
  - No asking EE for diagnosis/details
- Not documenting performance issues from the start
  - Consistency, fairness, and accountability are crucial!

# Biggest LOA Mistakes Employers Make

- Applying overly rigid administrative requirements
  - Don't elevate form over substance. Text from EE may contain the info needed to approve leave.
  - Don't get hung up on arbitrary deadlines. EE may need more time to submit dr. certification.
  - Administrative disconnect within the organization – is EE sending dr. notes to supervisor and HR is unaware?
- Not considering all potential LOA options
- Asking EE on LOA to do work
  - No exceptions!

# LOA/Interactive Process Best Practices

- What triggers obligation to consider LOA/accommodation?
  - EE asks about LOA
  - EE informs ER about illness or injury
  - ER learns of illness/injury through the grapevine or because symptoms are obvious
  - EE is injured on the job, or complains about being injured on the job
  - EE exhausts available CFRA/FMLA/PDL etc.

# LOA/Interactive Process Best Practices

- Document the interactive process
  - Make contemporaneous notes of each interaction; dates, attendees, substance of discussion
- Invite input from EE and dr.
  - What accommodations would allow EE to perform essential functions of position?
  - How long does dr. think LOA/accommodation will be needed?
  - Employment attorney can help craft questionnaire for dr. to fill out
- Do not end interactive process too early
  - Err on the side of giving the EE another chance to respond

# LOA/Interactive Process Best Practices

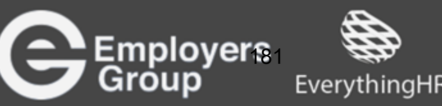
- Check in with EE as LOA end date approaches
  - Does EE need extension of LOA?
  - Does EE anticipate needing accommodation upon RTW?
  - Stay on top of how much leave EE has used; what other leaves may be available

# Documentation/Certification Issues

- What documentation is ER allowed to ask for, how to ask, and when?
  - Balancing EE's right to privacy with ER's need to for info to determine LOA options
  - Best practice: LOA should be handled by HR rather than EE's direct supervisor (if possible), esp. if LOA is due to EE's medical issues
  - Best practice: To the extent ER requires additional info or clarification, go through EE, rather than contacting dr. directly

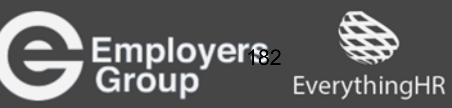
# Documentation/Certification Issues

- To be considered "sufficient" for purposes of FEHA accommodation, medical documentation should include:
  - Confirmation of existence of disability (not diagnosis)
  - Confirmation of need for accommodation (e.g., description of EE's limitations)
  - Name and credentials of healthcare provider
- ER is allowed to request clarification:
  - Identify what needs clarification (explain why the previous dr. note was insufficient); spell out exactly what additional information is needed. Do this in writing. Involve legal counsel.
  - Provide the EE's job description so the healthcare provider can specifically address EE's ability to perform essential functions of the job
  - Give the EE a reasonable opportunity to respond



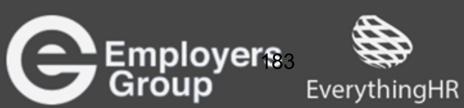
# Documentation/Certification Issues

- ER <u>is</u> allowed to require medical certification of need for FMLA/CFRA & PDL
  - Use forms prepared by CA Civil Rights Dept. (“CRD”) (formerly DFEH) (link in handout)
- ER <u>is</u> allowed to require proof of positive Covid test for CA Supplemental Covid leave. Acceptable documentation includes:
  - Medical record of test result; Email or text from testing company; Picture of test result
  - ER <u>cannot</u> require dr. certification
- ER should <u>not</u> require dr. note for absence under CA paid sick leave law
  - Labor Commissioner considers this to be retaliation



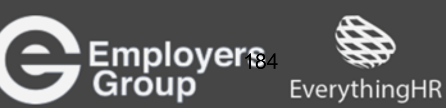
# Documentation/Certification Issues

- ER is allowed to require medical certification of ability to RTW after FMLA/CFRA & PDL
  - Use forms prepared by CA Civil Rights Dept. ("CRD") (formerly DFEH) (link in handout)
  - EE must be advised that RTW certification will be required before the LOA begins
  - ER must be consistent; cannot require RTW certification after some types of illness/injury-related LOA but not others



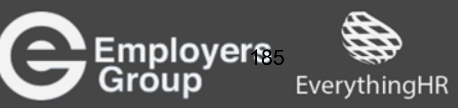
# The Importance Of Well-Drafted Job Descriptions

- LOAs often turn on whether the EE can perform the essential functions of the position. The job description is Exhibit #1 as to what the ER considers to be the essential functions of the position.
- Consider performing a “job analysis” to identify essential functions:
    - Typically performed by HR/outside consultant with input from management/legal
    - Formal evaluation of duties, tasks, expectations, deliverables, work environment, tools/equipment, supervisory relationships
    - May involve questionnaires, interviews of incumbents & managers



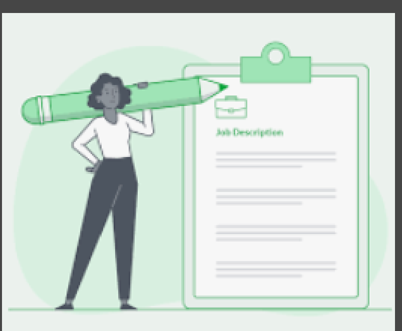
# The Importance Of Well-Drafted Job Descriptions

- Regular and reliable attendance can be listed in job description as an essential function
- In defining essential functions for job description, think about:
  - Amount of time spent performing the function
  - Consequences of not performing the function
  - What gets mentioned in performance reviews?
  - Actual experiences of EEs who have held the job



# The Importance Of Well-Drafted Job Descriptions

- Job description red flags:
  - No job description at all
  - Old, outdated descriptions
  - Overbroad descriptions; no details
  - Requirements that are not observed in practice
  - Drafted by managers without HR/legal review



# THANK YOU!

Jacqueline Beaumont, Esq.

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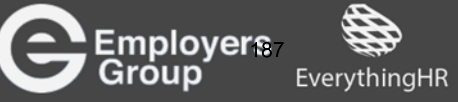
Ellen Connelly Cohen, Esq.

ecohen@calljensen.com



**Leaves Of Absence: What Employers Need To Know**
**WELU 2022**

**FMLA/CFRA Comparison Chart**

| | FMLA | CFRA |
|---|---|---|
| Covered ER | 50 or more EEs | 5 or more EEs |
| Covered EE | • Employed at least 12 mo.<br>• Worked at least 1,250 hrs. in last 12 mo.<br>• EE works at worksite with at least 50 EEs in 75-mile radius | • Employed at least 12 mo.<br>• Worked at least 1,250 hrs. in last 12 mo. |
| Reason for leave | • "Serious health condition" of EE or EE's "immediate family member"<br>  ○ Child<br>  ○ Parent<br>  ○ Spouse<br>• Birth/adoption/foster placement<br>• Qualifying military exigency<br>• Care for injured servicemember<br>• Pregnancy-related disability | • "Serious health condition" of EE or EE's "immediate family member"<br>  ○ Child (regardless of age)<br>  ○ Parent; parent-in-law<br>  ○ Spouse; registered domestic partner<br>  ○ Sibling<br>  ○ Grandparent<br>  ○ Grandchild<br>  ○ "Designated person"<br>• Birth/adoption/foster placement<br>• Qualifying military exigency<br>• See Pregnancy Disability Leave |
| Amount of Leave | • Up to 12 wks in a 12-mo period<br>• Up to 26 wks for care for injured servicemember | • Up to 12 wks in a 12-mo period |

**Helpful Links**:

- CA Paid Sick Leave: https://www.dir.ca.gov/dlse/paid_sick_leave.htm
- CA Paid Family Leave: https://edd.ca.gov/en/disability/paid-family-leave/
- CA State Disability Insurance: https://edd.ca.gov/Disability/
- CA Pregnancy Disability Leave: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/12/Pregnancy-Disability-Leave-Fact-Sheet_ENG.pdf

*This document is a general high-level overview for informational purposes and is not intended as legal advice. Leaves of absence are complex and highly-fact specific. Consult your employment attorney for advice specific to your situation.*

- CFRA/FMLA Healthcare Provider Certification: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/09/CFRA-Certification-Health-Care-Provider_ENG.pdf
- Pregnancy Disability Leave Certification: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/09/Pregnancy-Certification-Health-Care-Provider_ENG.pdf
- Disability Discrimination Brochure: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2019/08/DFEH_EmploymentDiscriminationBrochure.pdf
- CFRA/FMLA FAQs: https://edd.ca.gov/en/disability/faqs-fmla-cfra/

**Required Posters (California employers with five or more employees):**

- California Law Prohibits Workplace Discrimination and Harassment: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/10/Workplace-Discrimination-Poster_ENG.pdf
- Transgender Rights in the Workplace: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2019/08/DFEH_TransgenderRightsWorkplace_ENG.pdf
- Your Rights and Obligations as a Pregnant Employee: https://www.cdfa.ca.gov/exec/ocr/pdfs/Policy/2.1.1.2_Attachment_2_Pregnancy_Rights.pdf
- Family Care and Medical Leave and Pregnancy Disability Leave: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/09/CFRA-and-Pregnancy-Leave_ENG.pdf
- More info here: https://calcivilrights.ca.gov/Publications/

**Required EDD Pamphlets (when appropriate, including at time of leave or termination):**

- For Your Benefit: California's Programs for the Unemployed (DE 2320): https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2320.pdf
- Disability Insurance Provisions (DE 2515): https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2515.pdf
- Paid Family Leave (DE 2511): https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2511.pdf
- More info here: https://edd.ca.gov/en/Payroll_Taxes/Required_Notices_and_Pamphlets

*This document is a general high-level overview for informational purposes and is not intended as legal advice. Leaves of absence are complex and highly-fact specific. Consult your employment attorney for advice specific to your situation.*

# 11:50 – 12:05

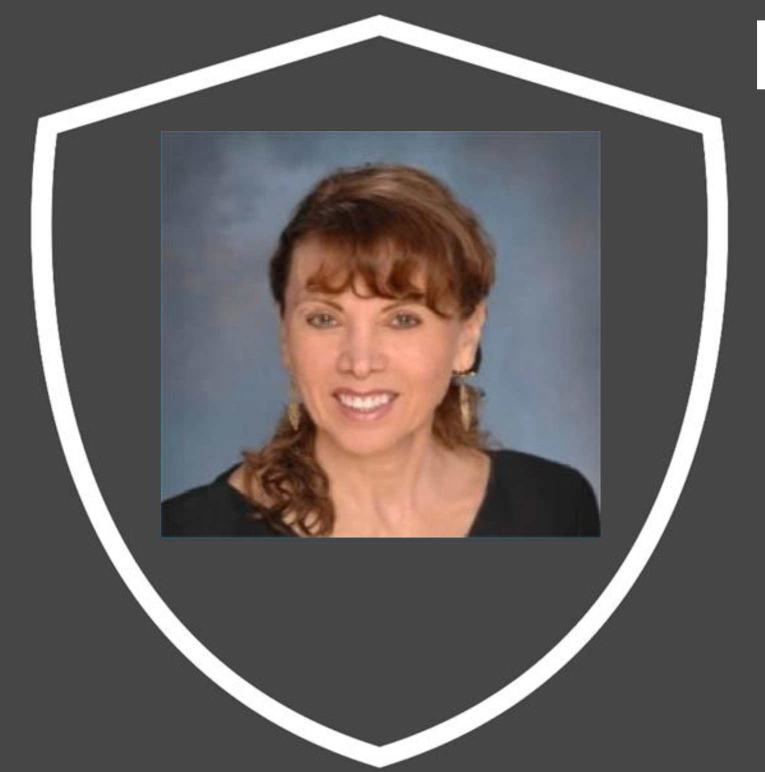
# Form 1-9: Upcoming Changes & Future Authorization Requirements

# Josie Gonzalez

**Josie Gonzalez** is "Of Counsel" to Stone Grzegorek & Gonzalez LLP, in Los Angeles, CA. She is recognized nationally as an expert in employment-based immigration, I-9 compliance and worksite enforcement. She previously served on AILA committee leadership positions in the areas of worksite enforcement. She has represented hundreds of employers in I-9 audits and represented a major employer who was criminally charged for I-9 worksite-related activities.

Josie received the American Immigration Lawyers Association Founder's Award for "the most substantial impact on the field of immigration law or policy." She served as the editor of AILA's leading treatise, *Guide to Worksite Enforcement & Corporate Compliance.*

She received her undergraduate, masters and law degree from U.C. Berkeley

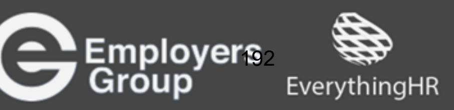


# Remotely Interesting I-9s: I-9 Guidance for Onboarding Off-Site Employees

Josie Gonzalez
SGG Immigration LLP
SGG@sggimmigration.com

# Dept. of Homeland Security (DHS) made 2 inter-related announcements in October:

- Employers can continue using the current I-9, which bears an expiration date of 10-31-22, until further notice.
- Employers can continue to conduct “virtual verification” of remotely hired employees, deferring the physical examination of the original work authorization documents in the presence of the employee until **July 31, 2023.**

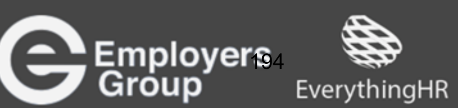


# Why are these two announcements inter-related?

- DHS has been working on developing a revised I-9. It now realizes that the new I-9 should have a feature for the employer who conducts I-9 virtual verification.
- DHS has also been working on developing the features of a permanent I-9 virtual verification, and, unlike the current temporary guidance, the employer will not need to later examine the original of the documents in the presence of the employee.

# Why is this good news?

- This is good news because it means that DHS is giving serious consideration to allowing employers to conduct virtual verification for remote employees in a less burdensome and more efficient manner – But DHS still has grave concerns and, perhaps not all employers will be allowed to do so.
- Before discussing what may be the features of a new I-9 virtual verification process, let's review why DHS has been troubled by this issue for so long. Why has it failed to provide a fix for employers, who even prior to COVID, grappled with this issue for employees it hired remotely?



# Critical I-9 features are the employer attestation and the I-9 Instructions:

- **"I-9, Section 2:** Employer or Authorized Representative Review and Verification. You must **physically examine** the documents."
- **VIP employer attestation:** "I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, **that the above-listed document(s) appear to be genuine** and to **relate to the employee named**, that the employee began employment on (month/day/year) __________ and that to the best of my knowledge the employee is authorized to work in the United States."

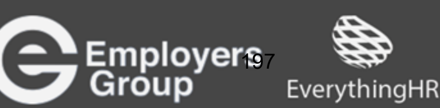
# Critical I-9 features are the employer attestation and the I-9 Instructions continued…..:

- **Section 3**: **Similar admonition under Section 3** of the I-9 for reverification of work authorization and rehires: "I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the U.S., and if the employee presented documents(s), the documents(s) that I have examined **appear to be genuine and to relate to the employee**."
- **Employer Responsibility**: DHS delegates responsibility to the employer to make a good faith effort to determine if documents are genuine and belong to the employee – not their cousin or friend.
- **ICE Fear**: Unless one does a tactile exam of the documents and compares them to the employee's appearance, one may be facilitating unauthorized employment.

# Court Challenge to DHS' Position:

Employer Solutions Staffing Group v. DHS, U.S. Court of Appeals for the Fifth Circuit, decided August 11, 2016

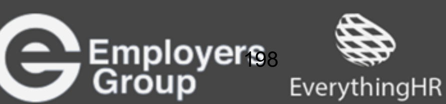
- ICE imposed a fine of $226,270 for failure to properly complete I-9s for 242 employees. The company had a bifurcated process for completing I-9s: One person in Texas examined the original documents presented by the employee; another person in Minnesota examined the color photocopies of the documents and signed the section two attestation. The Minnesota employee never saw the original of the documents in the presence of the employee.
- DHS argued that it was impossible for an attester to say the documents appear genuine and to relate to the employee unless the attester saw the original of the documents in the presence of the employee.

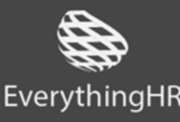


# Court Challenge to DHS' Position Continued…:

Employer Solutions Staffing Group v. DHS, U.S. Court of Appeals for the Fifth Circuit, decided August 11, 2016

- The company even ran the documents through E-Verify!
- ICE invalidated all the I-9s and gave no credit for proper completion and retention of the I-9s, including running the documents through E-Verify.
- The Court held for the employer and reversed the decision saying that ICE didn't provide clear guidance that the verification had to be completed by one person in the I-9 or its instructions.
- Today, such challenges won't succeed because DHS has now clarified the I-9 instructions to read: "The person who examines the documents must be the same person who signs Section 2."

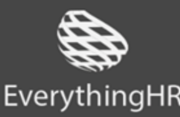





# How do ICE auditors know that the employer has engaged in bifurcated I-9 completion?

- The employer has the bad luck of being selected for an audit whereby I-9s are examined.
- The address of the section two signatory is different than the employee's locale stated in Section 1 of the I-9.

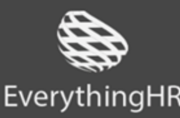
# Fast forward to today:
# It took the urgency in allowing people to work from home due to COVID health concerns to relax its standards for I-9 completion.




# The employer has 2 choices for on-boarding remote employees. What are the advantages/disadvantages of each choice?

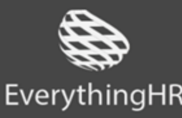
- **Virtual Verification:** Only available for employees **working exclusively remotely** due to COVID-related health precautions; **not for hybrid employment.**

  1. Need to develop and retain written documentation of one's onboarding and telework policy for each employee;
  2. Within three days after hire, it must inspect documents remotely in the presence of the employee and create the virtual connection (reliable video link, email, fax, secure upload);
  3. Maintain copies of the documents (Note--not otherwise required);




# Advantages/Disadvantages of on-boarding choices continued…

4. Write “Remote Inspection Completed on xx” in Section 2 “Additional information” box or Section 3 for reverifications.
5. Maintain good records of virtual verification I-9s to **ensure follow up physical inspection** of the documents and employee;
6. Once ICE announces the end of the policy OR the **employee commences non-remote employment on a regular, consistent or predictable basis, one must conduct in person meeting and examine the documents** and annotate the I-9 to record the physical inspection in Section two, noting the date and initial of the person conducting physical inspection. <u>If it’s the same person who conducted the virtual inspection, then write the date the physical inspection is done, and initial. If it’s a different person, complete a new section 2 on a separate page and attach it to the original I-9.</u>

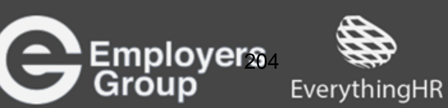



# Advantages/Disadvantages of on-boarding choices continued…

- **Complexities** arise if **different people** are involved; if the **original document is no longer available**, e.g. lost, renewed, status changed from permanent resident to citizen. The best practice may be to **complete a new I-9.**
- If the employee is **no longer employed**, **create a memo** explaining the reason for inability to conduct physical inspection.

# Advantages/Disadvantages of on-boarding choices continued…

- **Further Complexities:** There are **two COVID 19 virtual verification instructions**: For employees hired after **March 20,2020**, the provision only applied to employers and workplaces that operated **totally remotely** with no employees physically present at the work location. **After April 1, 2021**, the worksite could be open for business and virtual verification was allowed for those who **worked remotely until they undertook non-remote work on a regular, consistent, or predictable basis,** or until the program ends. **Also, what if the reason for remote work isn't COVID 19?** This DHS virtual verification provision was created solely due to health concerns related to COVID.



# Advantages/Disadvantages of on-boarding choices continued…

- **Delegation of I-9 completion:**
  - Use an **agent,** who may be a friend, roommate, or relative to conduct in-person verification. **The primary advantage is finality**. No follow-up is required, unless re-verification is required for expiring documents.
  - **Disadvantages**:
    1. Liability flows to the employer for any problems -- faulty completion of the I-9, or knowingly completing the attestation with knowledge of the employee's unauthorized status.
    2. Need to train the "agent" how to correctly complete the I-9, e.g. provide sample templates; acceptable documents, and lastly, review the I-9 for accuracy.

# Possible Regulatory Changes to Virtual Verification in 2023:

- Eligibility only if employer uses E-Verify (But will E-Verify have adequate staffing capability?)
- Mandatory retention of documents
- ICE training on fraudulent document detection (But if the documents are later found to be fraudulent, will there be a presumption of knowledge?)
- Training on antidiscrimination
- No need for subsequent physical inspection
- No resolution regarding the pending I-9s that have not yet been physically inspected.
- New policies may be temporary and viewed as pilot program
- Add a box to the I-9 to indicate that employee's documents were reviewed remotely.
- Question – will the employer need to sign a memorandum of understanding with ICE and open itself up to future ICE audits to determine compliance?
- Question – Will virtual verification be allowed for remote employment for non-COVID related reasons, e.g., regional salespeople?

# Possible I-9 Revisions

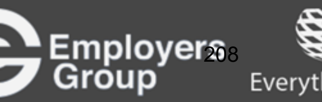
Possible release date? On or before July 1, 2023?

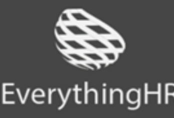
- New box is added to check if virtual verification is conducted.
- I-9 will be condensed to one, not two pages.
- The I-9 instructions will be reduced from 15 to 7 pages with a link to the M274 for those seeking additional guidance.
- Various immigrants have work authorization that is extended automatically even if their documents are expired. There will be a link to I-9 Central providing clarification.
- Section 3, Reverification and Rehire will provide for three spaces for reverification updates once work authorization expires.
- Provide clarification that the Rehire box is used if the person is rehired within three years of the date the original I-9 was completed; or if the employee provides proof of a legal name change.
- Use of the "Addition Information" box is explained and clarifies that an initial and date are required.
- No need to write "N/A" if information is not applicable; just leave blank.

# DACA, TPS, and others

DACA

- **DACA General eligibility:**
  - Entered the U.S before age 16 (per DHS the average age of arrival is 6 yrs. of age and 38% arrived before age 5);
  - Must be under the age of 30 years at the time of application.
  - Have resided in the U.S. since 2007 and have lived here five years.
- Multiple lawsuits and challenges argued that Pres. Obama could not provide this benefit via an executive order.
- DHS has published a 453-page Final Rule justifying the program: 825,000 DACAs who: “have obtained driver’s licenses and credit cards, bought cars, and opened bank accounts… its recipients have enrolled in degree programs, started businesses, obtained professional licenses, and purchased homes. DACA recipients are employed in a wide range of occupations, including management and business, education and training, sales, office and administrative support, and food preparation; thousands more are self-employed in their own businesses. Many have continued their studies, and some have become doctors, lawyers, nurses, teachers, or engineers. 30,000 are health care workers.”
- The legal challenge will go up to the Supreme Court which might not uphold the program.
- In the interim, DACAs already registered in the program get two-year extensions of work authorization.






# TPS:

**Nationals from El Salvador, Honduras, Nicaragua, Haiti**

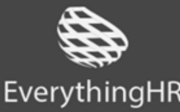
- Many were granted work permits over 20 years ago
- Continue to get work permits for two years.
- Status remains temporary and it can be revoked.

# Everyone Else…

¿Quien sabe?

IRCA was passed during a lame duck session in November 1986 in bipartisan legislation. Wall Street journal and many corporations advocate for ameliorative legislation to help fill serious labor shortages across all industries.

Employers Group
EverythingHR

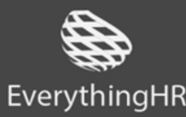



# SGG Worksite Enforcement & Compliance Practice

**SGG's Worksite Enforcement and Compliance Practice Group** is led by **Josie Gonzalez**. Josie has over 30 years of experience representing employers in all aspects of immigration law, and has testified twice in Washington, D.C., regarding the impact of U.S. immigration laws on the business community. She is a frequent commentator on agency regulatory activities, serves on the Board of Directors for the American Immigration Lawyers Association (AILA), an 11,000 member voluntary bar association in the field of immigration and nationality law, and is Founding Chair of AILA's Worksite Enforcement Committee.

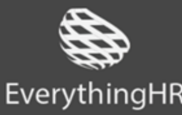
**Michele Franchett**, Partner at SGG and a certified specialist in U.S. Immigration and Nationality law, has over 20 years of business immigration experience. She has successfully represented a number of employers facing I-9 audits, none of whom received monetary penalties. She is the former Chair of the Southern California Chapter of AILA, and serves on the AILA national EB-5 Committee.

**Taiyyeba Skomra,** Partner at SGG and also a certified specialist in U.S. Immigration and Nationality law, has over 15 years of experience in all areas of U.S. immigration practice. She has also successfully represented employers subject to I-9 audits to reduce the monetary penalties.



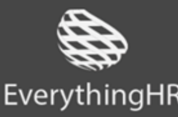

## Worksite Enforcement and Compliance

SGG's Worksite Enforcement and Compliance practice group has a combined total of over 65 years of experience in advising employers in all aspects of U.S. immigration law. Many of our employer-clients find SGG's deep experience in worksite enforcement tremendously reassuring, especially when they receive an unexpected visit from an Immigration and Customs Enforcement ("ICE") agent accompanied by an auditor from Homeland Security Investigations ("HSI"). SGG provides valuable counsel to employers in responding to Notices of Inspection. We liaise with ICE and HSI on the employer's behalf, and negotiate for reduction of fines.



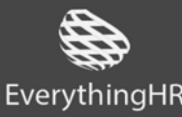

## Compliance

SGG advises employers seeking to ensure their I-9, Public Access Files and other immigration-related records comply with federal regulations. Many of our clients find our guidance in conducting an internal I-9 audit to be extremely helpful, especially prior to a merger, acquisition, restructuring or reorganization. More often than not we find technical and sometimes substantive errors in the I-9 records of employers who thought their documents were all in order. Catching an error in advance of an ICE/HSI inspection can help mitigate potential liability.



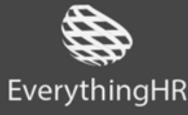

## Training

As part of our comprehensive legal services SGG provides training for Human Resources staff on I-9 compliance and other immigration-related issues. SGG is also available to provide ongoing support as needed, whenever questions arise involving an unfamiliar situation or updates on changes to law or policy affecting employment authorization.

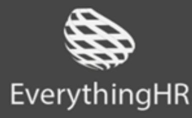



## Immigration Policies

SGG advises employers on the importance of consistent, well-drafted policies to ensure compliance with relevant immigration laws. We also advise employers about whether and when to petition for permanent residence for select employees. SGG plays a pivotal role in guiding employers in the development and implementation of consistent and equitable immigration policies.




# Questions?



# SGG IMMIGRATION LLP


## Contact us!

**Email: SGG@sggimmigration.com**
**Phone: (213)627-8997 | Fax: (213)627-8998**

## 2:00 -3:00

## Dazed & Confused- Navigating the Ever-Evolving Laws Surrounding Cannabis (and Psychedelics) in the Workplace

## Danielle Moore, Attorney (Fisher & Phillips LLC)

Danielle Moore has two primary objectives when counseling employers on labor and employment concerns: limiting financial impact on their business and getting ahead of litigation as early as possible.

Whether defending accusations of employment discrimination, wrongful termination, harassment, or retaliation, or analyzing a complex workplace issue, Danielle works to understand her client's goals and reach the best possible outcome. Especially amid threats of large-scale exposure — due to class action lawsuits or Private Attorneys General Act (PAGA) actions — Danielle's deep understanding of the Labor Code helps minimize liability and reduce future risk.

Danielle's clients rely on her advice about day-to-day employment issues impacting their workplace. She guides employment handbook and personnel policy preparation and provides preventive counsel for hiring, discipline and termination best practices.

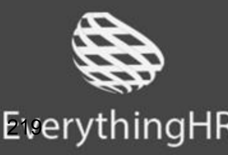
Danielle frequently conducts management training, lectures on emerging employment topics throughout the nation and has also taught employment law at the university level.

As a young partner, Danielle founded and co-chaired the Fisher Phillips Women's Initiative and Leadership Council to mentor and support rising women attorneys. Today the program benefits attorneys across the firm's 36 offices. Danielle currently serves as chair of the Fisher Phillips' Development Committee, which operates as a think tank and sounding board for new and creative ideas and initiatives to help the firm stay on the forefront of workplace law.

# Dazed and Confused:

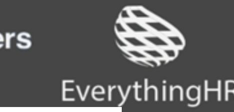
***Navigating the Ever Evolving Laws Surrounding Cannabis (and Psychedelics) in the Workplace***

WELU 2022



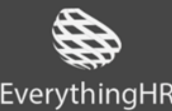
# Overview:

- The Current Landscape
- Status of the Law –Federal
- State Case Studies
- What Does it Mean for Employers
  - Drug Testing
  - Medical Cannabis and Accommodation
  - Legal Off Duty Conduct
  - Discrimination
- The Future of Cannabis and Recommendations




Legalized | Medical and decriminalized | Medical | Decriminalized | Fully illegal

# Cannabis is Big Business

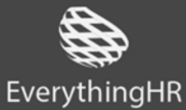



- Legal Recreational Marijuana – 21 + the District of Columbia and Guam
- Legal Medicinal Marijuana – 37 states Legal CBD for Medical Use – 44 states
- Decriminalization – 14 states
- June 19, 2018 – Canada becomes the first G7 country to legalize recreational marijuana and create a nation-wide marketplace
- Countries around the world, as well as the World Health Organization have issued pro-marijuana reports and/or statements
- Legal sales in North America expected to be $146.4 billion by end of 2025
    - ***BUT . . . it is still federally illegal***

# Current Key Issues:

- Can we still refuse to hire cannabis users?
- Do we need to change our drug free workplace policy?
- Do we have a duty to accommodate medical cannabis?
- Can we fire if we discover cannabis is being used by a current employee outside of work?
- Does it make a difference if it is off duty use?
- What about safety sensitive positions?
- Is cannabis here to stay?
- Are psychedelics next?

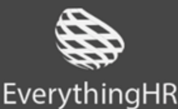
# REAL LIFE EXAMPLE– “Don’t Bother”




- An applicant seeks employment at a Santa Rosa facility of a large public company. She seeks a position as a Receptionist. She does well in the interview and is offered a position contingent on passing a drug test. When she receives the offer, the employee reveals that she is a medical marijuana user. The Human Resources Representative responds stating, “Oh, in that case, don’t bother following through on your application. We have a no tolerance policy and can’t hire you.” The employee sues for disability discrimination.

# REAL LIFE EXAMPLE– The Rumor Mill

- There is a rumor going around that a software engineer vapes marijuana on his rest breaks. A payroll clerk hears the rumor and reports it to HR. In doing so, she says that on her birthday, the engineer baked her a cake and "now it all makes sense! I remember feeling funny when I ate the cake later than night."
- HR doesn't really trust the Payroll clerk's assessment and the engineer's performance has been fine, so instead of approaching the engineer, they conveniently select him for a "random test" and he tests positive.
- When they approach him about it, he admits that he smoked marijuana with his friends when he was on vacation in Colorado a week ago, but is adamant that he is not a "stoner," has never smoked it at work and has never been inebriated on the job.




# REAL LIFE EXAMPLE– “It’s My Arthritis Lotion”

- A Shuttle Driver at an automotive dealership gets into a minor car accident with a sales employee who is taking a customer on a test drive. The sales employee is notoriously unreliable and reckless, while the shuttle driver is an all star employee.
- Although the dealership suspects that the accident is the sales employee’s fault, they have a strict anti-drug policy, so they post-accident drug test both of them.
- Surprisingly, the shuttle diver tests positive. HR calls the employee and she states that her doctor gave her a lotion for arthritis that has CBD in it that must have caused the positive drug test. She swears that she has never “gotten high.”

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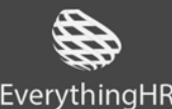
# How Did We get Here

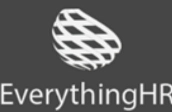



- **1970: The Controlled Substance Act** places "Marijuana" as a Schedule 1 controlled substance which is illegal without any exceptions. 21 U.S.C. § 812(b)
- **1996: California voters approve Prop 215,** The Compassionate Use Act, legalizing the use of medicinal marijuana. (Health & Safety Code § 11362.5)
- **2012 - Colorado Amendment 64:** Amended the CO Constitution. For the first time, private possession by persons 21 years of age or older of up to one ounce is no penalty. Private cultivation of up to six marijuana plants, with no more than three being mature is no penalty. The commercial sale of marijuana began on January 1, 2014, at establishments licensed under the regulatory framework.

# Status of the Law – Federal

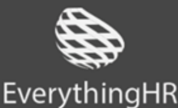
- Controlled Substances Act
- Drug-Free Workplace Act
- Occupational Safety and Health Act
- DOT Regulations

# Status of the Law – Federal




- **Still a Schedule I drug under the federal Controlled Substances Act, which means according to the Feds:**
  1. high potential for abuse,
  2. no currently accepted medical use in treatment in the US, and
  3. lack of accepted safety for use of it.

  **Other Drugs:**
  - Class 1 – Heroin, LSD
  - Class 2 – Cocaine, Fentanyl and Methamphetamine




# Status of the Law – Federal

**Drug-Free Workplace Act:**

- Applies to certain federal contractors
- To maintain eligibility for federal contracts or grants, employers must certify that they will meet specified requirements to ensure a workplace free of illegal drugs.
- Establish a drug-free awareness program.
- Require employees to report criminal convictions for drug-related offenses in the workplace within 5 days of conviction.
- Failure to comply can jeopardize contract or grant

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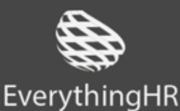
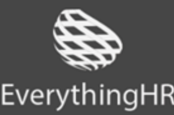



Employers Group

# California Case Study - Prop 64:

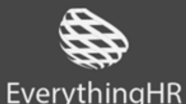
- Approved by voters on November 8, 2016.
- Allows adults 21+ to ingest marijuana for recreational use.
- Enables adults to possess, process, transport, purchase or give away to other adults up to 28.5 grams; and to grow up to 6 living plants
- Imposes various taxation, licensing requirements
- Municipalities are free to regulate, and have
  - *Has California over regulated?*

# California Case Study - Prop 64:



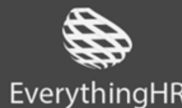

- Employers were still entitled to enact and enforce policies related to marijuana. And, did **not** need to tolerate marijuana use. Prop 64 expressly stated, that the statute does **not**:
    - Affect/restrict employers rights to maintain a drug and alcohol free workplace;
    - Require employers to permit or accommodate marijuana use/consumption/possession in the workplace; or
    - Affect the ability of employers to have policies prohibiting use by employees and applicants, or prevent employers from complying with state or federal law.

# AB 2188 – Discrimination in Employment: Use of Cannabis




- On and after January 1, 2024 – It is unlawful for an employer to discriminate against an individual while hiring, firing, setting a condition of employment, or penalizing employees at work due to the individual's <u>use of cannabis off the job</u>, or when an employer-required drug test finds <u>non-psychoactive cannabis in the individual's system</u>.
- It prohibits the use of drug tests that rely on finding non-psychoactive cannabis, as the California Legislature found that these tests do not reflect the individual's impairment, but rather an individual's cannabis usage.

# AB 2188 – Discrimination in Employment: Use of Cannabis

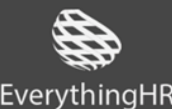



- This means that employers will be prohibited from firing employees or denying applicants job positions if drug test results merely detect cannabis metabolites in hair, blood, urine, or other bodily fluids.
- Exceptions – preemployment drug screening or upon positive required test by urine, hair, blood or bodily fluids.
- Certain exclusions –
    - Building and construction;
    - Jobs requiring federal background checks and clearance.

# AB 2188 – Discrimination in Employment: Use of Cannabis

- Employers can still:
    - Maintain a drug-free workplace.
    - Continue to issue disciplinary actions against employees who possess or use cannabis on the clock.
- The law also does not preempt state or federal laws requiring employees to be tested for controlled substances, such as those required for receiving federal funds, licensing, or federal contracts.

# California is Not Alone:




- New Jersey and New York: employee's off-duty use of cannabis cannot be the reason for any adverse employment action.
- Nevada, New York, City of Philadelphia: banning of pre-employment marijuana testing (Note: all have carve-outs for safety purposes)
- Connecticut: holding federal law doesn't preempt a state law that expressly prohibits employers from firing or refusing to hire someone who uses marijuana for medical purposes.

## So, what does all of this mean for employers?

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# Drug Testing:

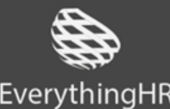
**Remember state drug testing requirements:**

- Pre-Employment
- Random Testing
- Post-Accident Testing
- Reasonable Suspicion
- DOT Covered Positions

CANNABIS AT WORK

# Drug Testing – Pre-Employment:

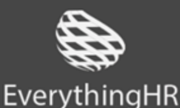
- Generally, employers may require applicants to undergo drug tests.
- However, the law is evolving – The District of Columbia temporarily passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing employees for marijuana use until after an offer for employment has been made.
- Colorado Example - Employers may also experience difficulty hiring.
- California – now regulates the type of test that can be used.




# Drug Testing – During Employment:

- Generally, employers remain free to implement and utilize drug-free, workplace programs and policies in spite of state law and the legal use of marijuana.
- But, should you change your policy language??
- Should you change your approach to testing?

# Drug Testing – During Employment:




- As a general rule, random drug test is not recommended and, in some circumstances, is not permitted.
- OSHA has stated blanket post-accident drug testing policy is improper.
- Drug testing can be conducted post-accident if
    1. There is a reasonable belief that the accident/injury was caused by an impairment, and
    2. The test will determine if the impairment existed at the time of the accident/injury (if available).

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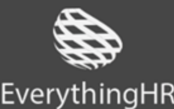
# Accommodating Medicinal Cannabis:

**I have a prescription!**

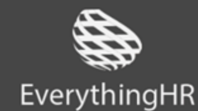
- Leave of absence – FMLA, CFRA
- Intermittent leave
- Accommodation under the ADA, and Engaging in the Interactive Process
- Employee Assistance Programs (EAPS)




# Accommodating Medical Cannabis:

- In 2010, the **Oregon** Supreme Court ruled that medical marijuana's status as an illegal drug under federal law means that no employer should be forced to accommodate it's use.

- In 2011, the **Washington** Supreme Court decided that employers need not accommodate an employee's use of medical marijuana, and that employees terminated for medical marijuana use – even offsite use – have no basis to sue their employers.
- In January 2016, a federal court judge in **New Mexico** dismissed a lawsuit brought by an employee who was terminated after testing positive for marijuana, finding that state law does not require employers to accommodate medical marijuana use.




The Court held that a sales and marketing firm discriminated against an employee of its Massachusetts operation who used marijuana to treat Crohn's disease when it fired her for failing a drug test.

"employers can't use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses."

An employer may still refuse to accommodate if use "would cause an undue hardship to the employer's business."

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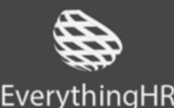
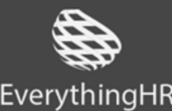
# Legal Off Duty Conduct Laws




*Coats v. Dish Network, (June 15, 2015)*

- Colorado paraplegic employee terminated after positive random drug test result.
- No safety sensitive position; did not impact job performance.
- Used while off-duty legally, to lessen symptoms of his condition.
- Argued a violation of CO's "Lawful Activities Statute."
- Court held that behavior was not protected by the statute; the conduct is not "lawful" Federally.




# Legal Off Duty Conduct Laws

- While you may prohibit use in the workplace, current technology does not match the law. Most drug tests detect THC in the system for several days and cannot detect current inebriation. However, clinical trials are underway.
- TO WATCH - Many states (including CO, NV, TN, NY, CA and more) have Legal Off Duty Conduct Laws protecting legal off duty conduct and these cases are statutes are trendy.

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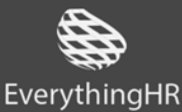
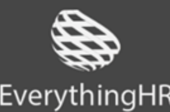



# ANTI- Discrimination Statutes Are Also Trendy:

- Many medical marijuana states still allow employers to “discriminate” against medical marijuana users.

- However, other states have anti-discrimination policies, while still more seem to be heading in that direction.

# ANTI- Discrimination Statutes:

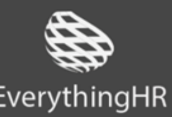



Examples:

- New York –has incorporated medical marijuana users into other laws prohibiting discrimination based on disability. N.Y. Pub. Health Law § 3369.

- Rhode Island - "No employer may refuse to employ or penalize, a person solely for being a cardholder" R.I. Gen. Laws § 21-28.6-4(c

Other states with anti-discrimination or accommodation laws include: Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, New York, Minnesota




- None of these laws requires employers to tolerate on-duty drug use.

- None of these laws prohibit workplace drug testing.

- But some raise questions about the validity of adverse employment actions based on positive drug tests.

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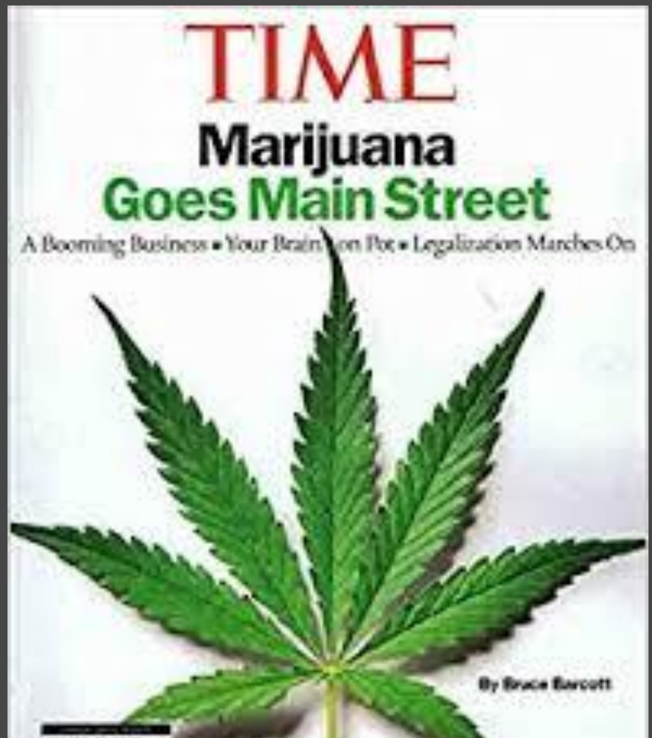
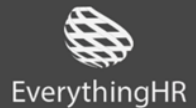
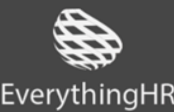





**The future is *hazy,* but one thing is clear:**

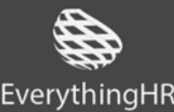
**Cannabis is here to stay**

# Biden Administration




- Support for legalization has become mainstream among Democratic politicians, and some Republicans.
- The House passed a decriminalization bill on April 1, 2022 and,
- Months later, several senators – including Senate Majority Leader Chuck Schumer – introduced the Cannabis Administration and Opportunity Act, which would federally decriminalize cannabis. The bill's future in the Senate is uncertain.

# Biden Administration



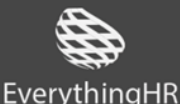

**On Oct. 7, 2022, President Joe Biden announced a 3-step approach to marijuana reform:**

1. He will issue pardons to everyone convicted of federal simple marijuana possession, and directed the Attorney General to develop an administrative process for the issuance of certificates of pardon
2. He called on all governors to make similar moves for convictions under state laws.
3. He asked the Secretary of Health and Human Services and Attorney General to initiate a review of how marijuana is scheduled under federal law – reconsidering whether it should be a schedule I drug.

# Psychedelics – is it the same or different?

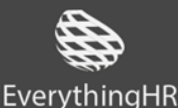
- Psychedelics are the new trend – MDMA, Ketamine, and Psilocybin
- 2020 - OR voters passed the Oregon Ballot Measure 109, making it the first state to both decriminalize psilocybin and also legalize it for therapeutic use.
- 2022 - CO followed with the 2022 Colorado Ballot Measure 122.
- Seattle, Denver, Oakland, and Washington, D.C. are among a score of municipalities that have decriminalized psilocybin mushrooms.

# Psychedelics – is it the same or different?




- Substantial support from the medical community and supporting data
- Hundreds of patents are being filed and millions of investor dollars are coming in
- The Food and Drug Administration is weighing approval of the therapeutic uses of MDMA and psilocybin, under an accelerated review. And, three years ago, the FDA approved esketamine, a nasal spray derived from the anesthetic ketamine, for depression that is resistant to other types of treatment.
- The National Institutes of Health has begun funding psychedelic research, and many of the country's premier universities have been racing to set up psychedelic research centers along with drug companies.

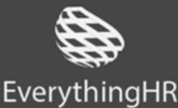
Employers Group




# So, What Do We Do?

1. Decide your position based on your business needs and business culture.
2. Consider a proactive memo to employees
3. Update handbook and policy if needed, but …
4. *BE CAREFUL and think expansively

# So, What Do We Do?

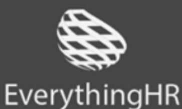



5. Apply policies uniformly.
6. Make Sure You're Not the "Test Case".
7. Publicize your policy and train supervisors and managers.
8. Eliminating strict post-accident/post-injury testing and replacing it with reasonable-suspicion testing.
9. Consider your testing method and whether it needs to change
10. Include cannabis in your interactive process.

# So, What Do We Do?

- Finally, Keep an eye on new developments in the law and stay up-to-date.

WELU 2022



**Danielle Hultenius Moore, Partner**
(858) 597-9616 | dmoore@fisherphillips.com

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## 10:40 – 11:40

## How to Reduce Hiring Risk in 2023 – Background Screening & Drug Testing Trends

## Alan Lasky

Join Universal Background Screening for a review of recent changes and regulations in 2023 for employment background screening. We will focus on best practices for new hires and ongoing screening within your organization. Topics of discussion include:

- Best Practices for screening
- Recent litigation/class action lawsuits against employers and how to avoid the pitfalls
- Federal (FCRA), state and CA municipal guidelines/legislation
- EEOC and FTC regulatory updates
- Ban the Box and Marijuana updates and other trends
- Your questions and concerns

BIO: Alan Lasky

Alan Lasky is the Senior Vice President of Sales for Universal Background Screening and has been in the background screening industry for over 20 years. Throughout his career, his focus has been on screening compliance, working with regulatory/safety-sensitive populations. His experience includes consulting with thousands of organizations in providing best-practice screening programs; previously consulting with the Pentagon on security programs for military base civilian screening. Alan holds a Doctoral degree in Clinical Psychology from CSPP/Alliant University - Los Angeles and previously worked with a California healthcare system as a clinician.

Universal Background Screening is a leading accredited provider of employment background checks, drug testing and OccuHealth services for organizations nationwide. Universal has partnered with Employers Group for over 11 years, providing clients compliant and accurate screening while delivering fast turnaround time with excellent customer service. Universal is the only screening firm being awarded 13 years in a row for top in quality of service/customer service by HRO Today's client-survey based award.

# HOW TO REDUCE HIRING RISK IN 2023

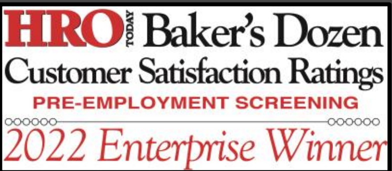
## BACKGROUND SCREENING AND DRUG TESTING TRENDS

Dr. Alan Lasky – SVP
Universal Background Screening

WELU 2022

# ABOUT UNIVERSAL

- Over 50 years experience
- 1 of only 7% of firms in US that is accredited
- Focused on Regulatory/Safety-Sensitive Populations:
  - Strong understanding of CA (and all state/federal/municipal) consumer reporting laws
  - Partnership with Employers Group for 11 years
- Voted 13 years in a row as top in customer service
  - ✓ Voted top Enterprise Screening Firm consistently by HRO Today (Client survey-based)



# Litigation on the Rise:

Universal BACKGROUND SCREENING

Employers Group EverythingHR

# WHO AUDITS CONSUMER REPORTING AGENCIES?

## Federal Trade Commission

- Independent agency of the United States government, established in 1914 by the Federal Trade Commission Act

## Consumer Financial Protection Bureau (2010)

- Agency of the United States government started by the FTC and responsible for consumer protection in the financial sector

## Equal Employment Opportunity Commission

- Federal agency that administers and enforces civil rights laws against workplace discrimination

# FEDERAL LAW: FAIR CREDIT REPORTING ACT (FCRA)

- The FCRA is a Consumer Protection Statute
  - Passed by Congress in 1970
    - Amended by the Crediting Reporting Reform Act in 1996
    - Amended 2003 by the Fair and Accurate Credit Transactions Act (FACTA)
- As federal law, it applies to everyone, in all states.
  - However, states can (and some have) extend and expand upon the law
- It is designed to:
  - Ensure accurate information is reported
  - Restrict/Limit what information is reported
  - Provides a dispute mechanism for consumers

# INCREASE IN LITIGATION AND RISK

Nov 4, 2021 - The CFPB will be working closely with the Federal Trade Commission to root out illegal conduct in the background screening industry. Background screening companies that violate the Fair Credit Reporting Act can be liable for significant civil penalties, restitution for victims, damages, and other relief.

- FTC Teaming up with CFPB - CFPB Takes Action to Stop False Identification by Background Screeners | Consumer Financial Protection Bureau (consumerfinance.gov)

**CFPB Compliance Link** to 3M+ Cases

# Why not use an online (unaccredited) screening firm:

NOTICE

This site contains REAL police records (court records of driving citations, speeding tickets, felonies, misdemeanors, sexual offenses, mugshots, etc.), background reports, photos, court documents, address information, phone numbers, civil judgments, properties owned, and much more. Please BE CAREFUL when conducting a search and ensure all the information you enter is accurate.

Learning the truth about the history of your family and friends can be shocking, so please be cautious when using this tool.

TruthFinder does not provide consumer reports and is not a consumer reporting agency. We provide a lot of sensitive information that can be used to satisfy your curiosity, protect your family, and find the truth about the people in your life. You may not use our service or the information it provides to make decisions about consumer credit, employees, insurance, tenant screening, or any other purposes that would require FCRA compliance.

I UNDERSTAND

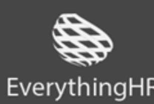
Many online screening firms are not legally following the federal (FCRA) and state laws which could end up with class action lawsuits for the screening firm AND client!

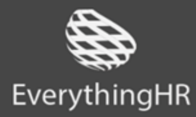
July 2022 - The plaintiff claims that the report provided by online firm caused him to be fired from his job due to the criminal record information contained therein.

# Class Actions On the Rise

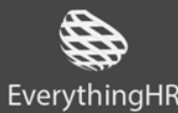
- Increase as plaintiff attorneys understand the laws and educating public
  - 1/3 of the U.S. population (100 million people), have some kind of criminal record (U.S. Department of Justice)
- Laws more fragmented through cities/municipalities
  - Industry is more technical, complex and in many cases pose challenges for even the most well-intentioned of employers (JDSupra)
- Increase in settlements: (FCRA includes no liability cap)
  - Up to $1,000 per person
  - Attorney's Fees / Court Costs
  - Damages (multi-million settlements->Billions$$)

Article July 2022 - $7B verdict – Spectrum – Murder by in-home installer
*"..reflects the extensive evidence regarding the nature of the harm caused by Charter Spectrum's gross negligence and reckless misconduct." ($1.1B Settlement)*



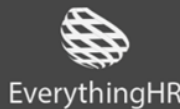



# CORE SERVICES AND COMPLIANCE




# COUNTY CRIMINAL COURT SEARCHES

- Conduct court runner/court clerk searches at the local County Court Houses
  - Over 3,300 county court jurisdictions throughout the United States
  - 30%+ manual courts (versus index/database files)
- Federally approved search (FCRA)
  - Felony and Misdemeanor information ("negative" court info not used in CA)
  - Primary Identifier including First and Last Name
    - Secondary Identifiers: DOB and SSN
- **California** only has county criminal and/or fingerprinting program (no statewide)
  - CA has 58 counties



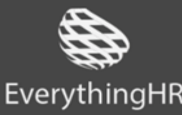

# DATABASE SEARCHES

- **USA CrimSearch™**
  - Criminal history data from 22 statewide court repositories and department of corrections records from 45 states, resulting in extensive coverage across 45 states plus the District of Columbia. Additional court data from over 180 individual counties.
- **USA OffenderSearch™** (nationwide)
  - Includes over 240 million criminal, sex offender and security threat records from an unequalled 320 data sources.
- **USA SecuritySearch™**
  - OFAC, SDN and many other National Security databases.

**Fully Compliant with Section 613(a) of the FCRA**

All information re-verified with the original jurisdiction to be sure it is "complete and up to date"

May 6, 2022, California federal court to approve a $9 million settlement in a class action lawsuit to settle claims that nationwide credit reporting agency allegedly violated the federal law by incorrectly labeling certain consumers as terrorists

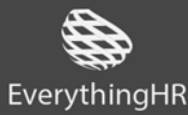



# Limitations of Report Contents

Federal regulations restrict information a CRA can report

| Data | Federal Limitations |
|---|---|
| Convictions | No Federal Limit* |
| Arrests (Non-Convictions) | 7-Year Federal Limit* |
| Bankruptcies | 10 Years |
| Other "Negative" Information | 7- Years |

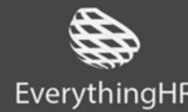
**9 States established greater limitations than Federal law*




# State Limitations on Criminal Records

| State | Time Limit | Convictions Only | Exemption? |
|---|---|---|---|
| California | 7 Years | Yes | None |
| Kansas | 7 Years | No | $20,000 |
| Kentucky | None | Yes | None |
| Maryland | 7 Years | No | $20,000 |
| Massachusetts | 7 Years | No | $20,000 |
| New Mexico | None | Yes | None |
| New York | 7 Years | Yes | $25,000 |
| New Hampshire | 7 Years | No | $20,000 |
| Washington | 7 Years | No | $20,000 |

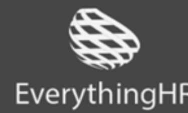
**Sept 27, 2022 - Amazon Sued For Refusing To Hire Sex Offenders -** Candidate accused Amazon of violating Megan's Law and claims Background firm violated California's seven-year bar for criminal background checks. He also said Background firm violated the federal Fair Credit Reporting Act by furnishing Amazon with unlawful reports.




# REDACTION/EXPUNGEMENT OF CRIMINAL AND PII INFORMATION

- **Expungement of Criminal Information**
  - Michigan, New Jersey, Connecticut, California, Pennsylvania, Virginia, Delaware, Colorado and Utah
    - Certain types of felonies and misdemeanor criminal records automatically will be expunged to help candidates who have some type of criminal record that may prevent them from accessing jobs, housing, education, loans, and other opportunities (article)
      - Concern regarding "Wobblers"
    - CA - SB-731 effectively seals the records of many felony convictions if they: (a) occurred on or after January 1, 2005; and (b) if the individual has completed all terms of incarceration, probation, mandatory supervision, post-release community supervision, and parole; and (c) are not convicted of a new felony for four years.

- **Redaction of Information**
  - California (Los Angeles) and Michigan
    - Removing Social Security Number, DMV License # and Date of Birth Information
      - ADM File No. 2017-28 – Michigan amends the need for certain authorized parties to receive this information April 1, 2022.
      - Senate Bill 1272 - California would amend this law to require the clerk to make these indexes searchable using DOB and driver's license number. Governor Vetoed – now goes back to senate/house for 2/3rds vote to still push through – If ratified, it will go into effect 01/01/2023



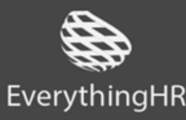

# Verification Trends - Challenges

## SHRM research

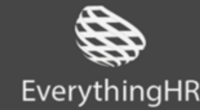
- 70% of college students surveyed would lie on a resume to get the job
- 26.5% stated in an AOL study that they would or did lie on a resume
- Over 46% of resumes contain falsifications (Robert Half)

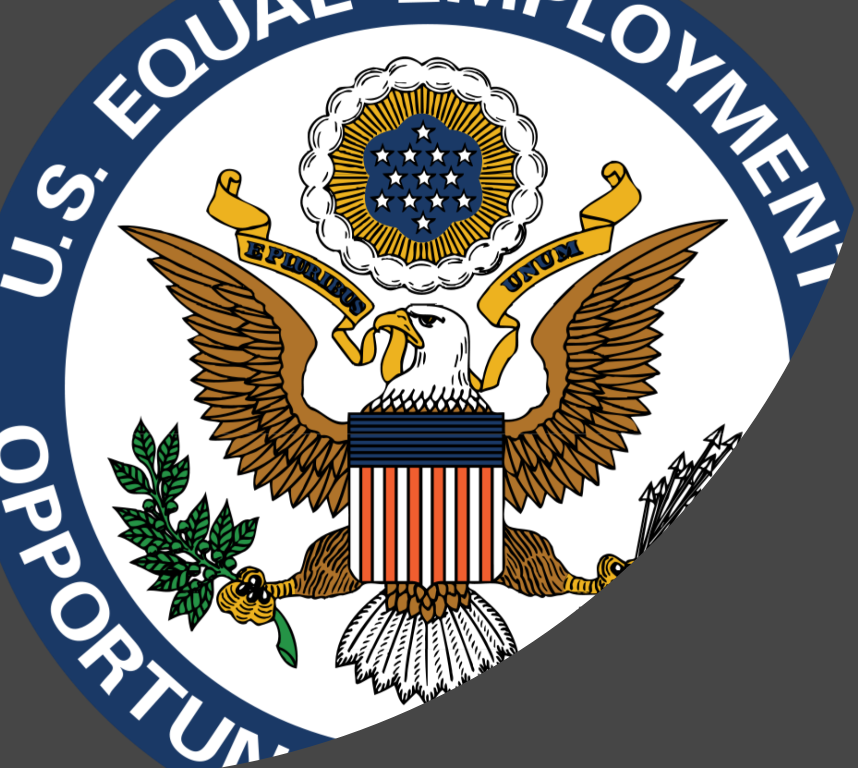
## Rising Tide of Bogus Degrees

- Bust in Pakistan running 370 education websites
  - 2019 – discovery of 600-900 “fake” schools
  - “This worldwide, multibillion-dollar industry is growing annually.”
- 3,300 unrecognized universities nationwide
- In Persian gulf region it was discovered more than 75,000 diplomas, transcripts “purchased” in US every year



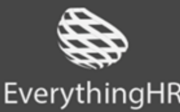

# How to Reduce Risk! Trends in Litigation




# EEOC – "Guidance Factors" April 25, 2012 (Requirements)

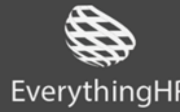
- Criminal
  - Review "nature and gravity" of the offense
  - Substantially job related / standardized
  - Severity of the offense
  - How long ago it occurred
  - Is person a repeat offender
- No "blanket" policies / no hire rules
  - ~~A felony conviction is an immediate disqualification~~
- Reduce Risk By:
  - Speaking with Legal and have a program in place
  - Case by case basis – yet standardized
  - Training for hiring process/procedures



# Standardize Your Screening Program

- **Issue**
  - Lack of consistency with background screening program
    - ✓ A la carte items ordered on some applicants but not others going out for same position
    - ✓ Risk of perceived discrimination and potential litigation

- **Solution:**
  - Keep process consistent through ordering packages

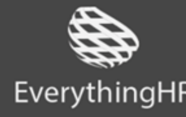


# Compliant Forms

## (#1Disclosure/Authorization)

- **Disclosure & Authorization Forms**
  - Federal and State Compliant Language
  - No “Extraneous Language” and no liability waiver
  - Candidate to Sign Prior to Conducting Background Check
  - “Solely of the Disclosure and Authorization”
    - Delta $2.3M, Petco $1.2M, Omnicare (CVS) -$1.3M, Marriott Ownership Resorts, Pepsi, Walmart, Petco, Chipotle, UBER -$7.5M, Chuck E Cheese -$1.7M, Sears, O’Reilly Auto Parts, Swift Transportation -$4.4M, Closetmaid -$1.8M, Uber, Whole Foods -$803K, Sprint

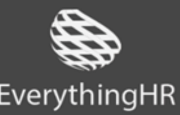
- **Solution:**
  - Use a compliant and separate Disclosure/Authorization form
  - Keep this form pure of the legal language; with no additional “extraneous” language
  - Can be automated (E-Form) as long as following requirements



# Compliant Forms

## (#2 Summary of Rights)

- Federal Law
  - Give The Candidate a copy of their rights
  - Revised September 12, 2018
    - Responding to several high-profile breaches – providing free national security freezes and freeze releases
  - "Solely of Rights Document"
- Solution:
  - Provided when giving the disclosure and authorization on its own form.
  - Do not staple with other documents




# Compliant Forms

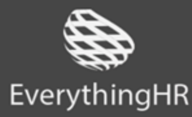
## (#3 Adverse Action Forms and Process)

### Any decision by an "End User" that has a negative impact on the consumer.

- Examples:
  - Denying employment (rescinding conditional offer)
  - Terminating employment (existing or new hire)
  - Denying promotion, transfer, etc.

### Why does the law require this process?

- To provide the **opportunity for the consumer to dispute** any information that may be incomplete or inaccurate
  - Identity theft
  - common/limited identifiers
  - human error




# Adverse Action: 4 Easy Steps – Pre-Adverse Process

***Before*** **taking any adverse action, you must:**

1
- Notify the consumer that you may take adverse action based on the consumer report (Pre-Adverse Action Letter)

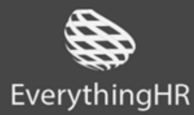
2
- Provide the consumer a copy of the report

3
- Provide the consumer a copy of the document *A Summary of Your Rights Under the Fair Credit Reporting Act* and any other applicable state notices

4
- Provide a "reasonable" amount of time for the consumer to receive the notice, review the report and initiate a dispute

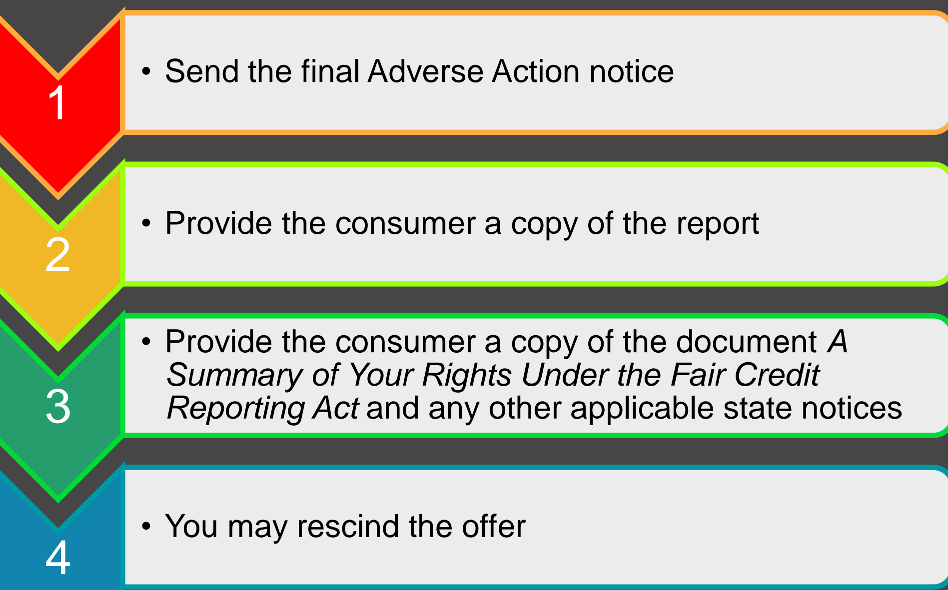
5 to **10** business days

- *March 2021 – New Form in Illinois to be provided - https://www.jdsupra.com/legalnews/illinois-enacts-new-background-check-4625056/*



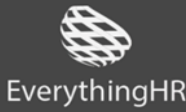

# Adverse Action: Final Adverse Process

***IF*** **the candidate does not dispute within the "reasonable amount of time" then:**




1. Send the final Adverse Action notice
2. Provide the consumer a copy of the report
3. Provide the consumer a copy of the document *A Summary of Your Rights Under the Fair Credit Reporting Act* and any other applicable state notices
4. You may rescind the offer

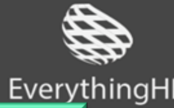
- *March 2021 – New Form in Illinois to be provided - https://www.jdsupra.com/legalnews/illinois-enacts-new-background-check-4625056/*



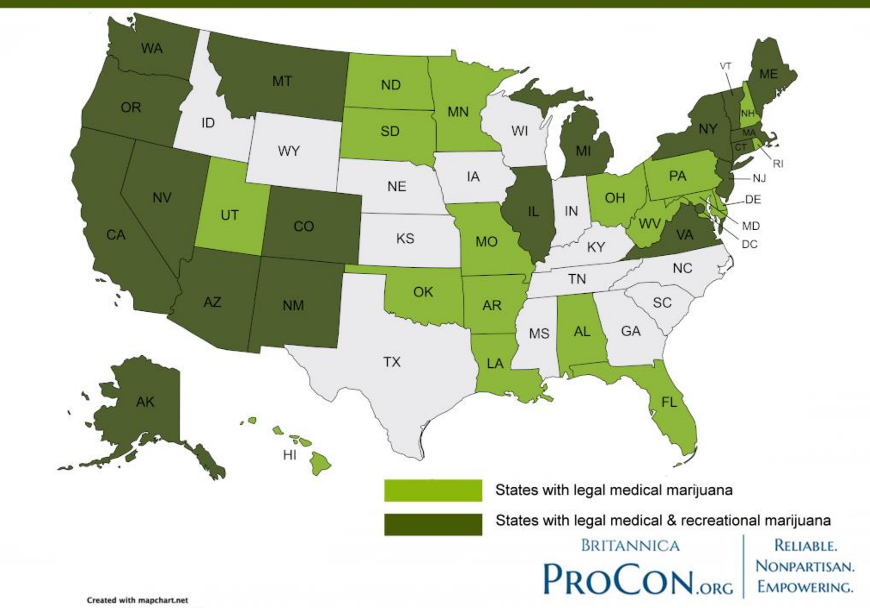

# Adverse Action: Dispute Process

## If Dispute

- Background Screening Firm will be contacted by candidate and discuss dispute with candidate updating client (documented)
- 30-day process (to hold requisition open) as per federal law
- Update to report and client if any changes from dispute



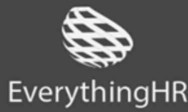

# Medical Marijuana Laws




Resource Link 2022- DISA

Positivity rate was up more than 30% in the combined U.S. workforce from an all-time low in 2010–2012.

- NY | March 2021 - Restricts the ability of an employer to consider a positive pre-employment marijuana test result.
- Philadelphia, PA | 2022 – (NV, DC similar) Employers are now prohibited from requiring prospective employees to undergo testing for the presence of marijuana as a condition of employment. "Safety Sensitive" positions exempt
- NJ | February 2021 - Prohibits employers from rejecting a job applicant who tests positive for marijuana. designating a "Workplace Impairment Recognition Expert" (WIRE) who must be trained to detect and identify an employee's use or impairment from drugs and to assist in the investigation of workplace accidents.
- MS | February 2022 - Employment protections
- CA | AB 2188 - Jan. 1, 2024 - Workplace protections for state-legal cannabis use outside of the workplace. It will prohibit employers from, penalizing or terminating an employee for admitting to using cannabis while off duty and away from work.



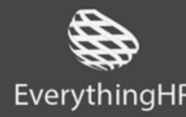

# Ban The Box – Trend Update

## Question on application:

- "Have you ever been convicted of a misdemeanor and/or felony?"
- Over 150 municipalities and 37 states and DC
- 15 states and 22 cities/counties extend laws to private employers
  - Laws add more teeth – EEOC Guidelines

- Tools

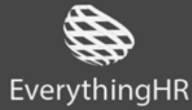
- NELP Reference (October 2021)
- Nolo Legal State Directory
- Google: "your state ban-the-box laws"




# BAN THE BOX REGULATIONS | California

- **COUNTY/MUNICIPALITY Bills/Regulations** (Public/City Agencies)
  - Alameda County, Berkeley, East Palo Alto, Oakland, Los Angeles (Private), Sacramento, San Francisco (Private)
    - Until last step in hiring process
  - Berkley, Carson, Compton and Santa Clara
    - Until conditional job offer made
  - Pasadena
    - Removal of question
  - Richmond
    - Prohibits inquiry into applicant's criminal history at any time unless required

**Most including EEOC Guidelines as requirements**




# Thank You

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**Martin Zanit**
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mzanit@universalbackground.com
**Bus: 877-263-8033 x3217**
**Mobile: 818-456-3261**

# 2:00 – 3:00

# OFCCP Regulation Update for 2023

## Suzanne Oliva

This is an affirmative action presentation set up specifically for companies that hold federal contracts and/or subcontracts. This presentation will cover OFCCP meaningful outreach, positive recruitment and applicant tracking in detail. We will also cover the OFCCP published proposed changes to the audit Scheduling Letter and Itemized Listing

This presentation will go over some of highlights of these changes:

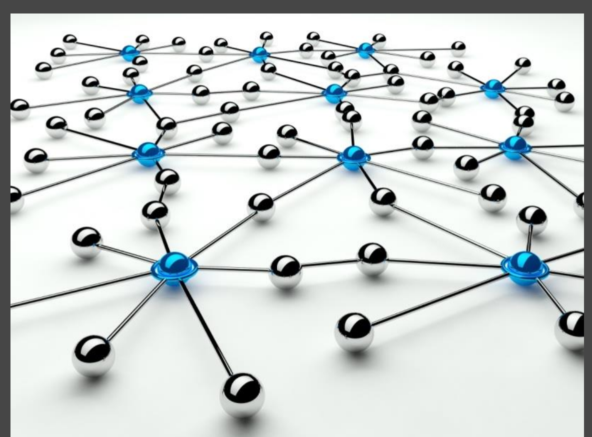
- Item 19 (new) Documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.
  This presentation will cover the use of Artificial Intelligence (AI) in your selection process. Mitigating Bias: The Inclusive Practice of Hiring. How to prepare for a Bias Audit.
- Item 20(c)(previously Item 18)Promotions: document of type of promotion, adverse impact analysis.
- (new Item 20(d)(previously Item 18)Terminations: document termination reason, adverse impact analysis.
- Item 21 (previously Item 19) Expanded Employee level compensation data for all employees
- Item 22 (new) Documentation that the contractor has satisfied its obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of the contractor’s “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3).

Suzanne Oliva is the Sr. Compliance Services Manager at Employers Group (EG) and EverythingHR providing full-service Equal Employment Opportunity, Affirmative Action (EEO/AA) and Diversity consulting services.

She has over 22 years of experience in producing Affirmative Action Plans and programs which meet (OFCCP) regulations. Suzanne and the Affirmative Action team respond to client inquiries in a broad scope of industries on all aspects of Affirmative Action, Department of Labor audits, policies and processes.

Suzanne's background includes specialized experience with Executive Order 11246, Executive Order 4212, Section 503 of the Rehabilitation Act, and Title VII; OFCCP Federal Contractor Portal for certification; Employment Law and Compliance; EEO-1 Reports, Vets-4212 Reports, CA Pay Data Report (DFEH), communicating code of ethics, ethical employment practices, organizational effectiveness, and insuring compliance with labor relations, and workplace law. Ms. Oliva has valuable experience in training and has been the consultant to numerous employers through compliance audits and corporate management reviews.

Suzanne and the Employers Group/Everything HR Affirmative Action team place emphasis on comprehensive data reconciliation, applicant tracking, compensation pay equity analysis, "good faith effort outreach, recruiting and other compliance measures that make the Employers Group Affirmative Action program comprehensive.



# OFCCP Regulation Update 2023

WELU 2022

**All companies that hold federal government contracts/subcontracts are required to comply with**

**U.S. Department of Labor**
**Office of Federal Contract Compliance Programs (OFCCP)**
**regulations**

**The OFCCP is a federal enforcement agency with extensive powers. They focus on affirmative action and equal employment opportunity .**

# OFCCP potential changes to 2023 audit scheduling letter Use of Artificial Intelligence

*Item 19*

**Documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.**

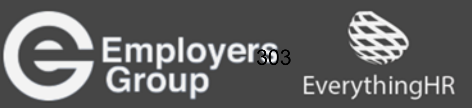
***Overcoming implicit bias can foster a more diverse community***
***Move the company toward improving culture and performance***
***Move the company toward productive relationships with clients***
***Set yourselves up for success!***

# Artificial intelligence (AI)

Artificial intelligence (AI) refers to the simulation of human intelligence in machines that are programmed to think like humans and mimic their actions. The term may also be applied to any machine that exhibits traits associated with a human mind such as learning and problem-solving.

# Artificial intelligence (AI)

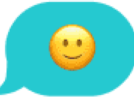
Artificial intelligence (AI) AI is used in the recruitment process to screen resumes and identify the most qualified candidate from a large pool of applicants.



I’m Olivia!

You qualify for an interview!

I’ll help you apply now. Let’s get started! 🎉

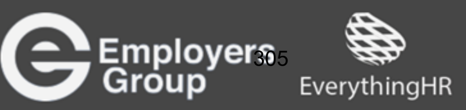


How can I help?

Good luck on your first day! You’ll do great!

# Artificial intelligence (AI)

An algorithm contains the biases of its builder.



# BIAS IN DATA

For example, a face-scanning mechanism is used to determine which applicants are the “best fit,” the system must be based on what has been successful In the past.

If in the past, the AI learns facial detail of white males over time it can defer to white males in selection.

Organizations can mitigate this issue by proactively seeking greater representation and more varied sample datasets.

# ALGORITHM BIAS OR HUMAN BIAS

To mitigate algorithm bias or human bias, we need to think carefully about our intentions when configuring systems and be transparent about our processes.

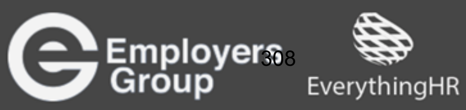
Look for AI creators that are transparent about their creation processes.

Start with clear documentation and communications to reveal any assumptions and explain the reasoning behind decision-making.

# Artificial intelligence (AI)

Along with EEOC and OFCCP there are a few states and cities that are pushing back on the use of unverified AI used in the hiring and selection process.

Employment decisions related to the use of automated employment decision tools should be verified by statistical analysis to show there is no disparate treatment as a result of the tools.



# SET UP COMPANY PROCESSES FOR STATISTICAL MEASUREMENT

To set up your bias audit you will need to:

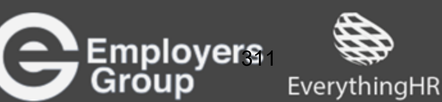
- Define terms
- Clarify your requirements for your selection and hire process
- Clarify your parameters for your bias audit
- Conduct adverse impact analysis on hires and promotions
- Clarify if you are going to publish the results of your bias audit
- Clarify the requirements for notices that employers and employment agencies will provide to employees and candidates for employment
- Set up next steps; your road to improvement

# SET UP COMPANY STEPS TO THE HIRING PROCESS

- ✓ Identify that there is an open position
- ✓ If you are using AI in the process, define & incorporate those steps in your process.
- ✓ Create Requisition
- ✓ Create Job Ad based on the basic and preferred qualification in the job description
- ✓ Insert the EEO Clause in all ads: "*[NAME OF COMPANY] is an Equal Opportunity employer. All qualified applicants will receive consideration for employment without regard to race, color, religion, sex including sexual orientation and gender identity, national origin, disability, protected Veteran Status, or any other characteristic protected by applicable federal, state, or local law.*"
- ✓ Post the job including meaningful outreach for Minority groups, Females, Veterans and Disabled.

# COMPANY STEPS TO THE HIRING PROCESS

- ✓ Instruct the applicant the steps they should take to apply for your position
- ✓ Each Applicant **should** be given the "Voluntary Invitation to Self Identify" for Applicants and Disabled. This step is necessary to measure disparate impact.
- ✓ Review solicited applications/resumes for basic qualifications, preferred qualifications
- ✓ Include Phrase in all ads: "If you are a qualified individual with a disability or a disabled veteran, you have the right to request an accommodation if you are unable or limited in your ability to use or access our career center as a result of your disability. To request an accommodation, contact the Human Resources Department ( ADD EMAIL HERE )

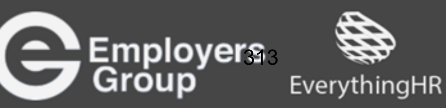


# COMPANY STEPS TO THE HIRING PROCESS

- ✓ Select applicants for interviews based on basic qualifications
- ✓ Fill in your Applicant log data entry
- ✓ Conduct Screening
- ✓ Set up interviews – record interview dates on both interview report and applicant log
- ✓ You can also ask the applicants to complete Employment Application

# ADVERSE IMPACT

Adverse Impact is "*A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group.*"



# CALCULATING ADVERSE IMPACT

Here we use the example of male versus female applicants for faculty hires. We have ten male applicants with 5 male hires for a 50% male selection rate. We also have forty female applicants with 5 female hires for a 12.5% female selection rate.

$$\frac{\text{Male Hires: } 5}{\text{Male Applicants: } 10} = .50 \qquad \frac{\text{Female Hires: } 5}{\text{Female Applicants: } 40} = .125$$

In our example our favored group is males and our unfavored group is females.

# CALCULATING ADVERSE IMPACT

In our example, we are dividing the female selection rate (.125) by the male selection rate (.5) to get .25 or 25%.

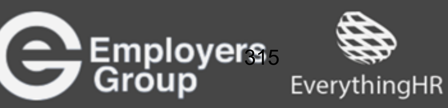
$$\frac{\text{Female Hires: } 5}{\text{Female Applicants: } 40} = .125$$

$$\frac{\text{Male Hires: } 5}{\text{Male Applicants: } 10} = .50$$

$$\frac{.125}{.50} = 0.25$$

Determine whether the result is less than 80%. Remember, according to the regulation, a result that is less than 80% is considered evidence of adverse impact.

In our example, the result is 25% indicating adverse impact.



# SCREEN FOR BASIC QUALIFICATIONS

Algorithms should screen for basic qualifications through questions in the on-line application.

1. Create policy or procedure
2. Ensure questions are consistent with screening for "basic qualifications"
3. Consider similarly situated job seekers
4. Note that if a question had an adverse impact on minorities or women, the company would have the obligation to show that the question is job related and consistent with business necessity

# SCREEN FOR BASIC QUALIFICATIONS

**Sample "Accounting Manager" online screening questions**

1. Do you have experience managing an accounting staff? Yes___NO___

2. Do you have experience with ALL of the following: financial reports, billing, collections, payroll, and budget preparation? Yes___NO___

3. Have you been Responsible for tax planning throughout the fiscal year & filing annual corporate tax return? Yes___NO___

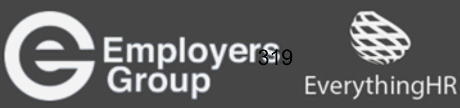
# ALWAYS SELECT THE MOST QUALIFIED

"While employers can and should hire the most qualified workers for the job, they cannot create artificial barriers to employment that unfairly block any individual from competing for good jobs."

# EVALUATION OF THE EFFECTIVENESS OF OUR EQUAL OPPORTUNITY PROGRAM

Annually, Human Resources Team and other relevant stakeholders meet to evaluate the effectiveness of the Equal Opportunity Employment practices.

If the company bias audit data identifies areas of adverse impact these areas are discussed, and the group considers ways to address these deficiencies.



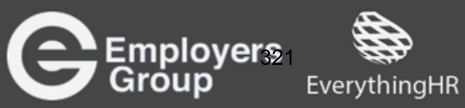
# USE OF EMPLOYMENT TESTS

- Can companies utilize an employment test (such as a personality, knowledge or physical capability test) as part of the online application process?

- Employment tests used as employee selection procedures, including on-line tests, are not considered basic qualifications

# USE OF EMPLOYMENT TESTS

Companies are required to retain records about the gender, race and ethnicity of the individuals who take a test used to screen them for employment, and other records made or kept about the test, regardless of whether the test takers are Internet Applicants.

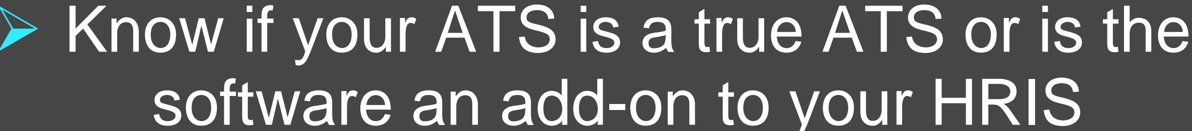


# DIVERSITY OUTREACH AND RECRUITING:

When setting up your defense to explain any adverse impact in hiring ratios it is important to track all recruitment efforts proving:

- where Jobs are posted
- that the recruitment source is receiving your job postings
- that the recruitment source is sending you qualified applicants
- to what extent did the activity attract qualified applicants?
- to what extent did the activity result in hiring?

# APPLICANT SOURCING USING SYSTEM LINKS

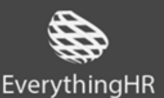
- **Know the capabilities of your ATS**
- Know what links are appropriate for specific job requisitions or job openings

- Know if your ATS is a true ATS or is the software an add-on to your HRIS
- Does your ATS include an applicant report?

# APPLICANT SOURCING USING SYSTEM LINKS

**Most applicant tracking systems allow you to establish links to post jobs with your selected outreach partner.**

- ✓ Test links to be sure they are working
- ✓ Test links by finding the job posting
- ✓ Select all the links where you want to send your job posting

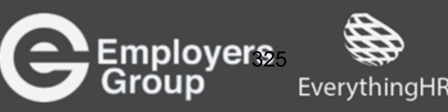
Employers Group



# APPLICANT SOURCING USING SYSTEM LINKS

- ✓ Establish a designated set of links for each protected category:
  - ❑ Females
  - ❑ Individual Minority Groups
  - ❑ Disabled
  - ❑ Veterans
- ✓ Communicate with the people behind the link.
- ✓ Clarify how you want the applicant to apply
- ✓ Gather the information on how the applicant heard about the job opening



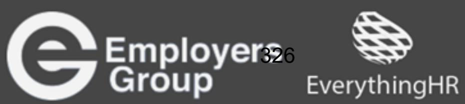


# DATA NEEDED FOR MEASUREMENT

In order to measure for bias you must have an employment application that collects the data.

Data for hires vs. applicants:

- ✓ Applicant Name
- ✓ Title of Position applied for
- ✓ Race, gender, disability status of the applicant
- ✓ Date applied

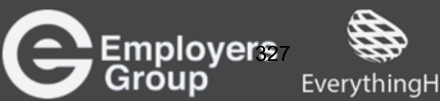


# DATA NEEDED FOR MEASUREMENT

Manage your Applicant Tracking System

Data for hires vs. applicants:

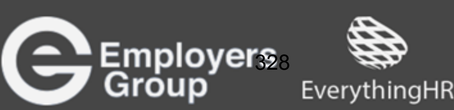
- ✓ EEO category mapped to the job title
- ✓ Date interviewed
- ✓ Date Hired (if hired)
- ✓ Disposition reason (reason the candidate was not hired)
- ✓ Disposition reason for all hires = Hired



# Your Human Resources Department

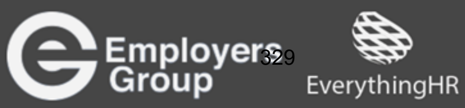
- It is vital that your company policies and procedures are reviewed by the team performing the tasks

- When was the last time the teams were asked how relevant/productive the policies have been in getting the job done?



# HUMAN RESOURCES TEAM DISCUSSION

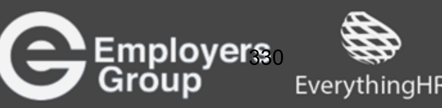
- How diverse is your HR team?
- When job openings come up in the Human Resources Department, we recommend that you conduct diversity outreach and recruiting to all your open positions.



# HUMAN RESOURCES TEAM DISCUSSION

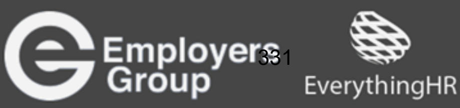
What lessons from employees have you learned about what is working and what is not?

What lessons have you learned from making a quick impromptu hiring decision?



# HUMAN RESOURCES TEAM DISCUSSION

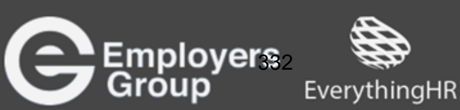
Does your recruitment process have measures in place that reduce the % element of personal preference and stereotyping, and increase the focus on skill and aptitude assessment?



# HUMAN RESOURCES TEAM DISCUSSION

Blind screening or blind recruitment is essential to your equal employment opportunity selection process.

Blind screening is the process of removing any and all identifications details from your applicants resumes and applications.  It helps your hiring team evaluate people on their knowledge, skills, ability and experience instead of factors that can led to biased decisions.



# OFCCP potential changes to 2023 audit scheduling letter
# Promotions

Item 20(c)(previously Item 18)

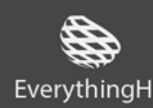
Promotions: For each job group or job title, provide the total number of promotions by gender and race/ethnicity, and identify whether each promotion was competitive or non-competitive. Provide documentation that includes established policies and describes practices related to promotions in the submission. Also include the previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which the person(s) was promoted.

# OFCCP potential changes to 2023 audit scheduling letter

## Types of Promotions

1. A competitive promotion occurs when individuals compete for and are considered for a position that results in a promotion.

2. *Succession planning is a process by which individuals are scanned to pass on the leadership role within a company.*

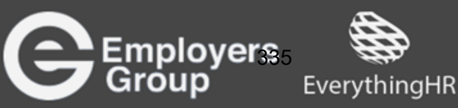


# OFCCP potential changes to 2023 audit scheduling letter

## Types of Promotions

3. Promotions in line typically entail accepting responsibility for supervising people in positions like the one you hold now. Promotions in line, like other promotions, aren't about reward or recognition — they satisfy employer needs.

4. The union may consider a successful shift bid a promotion if it included a higher hourly wage or shift differential.

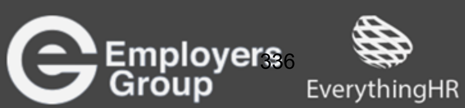


# OFCCP potential changes to 2023 audit scheduling letter

## Promotion Policy

Provide documentation that includes established policies and describes practices related to promotions.

Provide your promotion policy objective, eligibility and procedure.



# OFCCP potential changes to 2023 audit scheduling letter

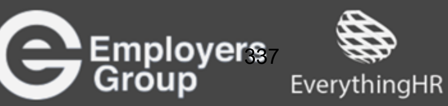
# Promotion Employee Documentation

## For each promoted employee include:

Previous supervisor & current supervisor

Previous compensation & current compensation

Previous department, job group, and job title & current department, job group, and job title



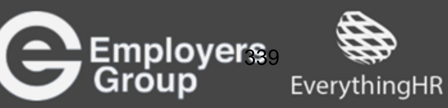
# OFCCP potential changes to 2023 audit scheduling letter
# Terminations

**(new Item 20(d)(previously Item 18)**

**Terminations: For each job group or job title, provide the total number of employee terminations, broken down by reason(s) for termination (*e.g.*, retirement, resignation, conduct, etc.) including gender and race/ethnicity information for each. When presenting terminations by job title, also include the department and job group from which the person(s) terminated.**

# EMPLOYEE TURN OVER RATE
## Terminations

- What is your employee turnover %,
- There are "High Risk algorithms being developed that measure employee performance while on the job.
- While these may make sense they can also be seen as discriminatory.

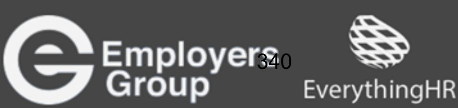


# EMPLOYEE TURN OVER RATE

## Terminations

**If the termination in question is a non-voluntary termination, we recommend that you review your progressive discipline policy with the managers and make sure you can defend the termination/s in question.**

- ❑ **Did the terminating manager follow the company policy?**
- ❑ **Document the criteria behind "Reduction in force" or "Layoff"**
- ❑ **Document if any of the terminations were “call backs”.**



# EMPLOYEE TURN OVER RATE

Does your HR team know exit reasons and breakdown of the voluntary and non-voluntary termination reasons?

- **If the termination in question is a voluntary termination, we** recommend that you conduct a turnover study.
- Involve your management and risk team
- Look for solutions that are geared at reducing turnover.

# OFCCP potential changes to 2023 audit scheduling letter Compensation

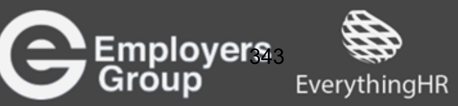
Item 21 (previously Item 19)

Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees, including those provided by staffing agencies) **as of (1) the date of the organizational display or workforce analysis and (2) as of the date of the prior year's organizational display or workforce analysis.**

# OFCCP potential changes to 2023 audit scheduling letter Compensation

## Item 22 (new)

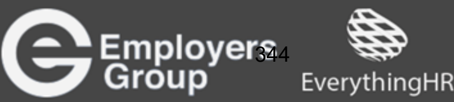
Documentation that the contractor has satisfied its obligation to evaluate its "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities," as part of the contractor's "in-depth analyses of its total employment process" required by 41 CFR 60-2.17(b)(3).



# OFCCP potential changes to 2023 audit scheduling letter Compensation

**Include documentation that demonstrates at least the following:**

- When the compensation analysis was completed; ei. 1/15/2023
- Number of employees the compensation analysis included
  Number and categories of employees the compensation analysis excluded; this depends on your analysis



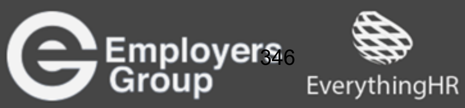
# OFCCP potential changes to 2023 audit scheduling letter

## Compensation

- Which forms of compensation were analyzed
- Where applicable, how the different forms of compensation were separated or combined for analysis (*e.g.*, base pay alone, base pay combined with bonuses, etc.);

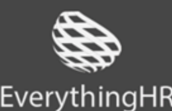
# OFCCP potential changes to 2023 audit scheduling letter
## Compensation

- Documentation that compensation was analyzed by gender, race, and ethnicity;



# OFCCP potential changes to 2023 audit scheduling letter
## Compensation

- The method of analysis employed by the contractor (*e.g.*, multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.).



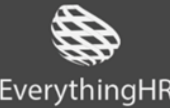
# Recruiting And Meaningful Outreach

# OFCCP's Outreach Regulations

***"External dissemination of policy, outreach and positive recruitment through Required outreach efforts."***

1) *The contractor shall undertake* ***appropriate outreach and positive recruitment activities*** *such as those listed in paragraph (f)*

2) *Efforts that are reasonably designed to effectively recruit protected groups.*




# Recruitment

**Recruitment is the process of finding, screening, hiring and eventually onboarding qualified job candidates.**

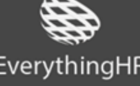
# Outreach

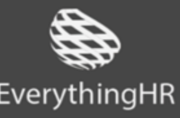
**Outreach is a process of creating and tracking your outreach partners.**

**You must be able to prove to OFCCP what partner(s) you used to post your jobs**

**And was that outreach partner able to send you qualified applicants.**

Employers Group





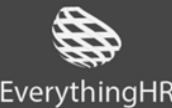

# How Are You Tracking Your Outreach Efforts?

## Recommendations:

Conduct recruiting efforts and positive outreach

- Track: Female, Minority, Disability and Veteran outreach partners

When an outreach partner is NOT sending qualified applicants replace them by adding to your outreach recruitment source list for that protected category.



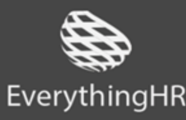

# Use Of Agencies And Head-Hunters For Outreach And Recruiting

- **Agencies and headhunters are outreach partners.**
- **The use of a recruiting firm in the hiring process does not relieve a contractor of its recordkeeping obligations**

# How To Follow Compliance With Your Outreach And Recruiting

OFCCP regulations require the contractor to document all outreach and recruitment activities, and retain these records for three (3) years

This should enable contractors and OFCCP to evaluate the effectiveness of these efforts in identifying and recruiting qualified applicants



# Tracking Your Outreach Efforts

# Document Your Mandatory Recruiting And Targeted Outreach

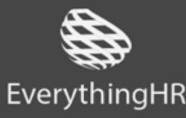
**You must be able to prove your outreach!**

- Job postings
- Phone calls
- Emails
- Meeting with the "Local Veterans Employment Rep"
- Communication for recruiters for disabled
- Job fairs
- Meetings with recruiting specialists

# OFCCP's Outreach Regulations

OFCCP requires federal contractors to track all recruitment efforts proving:

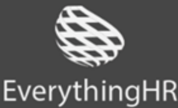
- Where Jobs are posted
- That the recruitment source you are using is receiving your job postings
- That the recruitment source can send you qualified applicants




# Tracking Your Outreach Efforts

**Evaluate the results of each outreach and recruitment activity to see if it is producing measurable results:**

1. **To what extent did the activity attract qualified applicants?**
2. **To what extent did the activity result in the hiring?**
3. **To what extent did the activity expand outreach?**
4. **To what extent did the activity increase capacity/capability?**

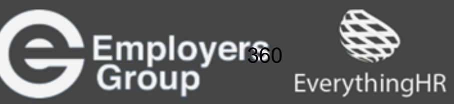


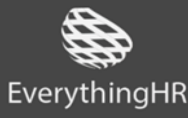

# OFCCP's Outreach Tracking #1

- Agent Type - Outreach
- Community Organization Recipient Type - Diversity
- Date Emailed ---/---/----
- Community Organization Recipient:
  - Recipient Name
  - Recipient Email(s)
  - Recipient Street Address, City, State, Zip
- Status of Outreach Assessment Recipient:
  - Yes, this organization is active
  - Yes, receiving our job postings
  - Yes, can send us qualified applicants

# OFCCP's Outreach Tracking #2

- Agent Type - Outreach
- Community Organization Recipient Type - Diversity
- Date Emailed ---/---/----
- Community Organization Recipient:
  - Recipient Name
  - Recipient Email(s)
  - Recipient Street Address, City, State, Zip
- Status of Outreach Assessment Recipient
  - No, contact email rejected, unable to contact
  - No, recruitment source no longer in business
  - No, can no longer send us qualified applicants





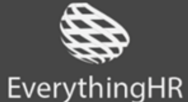

# OFCCP's Outreach Tracking #2

**Status** of Outreach Assessment Recipient

- No, contact email rejected, unable to contact
- No, recruitment source no longer in business
- No, can no longer send us qualified applicants

In this case the "Outreach Partner" needs to be replaced or updated.

Leave the "Outreach Partner" on your spreadsheet but note that this partner is "being replaced or updated"




# How To Follow Compliance With Your Outreach And Recruiting

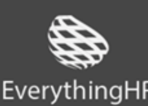
There is no requirement for a specific number of outreach relationships

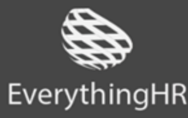
The requirement is to track:

What is working?

What is not working?

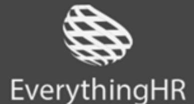
# Recruiting





# Recruitment

**Recruitment is the process of finding, screening, hiring, and eventually onboarding qualified job candidates.**




# Carefully Research Resources

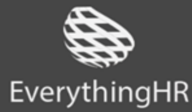
- State Empl.Office
- Female
- Black
- Hispanic
- Asian
- Nat American
- NHOPI
- Veteran
- Disabled
- University
- Local College
- Career Fair

# Posting With The State

Federal contractors and subcontractors ARE REQUIRED to post ALL jobs with the state employment office.

There are only three (3) exceptions:

- Jobs that last 3 days or less
- Internal Promotions
- Executive and Top Officials




# Posting With The State

**When you post your jobs with the State Employment Office it is your responsibility to notify the Local Veterans Employment Representative with:**

1. The name and location of each of your hiring locations
2. Your status as a federal contractor
3. Your hiring official contact information at each location in the state
4. Your request for priority referrals of protected veterans for job openings at all your locations within the state. (LVER)
5. Contact information for any/all 3rd-party employment services used by the contractor

**https://www.careeronestop.org/LocalHelp/service-locator.aspx**

# Posting With The State

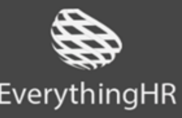
**Include all these job postings in your "outreach assessment"**

www.servicelocator.org

# You Have Flexibility

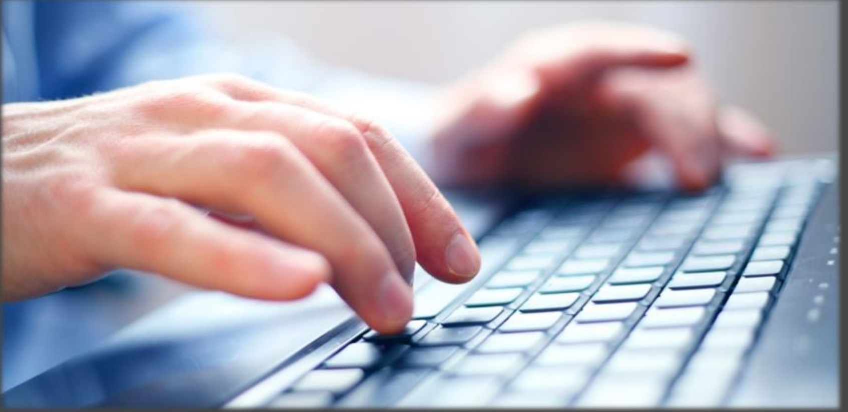
- You have the flexibility to choose recruitment resources
- You have flexibility to switch between and among different resources

EverythingHR




# You Have Flexibility

- Send the recruitment sources a letter telling them about your job openings and invite them to refer qualified applicants for the job.
- Invite them to assist you in your diversity recruitment efforts



# Sample Letter To Recruitment Source

**Will you verify that your company is able to source job applicants for any or all of the following categories: (check all that apply)**

- ☐ Minority
- ☐ Female
- ☐ Disabled
- ☐ Veteran

**Will your organization assist us in increasing the number of qualified applicants that are:**

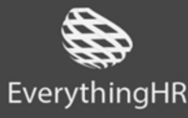
- ☐ Minority
- ☐ Female
- ☐ Disabled
- ☐ Veteran

- Are you receiving our job postings? Yes ______ No _______
- Are you the correct contact to receive our job postings?
- Yes ______ No _______

WELU 2022

# Social Media Recruiting

You can use social media to post jobs




# Search Engine Recruiting

## You can use search engine sites to source resumes

Job Sources

MULTI-POSTERS
CRM & DATABASES

broadbean, LOGICMELON, idibu, jobmate, meta, Bullhorn, Voyager, Profile, influence, Colleague, ProNet, Adapt, itris, MATCHMAKER, darwin, evolve

And more!

FRONT END WEBSITE

CONTENT MANAGEMENT SYSTEM

JOB MARKETING

ANALYTICS & REPORTING

Candidate Sources

JOB SITES
SEARCH & SOCIAL

Google For Jobs, indeed, Jobsora, trovit, jobrapido, JOBMANJI, Mitula, recruit-net, jooble, adzuna, jobisjob

And more!

# Social Media & Search Engine Recruiting

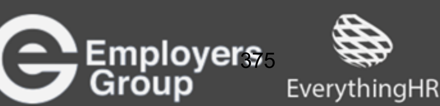
**Using social media or search engines to post jobs:**

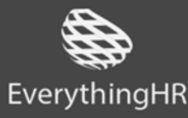
- Publicize job openings
- Use the same criteria as documented in all your other job postings
- Consider candidate's qualifications for a position.
- Select the most qualified
- Track all expressions of interest that meet the BQs

# Social Media & Search Engine Recruiting

**Caution:**

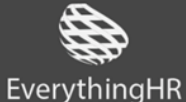
- Not all applicants use social media or search engines.
- Use a wide variety of job posting sources to avoid adverse impact of disadvantaged groups
- Never use personal information as a basis for your selection decision. Applicants disclose information that an employer cannot consider
- Look at multiple applicant's profiles
- Only consider the applicants qualifications, not the comments from others






# Search Engine Sourcing

- Set up your search using the basic qualifications for a position listed in your job description
- Track all results of your search
- Works well for "confidential hires"
- Where adverse Impact results, conduct a further search
- Need more applicants? Widen your search criteria
- Be able to prove your process to the OFCCP

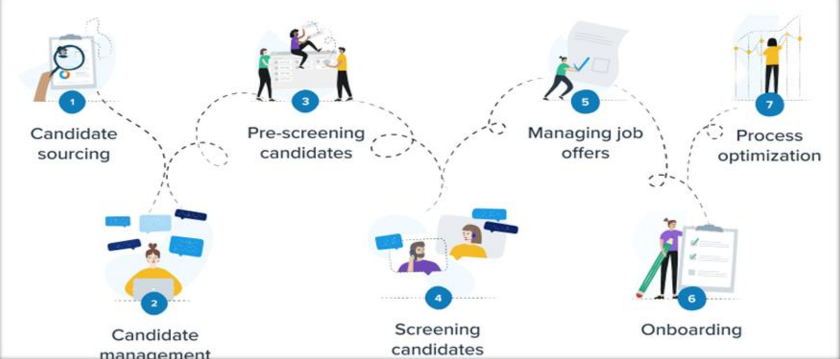



# How To Follow Compliance With Your Outreach And Recruiting

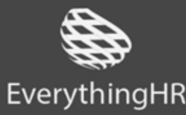
**There is no requirement for the length to time to keep your job posting "active"**

**The requirement is consistency with all postings:**

- Language must be consistent
- Basic and preferred qualifications must be the same
- Length of posting must be the same



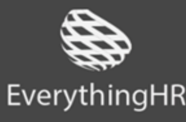

# Outreach And Electronic Applicant Tracking Systems Through Links




# Applicant Tracking System (ATS) Links

**Know the capabilities of your ATS**

- **Know what links are appropriate for specific job requisitions or job openings**
- **Know if your ATS is a true ATS or is the software an add-on to your HRIS**
- **Does your ATS include an OFCCP compliant reporting module or pre-canned report?**

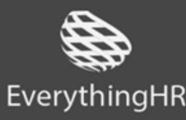



# Applicant Tracking System (ATS) Links

**Your ATS system may also require that you click a box to include your clauses.**

**SAMPLES MAY BE:**

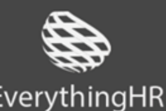
- ✓ Job posting clause
- ✓ ADA clause for disability
- ✓ Anti Bias clause
- ✓ ITAR clause
- ✓ eVerify clause




# Applicant Tracking System (ATS) Links

**OFCCP will look for your job posting EEO clause in your job postings.**

- ***Company is an Equal Opportunity/Affirmative Action employer.*** *All qualified applicants will receive consideration for employment without regard to race, color, religion, sex including sexual orientation and gender identity, national origin, disability, protected Veteran Status, or any other characteristic protected by applicable federal, state, or local law."*




# Using 3rd Party To Recruiters

# 3rd Party Venders To RECRUIT QUALIFIED APPLICANTS

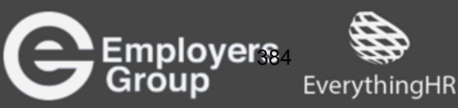
**A successful diversity recruitment vendor must be able to:**

- ✓ Assign diversity-certified recruiters
- ✓ Conduct online recruitment and job advertising
- ✓ Have an understanding of OFCCP outreach compliance
- ✓ Conduct jobs search for
  - Females
  - Minority groups
  - Veterans
  - Disabled

# 3rd Party Venders To RECRUIT QUALIFIED APPLICANTS

A successful diversity recruitment vendor must be able to:

- ✓ Post jobs with the relevant state job boards
- ✓ Post jobs across a variety of relevant diversity, veteran, and disability-focused job boards
- ✓ Maintain detailed records of all the above



# 3rd Party Venders To RECRUIT QUALIFIED APPLICANTS

A successful diversity recruitment vendor must include:

- ✓ Online "Employment Application"
- ✓ Online Application must also include
  - ✓ Voluntary Self Identification Form for Race, Gender and Veteran Status
  - ✓ Voluntary Invitation to self Identify Form for Disability, Form CC-305
- ✓ Tracking of the point of origin for all applicants
- ✓ Flexible reporting/export options

# 3rd Party Venders To RECRUIT QUALIFIED APPLICANTS

**3rd party recruitment vendors scan your jobs posted on your corporate website**

Be sure your postings are accurate and complete. They can only scan what you give them

# Electronic Internet Applicant Rule

# U.S. Dept of Labor Electronic Applicant Tracking Rule

Employers Group
EverythingHR

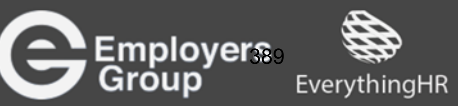
**An Internet Applicant is defined as an individual who satisfies the following criteria:**

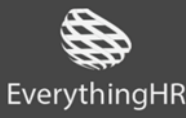
1. The individual submits an expression of interest to an open position through the Internet or related electronic data technologies;
2. The expression of interest must be in writing by either submission of a solicited resume or application,
3. The contractor considers the individual for employment in a particular position;
4. The individual must possess the basic qualifications for the position; and,
5. The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes themselves from further consideration or otherwise indicates they are no longer interested in the position.

# Applicant Selection

## Poll Question

Under the "Electronic Applicant Tracking Rule" Is a contractor required to consider every job seeker who expresses an interest in employment through the Internet and possesses the basic qualifications for the posted position?






# Applicant Selection

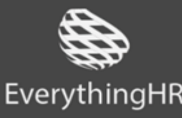
## Poll Question

A. No, only applicants that are interviewed must be tracked

B. Yes,  all applicants must be tracked

C. Yes, all applicants that meet the basic qualifications must be tracked

D. Yes, all applicants that apply for an open position, apply in writing, meet the basic qualifications and do not self remove from the posting must be tracked




# Applicant Selection

## Poll Question

A. No, only applicants that are interviewed must be tracked

B. Yes, all applicants must be tracked

C. Yes, all applicants that meet the basic qualifications must be tracked

D. Yes, all applicants that apply for an open position, apply in writing, meet the basic qualifications and do not self remove from the posting must be tracked

# What Do We Do With Walk-Ins?

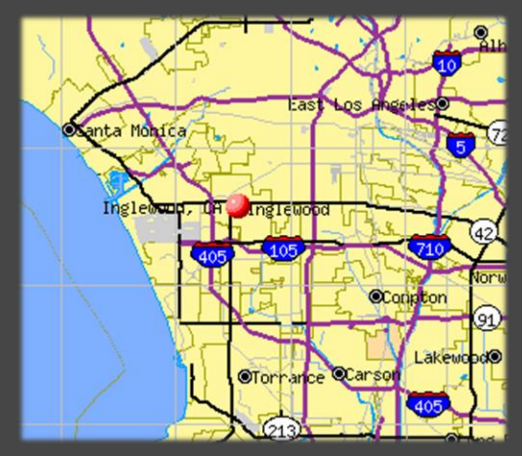
**Recommendation: Create front office flyer**

*Dear Applicant,*

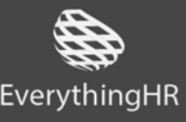
*We appreciate your interest in our job opportunities.*
*We post all of our jobs on the Corporate Website.*
*http://www.xyzcompany.com/*

*Or through the state employment office.*

*The local State Employment office address is:*
*110 South La Brea Avenue*
*Inglewood, CA 90301*




*Include: Map; Driving Directions; phone; hours of operation; website address.*

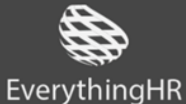


# Selection Process

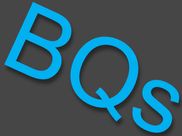
# Always Select the Most Qualified

Base your selection decision on the applicant's knowledge, skill and ability to do the job

Always benchmark their application and/or resume against the "basic qualifications" you listed in the job ad

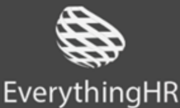



# Always Select the Most Qualified




**Always be able to prove to the OFCCP that you selected the most qualified individual**

**Never base your selection decision on *race, color, religion, sex, sexual orientation, gender identity, national origin, disability, protected Veteran Status, or any other characteristic protected by applicable federal, state, or local law***




# Applicant Selection

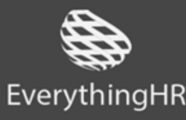
**Does a contractor "consider" an individual merely by running a (basic qualifications) search that brings up the individual's resume, if the contractor never opens the resume?**

**Not Considered**
**Not Reviewed**

# Applicant Selection

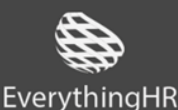
**If the contractor does not open the resume as a result of appropriate data management techniques that limit the number of resume "hits" that are reviewed, then the contractor has not "considered" that individual.**

**Not Considered**
**Not Reviewed**




# Applicant Selection

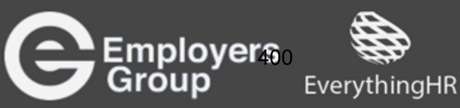
- Example: Your applicant pool has 40 applicants.
- You review the first 20 resumes, by date applied, and select one individual for hire.
- The other 20 applicants are “Not considered, Not reviewed”

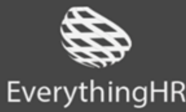



# Applicants and Section 503 Implementation of The Interactive Process

# The Employment Application Asks The Applicant To Check The Box:

- ❑ Can you perform the essential functions of the job with or without a reasonable accommodation?
- ❑ Would you like someone to contact you regarding a reasonable accommodation?

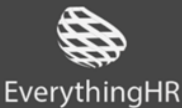





# The Interactive Process

If you have an individual with a disability request a reasonable accommodation you must enter into the "**Interactive Process**"

This can be for applicants or employees

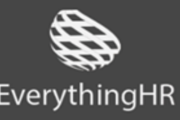



# What is "The Interactive Process"

- The Interactive process is to discover if the disabled applicant or employee needs a reasonable accommodation
- If an accommodation is needed the company needs to know the details of the required accommodation
- The process is <u>not</u> to discover the details of the disability

# Applicant Data Tracking

**Applicant data is used to measure adverse impact of selection processes**




# What If We Do Not Meet Our Placement Goal?

**Failure to meet the placement goal is not a violation of the regulations and will not lead to a fine, penalty or sanction**

**The regulations specifically provide that the goal is not to be used as a quota or a ceiling that limits or restricts placement**

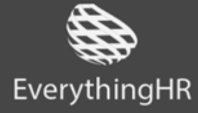
# What If We Do Not Meet Our Placement Goal?

**When you have placement goals you must show that you have conducted positive outreach and meaningful recruiting**

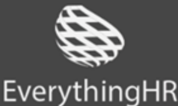
**If you cannot prove to the OFCCP that you have conducted meaningful recruitment efforts they will issue a violation**

# When Should Contractors Collect Voluntary Self ID Data?

Contractors are required to request race, gender, disability and veteran status data from all applicants as soon in the applicant process as is possible



# Disposition Reasons




# Disposition Reasons

**Your reason must answer: Why was the applicant not the most qualified?**

**Examples of appropriate reasons:**

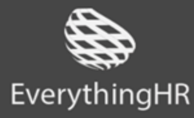
1. Not enough relevant experience
2. Did not display skills listed on resume
3. Lack of relevant education
4. Failed skills test
5. Not most qualified – unprofessional dress or demeanor
6. A more experienced applicant was selected
7. This applicant was selected for another position with the company

# Disposition Reasons

**Always track when an offer is extended**

**These reasons must be documented because an offer was extended:**

1. Applicant declined offer
2. Failed drug test or Did not show for drug test
3. Background check
4. No show to work

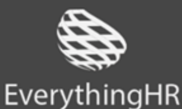



# Disposition Reasons

**The following are no longer applicants:**

1. Applicant declined interview
2. Applicant got another job
3. Applicant was no longer interested
4. Position closed or position cancelled

**Do Not Include in Adverse Impact Analysis**



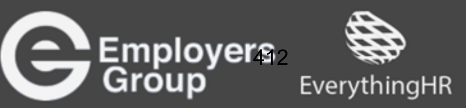

# Disposition Reasons

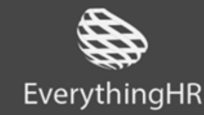
## The following are not disposition reasons:

1. Unknown
2. Other
3. Not Hired
4. Pending
5. Blank
6. Sent to Manager

# APPLICANT SELECTION
# POLL QUESTION

**If the contractor does not open the resumes that come in through the electronic applicant process, and the contractor hires an employee referral can the contractor be charged with discrimination?**



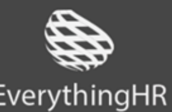



# APPLICANT SELECTION
# POLL QUESTION

If the contractor does not open the resumes that come in through the electronic applicant process, and the contractor hires an employee referral can the contractor be charged with discrimination?

**Yes**, the individual selected must be the most qualified applicant. The other applicants that applied before or at the same time as the referral should be considered.

WARNING




# Applicant Tracking Errors

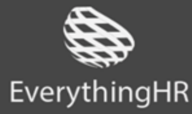
# Errors In Applicant Data

## Applicant must apply for an open position

Your applicant data must include

- Date applied
- Date interviewed
- Application and interview dates should be dated before the new hire date

**Applicant Tracking Error**



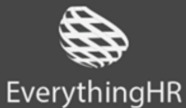

# Errors In Applicant Data

## Applicant must apply in writing

- Applicants that are hired without a resume or application are a red flag to OFCCP. They want to see that the applicant meets the definition of an internet applicant
- Applicant must apply for a specific job

The record of “Position applied for” should not be “any”.

**Applicant Tracking Error**




# Errors In Applicant Data

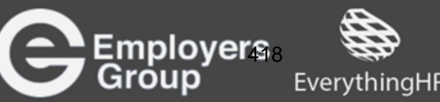
**The Applicant must meet the basic qualifications for the position**

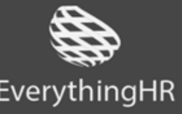
- Applicants should be true competitors
- Narrow your applicant pool
- Leaving in all "expressions of interest" in your pool could expose your company to adverse impact that is otherwise avoidable

## Applicant Tracking Error

NON-COMPLIANCE AHEAD

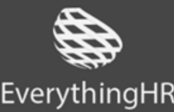
# Exposure for Non-Compliance Technical Violations Notice of Discrimination






# OFCCP Technical Violations

**New hires with no qualified "Applicant Pool"**

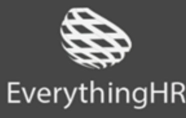



# OFCCP Notice of Violation

**This section will cover more serious violations that can lead to monetary fines and if not solved the company could be issued a consent decree or stop notice**

# OFCCP Notice of Violation

- Adverse Impact
- Contractor cannot justify selection processes and decisions
- Contractor did not or will not maintain and have available for inspection applicant & interview records
- Absence of validation testing if adverse impact is present




# Adverse Impact

**The existence of adverse impact is not always the result of an intentional action.**

**Example: An applicant pool may have a majority of males who applied. Your outreach data and your disposition reasons will be your defense.**

**Recommendation:**

- **Expand the recruitment area to include more females for non-traditional roles.**
- **Never target females or minorities for hire just because they are in a protected category.**

# OFCCP NOTICE OF DISCRIMINATION APPLICANT TRACKING DATA CONTENT

**For more information on documented notices of discrimination go to:**

**http://www.dol.gov/ofccp/**

**Latest Events and News**

## Notice of Discrimination

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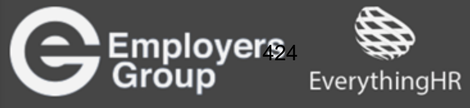
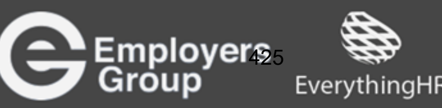
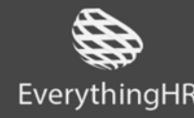


# EMPLOYERS GROUP AAP

**If Employers Group is writing your Affirmative Action Plan all the forms, letters, postings and clauses will be included in your plan**






# Meet Your AAP Team

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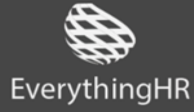
# COMPLIANCE IS OUR GOAL

## It takes all of us!




# QUESTIONS?

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# 10:40-11:40

# Leveraging Your Employee Handbook

## Colin Calvert

Colin Calvert is a partner in the Irvine office of Fisher Phillips. He works exclusively with employers to address every aspect of the employment relationship. Whether the issue involves applicants and onboarding, ensuring the safety and performance of current employees, or handling the fallout of messy terminations Colin and Fisher Phillips are prepared to assist.

Over the course of the past decade Colin has prepared and advised on over 500 employee handbooks. At the same time, he appreciates that each and every handbook and employer is unique. He looks forward to working with clients proactively on employment issues and is constantly surprised by the issues his clients face.

# Leveraging Your Employee Handbook

**COLIN CALVERT**
**Parter**
**Fisher Phillips**

Email: ccalvert@fisherphillips.com
Phone: (949) 798-2160

# It’s 10:45, do you know where your handbook is?

- When was it drafted?
- What is your attendance policy?
- Progressive discipline?
- When did you update your arbitration agreement?
  - Do you even have one?

# It’s more than a legal document

- It’s a statement of intent
- It’s a promise to your workforce
- It’s your most powerful management tool

# It’s also a singular point of risk

- If it’s mothballed
- If it’s application isn’t uniform
- If it’s out of date

# Your Handbook Deserves Better

- **Employers invest a significant amount of time, energy, and often legal fees in the creation of their handbooks**
- **These efforts can and should do more than check the box**

# Leveraging Your Handbook

- Ensure it's up to date. Handbooks should be updated every 18 months at least
- Outdated and unnecessary policies are a liability trap
  - In the past 18 months alone arbitration language has changed twice
  - Protected categories have grown
  - Paid sick and CFRA leave has expanded
  - Meal and Rest period penalty pay has changed
  - COVID-19 policies have likely lapsed

# Leveraging Your Handbook

- Don’t take your lawyer’s words for it
  - A handbook should speak to your key areas of emphasis and culture
  - If you’re unclear on a policy or aren’t sure what a key requirement is, how can you expect your employees to be?

# Leveraging Your Handbook

- Do more than dropping it on a new hire's desk or sending a .pdf
  - The orientation process is the singular moment when you have an employee's (alleged) undivided attention
  - While no one remembers orientation, it remains your best opportunity to communicate the importance of the handbook and reinforce key policies

# Leveraging Your Handbook

- **Market the Handbook**
  - **Emails, Reminders, Multiple points of access**

# Leveraging Your Handbook

- Lean on Managers
  - The Handbook is a managers best tool for accountability, its rarely used
  - Managers should receive semi-annual handbook refreshers or periodic training on key points of emphasis within the handbook and how to discipline on the same

# Leveraging Your Handbook

- Expand your toolbox
  - Ensure managers have uniform enforcement tools alongside the handbook
    - Disciplinary/Coaching Forms
    - Stand alone documents
    - Termination notices with substantive content
    - Stand alone leave policies

# Leveraging Your Handbook

- Train, Train, Train
  - In addition to periodic handbook updates, issue stand alone reminders to employees incorporating the handbook
    - “This is a reminder, that as set forth in the handbook…”
    - It’s a perfect way to reinforce policy and ensure the handbook remains top of mind for employees

# Leveraging Your Handbook

- Understand the end game
  - Arbitration agreements
  - Exit interviews
  - Providing notice

# Final Questions

**COLIN CALVERT**
**Parter**
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Email: ccalvert@fisherphillips.com
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# Thank You

**COLIN CALVERT**
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# 12:20-1:40

# Judicial and Employment Law Update

# Richard Simmons

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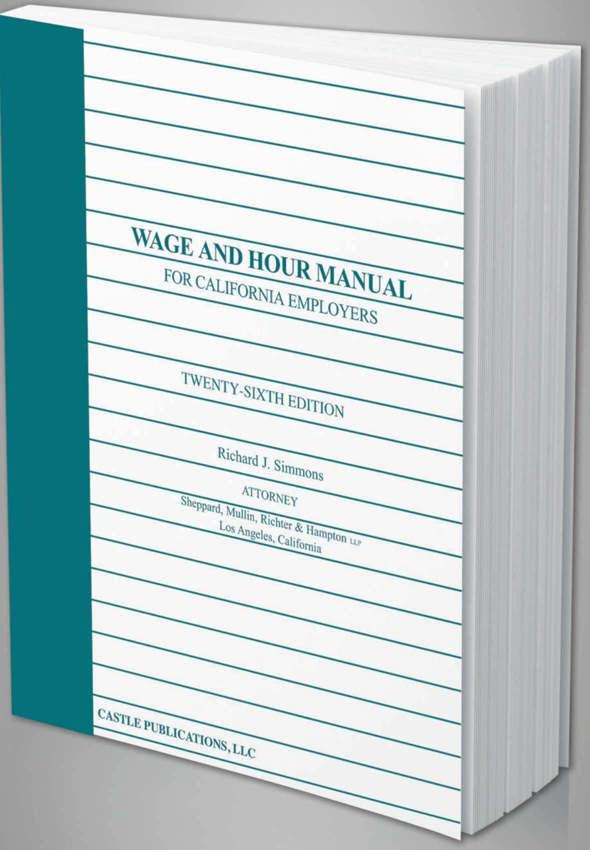


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The California Court of Appeal cited and followed Richard Simmons' treatise, the **Wage and Hour Manual for California Employers**, in a recent decision.

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- Won the only California Supreme Court case for employers in all of 2018
- Appeared on NBC and CBS News as a labor relations expert
- Successfully worked on drafting and securing adoption of new legislation, including new law for professional sports teams
- Selected by Continuing Education of the Bar (CEB) as featured author on California employment laws

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Richard J. Simmons is a partner in the Labor and Employment Practice Group in the firm's Los Angeles office.

**Areas of Practice**

Richard is a lawyer's lawyer and represents employers in wage-hour, PAGA, discrimination, contract, and wrongful discharge lawsuits. He has represented employers in over 100 class action lawsuits and landmark decisions. When the California Industrial Welfare Commission (the agency responsible to issue the state's Wage Orders) was sued, it asked Richard to defend the case over all other firms.

Richard represents employers in various employment law matters involving litigation throughout the country and general advice regarding state and federal wage and hour laws, employment discrimination, wrongful discharge, employee discipline and termination, employee benefits, affirmative action, union representation proceedings, and contract arbitrations.

## Honors

500 Leading U.S. Corporate Employment Lawyers, *Lawdragon*, 2016-2017, 2020-2023

Top Labor & Employment Lawyer, *Daily Journal*, 2009-2014, 2016-2022

Few management attorneys have prevailed in cases before the California Supreme Court in the past 10 years. Not only is Richard one of the few, he was the only management attorney to win an employment case before the Supreme Court in 2018.

He was named the Labor & Employment Attorney of the Year by the *Los Angeles Business Journal* in 2017.

Best Lawyers in America, *Best Lawyers*, 2009-2023

The Nation's Most Powerful Employment Attorneys, *Human Resource Executive*, 2015, 2017

Employment Lawyers Hall of Fame Inductee, *Lawdragon*, 2017, 2022

Bar Register of Preeminent Lawyers, 2020

Leading Lawyer in Labor and Employment, *Chambers USA*, 2006-2022

Recognition as expert in Labor and Employment, *The Legal 500*, United States

Labor and Employment Star - California, *Benchmark Litigation*, 2020-2023

California Hospital Association Certificate of Distinction, 2015

International Who's Who of Management Labour & Employment Lawyers, 2012, 2015

Recognized, Labor & Employment and Labor & Employment Litigation, *Legal 500*, 2011-2014, 2016-2018

"10 Leading Rainmakers," *Daily Journal*, 2009

Employment MVP, *Law360*, 2011

Litigation Star, *Benchmark Litigation*, 2011-2012

Who's Who Legal: California, 2008-2009

Southern California Super Lawyer, *Super Lawyers*, 2008-2022

Best of the Bar, Labor and Employment, *Los Angeles Business Journal*, 2007

Appointed by the California Industrial Welfare Commission as a member of three separate Minimum Wage Boards for the State of California

Graduated *summa cum laude*, University of Massachusetts as Commonwealth Scholar and member of *Phi Kappa Phi* Honor Society

President Sophomore Men's Honor Society

## Articles

- When Must Employee Travel Time Be Paid
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- Antelope Valley Board of Trade Business Outlook Conference Had Something for Everyone
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- "The New California Fair Employment and Housing Regulations: A Case of Administrative Overreaching," Employee Relations Law Journal, Vol. 6, No. 2
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- "First Amendment Protection of Shopping Center Picketing," Industrial Relations Law Journal, Boalt Hall School of Law

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- "California Department of Public Health Issues COVID-19 'Employer Playbook,' " August 5, 2020
- "California Supreme Court Confirms Validity Of Meal Period Waivers For Healthcare Employees," December 12, 2018
- "Sheppard Mullin Secures Major Victory for Chipotle in Nationwide Misclassification Action By Demonstrating Variations Among Proposed Class Members," April 10, 2017
- "California Court of Appeal Affirms Validity of Hospital Meal Period Waivers," March 16, 2017
- "Supreme Court Holds That Rest Periods Must Be Free From Duties And Employer Control," January 3, 2017

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California lawyers companies turn to first
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01.23.2006

Interview with Richard J. Simmons
02.23.2002

## Speaking Engagements

Mr. Simmons has lectured nationally on wage and hour, employment discrimination, wrongful termination, and other labor relations matters.

He has also been a lecturer at graduate labor law courses presented by the University of California at Los Angeles and the University of Southern California, and has appeared as an authority on labor law and employee benefit issues on the CBS Evening News and NBC Nightly News.

## Events

2022 Employee Handbook And Personnel Policies
Castle's Seminar Experience
In Person OR Virtual, 09.20.2022

2022 Employment Discrimination And Employee Relations Laws
Castle's Seminar Experience
In Person OR Virtual, 09.14.2022

2022 Wage And Hour Laws
Castle's Seminar Experience
In Person OR Virtual, 09.13.2022

2022 Employee Handbook And Personnel Policies
Castle's Seminar Experience
In Person OR Virtual, 03.22.2022

2022 Employment Discrimination And Employee Relations Laws
Castle's Seminar Experience
In Person OR Virtual, 03.16.2022

2022 Wage And Hour Laws
Castle's Seminar Experience
In Person OR Virtual, 03.15.2022

2021 Employee Handbook And Personnel Policies
Castle's Seminar Experience
In Person OR Virtual, 09.21.2021

2021 Employment Discrimination And Employee Relations Laws
Castle's Seminar Experience
In Person OR Virtual, 09.15.2021

2021 Wage And Hour Laws
Castle's Seminar Experience
In Person OR Virtual, 09.14.2021

2021 Wage And Hour Laws
Castle's Seminar Experience
Live Broadcast, 04.01.2021

2021 Employment Discrimination And Employee Relations Laws
Castle's Seminar Experience
Live Broadcast, 03.25.2021

2021 Employee Handbook And Personnel Policies
Castle's Seminar Experience
Live Broadcast, 03.18.2021

14th Annual Labor and Employment Law Virtual Conference
American Bar Association
November 11-13, 2020

2020 Employee Handbook And Personnel Policies
Summer 2020
Live Broadcast Experience, 09.24.2020

2020 Employment Discrimination And Employee Relations Laws
Summer 2020
Live Broadcast Experience, 09.17.2020

2020 Wage And Hour Laws
Summer 2020
Live Broadcast Experience, 09.10.2020

Reopening America – The Return To Revamped Workplaces During The Pandemic
Webinar, 05.13.2020

POSTPONED: 2020 Wage And Hour Laws
Winter 2020

2020 Employee Handbook And Personnel Policies
Winter 2020

2020 Employment Discrimination And Employee Relations Laws
Winter 2020

2019 Wage And Hour Laws
Summer 2019

2019 Employee Handbook And Personnel Policies
Summer 2019

2019 Wage And Hour Laws (NY)
Sheppard Mullin Office - 30 Rockefeller Plaza, 09.10.2019

2019 Employment Discrimination And Employee Relations Laws
Summer 2019

2019 Wage And Hour Laws
Winter 2019

2019 Employee Handbook And Personnel Policies
Winter 2019

2019 Employment Discrimination And Employee Relations Laws
Winter 2019

2018 Wage and Hour Laws
Summer 2018

2018 Employee Handbook And Personnel Policies
Summer 2018

2018 Employment Discrimination and Employee Relations Laws
Summer 2018

2018 Wage And Hour Laws
Winter 2018

2018 Employee Handbook And Personnel Policies
Winter 2018

2018 Employment Discrimination And Employee Relations Laws
Winter 2018

2017 Leaves And Local Ordinances
Summer 2017

2017 Wage and Hour Laws
Summer 2017

2017 Employee Handbook and Personnel Policies
Summer 2017

2017 Employment Discrimination and Employee Relations Laws
Summer 2017

2017 Employee Handbook and Personnel Policies
Winter 2017

2017 Employment Discrimination and Personnel Laws
Winter 2017

2017 Wage and Hour Laws
Winter 2017

2016 Wage and Hour Laws
Castle Publications, Ltd. Labor & Employment Seminars
Fall 2016

2016 Employee Handbook and Personnel Policies
Castle Publications, Ltd. Labor & Employment Seminars
Summer 2016

2016 Employment Discrimination and Personnel Relations Laws
Castle Publications, Ltd. Labor & Employment Seminars
Summer 2016

2015 Wage and Hour Laws
Castle Publications, Ltd. Labor & Employment Seminars
Summer 2015

2015 Employee Handbook and Personnel Policies
Castle Publications, Ltd. Labor & Employment Seminars
Summer 2015

2015 Employment Discrimination and Personnel Relations Laws
Castle Publications, Ltd. Labor & Employment Seminars
Summer 2015

2015 Wage and Hour Laws
Castle Publications, Ltd. Labor & Employment Seminars
Winter 2015

2015 Employee Handbook and Personnel Policies
Castle Publications, Ltd. Labor & Employment Seminars
Winter 2015

2015 Employment Discrimination and Personnel Relations Laws
Castle Publications, Ltd. Labor & Employment Seminars
Winter 2015

2014 Employee Handbook And Personnel Policies
Summer 2014: August 14 and 26

2014 Employment Discrimination and Personnel Relations Laws
Summer 2014: August 13 and 21

2014 Wage and Hour Laws
Summer 2014: August 12 and 20

2014 Wage and Hour Laws
Winter 2014: February 19, March 4 and 20

2014 Employee Handbook and Personnel Policies
Winter 2014: March 6 and 12

2014 Employment Discrimination and Personnel Relations Laws
Winter 2014: February 20 and March 5

2013 Employee Handbook and Personnel Policies - Pasadena Area and Orange County
Winter 2014: February 28 and March 12; Summer 2013: August 1 and 20

2013 Employment Discrimination and Personnel Relations Laws - Pasadena Area and Orange County
Summer 2013: July 31, August 15

2013 Wage and Hour Laws - Pasadena Area, Los Angeles, and Orange County
Summer 2013: July 30, August 7, August 14

2012 Employee Handbook And Personnel Policies - Pasadena, Orange County and Los Angeles
Winter 2012: February 24, March 8 and 14; Summer 2012: August 2, 14 and 16

2012 Employment Discrimination And Personnel Relations Laws - Orange County, Pasadena and Los Angeles
Summer 2012: July 26, August 1 and August 8

2012 Wage And Hour Laws - Orange County, Pasadena and Los Angeles
Summer 2012: July 25, July 31 and August 7

Meal Periods, Rest Periods and Labor Code Class Actions After *Brinker*
WebEx, 04.18.2012

2012 Employee Handbook and Personnel Policies - San Francisco, Orange County, Pasadena and Los Angeles
Winter 2012: February 8, February 24, March 8 and March 14

2012 Employment Discrimination and Personnel Relations Laws - San Francisco, Orange County, Pasadena and Los Angeles
Winter 2012: February 7, February 16, February 23 and March 1

2012 Wage and Hour Laws - San Francisco, Orange County, Pasadena and Los Angeles
Winter 2012: February 6, February 15, February 22 and February 29

The Aftermath of AT&T Mobility v. Concepcion
Labor & Employment Law Webinar
WebEx, 05.26.2011

2011 Employee Handbook And Personnel Policies - San Francisco, Pasadena, Orange County and Los Angeles
Winter 2011: February 9, February 25, March 8 and March 10

2011 Employment Discrimination And Personnel Relations Laws - San Francisco, Orange County, Pasadena and Los Angeles
Winter 2011: February 8, February 16, February 24, and March 3

2011 Wage and Hour Laws - San Francisco, Orange County, Pasadena and Los Angeles
Winter 2011: February 7, February 15, February 23, and March 2

2010 Employee Handbook and Personnel Policies Series - Los Angeles, Orange County, San Francisco and Pasadena

2010 Employment Discrimination and Personnel Relations Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

2010 Wage and Hour Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

2009 Employee Handbook and Personnel Policies Series - Los Angeles, Orange County, San Francisco and Pasadena

2009 Employment Discrimination and Personnel Relations Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

2009 Wage and Hour Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

2008 Employee Handbook and Personnel Policies Series - Los Angeles, Orange County, San Francisco and Pasadena

2008 Employment Discrimination and Personnel Relations Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

2008 Wage and Hour Laws Series - Los Angeles, Orange County, San Francisco and Pasadena

California Hospital Association: Labor and Employment Law Seminar
Dec. 5, Sacramento and Dec. 12, Garden Grove, 12.2007

## Memberships

Member, California Society for Health Care Attorneys

Member, American Society for Health Care Attorneys

Member, Labor Law and Tax Sections, American and Los Angeles Bar Associations

Member, National Advisory Board, Berkeley Journal of Employment and Labor Law, published by Boalt Hall School of Law at the University of California in Berkeley

## Practices

Labor and Employment

Employee Benefits/ERISA

Labor and Employment Counseling

Employee Hiring/Discipline/Termination

Handbooks and Personnel Policies

Wage and Hour Regulations

Labor and Employment Litigation

Labor Union Management Relations

Wage and Hour Class Actions

Healthcare

International Reach

Latin America

## Industries

Food and Beverage

Healthcare

## Education

J.D., University of California, Berkeley, Editor-in-Chief of the *Industrial Relations Law Journal* (now the *Berkeley Journal of Employment and Labor Law*)

B.A., University of Massachusetts, *summa cum laude*

# 2:00 – 3:00

# Top Employee Compensation Priorities for 2023

# Larry Robinson

Larry Robinson is the Founder and Managing Director of Compensation Consulting for the Robinson Compensation Group. Larry's compensation expertise and experience result from having been a Human Resources leader in iconic businesses combined with consulting with a wide range of organizations.

His corporate experience as the Vice President of Human Resources Operations at Dell culminated HR leadership positions at Xerox and Pepsi Cola International. Larry began his HR career at the General Electric Company in their renowned Employee Relations Training Program.

Executive, Managerial/Professional, Sales, Administrative/Clerical, Expatriate and Hourly compensation consulting engagements at Private and Public companies, Not-for-Profit Organizations and Institutions of Higher Education have led Larry to become nationally and internationally recognized as an employee compensation expert. He has successfully been retained as an Expert Witness in litigation focused market compensation equity.

Larry received a Bachelor of Science degree from the University of Delaware and an MBA from the University of Maryland.

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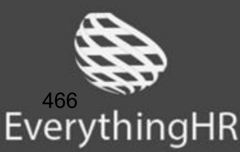
# What Are HR's Top 2023 Employee Compensation Priorities?

*Being prepared for unprecedented change & volatility*

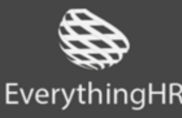
Presented by:
Larry Robinson, Robinson Compensation Group

WELU 2022



# We aren't the only ones concerned about employee pay!

So are your organization's leadership, governments AND your employees

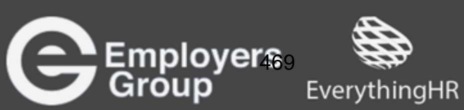



# Why focus on 2023 Employee Compensation?

- As the fourth quarter gets underway, HR and business leaders have their sights set on being prepared for 2023.
- The coming year is sure to be another challenging one for HR professionals:
  - The COVID-19 pandemic lingers on
  - Employers work to keep up with the seismic shifts in their businesses
    - Increased ‘regretted’ turnover
    - New demands for workplace location flexibility
    - An accelerated reliance on technology.

# 2023 May be a ‘Banner Year’ for Salary Increases

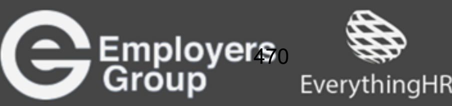
- Plan on larger-than-usual salary increases in 2023.
- The predominant 3% annual salary budget is gone.
- Actual 2022 salary increases came in at more than 3%.
- 2022 Cost-of-living increases were higher than 2021 (in the 2.5% - 2.7% range).
- Inflation soared to record levels in 2022. September was reported as 8.3%.

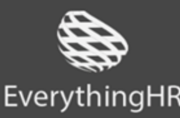


# Larger Salary Increases Coming in 2023

## *Reports from Leading HR Consulting Firms*

- Willis Towers Watson – Projecting the highest salary increases in 15 years.
- Gartner Group – 63% of client executives plan to make compensation adjustments in response to high inflation.
- Mercer – Finds that more than two-thirds of U.S. employers are eyeing enhancing health & benefits offerings in 2023 in order to attract and retain talent
  - Better healthcare access
  - More affordable medical care
  - Increase family-friendly benefits

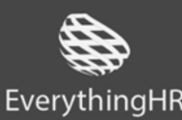





# HR Professional Organizations are also working to prepare their members to meet 2023 Employee Pay Challenges

## WorldatWork / SHRM / The Conference Board

- ❑ Original Salary Budget Surveys indicate that 2022 salary increases were expected to average 4.1%: a 20-year high. BUT……
- ❑ Follow-up surveys later in 2022 indicated that more than half of their member companies had increased salary budget projections as inflation began to spike.
- ❑ Many organization also have separate budgets for variable pay & promotion bonuses.

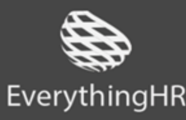



# WorldatWork

(Original 2023 Projections)

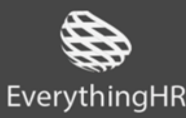
| Employee Category | Actual 2022 Mean | Actual 2022 Median | Projected 2023 Mean | Projected 2023 Median |
|---|---|---|---|---|
| Nonexempt hourly, nonunion | 4.2% | 4.0% | 4.1% | 4.0% |
| Nonexempt salaried | 4.1% | 4.0% | 4.1% | 4.0% |
| Exempt salaried | 4.2% | 4.0% | 4.2% | 4.0% |
| Officers/executives | 3.9% | 3.5% | 4.1% | 4.0% |
| **All** | **4.1%** | **3.8%** | **4.1%** | **4.0%** |

- Salary-increase budget data do not necessarily take into account unbudgeted and off-cycle base pay increases.
- Also, because of the tight labor market, new hires are frequently offered higher salaries than current employees in similar positions.



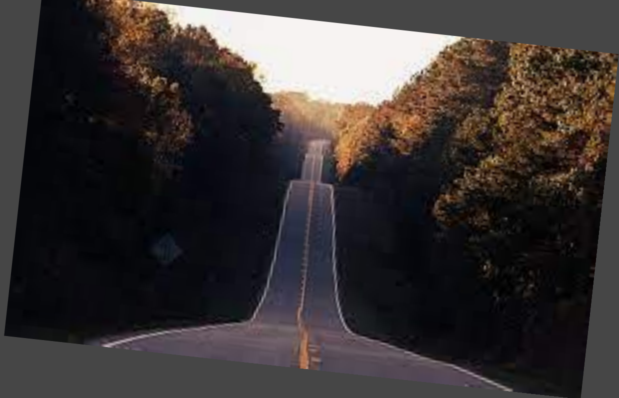

# Insights for What's Ahead

- Wage growth may remain elevated through the first half of 2023, but some economists predict that pay growth could decelerate later in the year.
- Driven by structural trends in the US labor market, employee compensation may grow faster over the next decade compared with the previous one leading to a future of tight labor markets.
- While salary increase budgets are predicted to rise for 2023, employers are watching trends in the labor market, the economy, and their own companies' dynamics carefully.
    - This could lead to adjusting budgets downward to reflect broader economic developments, including a worsening economic outlook.
- Salary increase budgets alone do not tell the full story, employers are using other levers in addition to base pay increases, such as more short-term incentives and other total rewards components to create competitive and attractive pay packages.




# What does all this mean to YOU?

- ❑ YES – There will be bumps in the road, but you are now better prepared to assist your organization in making informed employee pay decision.



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>
> — Jennifer Kramer, MS., SPHR, SHRM-CP, President, Kramer HR Group

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>
> — Christian T. Rogers, MHR, Director of HR, WinnaVegas Casino

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# 3:10-4:15

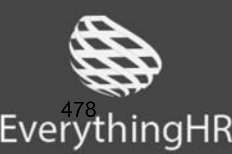
# HR Leadership in Precarious Times

# Paul Falcone

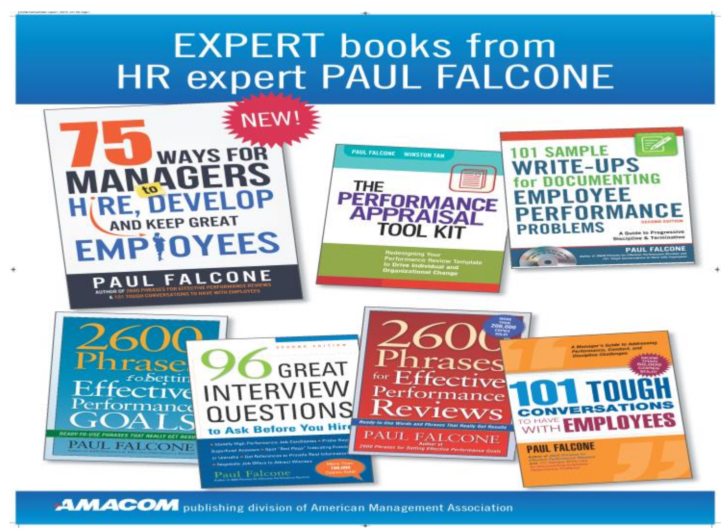
# Leadership in Precarious Times

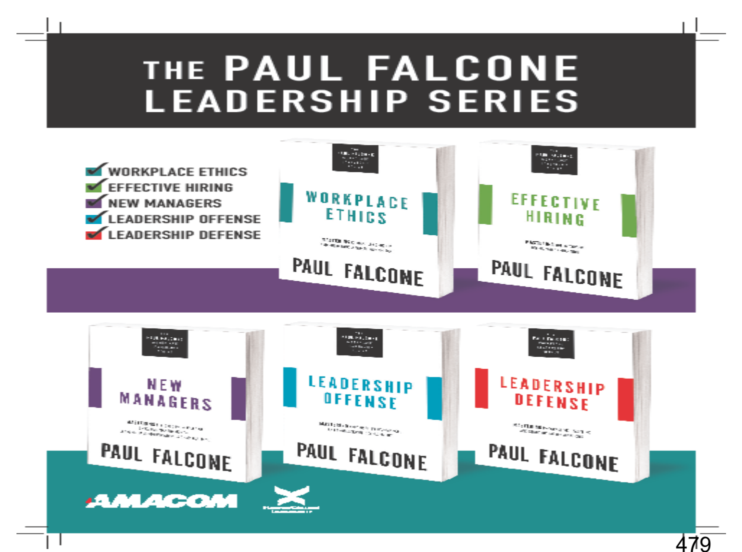
Paul Falcone

WELU 2022



Paul Falcone (PaulFalconeHR.com) is the principal of Paul Falcone Workplace Leadership Consulting, specializing in management and leadership training as well as executive coaching and facilitating corporate offsite retreats. He has held senior-level positions as CHRO of Nickelodeon, head of international HR for Paramount Pictures, and, most recently, CHRO of the Motion Picture and Television Fund.  Paul's career encompasses Fortune 500, union, nonprofit, and international experience in entertainment, healthcare/biotech, and financial services. Paul is a bestselling author with HarperCollins Leadership, a columnist for SHRM Online, and a trainer for the American Management Association.



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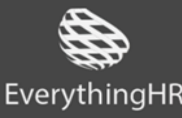
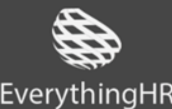
# Today's Agenda

I. Recruitment and Talent Scarcity Challenges in Light of the Great Resignation
II. Solutions for Leading a Multi-Generational Workforce
III. Making *"Remote Work"* Work—Managing the Unseen
IV. The Specter of Layoffs, Even While your Organization Struggles to Find Qualified Talent
V. Q&A




# Part I: Talent Scarcity in Light of the Great Resignation

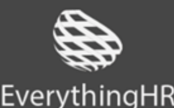
- *Sansdemic* = “without people”
- In light of COVID, people opted to leave their current positions and not look back. The reasoning went something like this: “I don’t know what I’m going to do, but I can guarantee you that it won’t be [BLANK].” You can fill in that blank with whatever job the person held previous to the pandemic: nursing assistant, waiter, corporate executive, or the like.
- The disconnect came with the fact that companies typically look to hire people with previous experience. Cutting off extended unemployment didn’t change the trend.




# Talent Scarcity (cont.)

- Big job boards like Indeed, CareerBuilder, Zip Recruiter, Simply Hired, Monster, and Dice (for technical computer talent), among others, will likely have challenges identifying the volume of talent needed for today's many employment openings.

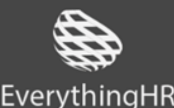
- Boutique job boards like VeteranJobs.net, DiversityJobs.com, LatinoJobs.org, OverFiftyJobs.com, BlackCareers.org, AsianHires.com, NativeJobs.org, LGBTjobsite.com, and WeHireWomen.com will likely expand their reach to tap qualified diverse talent (and complement your DEI outreach efforts).




# Talent Scarcity (cont.)

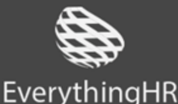
Likewise, social media sites like LinkedIn will continue to expand their outreach for professional level candidates.

And coming your way. . . Customized mobile apps and web platforms will permit turnkey employment solutions for smaller companies, including payrolling, benefits, workers' compensation, and overall "employment without boundaries." In other words, workers belonging to the vendor's payroll can work at multiple employers while the vendor remains the constant employer of record (https://www.bandofhands.com/) .




# Talent Scarcity (cont.)

- Your job? Research local resources, such as nursing, hospitality, or tech trade schools and professional development programs, including local training organizations like Workshops for Warriors.
- Further, determine which job boards, social media sites, and web platforms may work best for your organization relative to your geographic location and the types of hires you make.
- Set your recruitment budget for the next quarter or year by exploring new sources of potential talent providers and funnels. (Recruitment advertising agencies could help!)

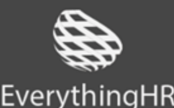



# Talent Scarcity (cont.)

Data Usage: Review internal promotion rates, especially from the individual contributor to frontline supervisor and manager level. Where is choke point?

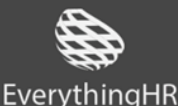
Extended Onboarding: Protect your “investment” by implementing one-on-one 30, 60, and 90-day onboarding meetings to ensure a good fit and assign training accordingly.

Allyship: Consider Employee Resource Groups (ERGs) for employees who share common characteristics (military-to-civilian transition, single working moms, or other personal/cultural interests).




# Talent Scarcity (cont.)

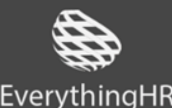
- Mentorship and Sponsorship: Assign new hire “buddies,” community ambassadors, and internal coaches for “high potential,” or “HIPO,” employees.
- Retention Efforts: Annual total turnover rate; %-age voluntary vs. involuntary turnover; #1 and #2 reasons for leaving (exit interview and focus group data); average tenure by company and department; internal transfer and promotion rate; # of employees ready to be promoted now vs. in 2-3 years; conduct “stay interviews” with your top performers.
- Community engagement, typically via volunteer days.
- Corporate social responsibility, including environmentalism and adopting nonprofit causes for sponsorship and fundraising.




# Gen Y and Gen Z to the Rescue!

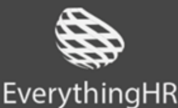
Millennials (Gen Y) and Zennials (Gen Z) are the most studied generational cohorts in world history. Their "Big 5" include:

1. Diversity of thoughts, ideas, and voices
2. Corporate social responsibility and environmentalism
3. Career and professional development
4. Work-life-family balance / control / equilibrium
5. Open, transparent, and ethical company leadership




# Common Reasons for Leaving

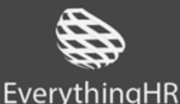
- ✓ Money and other forms of compensation
- ✓ Lack of communication, recognition, or appreciation
- ✓ Lack of training, learning opportunities, or career and professional development
- ✓ Company culture, management, or working conditions mismatch
- ✓ Overall lack of connection or engagement to the supervisor, company, or the position




# II. Solutions to Leading a Multi-Generational Workforce

1. ***Cross-generational mentoring and coaching:*** This helps acclimate older workers to new experiences and helps younger workers gain wisdom as they benefit from older workers' experiences. (Watch the movie *The Intern* with Robert DeNiro and Anne Hathaway working together as a team: you'll love the message and see how both generations helped one another not only survive but thrive.)

2. ***Collaborative and rotational work assignments and projects:*** These bring people together quite naturally and align them in a common cause. Remain cognizant of building teams with this type of diversity in mind. Diverse ideas and opinions tend to strengthen a team's final recommendations because of the inclusive nature of so many disparate points of view.

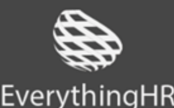



# Multi-Generational Workforce (cont.)

***3. Flexible work schedules:*** These offer new alternatives to getting work done thanks to technology. The COVID-19 pandemic made remote work a staple of business life worldwide. Encourage flexible teams and multiple outlets for communication and remote teambuilding to capitalize on this post-pandemic trend, which appears to create greater performance and productivity than traditional 9-5 work settings.

A recent Gallup study shows that engagement is highest among fully remote workers -- and lowest for fully onsite workers who can perform at least a portion of their job from home.

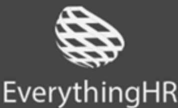
Similarly, remote workers report lower levels of burnout while fully onsite employees have the highest levels of burnout. Clear, purposeful, and frequent contact with remote employees is what's needed most.




# Multi-Generational Workforce (cont.)

***4. Opportunities to cross-train on the latest technologies:*** In-house technical training is helpful to any team, but it's an excellent stretch assignment for high-potential employees who enjoy teaching and public speaking. Don't be surprised to see members of elder generations picking up and mastering the newest and greatest technology, especially if the teacher can make it fun!

***5. Training workshops on leadership and communication:*** Encourage open discussions about how to ratchet communication up a notch in your shop. Create the space to sit around the proverbial campfire where elders can pass wisdom down to the younger generations. Encourage team members to let one another know how they prefer to communicate. (Google the term "Personal User Manuals" for additional ideas.)



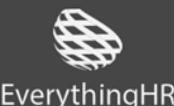

# Multi-Generational Workforce (cont.)

***6. A social atmosphere of community at work, including environmental awareness and social causes that make the world a better place***

***7. Team-building events that heighten awareness of others' backgrounds***

***8. Networks of cross-functional councils and boards that serve as a primary source of leadership and decision making***

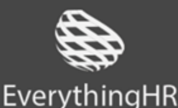
***9. Social networking tools that build relationships, increase collaboration, and enhance employee engagement:*** New tools are rampant in the workplace—communication tools, performance feedback apps, employee recognition software, and even robotics and smart apps that mimic human behavior and project future outcomes.




# Multi-Generational Workforce (cont.)

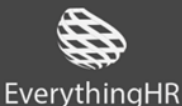
10. Institute "Fun Fridays"

- ***Set up Eat & Greets:*** Start a team lunch bunch and make it fun.
- ***Establish "60 Minutes of Happiness" Gatherings:*** Organize a remote Happy Hour with your coworkers once a week on company time.
- ***Play Tell the Truth:*** Gather trivia about the people on your team; send out a mapping-and-matching quiz and see who can correctly guess all of the matches.
- ***Picture This:*** Photoshop pictures of your team onto a picture of superheroes or celebrities. Use these avatars in all your PowerPoint presentations.




# Multi-Generational Workforce (cont.)

- Get Cartoony: Start an online cartoon board and post some funnies for all to enjoy (Dilbert, anyone?)
- Showcase Your Kids: Create a “Look at what my kid made!” or “Could you imagine my kid did this?” digital mural for employees to share their kids’ creations and peccadillos.
- Learn a New Language: If you work internationally, learn a few words and phrases of one of your clients; surprise your team with it in your next meeting.
- Learn More English: Pick a word of the day or week, make sure it’s obscure and esoteric, and ask everyone to create a funny sentence using it.

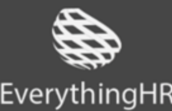



# III. Making "Remote Work" Work: Managing the Unseen

Among Generation X workers, who are now approaching middle age (42 – 57), the ability to work remotely ranks higher than compensation and benefits in terms of what makes them happy about their jobs.

Among this generation, remote work also topped having a great boss, a positive workplace culture, and career-growth prospects, according to new research on employee sentiments.

But while X, Y, and Z employees clearly value working remotely, many also say that doing so makes them feel **isolated** from their employer and colleagues.




# Remote Work (cont.)

- The top reason why employees say they'll leave their jobs at remote or hybrid organizations is the feeling of not being connected to the organization or its greater mission or purpose.

- Gen Z is the loneliest and most isolated generation on the planet.

The keys to successful remote / hybrid work = (1) building a strong culture of connection and (2) a true sense of belonging and community.

# Remote Work (cont.)

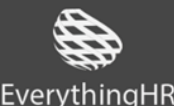
"Productivity Paranoia"

- "Productivity paranoia" describes management's fear or belief that employee output declines in work-from-home arrangements.
- The buzzword emerged from Microsoft's Work Trend Index. The report revealed that 87 percent of all employees, remote and in-person, feel productive at work. Yet only 12 percent of CEOs believe this to be true.

https://bit.ly/3sQ6VzK HR Magazine: **In Hybrid Work, Don't Rely on Just One Aspect of Productivity** by Katie Navarra, 10/9/2022

# Remote Work (cont.)

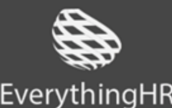
- The remote worker represents a **new workforce**, and it's vital to understand what makes them choose a company and what makes them stay.
- Employers need to evolve to accommodate changing preferences.
- “Remote leadership” is a new frontier and not taught in most business schools.
- Let the teaching begin! (Hint: Measure project outcomes, not minutes, even for remote hourly employees. And beware of wage & hour infractions!) ;-)




# Remote Work (cont.)

***Establishing a Rhythm and Cadence of Feedback and Communication***

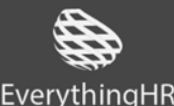
- How have you maintained a sense of community and connectedness with your manager and co-workers? Did you have virtual and in-person meetings and get-togethers at your prior companies and, if so, how often?
- How do you establish relationships and communication hubs with your peers to keep from feeling alienated or disconnected from the group?
- Some leaders worry about being effective in a virtual environment because if they can't physically oversee what's happening, they can't know that the work is getting done. How could you allay that concern?
- What amount of structure, direction, and feedback do you typically prefer from your supervisors regarding your workload on a day-to-day basis?
- How would you structure your communications with me to ensure that I feel confident in your work and that you will meet and exceed performance expectations?




# Remote Work (cont.)

***Setting Expectations Correctly and Measuring Results***

- What kinds of measurement standards—scorecards, key performance indicators , or customer satisfaction surveys, for example—have you been accountable for in the past? Which ones work best for you?
- I find that successful remote workers create goals for themselves—checklists, personal metrics dashboards, quarterly achievement calendars, and the like. What have you used in the past to gauge your performance? (If none, What could you see yourself creating to demonstrate your goal progression and results?)
- What types of formal goals have you set for yourself with prior employers in general, and how often did you meet with your supervisor to discuss them?
- I have five core values and expectations about remote work that I typically share with candidates at this stage to make sure we're on the same page.  They are. . .



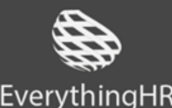

# Remote Work (cont.)

## 4 Basic Drivers of Employee Engagement

1. **Purpose**

It's easier for employees to see how their work fits into the bigger picture when their manager points them toward the larger goals.

Lesson: Don't let your remote employees fall into a rut. Take time to give employees the wider perspective of your company's purpose and show them how their work fits in. That purpose will help connect them to their team and your organization.

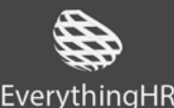



# Remote Work (cont.)

**2. Development**

Gallup data show that lack of development and career growth is the No. 1 reason employees leave a job.

Lesson: Don't let remote workers be "out of sight, out of mind." Developing remote employees might require a different strategy than developing onsite employees, but it should remain a high priority for managers.

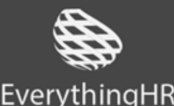



# Remote Work (cont.)

## 3. A Caring Manager

Employees need to know that someone is concerned about them as people first and as employees second.

Lesson: 21% of remote workers report feeling lonely or isolated. Take time to connect with your remote employees through quick connects, check-ins, and developmental coaching -- meetings that otherwise might happen naturally in the office.

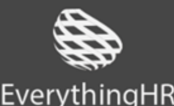



# Remote Work (cont.)

**4. A Focus on Strengths**

When managers remove roadblocks and focus on helping employees to their best work every day, employee wellbeing increases, and so does employee attraction, engagement, and retention.

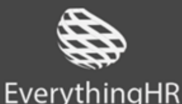
Lesson: Weave strengths into your conversations and activities with remote employees. “Strengths” conversations are motivating and empowering—they help people better understand themselves and others, create bonds, and develop relationships.




# Remote Work (cont.)

**A New Way Forward**

1. Regular weekly 1-on-1 meetings with direct reports
2. Regular weekly staff meetings with extended team
3. Ad hoc (monthly) “state of the state” meetings—debrief, reinvent, creativity
4. Quarterly career and professional development meetings
5. Professional networking and mentoring opportunities




# IV. The Specter of Layoffs—Even While You're Hiring

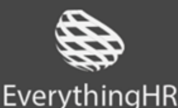
Cardinal Rule: Don't do things the way Elon Musk handled them at Twitter (i.e., "Check your emails in the morning to see if you'll still have a job here. . .")

A personal, caring—and even "loving" touch—will help people heal from a traumatic event like a layoff.

"I'm sorry his happening.

"You'll be eligible for rehire wants the freeze lifts.

"I'll be there to help you with updating your resume, your unemployment insurance claim, your COBRA application, and anything else you need, to the extent you'll allow me."




# Layoffs (cont.)

- "Please don't feel like you disappointed anyone. When reductions in force happen, *positions* are eliminated. *People* have to then get assigned to those eliminated positions, and that's why this is happening right now.
- "We appreciate all your hard work over the past X years, and I know I speak for everyone when I say we're really going to miss you.
- "I've provided copies of your past three years' annual performance reviews that you can share with prospective employers if you'd like.
- "As difficult as this is right now, I'd like to think that you're still proud of your association with our company and will consider rejoining us in the future if the opportunity arises."

# Layoffs (cont.)

Let healing begin from the moment that notice is given.

If possible, allow the individual the choice to say goodbye to friends and associates.

Avoid the "perp walk," if at all possible.

Meet with the survivors and explain: "As far as we know, there will be no further position eliminations for the foreseeable future / there may be additional layoffs over the next week. Know that we treated [NAME] with the dignity and respect he deserves, and I'll ask you all to do the same. As soon as I hear more, you'll know more. For right now, I'd ask you all to help him if he reaches out to you—don't be nervous about doing so. However, any requests for references have to be referred directly to me/HR."

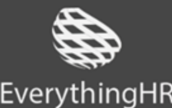
# A Note about "Boomerang Hiring"

Boomerang is the modish term used for identifying those corporate alumni who left the company voluntarily or for a specific reason.

Intern-to-hire is the most common type of boomerang recruitment.

Encouraging employees upon exit interviews to remain in touch if their career transition meets any unexpected hiccups.

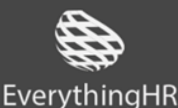
Leverage social media and alumni newsletters (plus occasional in-person follow-ups) to help keep the doors open. Make it personal. Show you've changed—gone remote, added new benefits, or made some kind of culture shift.




# Boomerang Hiring (cont.)

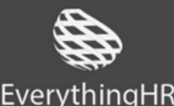
**The Pros and Cons of Boomerang Employees**

- Pro: They already understand the company and the culture.
- Con: Is the original reason they left the organization now better?
- Pro: Rehiring former employees generally costs less and has a higher ROI.
- Con: Old grievances can resurface if not addressed before rehire.
- Pro: You know what you're getting.
- Con: The individual may be running away from the current job, looking for the comfort of the “tried and true” and “comfortable.”




# Closing Comments

- A **new era of human wellbeing**—from flexible work schedules to better work-life integration to more quality time with loved ones or for personal endeavors—is upon us.
- Help your operational leaders set clear work expectations, reinforce work hour expectations, lead by example, and proffer creative (technical) solutions that will work for themselves and their teams.
- Remember to keep things simple, have your employees' backs, and help them do their very best work every day with peace of mind.




# Closing Comments (cont.)

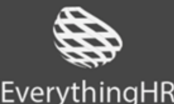
Look to become your employees' "favorite boss"—a prism that brings together employee engagement and satisfaction as well as discretionary effort for high performance—not because they have to but because they want to.

Would you want to work for you? If the whole company followed your lead, would you be happy with where you took it?

What you want for yourself, give to another.

When in doubt, err on the side of compassion.

*Be* the change you wish to see in others: practice role model leadership and expect others to respond in kind.




# Q&A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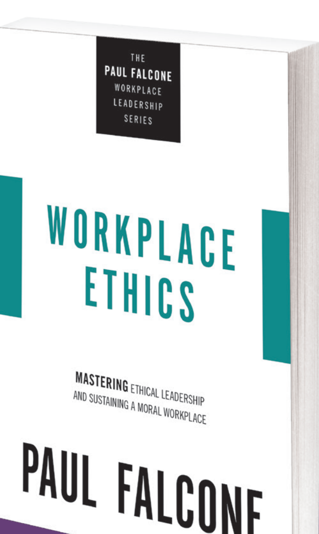


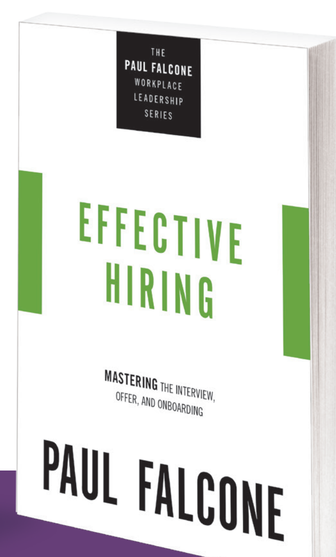


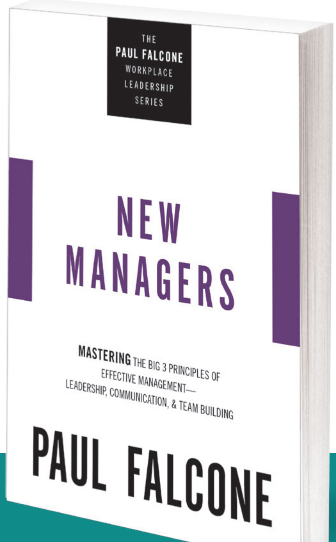


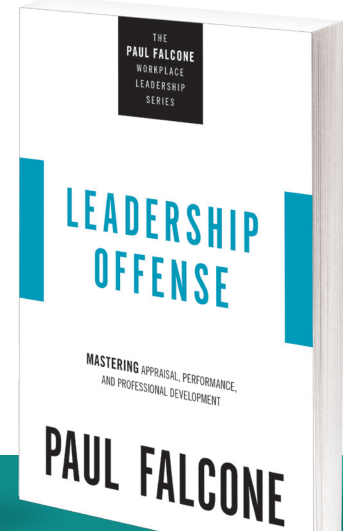


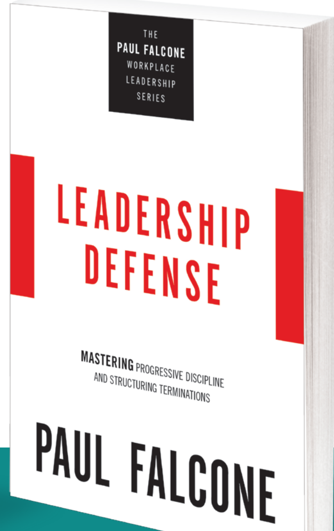

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Nov. 17th & Dec. 6th

WELU 2022

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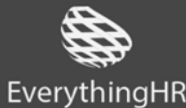


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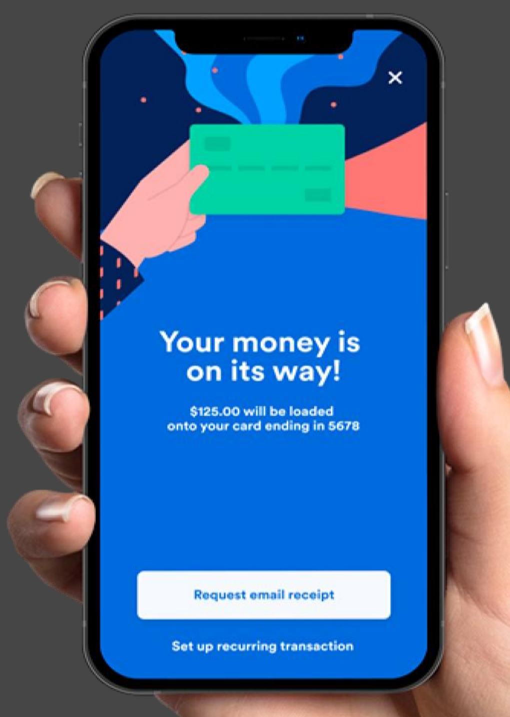

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You can schedule a demo here: Book a meeting with Ryan Farias or e-mail rfarias@payactiv.com with preferred dates/times and we will send a calendar invite.

# HOW WE GOT HERE…

On Monday July 20, 1896 (at about 8:20 p.m.), bylaws were approved for the formation of the Merchant and Manufacturers Association.
MMA is now (126 years later) known as Employers Group and EverythingHR.

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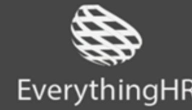


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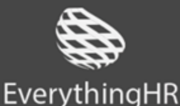


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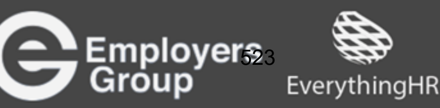
# FROM WELU's PAST…

The keynote speaker at the 1967 Merchant and Manufacturers Association (now Employers Group/EverythingHR) Annual Banquet (now WELU) was California Governor Ronald Reagan.



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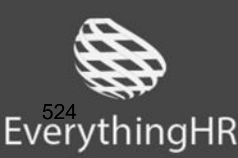

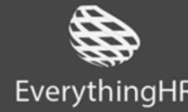


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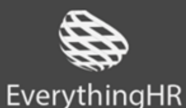
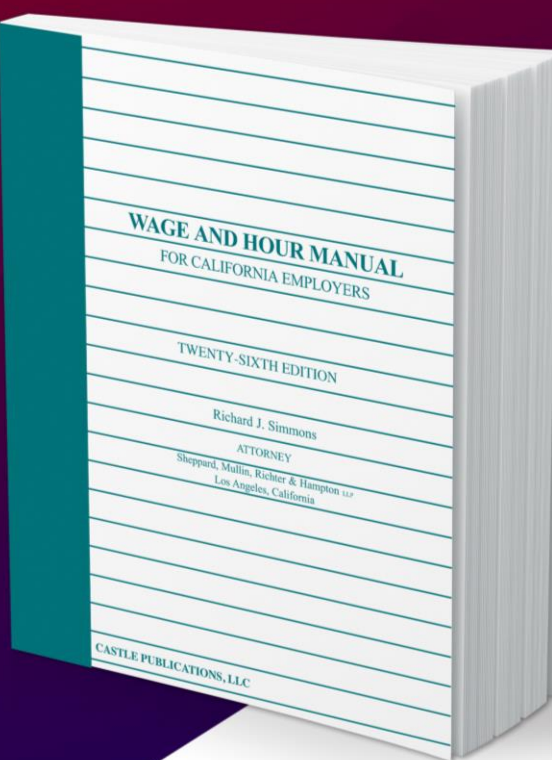



# ESSENTIAL LABOR AND EMPLOYMENT RESOURCES FOR CALIFORNIA EMPLOYERS




Castle Publications Virtual WELU Store
Open: 11:30 – 2:30
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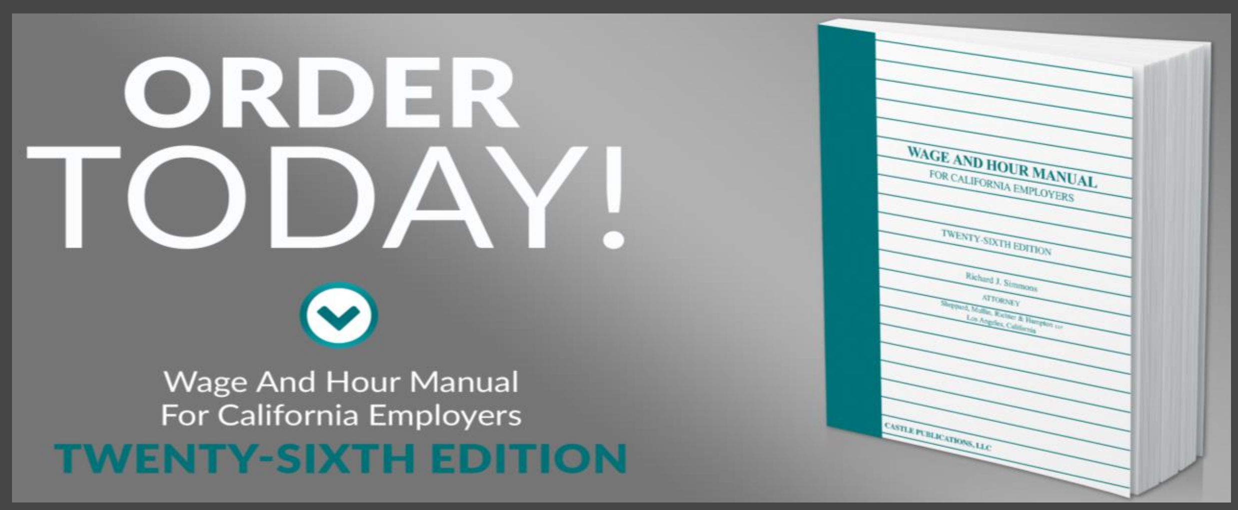
# NEW 2023 WAGE AND HOUR MANUAL




**Learn why so many employers, law firms, HR departments and payroll officials rely on the Wage and Hour Manual for the answers they need.**

*"**It's worth its weight in gold** (which is saying something, given its volume)."*

*"**Awesome book** – I use it almost daily in my office as a compensation manager."*

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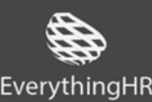
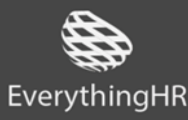




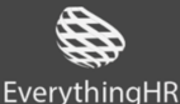

# IS THIS ADDRESSED IN YOUR HANDBOOK?

Studies show that office workers tend to swear more at the office than at home.

# Welcome to WELU Central

Nov. 17th & Dec. 6th

WELU 2022




# IMPORTANT INFORMATION

## Before you begin…

- Please make sure your Zoom name on your video/photo is updated and correct
- Enable and check the chat box for important links and information
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WELU 2022

# LEADERSHIP ACADEMY 2023

26 JAN

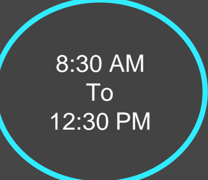
8:30AM-12:30PM

Virtual

SESSION START DATES

JAN 26$^{TH}$
APR 20$^{TH}$
JUL 27$^{TH}$
OCT 12$^{TH}$

Session Times




Session Time Period

Is the virtual Leadership Academy Right For Your Leaders (or yourself)?

- Are leaders self-aware of their behavioral and leadership tendencies?
- Are leaders effectively able to lead out of a crisis, and do they have the special skills to lead remotely?
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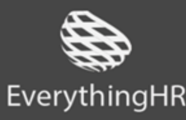


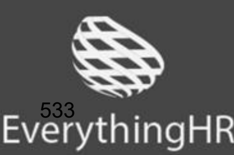

# WOULD A LITTLE TRAINING HELP?

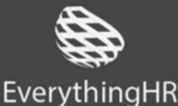
A Harvard Business Review survey reveals that 58% percent of people say they trust strangers more than their own boss?

# Welcome to WELU Central

Nov. 17th & Dec. 6th

WELU 2022



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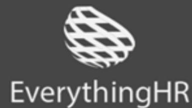


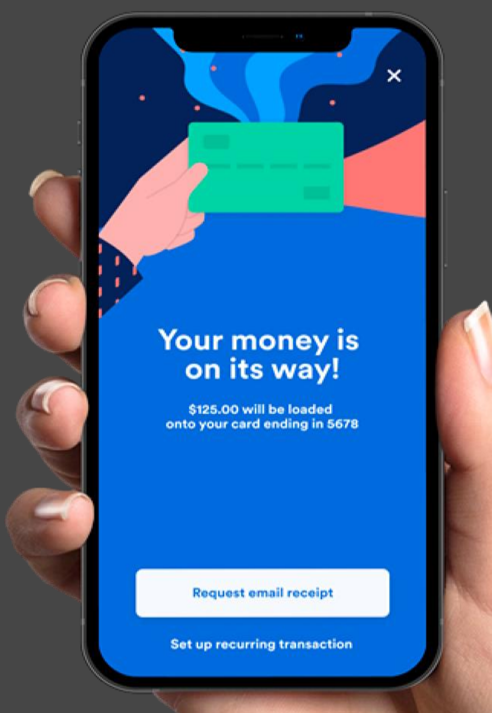

ON-DEMAND PAY

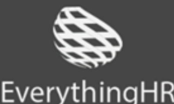
# Access to Earned Wages

Employees can get access to their earned but unpaid wages between paychecks when they need them.

Variety of transfer options to choose from:

- Payactiv Visa® Prepaid or Payroll Card
- Another debit or prepaid card
- Bank account
- Transfer to Amazon cash
- Pay for an Uber ride
- Pay a bill
- Pickup as cash at Walmart






# Payactiv – Earned Wage Access

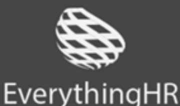
Get in touch with us!

Ryan Farias: rfarias@payactiv.com
Direct 818.515.0471

Payactiv is offering a $10 Starbucks card to **attendees that schedule and attend a 15 minute demo with Payactiv by January 31st.**
You can schedule a demo here: Book a meeting with Ryan Farias or e-mail rfarias@payactiv.com with preferred dates/times and we will send a calendar invite.

# IS YOUR CAMERA ON?

According to a survey by Lifesize, 82% of participants on a conference call are less likely to multitask with their camera on.




# KNOW THE PEOPLE YOU'RE HIRING

Universal Background Screening is a top nationwide screening firm, dedicated to delivering personalized service, providing ***quality, speed,*** and ***compliance!***

- **Background Screening**
- **Drug Testing**
- **Occupational Health**
- **Social Media**
- **Form I-9**

- ✓ **Fast Turnaround Time**
- ✓ **Screening Compliance Expertise**
- ✓ **White-Glove Service**
- ✓ **No-Cost Integrations**

**DELIVERING HIRE QUALITY™**

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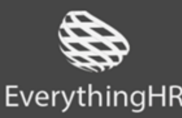
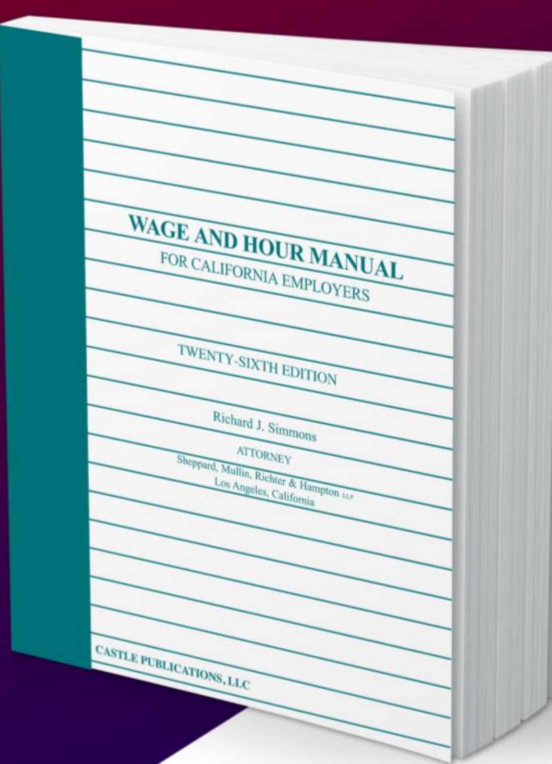



# WORKING 9 TO 5…

The most productive day of the workweek is Tuesday.

# ESSENTIAL LABOR AND EMPLOYMENT RESOURCES FOR CALIFORNIA EMPLOYERS

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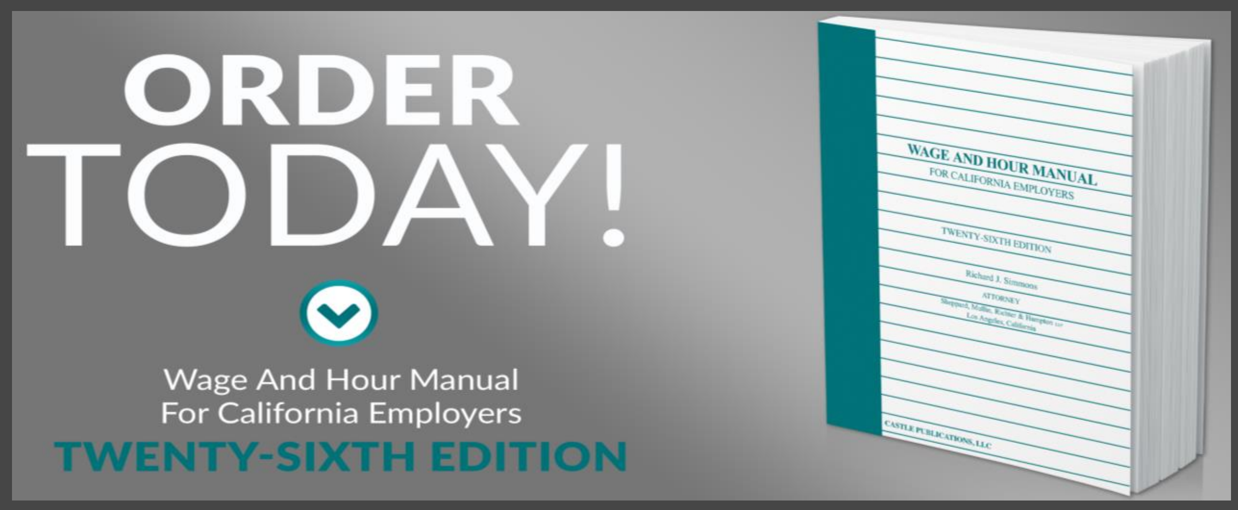


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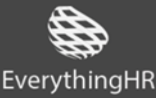

# HOW WE GOT HERE…

On Monday July 20, 1896 (at about 8:20 p.m.), bylaws were approved for the formation of the Merchant and Manufacturers Association.
MMA is now (126 years later) known as Employers Group and EverythingHR.

WELU 2022

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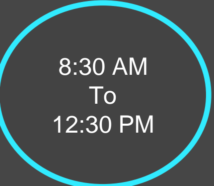


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training@employersgroup.com

# FROM WELU's PAST…

The keynote speaker at the 1967 Merchant and Manufacturers Association (now Employers Group/EverythingHR) Annual Banquet (now WELU) was California Governor Ronald Reagan.

# DELIVERING HIRE QUALITY

*Universal Background Screening is a leading provider of comprehensive employment background screening solutions. We support organizations coast-to-coast, ensuring their background screening process will be easier, while providing guidance to reduce hiring risk:*

## CORE SERVICES:

### BACKGROUND SCREENING SERVICES

Universal's experts help implement a screening program tailored to your organization's needs, creating a safe work environment by uncovering criminal records, verifications on employment/education/licenses, motor vehicle violations, employment credit, social media screening, and other background information. Programs can be customized, and include; job candidates, executives, vendors, consultants, volunteers, students, and other affiliated populations.

### DRUG TESTING

Universal offers cost-effective drug and alcohol testing services through our nationwide network of collection sites. We can implement a program to test any substances and provide a Medical Review Officer (MRO) for all Department of Transportation (DOT) and non-regulated testing.

### OCCUPATIONAL HEALTH SERVICES

Universal manages nationwide OccuHealth programs to assist your organization's compliance with health and industry regulations. Services are customized to your requirements and include general/DOT physicals, laboratory tests, vaccinations, titers, auditory/visual testing, TB tests, and back evaluations.

# VALUE

## CORE BENEFITS

### TECHNOLOGY TO SIMPLIFY SCREENING PROCESSES

Universal integrates with leading Applicant Tracking System (ATS) providers, enabling easy order and report retrieval. Our proprietary solution, creates a "wet" signature on electronic disclosure forms, improves candidate experience, increases accuracy, and reduces turnaround time.

### DEDICATED ACCOUNT TEAM

We provide white-glove service and assign a dedicated Account Executive and customer care team to work with you. Universal has consistently been awarded the top Enterprise Screening Firm through client-based surveys by HRO Today magazine.

### COMPLIANCE & ACCREDITATION

Universal is one of a small percentage of screening firms accredited by the Professional Background Screening Association (PBSA). We follow all State and Federal regulations to reduce hiring risk.

### QUICK TURNAROUND TIME

We focus on completing each report with urgency, understanding the importance of hiring candidates quickly. Our average turnaround time is less than two (2) business days for criminal searches.

### DISCOUNTED RATES

Universal offers industry competitive rates, discounts on services, integration options, and bundled packages.

**CONTACT US TO LEARN MORE ABOUT OUR SERVICES AND BECOME A CLIENT**

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# Thank you for joining us. See you next year!

**800-748-8484**
**training@employersgroup.com**
**www.employersgroup.com**