What's in Store for '24?

EverythingHR

WORKPLACE & EMPLOYMENT LAW UPDATE 2023

For over 40 years, employers have relied on Employers Group's Workplace and Employment Law Update (WELU) to get prepared for the coming year.

WELCOME & OPENING SESSION

8:00 - 9:10

Opening Panel

TOP LITIGATION ISSUES- WHAT'S IN STORE FOR 2024

T. Warren Jackson
Mediator
Signature Resolution

Robert Roginson
Office Managing Shareholder
Ogletree Deakins

Julie Dunne
Partner
DLA Piper

Jonathan M. Turner
Partner
Mitchell Silberberg & Knupp LLP)

T. Warren Jackson, Esq.

Mediator – Signature Resolution

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.

EXPERIENCE

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

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

ENFORCING AND RESISTING EMPLOYMENT ARBITRATION AGREEMENTS

SECTION OF LABOR & EMPLOYMENT

17TH ANNUAL MEETING

T. Warren Jackson – Signature Resolution

Marijana Matrura – Kessler Matura P.C.

Jason Veny – Murphy Anderson PLLC

Mike Griffin – Jackson Lewis P.C.

AGENDA

- Laws Governing Arbitration Process
- Recent Caselaw
- California Issues
- Employee/Employer Perspectives
- Developing and Implementing an Arbitration Program
- Opposing Arbitration

LAWS GOVERNING ARBITRATION

FEDERAL ARBITRATION ACT (9 U.S.C. § 1 *ET SEQ.*)

- 9 U.S.C. § 2

  "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."

FEDERAL ARBITRATION ACT (9 U.S.C. § 1 *ET SEQ.*)

- Section 1 carves out "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
- Over time, questions have arisen as to whether the Section 1 exemption should be narrowly or broadly construed, i.e., which workers are exempt from the FAA's coverage? Further clarification may be imminent!
- In *Bissonnette v. LaPage Bakeries,* 49 F.4th 655 (2d Cir. 2022) (rev. granted 9/29/23), the Supreme Court will address whether "to be exempt from the FAA, must a class of workers engaged in interstate transportation also be employed by a company in the transportation industry."

FAA PREEMPTS CONTRARY STATE LAW

- *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011)
- *Kindred Nursing Ctrs. LTS P'Ship v. Clark*, 581 U.S. 246 (2017)
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
- *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, 142 S. Ct. 1906 (2022)

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (FAIR ACT)

- Amended FAA
- Effective March 3, 2022
- Prohibits pre-dispute arbitration agreements covering claims of sexual harassment and sexual assault under federal, state, and tribal law
- Prohibits pre-dispute arbitration agreements class and representative action waivers addressing such conduct (9 U.S.C. § 402(a))
- Does *not* apply to earlier agreements. *Walters v. Starbucks, Inc.* 623 F. Supp. 3d 333 (FAIR does not apply to claims that arose or accrued before 3/3/22, even if lawsuit filed after that date)

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (FAIR ACT)

- "The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator…" (9 U.S.C. § 402(b))
- Impact of *Johnson v. Everyrealm, Inc.*, and its progeny. (entire case barred from arbitration or sex harassment only?; are harassment claims a pretext?)

JOHNSON V. EVERYREALM 2023 U.S. DIST. LEXIS 31242, 2023 WL 2216173 (SDNY FEB. 24, 2023) – IMPACT ON FAA

Court found that the "EFAA to render arbitration clause unenforceable as to the entire case involving a viably pled sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment."

- Decision examines stator text of the EFAA , where the operative language makes pre-dispute arbitration agreement invalid and unenforceable "with respect to a *case* which is filed under Federal, Tribal, or State law and relates to the … sexual harassment dispute." 9 U.S.C. §402(a)

- "Case" vs. "claim" or "cause of action"

APPLICATION OF *JOHNSON V. EVERYREALM*

- *Mera v. SA Hospital Group, LLC*, 2023 U.S. Dist. LEXIS 96912, 2023 WL 3791712 (S.D.N.Y. June 3, 2023)
- Claims: (1) FLSA; (2) sexual harassment claims under state/city law
- Defendant moved to compel
- Holding: Wage claims compelled; harassment claims NOT compelled
- Reasoning: Wage claims "do not relate in any way to the sexual harassment dispute"
- Distinguishes *Everyrealm*

RECENT CASELAW

COINBASE, INC. V. BIELSKI, 599 U.S. 736 (2023)

- What is the status of a district court litigation when a party has the statutory right under § 16(a) of the FAA for an immediate appeal?

- Filing an interlocutory appeal from the denial of a motion to compel arbitration automatically stays the district court proceeding.

COINBASE, INC. V. BIELSKI, 599 U.S. 736 (2023)

- Short-lived victory potentially for California employers.
- SB 365 signed on **October 12, 2023, effective January 1, 2024.**
- It amends the California CCP to state that when a party appeals an order dismissing or denying a motion to compel arbitration that does not necessarily stay proceedings in the trial court while the appeal is ongoing.

CALIFORNIA ISSUES

California-Centric Issues

- PAGA Waivers
- *Viking River Cruises/Adolph v. Uber Technologies*

California Private Attorneys General Representative Action (PAGA) Waiver

PAGA

- Authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations.
- PAGA waivers prohibited in arbitration agreements

PAGA DECISIONS

- The U.S. Supreme Court recently held in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, 142 S. Ct. 1906 (2022), that employers could require individual arbitration of PAGA claims, and that once an employee's claim is subject to individual arbitration, that individual and the State do not have standing to pursue the representative claim in court.
- *Adolph v. Uber Technologies*, No. S274671, 2023 WL 4553702 (Cal. 7/17/2023). Cal. Supreme Court resolved post-*Viking River* conflict by holding that plaintiff whose individual PAGA claims are compelled to arbitration does not lose standing to litigate non-individual claims in court.

ARBITRATION PERSPECTIVES

- Employer
- Employee
- Government Agency

EMPLOYER PERSPECTIVE

ADVANTAGES

- Arbitration can be speedier than court
- Increased predictability due to experienced arbitrators and no jury
- Potential for reduced litigation costs
- Confidentiality
- Enhanced settlement potential
- Choice of Forum/Arbitrator
- Limitations on Discovery

DISADVANTAGES

- Costs of arbitrators, particularly upfront, will drive early settlements
- Arbitrators less likely to grant dispositive motions
- Limit on appellate rights
- Risk of “mass arbitrations”
- Fear that arbitrator may “split the baby”
- Employee resistance
- Competition for talent

Employee's Perspective

Cons:

- Lower recoveries
- Class/collective waivers
- Arbitrators lack of diversity
- Mass arbitration – staffing/scheduling issues

Employee's Perspective - Cons (continued)

- Payment delays from some employers
  - some jurisdictions have responded, see e.g., California Code of Civil Procedure, sections 1281.97-1281.99 (failure to pay fees & costs within 30 days of due date is a material breach of the arbitration agreement; recent case law indicates all fees & costs must be invoiced at the beginning of the arbitration
- Rules Disputes: Commercial Rules v. Employment Rules

Government Agency Perspective

- Arbitration agreement does not preclude agency charge
- Does not bar EEOC from pursuing victim-specific relief in litigation on behalf of an employee who files a timely charge of discrimination
- Potential for litigating in two forums

DEVELOPING AN ARBITRATION PROGRAM

Developing and Implementing an Arbitration Program

Form of Agreement

- Best Practice:
  - Stand-alone agreement + applicable rules
  - Keep it short
  - Clear language
  - Translations
  - Signature (hand signed or electronic)

- Other Option:
  - Incorporate into handbook
  - Signed acknowledgment
  - Drawback: much more susceptible to argument that no contract is formed

Developing and Implementing an Arbitration Program

Other Considerations

- Selecting arbitration service (AAA, JAMS, etc.)
- Choice of law
- Procedures (home-grown or service's default?)
- Class action waiver
- Logistics of implementation

OPPOSING ARBITRATION

Opposing Arbitration

- **Challenges to Signing the Agreements**

"While handwritten and electronic signatures once authenticated have the same legal effect, there is a considerable difference between the evidence needed to authenticate the two. Authenticating an electronic signature if challenged can be quite daunting," 87 Cal. App. 5th 747, 303 Cal. Rptr. 3d 835, 845 (2023)

- **Use of Outdated Version or Language**

Many employers have been promulgating mandatory arbitration provisions in their employment agreements for decades and have failed to update the language used. Other employers may have updated the language of their arbitration provisions, and incorrectly assume their prior employees are grandfathered into their new arbitration agreements. As a result, Plaintiff attorneys must carefully read each arbitration agreement provided by the employer.

- **Invoke Transportation Worker Exception**

QUESTIONS

THANK YOU

Panelists (prior contributors to paper and slide deck):

- **Marijana Matura**, mmatura@kesslermatura.com
- **Mike Griffin,** michael.griffin@jacksonlewis.com
- **Jason Veny,** jveny@murphypllc.com
- **T. Warren Jackson,** wjackson@signatureresolution.com

- **Hon. John A. Henderson** John.Henderson@usdoj.gov
- **Laura McKenzie Holt**, lmholt@texaschildrens.org
- **Zhanna Meggison** Zhanna.meggison@eeoc.gov
- **Michael Royal** MRoyal@littler.com
- **Melissa S. Woods**, Mwoods@cwsny.com

Robert R. Roginson

Office Managing Shareholder

Ogletree Deakins 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.

Robert represents employers in administrative agency investigations and state and federal class action litigation. He 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 federal wage and hour and pay practice laws, federal preemption matters, prevailing wage laws, project labor agreements (PLAs), labor relations and union matters. Robert is regarded by clients as a trusted strategic advisor focused on developing effective and practical solutions to complex legal employment challenges. He is adept at developing compliant policies and practices to avoid and minimize litigation.

From November 2007 until March 2010, Robert served as Chief Counsel for the California Division of Labor Standards Enforcement (DLSE). Appointed by Governor Arnold Schwarzenegger, he 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, Robert 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. Robert 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. He has also served as an expert witness and consultant in several wage and hour and public works matters.

Robert 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. Robert counsels national employers on steps to achieve multi-state compliance with state prevailing wage laws. He 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, Robert co-wrote and edited the DLSE's Public Works Manual. Before becoming an attorney, he 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.

Julie Dunne

Partner – DLA Piper

For more than three 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.

EXPERIENCE

- 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
- 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

EDUCATION

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

AWARDS

- Named to Best Lawyers in America for work in Employment Law – Management, and Litigation – Labor and Employment, *Best Lawyers* (2011-2024)
- *The Legal 500 United States*
    - Recommended, Labor and Employment Disputes (Including Collective Actions): Defense (2021-2023)
- Recognized as 2023 "Lawyer of the Year" for Litigation – Labor and Employment in San Diego, *Best Lawyers* (2022)
- Recognized as "Labor & Employment Star" by *Benchmark Litigation* (2021-2024)...

MEMBERSHIPS AND AFFILIATIONS

- 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

Jonathan M. Turner

Partner - Mitchell Silberberg & Knupp LLP

After many years as a co-managing partner with his own law firm, Mr. Turner was invited to join MSK, as an equity partner in the firm's labor and employment law practice group. This was a welcome opportunity for him. Throughout most of his legal career, Mr. Turner has provided counsel, advice and representation to many employer clients also served by MSK, including major producers and distributors in the filmed entertainment industry. Having served earlier in his career as part of the legal staff for the Alliance of Motion Picture and Television Producers and later as in-house labor and employment law counsel for Twentieth Century Fox, he already was professionally acquainted with MSK, its outstanding group of lawyers, and its reputation as a premier law firm for employers in the filmed entertainment industry; hence, the decision to join the firm was a natural and logical move for him.

Mr. Turner has been with MSK since 2015, working out of its Los Angeles offices, where he continues to counsel and represent employers in all aspects of labor and employment law. While a large focus of his practice is in the filmed entertainment industry, Mr. Turner also represents employers across all industry sectors. His practice includes employer representation in labor arbitrations, administrative proceedings, court litigation, and collective bargaining negotiations. Mr. Turner has successfully defended employers at trial and on appeal in wrongful termination cases involving claims for racial discrimination, age discrimination, sexual harassment, disability discrimination, retaliation and breach of employment contract.

Mr. Turner's practice also includes advice and counsel to employers on human resource management, workplace and leave accommodation issues, compliance with wage and hour laws, employee discipline, harassment prevention, union organizing issues, and collective bargaining negotiations on behalf of management.

Throughout his professional career, Mr. Turner has spoken on the topic of employment and labor law at various events, including the ABA Employment and Labor Law Annual Conference, the Entertainment Industry Employment and Labor Law Annual Conference, and seminars and programs sponsored by the Council on Education in Management, the John Langston Bar Association, the Orange County Industrial Research Association, and the Goldman Sachs Legal Clinic for Small Businesses. Mr. Turner also speaks regularly on workplace issues at management training conferences and seminars for his clients.

honors & awards

- Recognized by *Best Lawyers in America©* in Labor Law - Management (2023-2024)

professional, business and civic affiliations

- State Bar of California, Member
- Los Angeles County Bar Association, Member

- John Langston Bar Association, Member
- California Minority Counsel Program, Member
- National Association of Minority & Women Owned Law Firms (NAMWOLF), Member

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IT'S THE MOST WONDERFUL TIME OF THE YEAR" – THE 2024 EMPLOYMENT LAW UPDATE

Ryan M. Haws

Attorney
LightGabler

Employment laws are changing with unprecedented speed and complexity.

Our job is not only to stay on top of those changes, but to find the right course for your business. You need the laws to work for you; we make sure they do.

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The 2024 Employment Law Update!

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Employers Group®

Presented By:

Ryan M. Haws, Esq.
LightGabler
805.248.7047
rhaws@lightgablerlaw.com
www.lightgablerlaw.com

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A SUMMARY: THE 2023 LEGISLATIVE SESSION (#1)

- 1046 bills sent to the Governor
- 890 bills signed: signing rate approx. 85%
- 156 bills vetoed: veto rate approx. 15% (last year 14.5%)
- Around 10% related to labor and employment topics
- Bills go into effect January 1, 2024, except where noted
- Two urgency measures and a few extended to 2024 or 2025
- All are California laws except where noted

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AGRICULTURE: OVERTIME (2016-2025) (AB 1066 REMINDER) (#2)

- Phase-in of overtime over seven years
- 26+ employees = regular daily/weekly overtime now applies (8/40)
- 25 or fewer employees = 8.5/45 still in effect for 2024 (regular OT next year)
- Meal periods now apply to all AG workers with limited exceptions (e.g., irrigators)

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ARBITRATION: AB 51 UPDATE (#3)

- AB 51 seeks to prohibit use of mandatory arbitration in FEHA / Labor Code claims
- Litigation ensued in federal court (9th Circuit)
- *Viking River* case – SCOTUS allows arbitration of PAGA
- On 8/22/22, 9th Circuit withdrew its prior approval of AB 51; rehearing pending
- Injunction prohibiting enforcement of AB 51 still in effect
- On 2/15/23, 9th Circuit reversed its ruling and affirmed that AB 51 is preempted by the FAA
- Possible petition to SCOTUS for final decision
- “Mandatory” arbitration is advisable for new hires; litigation is ongoing

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ARBITRATION: NO AUTOMATIC STAY DURING APPEAL (AB 365) (#4)

- Modifies the Civil Code of Procedure
- No automatic stay on appeal of an order dismissing or denying a motion to compel
- Contrary to the SCOTUS holding in the federal case of *Coinbase, Inc. v. Bielski*
- Wait to see what CA courts will do next

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BACKGROUND CHECKS: FAIR CHANCE REGULATIONS (#5)

- Effective October 1, 2023
- Modifications of the Fair Chance Act “ban the box” rules from 2018
- 5 key things to know
  - Broadened definition of “applicant”
  - Broadened definition of “employer”
  - Broadened prohibitions on advertising and recruiting missteps
  - Prohibition against use of volunteered information
  - Expanded individualized assessment criteria

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BATHROOMS: SINGLE-USER = ALL-GENDER (AB 783) (#6)

- AB 1732 (2016) all public businesses with single-user toilets must be designated “all-gender”
- Businesses missed the message
- This bill requires all California cities and counties to:
  - Give written notice to all applicants for a business license or a permit
  - That notice reminds them of the requirement that their single-user toilet facilities must be identified as all-gender toilet facilities

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BATHROOMS: SINGLE-USERS & CONSTRUCTION SITES (AB 521) (#7)

- Requires Cal/OSHA to begin the rule making process by December 1, 2025
- At least one single-user toilet facility for employees identifying as female or nonbinary
- Amends the Labor Code and Health and Safety Code

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CALSAVERS: EMPLOYER DEFINITION EXPANDS (AB 1234 & SB 1126) (#8)

- California's retirement plan system required if no private plan in place
- Currently applies to employers with 5+ employees
- As of 1/1/26, will apply if only one non-owner employee on payroll
- Penalties are up to $750 per employee for failure to comply

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COMPENSABLE TIME: FOOD HANDLER CARD (AB 476) (#9)

- Retail food code requires food handlers to obtain a food handler card
- This bill makes the time spent by employees on training and testing compensable time
- Employees must be relieved of all work duties
- Employers must reimburse employees for the costs of training/testing/renewal ($15)
- Cannot require job candidates to have an existing food handler card as a condition of hire
- By 1/1/25 the State Department of Public Health will post links to accredited training programs on its website

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COVID-19: NON-EMERGENCY STANDARDS (#11)

- Effective since 2/3/203 and in place for two years (except record keeping = 3 years)
- Key takeaways:
  - No more exclusion pay
  - More flexibility in your COVID-19 prevention plans (CPP)
    - Can be a separate document OR
    - Can be part of your Injury and Illness Prevention Program (IIPP)
  - Cal/OSHA will follow the CDPH on quarantine and isolation issues
  - Outbreaks no longer need to be reported to local health departments
    - 3 or more cases among employees in an "exposed group" within a 7-day period
  - Major outbreaks must be reported to Cal/OSHA
    - 20 or more COVID-19 cases in an "exposed group" within a 30-day period
  - Exposure notices can be posted (so long as no close contact)
    - Leave it up for 15 days
    - Close contact still gets individual notice

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COVID-19: RECALL RIGHT & CERTAIN INDUSTRIES (SB 723) (#12)

- Expands and extends prior bill SB 93 to 12/31/2025
- Now: Laid off after 3/4/2020 = presumption that state RIF or economic reason = COVID-19
- Covered Employers: Airports, hospitality, building services, and event centers
- Must offer laid off employees any job positions that become available for which laid off employees are qualified
- Must offer within 5 days. Employee has 5 days to accept

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CRD: CFRA PILOT PROGRAM EXTENDED BY ONE YEAR (AB 1756) (#13)

- Pilot program for small employers at the CRD (5-19 employees)
- An employee raises dispute about CFRA or bereavement leave (reproductive loss leave?)
- The CRD offers the employee and employer the chance to do early mediation
- Extension to January 1, 2025

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DIVERSITY, EQUITY & INCLUSION: CA'S "BRIDGE" PROJECT (SB 477) (#14)

- Removes 7-year-old taxpayer funded travel ban to states with discriminatory anti-LGBTQ+ laws
- Provides fund for CA to create nationally-aired non-partisan marketing and advertising campaigns on social equity, civil rights, and anti-discrimination
- DEI is a critical initiative. Review your policies, procedures and practices

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ELECTRONIC NOTIFICATION: BENEFITS REQUIRE OPT-IN (AB 1355) (#15)

- Effective through January 1, 2029
- Employees can opt-in to receive certain benefits documents via email:
  - Tax documents (federal and California earned income tax credits)
  - Unemployment benefit documents.
- These formerly had to be mailed to the last known address or given by hand

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FAST FOOD: OUT WITH THE OLD, IN WITH THE NEW (AB 1228) (#16)

- 2022 – AB 257 FAST Act
  - Created a Fast Food Council (FFC) with final authority to establish industry-wide rules for wages and working conditions
  - Would have created a $22 minimum wage
  - Political maneuvering ensues
    - Industry qualified a referendum for the November 2024 ballot, which stalled out the FAST Act implementation
    - The IWC is refunded and laws are drafted to create joint liability for franchisors and franchisees
    - Governor's offices get involved in the negotiations
- September 2023 – A compromise is reached, and AB 1228 is revised

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FAST FOOD: OUT WITH THE OLD, IN WITH THE NEW (AB 1228) (#16) (CONT'D)

- FFC authority is now only advisory in nature (except for setting the minimum wage)
  - Can develop workplace standard but …
  - Must involve the DLSE, Cal/OSHA or the CRD, etc.
  - Those agencies promulgate the new standards, rules, or regulations under the normal rulemaking processes
- Composition of the FFC is modified to give the industry a "fairer" shake
- The IWC is defunded
- The joint liability bill was quashed
- The minimum wage was adjusted downward
- The 2024 referendum on the FAST act is to be withdrawn

FAST FOOD: OUT WITH THE OLD, IN WITH THE NEW (AB 1228) (#16) (CONT'D)

- New minimum wage? $20 per hour, effective April 1, 2024
  - Subsequent annual increases = the lesser of 3.5% or national CPI (rounded)
  - Salary for management = $83,200/yr.
- Who does it apply to? 60 establishments nationally, at least one in CA, with:
  - Shared branding (standardized options for decor, marketing, packaging, products, & services)
  - Primarily engaged in providing food and beverages for immediate consumption on or off premises (limited to no table service)
  - NAICS Code 722513
- Excludes bakeries that sell bread on premises or restaurant within a grocery store (and the grocery store employs the workers – e.g., Starbucks inside a Vons)
- FFC sunsets on January 1, 2029

FEHA: CANNABIS USE PROTECTED OFF DUTY, OFF-SITE (AB 2188) (#17)

- Effective January 1, 2024
- Violation of FEHA to discriminate based on off-site, off-duty cannabis use
- Can test for THC (active ingredient) to show impairment; but not metabolites to show evidence of prior use and still in the system
  - Treats marijuana more like alcohol
- Other prohibitions still in effect as to on-duty possession, use, impairment, etc.
- Exempts workers in building and construction trades, some government agencies (DOT, FAA, etc.) and businesses receiving federal funds or federal contractors

FEHA: WEED = DON'T EVEN ASK ABOUT IT (SB 700) (#18)

- Expansion of AB 2188
- Employers CANNOT ask about prior use of cannabis (its unlawful!)
- Employers CANNOT use criminal history information about cannabis
- Employers required to consider this information under state or federal law are excluded (DOT, FAA, etc.)
- No exclusion for the construction trades

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IDENTITY: USE THE AFFIRMED NAME (AB 760 and SB 372) (#19)

- AB 760 requires State universities to use students' gender-affirmed names
- SB 372 requires the DMV to update licenses & registration to a current name or gender
- Ties back to slide on DEI & making sure your workplaces stay ahead of the trends

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IMMIGRATION: NEW I-9 FORM (#20)

- Required to be used as of 11/1/2023
- “Form I-9 Edition 08/01/23” (bottom left-hand corner)
- Mostly minor changes
  - Shortening up the document and having separate supplements
  - Adds a checkbox allowing for remote verification for E-Verify users
  - For non-E-Verify employers, you must do in-person examination of I-9 docs

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INDEPENDENT CONTRACTORS: EXTENSION END (AB 1561; AB 1506) (#21)

- Exclusions for manicurists, construction contractors and newspaper carriers
- Extension to 2025 instead of 2022
- Commercial fishing – exclusion extended to 2026

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REPRODUCTIVE LOSS (SB 848) (#22)

- Largely tracks the framework from last year's bereavement leave
- Applies to private employers with 5+ employees and all public employers
- Employee must be employed for at least 30 days
- Reproductive Loss Event (RLE)
  - Miscarriage, stillbirth, failed surrogacy, unsuccessful assisted reproduction, or failed adoption
- Allows five days of unpaid bereavement leave (employees can apply paid time off benefits)
  - Can use PTO, vacation or sick leave benefits to cover unpaid days
  - Employers can choose to have a paid policy

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REPRODUCTIVE LOSS (SB 848) (#22) (CONT'D)

- Need not be taken consecutively, but must be used within three months of the RLE, UNLESS
  - Employee is on leave (FMLA, CFRA, PDL, etc.)
  - Used within three months of the end date of the other leave
- Limited to 20 days within a 12-month period, if multiple RLE events
- Cannot request documentation about the underlying cause of the RLE situation
- Any information must be kept confidential
- Update your handbook

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LOCAL ENFORCEMENT: PUBLIC PROSECUTORS (AB 594) (#23)

- California's Budget Bill added "18M for local law enforcement of the Labor Code
- Effective through 1/1/2029, public prosecutors (DAs) can civilly and criminally prosecute Labor Code violations
- They should give the DLSE 14 days' notice, but failure to do so is not a defense for an employer
- Local prosecutors can apply for grant funding from the State
- Big cities already have their enforcement units set (SD, LA, SF)

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LOCAL RULES: LOS ANGELES & SF AREAS (#24 & 25)

- Check your local rules. Local rules abound. Most often they grant greater protections to workers than State rules
- Los Angeles
  - FWWO – effective 4/1/2023
    - Deals with predictive schedules for retail workers
  - Freelance Worker Protections Ordinance – effective 7/1/2020
    - Protections for solo “gig” independent contractors
- San Francisco
  - Private Sector Military Leave Pay Protection Act
    - Supplemental pay for workers on military leave (100+ employees worldwide)

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MEAL & REST PERIODS: AIRLINE CABIN CREW (SB 41) (#26)

- Adds Labor Code section 512.2
- Cabin crew workers covered by the Railway Labor Act and a valid CBA are exempt from the normal meal and rest break rules.

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NON-COMPETES: IT'S NOTICE TIME (AB 1076) (#27)

- Companion bill to SB 699 (next slide)
- Declaratory of existing case law (*Edwards v. Arthur Andersen*)
- Applies prohibitions against non-competes to non-contracting parties
- Requires employers to notify current and former employees (hired after 1/1/2022) subject to non-competes that:
  - The agreement is void
  - Must be sent by February 14, 2024 (Happy Valentine's Day) and
  - Be sent to last known address and email address
  - Must specify that including a violative noncompete clause in an employment contract is "unfair competition" under Business and Professions Code Section 17200 et seq.

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NON-COMPETES: NO RESTRAINTS ON TRADE (SB 699) (#28)

- Expands current prohibitions against non-competes
- ""[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Very narrow exception)
- Four narrowing changes:
  - Non-competes are void & unenforceable no matter where and when signed
  - Current & former employer cannot enforce non-competes "regardless of whether the contract was signed and the employment was maintained outside of California."
  - Employers entering or enforcing an unlawful noncompete = civil violation & gives the affected employee a private right of action
  - Allows prevailing employees to collect attorney's fees and costs
  - Constitutional issues?

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NON-DISCLOSURE AGREEMENTS: “SPEAK OUT ACT” (#29)

- Effective 12/7/2022
- Continuance of #MeToo movement to empower victims to “speak out”
- Makes any blanket non-disclosure and non-disparagement contract clauses void and unenforceable if the contract was executed before a “sexual assault dispute” or a “sexual harassment dispute” arose
- “Sexual assault dispute” means, “… a dispute involving a non-consensual sexual act or sexual contact … including when the victim lacks capacity to consent,” and
- “Sexual harassment dispute” means “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”

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OSHA: INDOOR HEAT ILLNESS REGULATIONS (#30)

- In process since 2016 AND still not final (pundits opine finalization in spring 2024)
- So you can prepare, here are the basics:
  - All indoor places of employment where the temperature equals or exceeds 82 degrees (does not apply to remote workplaces)
  - Greater protections are required in higher-heat times (87 degrees or higher)
  - Have a heat illness prevention program (can be part of IIPP or separate document)
  - Must maintain cool-down areas
  - Allow and encourage preventative cool-down rests in a cool-down
  - Provide access to fresh, pure, suitably cool, and free drinking water as close as practicable to working areas and in cool-down areas
  - Provide first aid or emergency response if signs or reports symptoms of heat illness
  - Employers must provide training on indoor heat illness prevention

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OSHA: TRO's & WORKPLACE VIOLENCE PREVENTION PLANS (SB 553 and SB 428) (#31)

- SB 553 and SB 428 – effective 1/1/25 make it easier for employers and union reps to pull restraining orders to protect the workplace
- SB 553 also creates requirement for companies to implement Workplace Violence Prevention Plans (WVPP) (can be part of the IIPP or a separate document)
- Restraining orders:
  - Adds Code of Civil Procedure Section 527.8
  - Unions representing employees will be able to petition the court for a workplace TRO
  - Employers, even without actual violence, will be able to petition the court for a workplace TRO due to harassment
  - Before seeking TRO for a workplace violence, the (employer or union) has to offer affected employee the opportunity to remain anonymous

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OSHA: TRO's & WORKPLACE VIOLENCE PREVENTION PLANS (SB 553) (#31) (CONT'D)

- **Who?** Virtually all employers (at least one employee)
  - Exemptions (HCFs, DCR, certain law enforcement agencies)
- **Where?** Places of employment, and employer-provided housing and employees
  - Does not apply to remote work spaces or workplaces with under 10 employees, inaccessible to the public
- **When?** By July 1, 2024
- **What?** Must establish, implement, and maintain an effective written WVPP

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OSHA: TRO's & WORKPLACE VIOLENCE PREVENTION PLANS (SB 553) (#31) (CONT'D)

- **What goes in the plan?**
  - Names or job titles of the persons responsible for implementing the plan;
  - effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report;
  - Effective procedures to communicate with employees regarding workplace violence matters….;
  - "effective procedures to respond to actual or potential workplace violence emergencies…."
  - Many other items
- Must provide review and revise it annually
- Must provide training at outset, any time something changes and annually thereafter
- Keep records (5 yrs. for most content, 1 yr. for training materials)

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BALLOT MEASURE TO REPEAL PAGA (#32)

- Private Attorney Generals Act – allows employees to file lawsuits for themselves and other employees to recover penalties for certain labor law violations by their current or former employers
- Out of control
- Ballot measure to repeal this law and require the DLSE to act and to increase funding
- Only the DLSE to enforce labor laws and impose penalties

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PAID SICK LEAVE: 40 HOURS OR FIVE DAYS (SB 616) (#33)

- Amends the Healthy Workplaces, Healthy Families Act of 2014 in three main ways
  - Increases the hours/days of PSL and the way PSL is provided to employees;
  - Expands certain protections for union employees; and
  - Excludes railroad workers from PSL coverage
- "Full amount of leave" = means *40* hours or *five* days (not 24 hours or three days)
  - IHSS workers
  - "individual provider of waiver personal care services."

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PAID SICK LEAVE: 40 HOURS OR FIVE DAYS (SB 616) (#33) (CONT'D)

- **Standard Accrual** = one hour per every 30 hours worked, but they can use *40* hours or *five* days (not 24 hours or three days)
  - Can be satisfied by providing 24 hours of accrued sick leave by the 120th calendar day of employment … *and no less than 40 hours by the 200th calendar day of employment*
- **Alternate Accrual** = (any rate not 1/30) is fine <u>but</u> they must have 24 hours by the 120th calendar day of employment … *and at least 40 hours by the 200th calendar day of employment*
- **Frontloading** = must give *40* hours or *five* days (not 24 hours or three days)
- **PTO** = A viable alternative so long as the plan meets the accrual, carryover and use requirements AND CA vacation rules
- "**Grandfathered Plans**" = (in place before 1/1/2015 + other criteria) must allow them to accrue at least *five* days or *40* hours of sick leave, or paid time off, within *six* months of employment

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PAID SICK LEAVE: 40 HOURS OR FIVE DAYS (SB 616) (#33) (CONT'D)

- Check your local rules (we expect change)
- Partial preemption of local rules by SB 616? Yes, but only as to (LC 246):
  - Subdivision (g) - no payout of unused sick leave at separation, but reinstatement of unused sick leave upon return within one year;
  - Subdivision (h) - lending PSL allowed at the employer's discretion;
  - Subdivision (i) - itemized wage statements and written notices of PSL available;
  - Subdivision (l) - how to calculate PSL pay;
  - Subdivision (m) - "foreseeable" and "unforeseeable" notice provisions; and
  - Subdivision (n) - payday rules and employer recordkeeping and employee documentation.
- Certain portions of the PSL protections now apply to union employees (e.g., prohibition against requiring an employee to find a replacement worker) and anti-retaliation
- Railroad workers are excluded

PFL/SDI Rates Higher for Low-Income Workers (SB 951) (#34)

- Paid Family Leave and State Disability Insurance benefits increased
- Phased-in increases up to 90% for lowest income workers
- No more cap on wage tax at $145,600; now unlimited taxation to pay for the increased benefit

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PREGNANCY: FEDERAL ACCOMMODATION REGS (#35)

- Effective 6/27/2023 (also see the PUMP Act)
- Federal law adding reasonable accommodation protections for employees
- CA has stricter laws under its Pregnancy Disability and Lactation Accommodation statutes
- Review the EEOC guidance

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PRIVACY: CCPA/CPRA COMPLIANCE (#36)

- Enacted in 2018, and effective 1/1/2023
- CPRA exclusion for “HR” documents until 1/1/2023
- Does it apply to you? For-profit company in CA that meets any of the 3 criteria:
  - Gross annual revenue of over $25 million;
  - Buy, sell, or share the personal information of 100,000 or more consumers; or
  - Derive 50% or more of annual revenue from selling or sharing consumer information
- There are other criteria related to joint business and voluntary compliance
- “Delete my files” request?
  - Employer still has a duty to maintain files under various code sections
  - May deny if records must be maintained under other statutes (e.g., LC 433; LC 226; LC 1174)

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PRIVACY: REPRODUCTIVE & SEXUAL HEALTH DIGITAL DATA (AB 254) (#37)

- Expands California Civil Code Section 56.05 (CMIA)
- To cover any “reproductive or sexual health digital services” that collects “reproductive or sexual health application information.”
- To address the current lack of protection for sensitive information collected by menstrual tracking apps and other digital services

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PRIVILEGED COMMUNICATION: NO FORMAL COMPLAINT (AB 933) (#38)

- Adds Civil Code Section 47.1
- Expands the definition of “qualified privileged communication”
- Now covers “communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination,” even if there is no formal complaint raised [formerly covering only a complaint of sexual harassment].
- Meant to: “… help curb any unnecessary, and ultimately unsuccessful, litigation against individuals who choose to come forward with their stories of sexual assault and harassment.”

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PROTECTED CATEGORY: FEHA EXPANDS (SB 523) (#39)

- California's response to *Roe v. Wade* being overturned
- No discrimination allowed for "reproductive health decision-making"
- Presumably includes contraception, in vitro fertilization, abortion

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PUBLIC SECTOR: JOINT & SEVERAL LIABILITY (AB 520) (#40)

- Amends Labor Code Section 238.5
- For public entities contracting with the property services or long-term care industries
- Extend joint and several liability for unpaid wages, including interest
- California regional center that allocates public funding to individual caregiver companies

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RETALIATION: PROTECTIONS AND PENALTIES EXPAND (SB 497) (#43)

- Creates a rebuttable presumption of retaliation
- If adverse action (discharge, demotion, suspension, retaliation against, etc.) within 90 days of an employee's engaging in a protected activity (*e.g.*, complaint, whistleblowing, etc.)
- Not a free pass to retaliate on day 91
- Increased penalties – $10,000 penalty is available per employee, per violation

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SAFETY: MOTION PICTURES AND FIREARMS (SB 132) (#44)

- Result of the death on the film set “Rust”
- New safety protocols for on-set use of ammunition & firearms (motion picture industry)
- Creates and funds a “Safety on Productions Pilot Program” tax credit

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SCHOOLS: CULTURAL COMPETENCY TRAINING INBOUND (AB 5) (#45)

- Amends Education Code 218
- Effective 7/1/2025
- State Department of Education will develop and implement a mandatory online training delivery platform and an online training curriculum for [public school] teachers and other certificated employees
- The training will be “to support lesbian, gay, bisexual, transgender, queer, and questioning (‘LGBTQ’) cultural competency training”

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SMOKING: DON’T SMOKE IN CA HOTELS (SB 626) (#46)

- Disallows the 1995 rule that up to 20% of the guestroom accommodations in a hotel, motel, or similar transient lodging establishment could be smoking rooms
- All hotel rooms must now be smoke free

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UNIONS: SECRET BALLOT / MAJORITY SUPPORT PETITIONS (AB 113) (#47)

- Urgency measure effective 3/15/2023
- Sunsets on January 1, 2028
- Provides “two procedures available by which a union can be certified to represent an employer’s agricultural employees”
  - In-person secret ballot election (the normal process); or
  - A Majority Support Petition (the new-ish card check election – AB 2183)
- Repeals the Labor Peace agreement provisions of AG 2183

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VETOED BILLS: KEY BILLS THAT DID NOT PASS (#48)

- **SB 799** - Allow striking employees to collect unemployment benefits
- **SB 403** - Add "caste" to the list of California protected categories
- **SB 731** - Require 30 days' notice before returning remote workers to the office
- **AB 524** - Add "family caregiver" status as a new protected category under FEHA
- **AB 1356** - Expand Cal-WARN Act protections, by among other things, requiring 75-days' advance notice to impacted employees
- Watch for these to make a return showing next year

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CA'S MINIMUM WAGE HIKE CONTINUES (#49)

- Hourly employees - increase from $15.50 to $16.00 (up 3.5%)
- Exempt employees - salary must increase to $66,560 (minimum wage x 2 x 2080)
- Check your local rules, but
- Use state minimum wage, not higher local minimum wage, to determine exempt salary minimum (be careful with AB 1228 and SB 525)

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WAGES: FEDERAL INCREASE IN SALARY THRESHOLD (#50)

- FEDERAL increase in the exempt salary = $1,059 per week (or $55,068 per year)
- Highly Compensated Employee exemption rises to $143,988
- Doesn’t impact your CA employees – our requirements are higher

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WAGES: INCREASES FOR COMPUTER SOFTWARE & PHYSICIANS (#51 & #52)

- Computer Software and Systems Analysts – if paid $115,763.35 annually or $55.58/hour, then no entitlement to overtime
- Don’t confuse (a) above with company’s IT support personnel
- Physicians and surgeons – if paid $101.22/hour, no entitlement to overtime

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WAGES: INCREASED MINIMUM WAGE FOR HEALTH CARE (SB 525) (#53)

- Hourly: phase-in a state-wide $25 per hour minimum wage (in due course)
- Exempt: exemption is 1.5 x health care worker minimum wage, or 2x state minimum wage, whichever is greater ($83,200)
- Future increases either 3.5% or CPI-U
- 5 different minimum wage schedules depending on facility size, type, location, and governmental payor mix percentage
- Preempts any lower local industry or city/county jurisdictions minimum wage rules – but they can go higher or introduce general minimum wage rules for all workers that are higher

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WAGES: INCREASED MINIMUM WAGE FOR HEALTH CARE (SB 525) (#53) (CONT'D)

- Applies to almost all healthcare facilities except hospital owned, controlled, or operated by the State Department of State Hospitals and a tribal clinic exempt from licensure … or an outpatient setting conducted, maintained, or operated by a federally recognized Indian tribe, tribal organization, or urban Indian organization
- Applies to almost all workers including - but not limited to, "employees performing work in the occupation of a nurse, physician, caregiver, medical resident, intern or fellow, patient care technician, janitor, housekeeping staff person, groundskeeper, guard, clerical worker, nonmanagerial administrative worker, food service worker, gift shop worker, technical and ancillary services worker, medical coding and medical billing personnel, scheduler, call center and warehouse worker, and laundry worker, regardless of formal job title"
- Does not include - outside salespersons, public sector work, if the primary duties performed are not health care services, delivery or waste collection work on the premises, or medical transportation services in or out of a covered health care facility, so long as (for both (3) and (4)) the worker is not an employee of any person that owns, controls, or operates a covered health care facility

WAGE THEFT: UPDATED FORM ON THE WAY (AB 636) (#54)

- Amends Labor Code Section 2810.5
- Requires the DLSE to issue a new Wage Theft Prevention Notice form
- Two additional section:
  - Federal or state emergency or disaster declaration:
    - Applicable to the county or counties where the employee is to be employed
    - Issued within 30 days before the employee's first day of employment,
    - MAY affect their health and safety during their employment
  - H-2A notices in Spanish regarding workplace rights

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WORK PERMITS: WORKPLACE READINESS WEEK (AB 800) (#55)

- Public high schools (and charter schools) must implement a “Workplace Readiness Week”
- Educate student on workplace topics like:
  - prohibitions against independent contractor misclassification, child labor, wage and hour protections, worker safety, workers’ compensation, unemployment insurance, paid sick leave, other leaves, SDI, the right to organize a union in the workplace, and prohibitions against retaliation
- 11th & 12th grade students will be educated on these topics as part of their regular history-social science curriculum
- Effective 8/1/2024, before issuing a work permit, a school will have to issue the student a document explaining basic labor rights.

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Thank you for attending!

Ryan M. Haws, Esq.
LightGabler
805.248.7047
rhaws@lightgablerlaw.com
www.lightgablerlaw.com

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LightGabler

We Make Business Work®

760 Paseo Camarillo, Suite 300
Camarillo, CA 93010
805.248.7208 ■ Fax: 805.248.7209
LightGablerLaw.com

"IT'S THE MOST WONDERFUL TIME OF THE YEAR"

The 2024 Employment Law Update!

Prepared and Presented by:

Ryan Haws
(805) 248-7047
rhaws@lightgablerlaw.com

Ryan M. Haws, Esq.

Ryan practices in the area of employment law advice and counsel. With a background in social work and past legal experience with employment and family law matters, he focuses on proactive resolution of workplace disputes while aggressively defending his clients' interests, and provides guidance to employers on complying with legal standards while preserving business productivity and employee morale. Ryan counsels employers in all aspects of employment law, including:

- Training & preventive counseling for employee relations & litigation avoidance
- Development and revision of employee handbooks and personnel policies
- Disabilities and leaves of absence
- Workplace privacy issues, employee complaints and internal investigations
- Employee hiring, discipline and termination
- Wage and hour matters
- Protection of employer trade secrets and confidential information

Ryan has been recognized as one of the top 40 up-and-coming business professionals by the Pacific Coast Business Times. He serves as a Board Member of the Western Ventura County Employer Advisory Council and the Ventura County Professionals in Human Resources Association (PIHRA). He is also a member of the Ventura County Bar Association. In his spare time, Ryan frequently coaches local basketball and softball leagues. He is an active member of his church community.

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NEW LEGISLATION AND OTHER KEY TOPICS

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1. A SUMMARY: THE 2023 LEGISLATIVE SESSION

The California State Legislature convened its 2023 Legislative Session on January 4, 2023, and by the September 14, 2023 deadline, the Legislature sent 1,046 bills to Governor Gavin Newsom. As of the October 14, 2023 signing deadline, Governor Newsom signed 890 of those bills into law (85%) and vetoed 156 bills (15%). Of the signed bills, around 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 January 3, 2024 (see #48 for a few key bills).

Other than SB 41 and AB 113 (see #26 and #47 below), which were urgency measures effective immediately upon the Governor's signature, most of the other bills noted below are effective on January 1, 2024, 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/faces/billSearchClient.xhtml (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
2024	**8.5**	**45**
2025	8	40

26 or more employees:

YEAR	DAILY OVERTIME	WEEKLY OVERTIME
2022	8	40

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

Note that most of the 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 complete copy of IWC Wage Order 14, see: https://www.dir.ca.gov/IWC/IWCArticle14.pdf.

3. ARBITRATION: AB 51 UPDATE

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 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, the 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) and it granted the Chamber's request for a panel rehearing on the matter.

Most recently, on February 15, 2023, a divided three-judge Ninth Circuit Court panel reconsidered its former (errant) decision, reversed course 180 degrees, and affirmed the September 15, 2021 district court ruling that the FAA preempted AB 51. The panel (this time) held that the FAA preempts not only state laws affecting the enforceability of executed arbitration agreements, but also state laws that discriminate against the formation of arbitration agreements. Here, the court found that the FAA preempted AB 51 because AB 51 discriminated against the formation of mandatory arbitration agreements by criminalizing the act of entering into such agreements.

PRACTICE TIP: Based on the February 15, 2023 ruling, employers can require applicants and current employees to sign mandatory arbitration agreements as a condition of employment. Be sure to also update your employment application, offer letters, employment agreements and other similar documents to reflect this change.

4. ARBITRATION: NO AUTOMATIC STAY DURING APPEAL

SB 365 amends California Code of Civil Procedure Section 1294 (the CAA) so that an appeal of any order dismissing or denying a petition to compel arbitration does not automatically stay the proceeding in the trial court until such appeal is resolved. However, the United States Supreme Court recently held in *Coinbase, Inc. v. Bielski* that under the FAA, a federal district court must stay proceedings upon the appeal of denial of a motion to compel arbitration. California courts have yet to opine on the issue. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB365.

5. BACKGROUND CHECKS: FAIR CHANCE REGULATIONS

Effective October 1, 2023, California employers must follow modified regulations under the FCA when using an applicant's or employee's criminal history to inform their employment decisions. The FCA modifications include a variety of changes that affect the hiring process from start to finish, placing more stringent burdens and restrictions on employers. The modifications can be found in California Code of Regulations Title 2, Section 11017.1 See: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/FinalText-CriminalHistoryEmployDecRegulations.pdf.

The key FCA provisions and modifications are summarized below:

1. The term "employer" has been expanded under the modified FCA to include "any direct or joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list." In other words, an employer may not hire a third party to act on its behalf to circumvent the requirements of the FCA. (This does not apply to employers required by law to conduct a criminal background check, such as state or local agencies, criminal justice agencies, or Farm Labor Contractors.)

2. The term "applicant" has been expanded under the modified FCA to include not only individuals applying for a position, but also existing employees applying for a new position or who are subject to review after a change in management, ownership, policy or practice. An employer also cannot evade the requirements of the FCA by letting the applicant start working before reviewing their criminal history.

3. Advertisements, job postings, and recruiting material cannot include statements that suggest the employer will not consider applicants with a criminal history. The modified FCA provides examples such as "No Felons" or "Must Have Clean [Criminal] Record."

4. As a reminder, an employer may not consider an applicant's criminal history before making a conditional offer of employment. This prohibition includes information voluntarily provided by the applicant or gained from any other source (such as an internet search). An employer may consider an applicant's criminal history only after extending a conditional offer, subject to the restrictions below.

5. Recall that after making a conditional offer of employment and upon learning of an applicant's criminal history, the employer must make an individualized assessment, which is a “reasoned, evidence-based determination” of whether the applicant’s criminal history has a direct and adverse relationship with the duties of the job which would justify denial. The employer must consider the following general factors: (1) the nature and gravity of the offense or conduct; (2) the time passed since the offense or conduct; and (3) the nature of the job held or sought.

6. The modified FCA also provides a non-exhaustive list of sub-factors that may be included when making an individualized assessment; employers conducting an individualized assessment should review these factors. Certain types of criminal history, such as non-felony marijuana convictions over two years old and non-conviction arrests, can never be considered in a hiring decision.

7. Although not new, the next step, if the employer wishes to revoke the conditional offer after the individualized assessment, the employer must notify the applicant in writing of its preliminary decision to revoke. That notification must cover a series of specific requirements. The applicant must be given five business days to respond to the employer's notice by challenging the accuracy of the information considered, including submitting evidence of rehabilitation and/or mitigating circumstances. If the applicant timely notifies the employer of the need for additional time to respond, the employer must grant at least five additional business days to the employee to do this before the decision becomes final. If an applicant challenges the employer’s preliminary decision to revoke the offer, the employer must perform a reassessment, including considering any evidence of rehabilitation or mitigating circumstances. After reassessment, if the employer still wishes to rescind the conditional offer, it must provide written notification to the applicant and include information on how to challenge the decision and the applicant's right to file a complaint with the CRD.

8. Remember that even if the employer can justify its revocation decision as job-related and necessary, an applicant still may file a claim for discrimination under FEHA, arguing that there were less discriminatory alternative actions the employer could have taken. To defend against such claims, employers are strongly encouraged to follow all the steps discussed above and maintain good documentation of each step along the way.

PRACTICE TIP: In addition to following these changes to the California law, employers must review any local ordinances that apply to their various locations. Cities such as Los Angeles and San Francisco have enacted their own local rules on the use of criminal history in the hiring process.

6. BATHROOMS: SINGLE-USER = ALL-GENDER

Since 2016, AB 1732 has required “businesses, places of public accommodation, and state or local government agencies” that offered a single-user toilet facility to designate that facility as an all-gender toilet facility. Clearly some businesses did not get the message. To get the news out, **AB 783**, as of January 1, 2024, will require all California cities and counties to provide written notice to all applicants for a business

license or a permit, of the requirement that their single-user toilet facilities must be identified as all-gender toilet facilities. According to the bill's author, "Restrooms are a necessity of life, and access to them influences our ability to participate in public life. Restricting access to single-occupancy restrooms by gender creates problems of safety, fairness, and convenience. This issue disproportionately impacts members of the LGBTQ+ community, women, and parents and caretakers of dependents of the opposite gender… [This bill] is an important follow-up … that ensures businesses are complying with the law by requiring cities to issue written notice to business license applicants that all single-occupancy restrooms be designated as 'all-gender'." See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB783.

7. BATHROOMS: SINGLE-USERS & CONSTRUCTION SITES

AB 521 amends both the Health and Safety and the Labor Codes to address concerns that women and nonbinary individuals are underrepresented in the trades and face barriers on construction sites. One barrier is access to secure and clean jobsite restroom facilities. Labor Code Section 6722 will require the Cal/OSHA Standards Board to draft a rulemaking proposal by December 1, 2025, to consider requiring construction jobsites to have at least one single-user toilet facility designated for use by employees who identify as female or nonbinary. Health and Safety Code Section 118600, which already requires all single-user toilet facilities to be all-gender facilities at any business establishment, place of public accommodation, or state or local government agency, is amended to not apply to construction jobsites in anticipation of the new Labor Code amendment. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB521.

8. CALSAVERS: EMPLOYER DEFINITION EXPANDS (REMINDER)

SB 1234 (2016) created 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.

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#.

9. COMPENSABLE TIME: FOOD HANDLER CARD

The California Retail Food Code requires that within 30 days of hire, a food handler must obtain a food handler card. That card must then be kept valid throughout employment. To obtain a food handler card, an individual must successfully complete a food handler training course and examination, both of which cost no more than $15. **SB 476** amends Health and Safety Code Section 113948 to characterize as compensable hours worked, the time it takes an employee to complete the necessary training and to take the examination to obtain (or renew) a food handler card. During that training and testing time, the employer must relieve the affected employee of all other work duties. The bill also requires the employer to reimburse for any necessary costs or losses incurred by the employee to obtain the card (including the training course and examination ($15, although there may be less costly options)). It also prevents an employer from requiring a job candidate to have an existing food handler card as a condition of hire. The State Department of Public Health, by no later than January 1, 2025, is required to post links on its internet website for certain American National Standards Institute ("ANSI")-accredited food handler training programs. Local health departments will be required to post links to the State's website. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB476.

10. COMPLIANCE: HUMAN RESOURCES REVIEW

It can be daunting for California employers to keep up with the myriad of ever-changing employment laws in a "typical" year. In 2023, employers were bombarded with a host of muddled changes to local, state and federal laws. 2024 promises more of the same, as our California courts and legislature have imposed several sweeping changes and a few hidden traps for employers. With lawsuits on the rise, now, more than ever before, focusing on compliance is critical. We recommend that companies conduct a human resources compliance review at least annually. We also have discovered that even after these reviews, some employers find that their staff has persisted in handling matters not in compliance with California law, or not best practices. To assist our clients in their compliance efforts, LightGabler offers a human resources compliance review that covers over 120 potential hotspots that have regularly tripped up even the most well-intentioned employers.

11. COVID-19: NON-EMERGENCY STANDARDS

On February 3, 2023, Cal/OSHA's Board adopted slightly more flexible COVID-19 Non-Emergency Regulations ("CNR") to replace its former Emergency Temporary Standards ("ETS"). The CNR will remain in effect for two years from the date of their implementation, except for the recordkeeping subsections, which will apply for three

years. The CNR largely carry forward the former ETS requirements, but there are several key CNR changes, a few of which are described below.

No Exclusion Pay / Flexible COVID-19 Prevention Plan ("CPP") and Training Requirements

The CNR does not require exclusion pay.

The CNR also grants employers greater flexibility to create COVID-19 safety-related documentation in one of two ways: (1) addressing it in the written IIPP; or (2) maintaining a separate CPP. In addition, COVID-19 training need not be done separately, but can instead be part of the employer's overall safety (IIPP) training.

Cal/OSHA Follows the CDPH on Quarantine and Isolation Issues

The CNR FAQs state explicitly that Cal/OSHA will follow the CDPH current isolation standards – "The COVID-19 Prevention regulations' required exclusion periods for employees with COVID-19 are the same as CDPH's recommended isolation periods for positive COVID-19 cases." Thus, CNR standards will continue to evolve as the CDPH guidance changes over time. See: https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx.

COVID-19 Exposure Notices

The CNR defers to Labor Code Section 6409.6, which allows employers the flexibility of choosing to post a notice at the workplace (for those employees with no known close contact) or continue issuing individual written notices. A posted exposure notice must be in English as well as the language understood by the majority of employees, must be posted within one business day of when the employer receives notice of the potential exposure, and must remain posted for 15 days.

AB 685 notice (to individuals with a close contact) is required until January 1, 2024. After that time, employers should follow the Cal/OSHA CNR notices standards. Relatedly, employers remain required to notify their workers' compensation carriers of COVID-19 cases until January 1, 2024 (there is a potential $10,000 penalty for non-compliance).

Outbreaks

The CNR does not require employers to report COVID-19 cases or outbreaks to their local health departments (unless the local rules in the employer's jurisdiction require doing so). For major outbreaks, the CNR contains a new requirement that employers must report the outbreak to Cal/OSHA itself.

Additional Information

The DIR has posted FAQs and additional information on the CNR, which will be accessible at:
https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html.

12. COVID-19: RECALL RIGHT & CERTAIN INDUSTRIES

SB 723 amends Labor Code Section 2810.8. You may recall SB 93 from 2021. That bill required 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 recall rights. It also required covered employers to rehire laid-off employees based on a seniority preference system. For covered employers, this bill essentially eliminated the flexibility to decide which employees to bring back, and the order in which to return laid-off employees to work. SB 93 expires December 31, 2024.

SB 723 revises Section 2810.8 (SB 93) in couple of ways. First, it extends the effect for an additional year, until December 31, 2025. Second, it expands the definition of "laid-off employee" to now mean any employees that were employed by the employer for six months or more and whose most recent separation from active employment occurred "on or after March 4, 2020." This cast a much wider rehire obligation net for covered employers (see below). SB 723 also creates "a presumption that a separation due to a lack of business, reduction in force, or other economic, non-disciplinary reason is due to a reason related to the COVID-19 pandemic, unless the employer establishes otherwise by a preponderance of the evidence."

SB 723 does not change the scope of SB 93; it still only applies to the following types of businesses: (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 (more than 50,000 square feet or 1,000 seats that are used for the purposes of public performances, sporting events, or business meetings).

SB 723 does not change the notice requirements laid out in SB 93. Under Section 2810.8, 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." Note that for the purposes of SB 723, a business day is defined to mean any calendar day except Saturday, Sunday, or any official State holiday.

SB 723 also leaves intact the notices of reopening that 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.” Companies must follow the seniority-based right to recall rules continued by SB 723. 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.”

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. 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.

SB 723, like its predecessor SB 93, still does not create a private right of action for former employees. Rather, the California DLSE is tasked with adjudicating complaints and enforcement. The law provides for injunctive relief, back pay and civil penalties, so covered employers must take this seriously.

As with SB 93, employers are required to keep recall-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.” See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB723.

13. CRD: CFRA PILOT PROGRAM EXTENDED BY ONE YEAR

A few years back, under Government Code Section 12945.1, California instituted a CRD (DFEH) mediation pilot program for small employers (between five and 19 employees). Under this program, if an employee of a small employer requests an immediate “right-to-sue” notice from the CRD for a CFRA or bereavement leave-related claim, the CRD then automatically sends the employee a notice that it offers to provide free mediation services, facilitated by a neutral CRD mediator, to help the parties resolve the disagreement. The CRD then notifies the employer, and either party (employer or employee) can then request the matter be mediated. This program was set to sunset on January 1, 2024. **AB 1756** extends that sunset date by one year to January 1, 2025. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1756.

14. DIVERSITY, EQUITY & INCLUSION: CA'S "BRIDGE" PROJECT

SB 447 authorizes GO-Biz to create a new public awareness project called the Building and Reinforcing Inclusive, Diverse, Gender-Supportive Equity Project ("BRIDGE Project"). According to the State's press release, this project will "promote California's values of acceptance and inclusion of the LGBTQ+ community across the country" through state-funded, non-partisan marketing and advertising campaigns on social equity, civil rights, and anti-discrimination. The bill also removes the seven-year-old travel ban that formerly prevented taxpayer-funded travel by state agencies and departments to states that had adopted discriminatory anti-LGBTQ+ laws. Senator Atkins, the bill's author, stated, "Today, we are sending a message to the rest of the nation – here in California, we embrace one another, not in spite of our differences, but because of them. And we are ready to reach across the aisle, and across state lines, to help open hearts and minds, and support our LGBTQ+ youth and communities who are feeling so alone." See:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB447.

PRACTICE TIP: Employers should review their policies, practices and procedures with an eye toward diversity, equity and inclusion. One basic way to do so is to eliminate gender-based terms such as "he" and "she," and replace those terms with a neutral term such as "they." Be sure to also review the California CRD's materials on the "The Rights of Employees Who Are Transgender or Gender Nonconforming," viewable here:
https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/The-Rights-of-Employees-who-are-Transgender-or-Gender-Nonconforming-Fact-Sheet_ENG.pdf.

15. ELECTRONIC NOTIFICATION: BENEFITS REQUIRE OPT-IN

AB 1355, at least until January 1, 2029, will allow California employers to electronically distribute certain required documents, so long as the employee opts in to the employer's electronic distribution program. Specifically, once an employee opts in, either electronically or in writing, an employer can then electronically distribute in "PDF, JPEG, or other digital image file type" certain required tax documentation (*e.g.*, federal and California earned income tax credits) and unemployment benefits information. Before AB 1355, these documents needed to be handed directly to the employee or mailed to the employee's last known address. This bill makes clear, however, that "An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee who does not affirmatively, in writing or by electronic acknowledgment, opt into receipt of electronic statements or materials." See:
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1355.

16. FAST FOOD: OUT WITH THE OLD, IN WITH THE NEW

In 2022, AB 257 attempted to create the FFC to set minimum standards for workers in the fast food industry. This bill was seen by many as a harbinger of industry-wide/sectoral bargaining (one industry, and workers negotiating with employers for increased rights across that industry). After the Governor signed AB 257 into law, a coalition of businesses created a referendum that qualified for the November 2024 ballot

and proposed to repeal AB 257. This delayed the implementation of AB 257 until after the 2024 election. What followed was a chess match of political maneuvering and behind-the-scenes negotiation between labor leaders and the fast food industry. On September 11, 2023, the groups reached a compromise. The restaurant industry agreed to withdraw its pending ballot measure, and labor leaders agreed to a marginally modified version of AB 257, now codified in **AB 1228**. Below is a summary of some key provisions of AB 1228:

What does it do? It creates an FFC, and, effective April 1, 2024, it sets a $20 per hour minimum wage for covered national fast food chains. Specifically, AB 1228 repeals Labor Code Part 4.5.5 (Sections 1470, 1471, 1472, and 1473) (formerly AB 257) and adds a new Part 4.5.5 (Sections 1474, 1475, and 1476). This rise in the state-wide fast food minimum wage also increases the salary basis for impacted exempt employees to $83,200 annually.

Which businesses are covered? Any "national fast food chain," defined as, "… a set of limited-service restaurants consisting of more than 60 establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service." (AB 257 applied to chains "consisting of 100 or more establishments".) A "limited-service restaurant" includes, but is not limited to, an establishment with the North American Industry Classification System Code 722513.

Are any businesses excluded? Yes. AB 1228 does not cover: (1) "an establishment that on September 15, 2023, operates a bakery that produces for sale on the establishment's premises bread … so long as it continues to operate such a bakery. This exemption applies 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…." (such as a Starbucks inside of a Target or Ralphs market). It is expected that additional businesses will be excluded through future legislation.

What is the FFC? The FFC is part of the California DIR and will operate through January 1, 2029. AB 1228 slightly modifies the FFC composition contemplated by AB 257. Under AB 1228, the FFC is comprised of nine members, as follows: two fast food industry representatives; two fast food restaurant franchisees'/owners' representatives; two fast food restaurant employee representatives; two advocate representatives for fast food restaurant employees; and (this is new) "one unaffiliated member of the public who is not an owner, franchisee, officer, or employee in the fast food industry; who is not an employee or officer of a labor organization or a member of a labor organization representing fast food restaurant employees; and who has not received income from the fast food industry or any labor organization for a period of two years prior to appointment."

This unaffiliated member chairs the FFC (this is also new). There are also two non-voting members, one from the DIR and another from GO-Biz.

What is the FFC's purpose? It exists "… to establish fast food restaurant minimum standards on wages, and develop fast food restaurant minimum standards on 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." The FFC must hold its first meeting by March 15, 2024.

How does the FFC make changes to the law? To pass any new standard, rule, or regulation, requires an affirmative vote of at least five of the nine voting council members. Presumably, this means that decisions can pass even if the fast-food industry and franchisee/owner representatives object. AB 1228 also makes clear that the FFC cannot create standards that are less beneficial than existing standards, rules, or regulations. One important difference between AB 257 and AB 1228 is that the FFC, other than for minimum wages, will not have authority to promulgate new standards, rules, or regulations on its own. Instead, the FFC needs to involve the DLSE, Cal/OSHA or the CRD, as needed. Those agencies would then promulgate the new standards, rules, or regulations under the normal rulemaking processes.

What about the minimum wage? By April 1, 2024, the minimum wage will be $20 per hour for national fast food chain restaurant employees (AB 257 would have made this $22 per hour by January 1, 2022). AB 1228 also notes that on or after January 1, 2025 and through 2029, the FFC "… may establish … minimum wages for fast food restaurant employees … on an annual basis." These 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 non-seasonally adjusted United States CPI-W." AB 1228 also allows adoption of local wages for fast food workers higher than those required by AB 1228. It also allows for a higher general local minimum wage increase that exceeds the AB 1228 requirements (*i.e.*, a rate applicable to all hourly employees, not just fast food employees).

Is there more I should know? Yes. AB 1228 is very detailed and contains many additional components that are beyond the scope of this summary. Please be sure to read the bill in its entirety if it applies to your business. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1228.

17. FEHA: CANNABIS USE PROTECTED OFF DUTY, OFF-SITE

By passing AB 2188, and adding Government Code Section 12954, California became 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 non-psychoactive 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 FEHA, making off-duty, off-site cannabis use a protected category.

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 non-psychoactive cannabis metabolites."

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.

PRACTICE TIP: Employers should review their onboarding materials and drug-free workplace policies with employment counsel to ensure that they will be ready for AB 2188 compliance before it 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 Tetrahydrocannabinol testing modalities to applicants and employees. Federal contractors (or other excluded businesses) should review their forms to make sure they clearly tell applicants and employees up front that AB 2188 does not apply to their workplaces.

18. FEHA: WEED = DON'T EVEN ASK ABOUT IT

SB 700 amends Government Code Section 12954 and builds on AB 2188 from last year's new laws (no discrimination based on off-site/off-duty cannabis use, and testing only for TCH showing active impairment – not metabolites) by (1) preventing employers from seeking "… information from an applicant for employment relating to the applicant's prior use of cannabis"; and (2) preventing use of "Information about a person's prior cannabis use obtained from the person's criminal history … unless the employer is

permitted to consider or inquire about that information under Section 12952 or other state or federal law." Unlike AB 2188, SB 700 does not exclude the building and construction trades. The only exclusion to SB 700 is for "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." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB700.

19. IDENTITY: USE THE AFFIRMED NAME

AB 760 requires the University of California, the California State University, or the California Community Colleges to "…identify [a] student in accordance with the student's gender identity and affirmed name…" unless there is "a legally mandated obligation" to use the student's "gender or legal name as indicated in a government-issued identification document." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB760.

SB 372 requires the Department of Consumer Affairs, upon receipt of proper government-issued documentation, to update an individual's license or registration by replacing references to the former name or gender on the license or registration … "with references to the current name or gender." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB372.

20. IMMIGRATION: NEW I-9 FORM

The USCIS recently published a new edition of its Form I-9, which can be found at: https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf.

As of November 1, 2023, all employers must use the new Form I-9. To verify that you are using the new Form I-9, check the bottom left-hand corner of the form for the issue date. You should see "Form I-9 Edition 08/01/23."

The changes to the newest edition of the Form I-9 are relatively minor. The document has been updated to fit Sections 1 and 2 onto a single page. Other sections – for example, what was formerly Section 3 – are now separate supplements. A more useful portion of the updated form relates to reviewing documentation for remote workers. The new edition adds a checkbox and the following statement: "Check here if you used an alternative procedure authorized by [the Department of Homeland Security] DHS to examine documents." This "alternative procedure" accommodates an employer's need to verify documents on a remote basis under certain conditions.

At this time, the new checkbox remote verification option is available only to employers who are voluntarily participating in the E-Verify process and are currently in good standing at the hiring location for which the remote verification (E-Verify) process will be used. There is no cost to use E-Verify. Employers can learn more about E-Verify at www.E-Verify.gov. Further information about the alternative verification process can be found at:

https://www.federalregister.gov/documents/2023/07/25/2023-15533/optional-alternative-1-to-the-physical-document-examination-associated-with-employment-eligibility.

For employers that do not participate in E-Verify, remember that the standard I-9 verification process requires employers to "examine their employee's documentation in their physical presence." Also, significantly, remember that for any employers who availed themselves of the temporary COVID-19 flexibility policies (allowing for remote verification of I-9 documentation between March 20, 2020 and July 31, 2023) to perform the required in-person re-verification of the original identity and right-to-work documentation for those employees that were remotely verified during the temporary COVID-19 flexibility period, that option expired August 30, 2023.

21. INDEPENDENT CONTRACTORS: EXTENSION END (REMINDER)

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

Last year, AB 2955 amended 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.

22. LEAVE OF ABSENCE: REPRODUCTIVE LOSS

Last year our legislature passed SB 1949, creating bereavement leave. This year, our legislature passed **SB 848**, which expands Government Code Section 12945.6 to create a new leave of absence for an RLE, which is defined as "…the day of, or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction." Each type of RLE is defined specifically in the statute (failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction).

Reproductive loss leave, for the most part, tracks last year's bereavement leave framework. Like bereavement leave, reproductive loss leave: (1) applies to employers with five or more employees; (2) defines an eligible employee as "a person employed by the employer for at least 30 days prior to the commencement of the leave"; (3) grants up to five days of unpaid reproductive loss leave (unless the employer has a policy or creates a policy that provides for paid reproductive loss leave); (4) allows eligible employees to choose to apply available vacation, PTO, personal time, compensatory time or sick leave to cover any unpaid reproductive loss leave time; (5) [reproductive loss leave] days do not need to be consecutive, but those days must be completed within three months of the RLE; except that, "if, prior to or immediately following a[n] RLE, an employee is on or chooses to go on leave from work pursuant to [CFRA], or any other leave entitlement under state or federal law [such as FMLA, PDL, etc.], the employee shall complete their reproductive loss leave within three months of the end date of the other leave"; (6) considers 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 reproductive loss leave; and (7) is considered a separate leave entitlement, distinct from other available leaves (CFRA, FMLA, PDL, etc.).

How is reproductive loss leave different than bereavement leave? Unlike bereavement leave, which can potentially be taken an unlimited number of times per year, for reproductive loss leave, if "an employee experiences more than one [RLE] within a 12-month period, an employer shall not be obligated to grant a total amount of reproductive loss leave time in excess of 20 days within a 12-month period." Under reproductive loss leave, an employer also cannot ask for documentation of the situation causing the need for reproductive loss leave.

The bill makes clear that, any RLE information an employer collects must be maintained confidentially and not "… disclosed except to internal personnel or counsel, as necessary, or as required by law." SB 848 also has strong anti-retaliation provisions – "It shall be an unlawful employment practice for an employer to retaliate against an individual, including, but not limited to, refusing to hire, discharging, demoting, fining, suspending, expelling, or discriminating against, an individual because of either of the following: (1) An individual's exercise of the right to reproductive loss leave. (2) An individual's giving information or testimony as to their own reproductive loss leave, or another person's reproductive loss leave, in an inquiry or proceeding related to rights guaranteed under [SB 848]." See:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB848.

PRACTICE TIP: Update your handbook and other company policies to reflect this change. If you already have a reproductive loss leave policy, make sure you now offer at least five days.

23. LOCAL ENFORCEMENT: PUBLIC PROSECUTORS

AB 594 amends Labor Code Sections 218 and 226.8, adds Chapter 8 (Section 180 et seq.), and repeals Section 181, to allow "public prosecutors," until January 1, 2029, to prosecute civilly or criminally certain Labor Code violations and to enforce various California Labor Code sections without oversight by the DLSE; but, before doing so, the public prosecutor must first give the DLSE a "14-day notice … prior to prosecuting an action." The public prosecutor can also seek injunctive relief to prevent continuing violations. According to the legislative declarations, taking this step is necessary because, "Wage theft is widespread in California, and is particularly egregious in low-wage industries, disproportionately impacting the most vulnerable workers … [and] … Existing resources are insufficient to protect workers or to incentivize legal compliance by employers."

AB 594 defines a public prosecutor as "the Attorney General, a district attorney, a city attorney, a county counsel, or any other city or county prosecutor." Unless a public prosecutor has statewide prosecution authority under Business and Professions Code Section 17204 (unfair competition), the public prosecutor is "… limited to redressing violations occurring within the public prosecutor's geographic jurisdiction." This bill also does not apply to PAGA, the ALRA, or workers' compensation claims.

Any wages, damages, or penalties due to the employee, but recovered by a public prosecutor, are paid to the employee. Civil penalties recovered go to the State General Fund. If the DLSE would be entitled to such penalties, the Court may also award a "prevailing plaintiff" (public prosecutor) attorney's fees and costs.

Regarding arbitration, AB 594 provides, "In any action initiated by a public prosecutor or the Labor Commissioner to enforce this code, any individual agreement between a worker and employer that purports to limit representative actions or to mandate private arbitration shall have no effect on the authority of the public prosecutor or the Labor Commissioner to enforce the code." Note also that any appeal after denial of a motion to compel arbitration will not stay an enforcement action by a public prosecutor or the DLSE.

Finally, this bill amends SB 459 (Labor Code Section 226.8) to allow the DLSE or public prosecutor (along with the Labor and Workforce Development Agency and courts) to examine "willful misclassification" of independent contractors using various mechanisms including, among others, citation issuance, temporary injunctive relief, or court filings. See:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB594.

24. LOCAL RULES: LOS ANGELES AREA

The City of Los Angeles ("City") Fair Work Week Ordinance ("FWWO") went live on April 1, 2023. This ordinance governs how retail employers deal with scheduling and providing good faith estimates of work schedules to new and current employees (anyone working in the City two or more hours per week). A covered business is any company that meets all of the following criteria: "(a) identifies as a retail business in the North American Industry Classification System ('NAICS') under Retail Trade categories 44-45; (b) has at least 300 employees globally; and (c) exercises control (directly or indirectly) over the wages, hours or working conditions of employees." With regard to what is a good faith estimate, the City's FAQs note the estimate should include: (1) the estimated number of hours that the employee will be expected to work each week and a notice of rights under the ordinance before hire; (2) the days of the week the employee can expect to work, or the days of the week the employee will not be expected to work; (3) the times or shifts the employee can expect to work, including start and end times, at least 14 days in advance; (4) the locations where the employee is expected to work; (5) whether the employee can expect to work any on-call shifts; and (6) a written good faith estimate of future schedules within 10 days of an employee's request.

The ordinance can be found here:
https://wagesla.lacity.org/sites/g/files/wph1941/files/2023-03/Fair%20Work%20Week%20Ordinance.pdf.

Ordinance FAQs can be found here:
https://wagesla.lacity.org/sites/g/files/wph1941/files/2023-03/Fair%20Work%20Week%20FAQs.pdf.

On July 1, 2023, the City's Freelance Worker Protections Ordinance took effect. This ordinance impacts most businesses hiring freelance workers in the City. For purposes of the ordinance, a freelance worker is any individual or entity composed of no more than one person that is hired as a contractor to perform services for compensation in the City (valued at $600 or more – individual job or cumulative jobs in a calendar year). This ordinance excludes companies that hire app-based drivers providing prearranged transportation or delivery driver services. The ordinance also excludes professionals such as lawyers, architects or engineers that are already required to have written agreements. The ordinance requires a written contract and timely payment.

The ordinance can be found here:
https://wagesla.lacity.org/sites/g/files/wph1941/files/2023-06/Freelance%20Worker%20Protections%20Ordinance.pdf.

NOTE: The section above contains only a summary of just two of the many local rules specific to the City. It is NOT an exhaustive list of all the applicable local rules for the City. Also, be sure to check for any local city or county posting requirements.

25. LOCAL RULES: SAN FRANCISCO

On February 19, 2023, the City of San Francisco's ("SF") Private Sector Military Leave Pay Protection Act ("MLPPA") went live. That ordinance requires covered businesses in SF to "provide employees (who work in SF) with supplemental paid leave for up to 30 calendar days of military duty – *i.e.*, when the employee is deployed to respond to a natural disaster or military conflict, or attends required annual military training. 'Employees' [are] covered by the Ordinance if they are a member of the reserve corps of the United States Armed Forces, National Guard, or other uniformed service organization of the United States." The supplemental pay is meant to "… ensure the employee receives their total gross pay for the schedule they would have worked had they not been required to complete their Military Duty." Covered employers are those businesses "…. with 100 or more employees worldwide … The City and County of San Francisco and all other governmental entities are not Covered Employers."

The ordinance can be found here: https://sfgov.legistar.com/View.ashx?M=F&ID=11593358&GUID=44A8DDFF-ABA6-401D-9236-E6612D8DC3B4.

Additional information can be found here: https://sf.gov/information/understanding-military-leave-pay-protection-act#:~:text=The%20Private%20Sector%20Military%20Leave,30%20days%20of%20military%20duty.

NOTE: The section above contains only a summary of just one of the many local rules specific to SF. It is NOT an exhaustive list of all the applicable local rules for the City. Also, be sure to check for any local city or county posting requirements.

26. MEAL & REST PERIODS: AIRLINE CABIN CREW

SB 41 was an urgency measure (effective upon signature on March 23, 2023) that added Labor Code Section 512.2 and clarified that certain airline cabin crew employees who are covered by the Railway Labor Act, and covered under a collective bargaining agreement with valid meal and rest period provisions, are exempted from California's meal and rest period rules. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB41.

27. NON-COMPETES: IT'S NOTICE TIME

AB 1076 is a companion bill to SB 699. It amends Business and Professions Code Section 16600 and adds Section 16600.1. This bill does four things: (1) it declares and codifies into law the holding of *Edwards v. Arthur Andersen,* 44 Cal. 4th 937, that, "Non-competition agreements are invalid under section 16600 in California even if narrowly drawn, unless they fall within the applicable statutory exceptions of sections 16601, 16602, or 16602.5." This holding will be broadly construed; (2) it applies non-competition protections not only to the actual contracting parties, but also to those non-contracting parties that are impacted by violative contract terms that seek to restrain a contracting

party "… from engaging in a lawful profession, trade, or business"; (3) it requires employers, as of February 14, 2024 (Happy Valentine's Day!), to send out a written "individualized communication" to all current and former employees hired after January 1, 2022, who are subject to a void agreement because the agreement violates AB 1076 (one that contains a non-compete that does not fall into one of the narrow exceptions). This communication must be sent to the individual's last known address and email address; and (4) it specifies that including a violative non-compete clause in an employment contract is "unfair competition" under Business and Professions Code Section 17200 et seq. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1076.

28. NON-COMPETES: NO RESTRAINTS ON TRADE

SB 699 adds Business and Professions Code Section 16600.5 and bolsters existing California law and policy preventing non-competition and non-solicitation contracts meant to restrain a person from engaging in a lawful profession, trade, or business of any kind. Recall that Section 16600 *et seq.* (subject to very narrow exceptions related to the sale or dissolution of corporations, partnerships and limited liability corporations) already provides in pertinent part, "[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." SB 699, which takes effect on January 1, 2024, expands the existing protections against non-competition and non-solicitation agreements in four ways: (1) any such contract is void and thus unenforceable "regardless of where and when the contract was signed"; (2) current/former employers will be unable to enforce void contracts, "regardless of whether the contract was signed and the employment was maintained outside of California"; (3) any employer that enters into a void contract commits a civil violation and the affected current/former/prospective employee has "a private action [against the employer] … for injunctive relief or the recovery of actual damages, or both"; and (4) if current/former/prospective employees prevail against the employer, they can recover "reasonable attorney's fees and costs." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB699.

PRACTICE TIP: The bottom line is that California will deem almost all non-compete/non-solicit agreements to be void and unenforceable, even if signed and valid in another state. For example, if an employee based in Texas and bound by an enforceable non-compete agreement in Texas, now comes to work in California, the Texas agreement would be deemed void and unenforceable under SB 699. What remains enforceable, however, are properly drafted confidentiality/non-disclosure agreements that prevent employees from using or disclosing their employer's trade secrets or other confidential and proprietary information to third parties. Employers should review their hiring practices, offer letters, employment agreements and other policies to ensure compliance with this new legislation.

NOTE: We expect legal challenges to SB 699 under federal preemption and Constitutional law. That said, there is also a national push against non-competition agreements. For example, in January 2023, the FTC announced a Notice of Proposed Rulemaking to ban all non-competition agreements nationally (subject to limited

exceptions relating to business sales). To date, there is no clarity on the final scope of the FTC's non-competition rules, but we expect further clarity in 2024.

29. NON-DISCLOSURE AGREEMENTS: "SPEAK OUT ACT"

President Biden signed the "Speak Out Act" into law on December 7, 2022. This law empowers victims of sexual assault or sexual harassment to come forward, by making blanket non-disclosure and non-disparagement contract clauses void and unenforceable if the contract was executed before a "sexual assault dispute" or a "sexual harassment dispute" arose. (*emphasis added*). The law defines "sexual assault dispute" to mean, "… a dispute involving a non-consensual sexual act or sexual contact … including when the victim lacks capacity to consent," and "sexual harassment dispute" to mean, "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Notably, this law is narrowly tailored – it only impacts agreements entered into on or after December 7, 2022, and it does not apply to post-dispute agreements. It also does not apply to properly drafted non-disclosure and non-disparagement contract clauses when applied to matters other than pre-dispute sexual assault or sexual harassment. See: https://www.congress.gov/117/plaws/publ224/PLAW-117publ224.pdf.

NOTE: This law is another step in our country's efforts to prevent future repetitions of past #MeToo travesties and to "empower survivors to come forward [and] hold perpetrators accountable for abuse." In the "Findings" section of the bill, Congress noted the following disturbing facts – "Eighty-one percent of women and 43 percent of men have experienced some form of sexual harassment or assault throughout their lifetime… One in three women has faced sexual harassment in the workplace during her career, and an estimated 87 to 94 percent of those who experience sexual harassment never file a formal complaint."

30. OSHA: INDOOR HEAT ILLNESS REGULATIONS

In 2016, SB 1167 passed and required Cal/OSHA to propose regulations to protect employees from indoor heat hazards. In April 2019, Cal/OSHA published draft regulations. Then COVID-19 hit, and the process stalled out... until now. Cal/OSHA has once again started moving the regulations toward publication. In May 2023, public hearings were held. After the last public hearing, there was a 45-day comment period and two subsequent 15-day comment periods (the second comment period concluded on August 22, 2023). We now await adoption of the regulations by the Cal/OSHA Standards Board, which could happen in the fall of 2023, but given the history, it could also take longer. Regardless of when the regulations pass, here is what you need to know:

1. The regulations apply to all indoor places of employment where the temperature equals or exceeds 82 degrees Fahrenheit, when employees are present (this does not apply to remote workplaces chosen by the employee that are not controlled by the employer). Like the outdoor heat illness regulations, greater protections are required in higher-heat times – here, the escalation occurs if the temperature equals or exceeds 87 degrees Fahrenheit, when employees are present.

2. Employers are required to have a heat illness prevention program. This can be part of the employer's IIPP or a separate stand-alone document.
3. Employers must maintain cool-down areas at all times while employees are present.
4. Employers must allow and encourage employees to take preventative cool-down rests in a cool-down area when they feel the need to do so to protect themselves from overheating.
5. Employers must provide access to fresh, pure, suitably cool, and free drinking water as close as practicable to working areas and in cool-down areas.
6. Employers must provide first aid or emergency response to employees who exhibit signs or report symptoms of heat illness while taking a preventative cool-down rest or during a preventative cool-down rest period. Employers are also required to monitor newer employees for heat illness symptoms.
7. Employers must identify and control environmental factors present at the workplace which increase the occurrence of heat-related illness (*e.g.*, providing heat resistant clothing, air conditioning, limiting time in high-heat areas, etc.).
8. Employers must provide training on indoor heat illness prevention.

Employers should also keep in mind that, even without these new regulations, Cal/OSHA has previously cited employers for indoor heat issues under its IIPP standard (https://www.dir.ca.gov/title8/3203.html), and that the California Industrial Welfare Commission ("IWC") Wage Orders in Section 15, titled "Temperature," states, "The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed… If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort."

Employers can track the progress of the Cal/OSHA indoor heat illness regulations and view the full version of the proposed regulations at: https://www.dir.ca.gov/oshsb/Indoor-Heat.html.

31. OSHA: TRO'S & WORKPLACE VIOLENCE PREVENTION PLANS

SB 553 adds Code of Civil Procedure Section 527.8, amends Labor Code Section 6401.7 and adds Section 6401.9, to create two additional protections against violence in California workplaces.

First, by adding Code of Civil Procedure Section 527.8, effective January 1, 2025, the Workplace Violence Act will allow employers and/or collective bargaining representatives to file for a temporary restraining order ("TRO") on behalf of an employee "… who has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace …." Because of the inherent problems that can arise as the result of filing for

a TRO, before filing the TRO, the employer or the collective bargaining representative must give the employee that suffered the acts of unlawful violence or a credible threat of violence, the chance to decline being named in the TRO. If the employee declines, the employer or the collective bargaining representative can still seek the TRO on behalf of other employees at the workplace. SB 553 also makes clear that a TRO or other order issued by a court cannot prevent concerted protected activity or speech protected under the National Labor Relations Act.

Second, by amending Labor Code Section 6401.7 and adding Section 6401.9, SB 553 creates a new requirement for California employers to establish, implement and maintain an effective workplace violence prevention plan ("WVPP"). Governor Newsom's signing statement says, "This important policy will ensure there is a plan in place at workplaces across our State, in order to help protect California workers from workplace violence. Everyone deserves to be and feel safe everywhere they are, especially at work."

Who is covered? Virtually all employers with at least one or more employees, places of employment, and employer-provided housing and employees.

Is any employer exempted? Yes. The following five are exempt: (1) health care facilities ("HCFs"), service categories, and operations (HCFs already have their own healthcare workplace violence regulations and plan requirements); (2) facilities operated by the Department of Corrections and Rehabilitation; (3) certain law enforcement agencies; (4) employees teleworking from a location of the employee's choice, which is not under the control of the employer; and (5) places of employment where there are less than 10 employees working at the place at any given time and that are not accessible to the public. Cal/OSHA, however, can overrule the exemptions, but it would need to issue a special compliance order.

What is required? Covered employers must establish, implement, and maintain an effective written WVPP. The WVPP can either be incorporated as a separate IIPP section or it can be maintained as a separate document (such as your COVID-19 Prevention Plan). That plan must be "available and easily accessible to employees, authorized employee representatives, and representatives of the division at all times." Employers must also maintain a violent incident log, train employees on the WVPP, and do regular effectiveness reviews of the WVPP.

When do I have to have my WVPP ready? By July 1, 2024.

What should be in the plan? The statute contains a long laundry list of requirements beyond the scope possible to include in a short summary, but here are a few key items: (1) names or job titles of the persons responsible for implementing the plan; (2) effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report; (3) effective procedures to communicate with employees regarding workplace violence matters….; and (4) "effective procedures to respond to actual or potential workplace violence emergencies…." Be sure to review the full list of requirements. These

can be found by clicking on the link below.
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB553.

Once created, do I need to update it? The plan needs to be reviewed annually and revised as needed.

Do I have to provide training? Yes. You must provide employees with initial training when the plan is first established, and annually thereafter. Coverage topics include, "The employer's plan, how to obtain a copy of the employer's plan at no cost, and how to participate in development and implementation of the employer's plan … the definitions and requirements as spelled out in Labor Code Section 6401.9 … How to report workplace violence incidents or concerns to the employer or law enforcement without fear of reprisal … Workplace violence hazards specific to the employees' jobs, the corrective measures the employer has implemented, how to seek assistance to prevent or respond to violence, and strategies to avoid physical harm…." Additional training on the WVPP must be provided when "… a new or previously unrecognized workplace violence hazard has been identified and when changes are made to the plan. The additional training may be limited to addressing the new workplace violence hazard or changes to the plan."

All training records must be maintained for a minimum of "… one year and include training dates, contents or a summary of the training sessions, names and qualifications of persons conducting the training, and names and job titles of all persons attending the training sessions."

What about recording incidents? For each workplace violence incident that occurs, employers must record information about the incident in a violent incident log. The log information, among other things, must include, "The date, time, and location of the incident, the workplace violence type or types … involved in the incident" and "A detailed description of the event that includes …information solicited from the employees who experienced the workplace violence, on witness statements, and on investigation findings." Be certain to "omit any element of personal identifying information sufficient to allow identification of any person involved in a violent incident."

How long should I keep WVPP-related documents? It depends on the type of document. Five years for: "records of workplace violence hazard identification, evaluation, and correction"; violent incident logs; and records of workplace violence incident investigations. One year for training records (include training dates, contents or a summary of the training sessions, names and qualifications of persons conducting the training, and names and job titles of all persons attending the training sessions).

Is there more to this? Yes. This summary is not a complete list of all the requirements of SB 553. Covered employers should consult with competent OSHA counsel to ensure full understanding and compliance by the July 1, 2024 deadline. See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB553.

What's coming down the road? By December 1, 2025, Cal/OSHA must propose standards for the WVPP. Then, by December 31, 2026, the Cal/OSHA Standards Board must adopt such standards.

Companion Bill SB 428, also expands employers' rights under the Workplace Violence Safety Act to protect workers from public harassment (even without violence) "… any employer, whose employee has suffered harassment, unlawful violence, or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace…." This bill defines "harassment" as, "… a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress." The legislative history gives the following example, "[A] sixty-five-year-old man became obsessed with a twenty-four-year-old employee. He repeatedly came to her place [of] business and at times called her up to 100 times for [*sic*] day for months. He was not threatening her with violence initially. He wanted her attention and told her that he was in love. Until there was a threat of violence, which eventually occurred, both the victim and the business felt helpless to protect the victim. Ultimately, this defendant's repeated rejections lead [*sic*] him to threaten violence." The point of SB 428 is that a business should not have to wait for a threat of violence to protect its employees. SB 428 is also effective January 1, 2025. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB428.

32. PAGA: BALLOT MEASURE TO REPEAL PAGA

Currently, PAGA allows employees to file lawsuits on behalf of themselves and other employees to recover penalties for certain labor law violations by their current or former employers. This ballot measure would repeal PAGA and require the Legislature to provide an unspecified increase in funding to the Labor Commissioner, who would retain exclusive authority to enforce labor laws and impose penalties. In addition, this measure would require the Labor Commissioner to provide employers with pre-enforcement advice to correct identified violations prior to imposing penalties and would also authorize increased penalties for willful violations. See: https://oag.ca.gov/system/files/initiatives/pdfs/21-0027A1%20%28Employee%20Civil%20Action%29.pdf.

33. PAID SICK LEAVE: 40 HOURS OR FIVE DAYS

SB 616 amends California's Healthy Workplaces, Healthy Families Act of 2014 (PSL), which is codified in Labor Code section 245 *et seq.*) in three main ways: (1) it increases the hours/days of PSL and the way PSL is provided to employees; (2) it expands protections for union employees; and (3) it excludes railroad workers from PSL coverage. These changes are outlined more fully below:

- **"Full amount of leave":** That term now means *40* hours or *five* days (not 24 hours or three days). This change also applies to covered in-home support services workers and an "individual provider of waiver personal care services."

- **Standard Accrual (accrual amount and use cap):** Although employers can still use the State's standard accrual rate – "one hour per every 30 hours worked," from the commencement of employment, employers must now allow eligible employees to **use** up to "… *40* hours or *five* days of accrued [PSL] in each year of employment, calendar year, or 12-month period" (use cap).

- **Alternate Accrual:** Employers can use an alternate accrual rate – something other than the State's standard accrual rate (one hour of PSL for every 30 hours worked) – so long as "the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment … *and no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period."*

  The bill also notes that employers can satisfy the PSL accrual requirements by providing no less than 24 hours of PSL that are available for the employee's use by the completion of the 120th calendar day of employment, and 40 hours of PSL that are available for the employee's use by the completion of the 200th calendar day of employment.

- **Accrual Carry-Over Cap:** Employers using an accrual method must now allow eligible employees to **carry over** up to *80* hours or *10* days of unused PSL from year to year (carry-over cap). Under SB 616, employers may still limit use to 40 hours or five days in any year period (be sure to check your local rules).

- **Frontload Method:** Employers can still use a front-loading method. Employers, however, must now provide *five* days or *40* hours at the beginning of each year of employment, calendar year, or 12-month period.

- **PTO:** PTO plans are still a viable alternative option to separate vacation and sick leave policies, so long as they meet the accrual, carryover and use requirements of the PSL rules (PTO policies also must comply with California's vacation rules).

- **Grandfathered Plans:** (PSL policies entered into on or before January 1, 2015, and that meet other criteria) To allow for grandfathering, the PSL plan must now allow eligible employees to accrue at least *five* days or *40* hours of sick leave, or paid time off, within *six* months of employment.

- **State's Partial Preemption of Local Rules:** SB 616 *partially preempts* local PSL rules for the following portions of Labor Code 246:

- *Subdivision (g)* – no payout of unused sick leave at separation, but reinstatement of unused sick leave upon return within one year;

- *Subdivision (h)* – lending PSL allowed at the employer's discretion;

- *Subdivision (i)* – itemized wage statements and written notices of PSL available;

- *Subdivision (l)* – how to calculate PSL pay [remember that PSL must be paid at the "regular rate of pay," which includes all forms of compensation];

- *Subdivision (m)* – "foreseeable" and "unforeseeable" notice provisions; and

- *Subdivision (n)* – payday rules and employer recordkeeping and employee documentation.

NOTE: Other than the limited subsections noted above, SB 616 *does not* preempt any other areas of any local sick leave rules. Thus, if a local jurisdiction has, for example, rules that require more sick leave to be provided annually, a different accrual method or higher carry-over amounts, those local rules will still control. Currently, the cities with local sick leave rules are the following: San Diego, Los Angeles, West Hollywood, Santa Monica, San Francisco, Oakland, Emeryville and Berkeley. We expect that these cities may adjust their rules as the result of SB 616.

- **Collective Bargaining Agreements:** SB 616 extends certain portions of the PSL rules (*e.g.*, prohibition against requiring an employee to find a replacement worker) and the PSL anti-retaliation protections to employees covered by collective bargaining agreements (employees in the construction industry covered by a valid collective bargaining agreement are not impacted by this change).

- **Railroad Workers:** Railroad workers are excluded from coverage under SB 616.

See:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB616.

34. PFL/SDI: LOW-EARNER RATES INCREASE IN 2025 (REMINDER)

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 PFL and 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 (currently about $57,000) could receive up to 90% of their regular wages while taking leave. This increased benefits calculation will make taking a leave of absence such as 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.

35. PREGNANCY: FEDERAL ACCOMMODATION REGS

The federal PWFA went into effect on June 27, 2023, which requires covered employers to provide "reasonable accommodations" to pregnant employees and applicants who have known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." In addition, PWFA allows an employee or applicant to be qualified for a reasonable accommodation even if the inability to perform the essential functions of the job is temporary. In August of 2023, the EEOC proposed regulations to help understand how the EEOC may interpret this law, including defining "known limitation," "temporary," and providing specific examples of reasonable accommodations. (California's pregnancy disability leave laws are tied explicitly to medical advice and have no undue hardship defense, so the California laws are likely to supersede federal law on these issues). The EEOC also posted guidance for employers: See: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

36. PRIVACY: CCPA/CPRA COMPLIANCE (UPDATE & REMINDER)

The CCPA was enacted in 2018 and went into effect on January 1, 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. The definition of "consumer" is very broad and includes any natural person who is a California resident. For employers this meant the definition captures applicants, employees, contractors and other individuals associated with the employer's business.

In November 2021, through Proposition 24, CPRA, Californians voted to amend the CCPA to provide consumers with even higher-level rights, and to allow consumers to control what businesses collect and do with their (the consumers') personal information. Through January 1, 2023, however, the CPRA contained a time-limited exemption for employers related to their collection of California applicant/employee/contractor data ("HR information").

As of January 1, 2023, the exemption terminated. Since that time, there was a slew of activity by employers looking to become compliant before the six-month administrative enforcement grace period expired on July 1, 2023, and for the CPPA to issue its final CPRA regulations, which it belatedly accomplished, in a partially complete fashion, on March 29, 2023 (the CPRA required these regulations to be issued by July 1, 2022). The California Chamber of Commerce almost immediately sought an injunction against the enforcement of the CPRA regulations. On June 30, 2023, a superior court granted the injunction and delayed the enforcement of the CPRA regulations until March 29, 2024. Importantly, although enforcement of the CPRA regulations has been delayed, the injunction does not delay enforcement of all aspects of the CCPA (as amended by the CPRA). The California Attorney General is intent on moving forward. For example, in July 2023, that office sent out letters to various businesses seeking information about their compliance with the CCPA as it pertained to employees and job applicants. Then, on August 4, 2023, the Attorney General's office appealed the June 30, 2023 injunction delaying enforcement of the CPRA regulations. Thus, although the litigation on this issue is not final, CCPA-covered employers should continue to take steps to ensure they are CCPA compliant.

Most of the CCPA provisions apply only to certain types of for-profit companies that meet at least one of the following criteria: "[1] Have a gross annual revenue of over $25 million; [2] buy, sell, or share the personal information of 100,000 or more California residents or households; or [3] derive 50% or more of their annual revenue from selling or sharing California residents' personal information." According to CPPA, "The CCPA also applies to some entities controlled by these businesses, certain joint ventures or partnerships made up of these businesses, and those persons that voluntarily certify to be subject to the CCPA. Additionally, [t]he CCPA imposes separate obligations on service providers and contractors (who contract with businesses to process personal information) and other recipients of personal information from businesses. The CCPA does not generally apply to nonprofit organizations or government agencies."

The full scope of the CCPA requirements for covered businesses is too expansive a 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. Employers may consider focusing their compliance efforts on, among other items, providing required CCPA notices, compliance with online privacy policies, implementing appropriate safety measures to lessen the risk of a data breach, and reviewing contract terms with vendors to ensure CCPA-mandated terms are included. CPPA has posted FAQs here: https://cppa.ca.gov/faq.html.

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 employment law counsel.

37. PRIVACY: REPRODUCTIVE & SEXUAL HEALTH DIGITAL DATA

AB 254 amends California Civil Code Section 56.05 and extends the California Confidentiality of Medical Information Act to include any "reproductive or sexual health digital services" that collect "reproductive or sexual health application information." "Reproductive or sexual health digital service" is defined to mean "… a mobile-based application or internet website that collects reproductive or sexual health application information from a consumer, markets itself as facilitating reproductive or sexual health services to a consumer, and uses the information to facilitate reproductive or sexual health services to a consumer." "Reproductive or sexual health application information" means information about a consumer's reproductive health, menstrual cycle, fertility, pregnancy, pregnancy outcome, plans to conceive, or type of sexual activity collected by a reproductive or sexual health digital service, including, but not limited to, information from which one can infer someone's pregnancy status, menstrual cycle, fertility, hormone levels, birth control use, sexual activity, or gender identity. According to the bill's author, this bill is necessary because, "The current lack of protection for sensitive information collected by menstrual tracking apps and other digital services leaves individuals vulnerable to criminalization and predatory advertising based on their reproductive health choices." See:
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB254.

38. PRIVILEGED COMMUNICATION: NO FORMAL COMPLAINT

AB 933 adds Civil Code Section 47.1 and expands already existing "qualified privileged communication" protections under Section 47 to now include any "… communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination," even if there is no formal complaint raised [formerly covering only a complaint of sexual harassment]. Although Section 47.1 still applies the qualified privilege only to "… an individual that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination," it expands protections to covered communications "whether the complaint is, or was, filed or not." To be considered privileged, however, the communication must be made without malice and must contain "factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication …." According to the bill's author, one of the main purposes of the AB 933 expansion was to, "… help curb any unnecessary, and ultimately unsuccessful, litigation against individuals who choose to come forward with their stories of sexual assault and harassment," thus, this bill also contains powerful incentives against lawsuits filed only to delay, harass or chill survivor speech. Specifically, AB 933 provides that "A prevailing defendant [the person that engaged in the qualified protected communication] in any defamation action brought against that defendant for making a communication that is privileged under this section shall be entitled to their reasonable attorney's fees and costs for successfully defending themselves in the litigation, plus treble damages for any harm caused to them by the defamation action against them, in addition to punitive damages

available under Section 3294 or any other relief otherwise permitted by law." See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB933.

39. PROTECTED CATEGORY: FEHA EXPANDS (REMINDER)

SB 523, effective January 1, 2024, 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, as of January 1, 2023, SB 523 added "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's protected category lists to include reproductive health decision-making, if you have not done so already.

40. PUBLIC SECTOR: JOINT & SEVERAL LIABILITY

AB 520 amends Labor Code Section 238.5 to extend joint and several liability for unpaid wages, including interest, to public entities contracting with the property services or long-term care industries. Notably, prior law from 2015 (SB 588), already extended such joint and several liability to both individuals and private sector businesses contracting with property services or long-term care companies. Under this expansion, a "public entity" is defined as, "a city, county, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state." The definition explicitly excludes "the state." According to the author, this bill is necessary because, "Public entities contract out this work to the lowest bidder and an array of unaccountable service providers, which perpetuates the worst of the worst employment practices: wage theft, retaliation, harassment, and even assault. [This bill] would hold public entities jointly liable for wage theft committed by their property service contractors." For example, this might apply to a California regional center that allocates public funding to individual caregiver companies. See:
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB520.

41. REIMBURSEMENT: MILEAGE RATES FOR 2023

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

1. 65.5 cents per mile driven for business use, a change of three cents from the rate for 2022;
2. 22 cents per mile driven for medical or moving purposes for qualified active-duty members of the Armed Forces, consistent with the increased midyear rate set for the second half of 2022; and

3. 14 cents per mile driven in service of charitable organizations. The charitable rate is set by statute and remains unchanged from 2022.

The 2024 mileage rates will be available in December. Effective January 1, 2024, 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 2023;
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 2023; and
3. ___ cents per mile driven in service of charitable organizations. The charitable rate is set by statute and remains unchanged from 2023.

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 auto allowance to cover personal vehicle costs incurred by the employee. When doing so, employers must inform employees that if the stipend exceeds their actual mileage, they must report the excess to the employer so that it can be reduced or taxed as additional income. Employers also must inform employees that if the stipend does not cover their actual mileage, they are entitled to submit a request for additional reimbursement. Employees also must keep (and preferably, submit to the employer) records of their business mileage for tax purposes. The federal government has been cracking down on the taxation of automobile stipends/allowances if there is no documentation to prove the personal vehicle use. Employers should consult with their CPA or other tax professional about this issue.

42. REMINDERS: POSTER UPDATES AND TRAININGS

Update Your All-In-One Posters

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.).

UPDATE: The EEOC released a revised "Know Your Rights" poster, that now includes information on the PWFA. The poster can be found at: https://www.eeoc.gov/poster.

The DOL has also created a new FMLA poster which can be found at: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf.

The DOL FLSA poster can be found at: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/minwagep.pdf.

CHECK LOCAL AREA POSTING REQUIREMENTS: Be sure to also check for any local city or county postings that might be required, depending on your location. For example, Los Angeles City has local posting requirements that can be found at: https://wagesla.lacity.org/#for-employers, and San Francisco minimum wage posters can be found at: https://sf.gov/information/understanding-minimum-wage-ordinance.

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).

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/.

43. RETALIATION: PROTECTIONS AND PENALTIES EXPAND

SB 497 amends Labor Code Sections 98.6, 1102.5, and 1197.5 to increase employee anti-retaliation protections and enhance violation penalties for employers. This bill creates a rebuttable presumption of retaliation if any adverse employment action (*e.g.*, discharge, demotion, suspension, retaliation against, etc.) is taken by an employer within 90 days of an employee's engaging in a protected activity (*e.g.*, complaint, whistleblowing, etc.). This bill enhances violation penalties under section 1102.5 by noting that the $10,000 penalty is available per employee, per violation. When considering the penalty amount, the DLSE is instructed to "consider the nature and seriousness of the violation based on the evidence obtained during the course of the investigation … include[ing], but [] not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace…." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB497.

PRACTICE TIP: Do not assume there is a free pass to take adverse action against a complaining employee on day 91. A retaliation claim can arise on day 91, 92, 102 or beyond. Always be sure to consult with competent employment counsel before taking any

adverse actions that could result in possible legal claims.

44. SAFETY: MOTION PICTURES AND FIREARMS

SB 132 resulted from the tragic death of cinematographer Halyna Hutchins on the set of the film "Rust" in October 2021. This bill creates new state safety protocols for the motion picture industry (film, streaming, television, commercial and noncommercial productions) regarding the on-set use of ammunition and firearms. SB 132 also establishes training standards for those responsible for on-set ammunition and firearms, and it provides for a "Safety on Productions Pilot Program" tax credit for motion picture productions that hire or assign an independent safety advisor to a production occurring between July 1, 2025, and June 30, 2030. SB 132 will be enforced by Cal/OSHA. See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB132.

45. SCHOOLS: CULTURAL COMPETENCY TRAINING INBOUND

AB 5 amends Education Code 218 to create the "Safe and Supportive Schools Program." Under this program, by no later than July 1, 2025, AB 5 will require the State Department of Education to both develop and implement a mandatory online training delivery platform and an online training curriculum "to support lesbian, gay, bisexual, transgender, queer, and questioning ('LGBTQ') cultural competency training for [public school] teachers and other certificated employees." The former law only encouraged but did not mandate the use of such training. AB 5 applies to all California school districts, county offices of education, or charter schools serving pupils in grades 7 to 12 and will require, "commencing with the 2025–26 school year, and continuing through the 2029–30 school year…" that all teachers and other certificated employees "…require at least one hour of training annually..." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB5.

46. SMOKING: DON'T SMOKE IN CA HOTELS

Since 1995, California law (Cal/OSHA) has banned the smoking of tobacco products inside enclosed spaces at work. The law, however, established a few exemptions from "place of employment" for certain businesses. For example, the law created a specific smoking-allowed exemption for up to 20% of the guestroom accommodations in a hotel, motel, or similar transient lodging establishment. No longer. **SB 626** specifically eliminates this transient lodging smoking exemption. The American Cancer Society Cancer Action Network, a proponent of this bill noted, "Senate Bill 626 will expand California's smoking protections by closing loopholes in California's smoke-free workplace law that still allows hotels and motels to permit smoking in up to 20% of their guestrooms. This loophole is outdated with several states and hundreds of local governments having already enacted laws to prohibit smoking in 100% of hotel and motel rooms. The health and wellbeing of hotel and motel guests and employees demands that all hotel guestrooms in California be smoke-free." See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB626.

PRACTICE TIP: Many local jurisdictions have no-smoking regulations that are stricter and more protective than the California standard. Be sure to check your local ordinances, depending on where your workers are located.

47. UNIONS: SECRET BALLOT / MAJORITY SUPPORT PETITIONS

Consistent with statements made last year, on May 15, 2023, Governor Newsom signed **AB 113** into law. AB 113 became effective immediately, but portions of AB 113 sunset on January 1, 2028 (at which time certain provisions will be repealed unless extended). AB 113 provides "two procedures available by which a union can be certified to represent an employer's agricultural employees" – (1) in-person secret ballot election; or (2) a Majority Support Petition (basically the card check election process outlined in AB 2183).

Under the secret ballot method, which is the standard method outlined in the ALRA, a labor organization files a petition with the ALRB that "include proof that more than 50% of the workers wish to have an election. Once this showing of support is confirmed, the ALRB will conduct a secret ballot election, often at the grower's worksite, where workers will be able to cast their ballots in person." Neither AB 2183 nor AB 113 make changes to this traditional certification process, which is discussed briefly below.

Under the Majority Support Petition, a labor organization that has filed LM-2 forms with the United States Department of Labor for the previous two years and that has a collective bargaining agreement covering agricultural employees in effect on May 15, 2023, submits a petition to the ALRB stating by name that 50 percent or more of the employer's employees (those on payroll immediately preceding the filing of the petition) seek unionization. The petition must be supported by "proof of majority support, through authorization cards, petitions, or other appropriate proof." At that point, the ALRB must determine if the submitted petition has majority support within five days. If the ALRB determines that the petition is not supported, it notifies the labor organization of the deficiency, and the labor organization has 30 days to cure.

Under either method, the affected employer has 48 hours after receiving the petition to file a response, which must include the following information: "a list containing the full names, street addresses, telephone numbers, job classifications, and crew identification for all of its agricultural workers, including those employed by farm labor contractors, as of the payroll period immediately preceding the filing of the petition." Note that although employers can appeal the ALRB's certification decision, to do so, they must post a bond with the ALRB "in the amount of the entire economic value of the order." AB 113 makes clear that the bonding requirements "apply in both unfair labor practice and mandatory mediation and conciliation proceedings."

Under either method, once certified by the ALRB, the labor organization immediately becomes the exclusive representative of all the agricultural employees in the collective bargaining unit with respect to rates of pay, wages, hours of employment, or other conditions of employment.

AB 113 also repeals the provisions of AB 2183 related to the secret ballot mail-in election process and the Labor Peace compact. Because AB 113 allocates only limited funds to the ALRB, the bill limits the Majority Support Petitions that can be submitted to 75 through the bill's sunset date. Regarding the sunset date, the ALRB website clarifies, "Note this sunset date applies only to the process to select a bargaining representative, and a union selected through this process will remain certified as the bargaining representative of the employees that selected it. The new appeal bond procedures and requirements enacted by AB 113 are permanent amendments to the ALRA." See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB113.

ALRB FAQs on AB 113: https://www.alrb.ca.gov/ab-113-faq-english/.

48. VETOED BILLS: KEY BILLS THAT DID NOT PASS

1. **SB 799** sought to allow striking employees to collect unemployment benefits. In his veto message, the Governor indicated that the Employment Development Department lacked sufficient funds for this expansion.
2. **SB 403** proposed to prohibit "caste" discrimination by adding that term to the long list of California protected categories. In his veto message, the Governor indicated that this bill was unnecessary because caste is already protected under the FEHA definition of ancestry.
3. **SB 731** sought to require employers to give 30 days' notice to remote workers before returning them to the office. In his veto message, the Governor indicated that this bill did not consider the needs of employers, particularly small businesses.
4. **AB 524** proposed to add "family caregiver" status as a new protected category under FEHA. In his veto message, the Governor indicated that this bill placed too great a burden on small business, and that the language of the bill was too vague.
5. **AB 1356** sought to expand Cal-WARN Act protections by, among other things, requiring 75-days' advance notice to impacted employees. In his veto message, the Governor indicated that this bill was not consistent with the purposes of Cal/WARN and went too far.

49. WAGES: CA'S MINIMUM WAGE HIKE CONTINUES

Effective January 1, 2024, California's minimum wage for non-exempt (hourly) employees will increase from $15.50 to $16.00, a 3.5% increase from 2023. The ripple effect of these increases and changes will significantly alter the employee pay scales for both non-exempt and exempt employees.

For non-exempt employees, as each of the new increases go into effect, an employer's lowest-level worker could now possibly earn the same amount per hour as the employee's most proximate supervisor – causing a chain-reaction of wage increases for

all employees from top to bottom; which could significantly and negatively impact an employer's profitability.

For exempt workers, Labor Code 515 requires them 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 latest increase in the minimum wage, as of January 1, 2024, the minimum new salary requirement for exempt employees will increase from $64,480 to $66,560 annually (from $1,240 to $1,280 weekly or from $5,373.33 to $5,546.67 monthly).

NOTE 1: Over 30 California cities and counties are considering (or have passed) similar or greater local minimum wage hikes. Employers must comply with the higher of the California state or local minimum wage that applies to their employees. Note also that several local areas increase their minimum wages on July 1st of each year (not January 1st). 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/.

NOTE 2: There will be a ballot measure on the November 2024 ballot seeking to increase California's minimum hourly wage by one dollar per year until it reaches $18.00, and then to have annual COLA increases to account for future inflation. See:
https://oag.ca.gov/system/files/initiatives/pdfs/21-0043A1%20%28Minimum%20Wage%29.pdf.

50. WAGES: FEDERAL INCREASE IN SALARY THRESHOLD

The DOL has increased the federal salary threshold for an employee to be deemed exempt from the federal overtime pay requirements. The increased threshold is $1,059 per week (or $55,068 per year). There is also an increase to the federal Highly Compensated Employee ("HCE") exemption salary threshold, up to $143,988 (California does not have an HCE exemption and California employers cannot use the HCE exemption). Lastly, there will now be automatic updates to these earnings thresholds every three years.

NOTE: This new federal threshold still does not surpass that of California, which, as of January 1, 2024, will still be higher. Thus, California employers must follow California's salary requirements for their California employees.

DOL FAQS: https://www.dol.gov/agencies/whd/overtime/rulemaking/faqs.

51. WAGES: INCREASE FOR COMPUTER SOFTWARE EXEMPTION

Effective January 1, 2024, the DIR will adjust computer software employees' minimum hourly rate of pay exemption from $53.80 (the 2023 rate) to $55.58. The minimum monthly salary exemption will also increase from $9,338.78 (the 2023 rate) to

$9,646.96 and the minimum annual salary exemption will be increased from $112,065.20 (the 2023 rate) to $115,763.35. This change reflects a 3.3**%** increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. See: https://www.dir.ca.gov/oprl/ComputerSoftware.htm#:~:text=In%20accordance%20with%20Labor%20Code,from%20%24112%2C065.20%20to%20%24115%2C763.35%20effective.

52. WAGES: INCREASE FOR PHYSICIAN EXEMPTION

Effective January 1, 2024, the DIR will adjust the licensed physician and surgeon employee's minimum hourly rate of pay exemption amount from $97.99 (the 2023 rate) to $101.22. This change reflects a 3.3% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. See: https://www.dir.ca.gov/oprl/Physicians.htm.

53. WAGES: INCREASE MINIMUM WAGE FOR HEALTH CARE

SB 525 adds Labor Code Sections 1182.14 and 1182.15 and seeks to address health care worker shortages by phasing in a $25 per hour minimum wage for certain "covered health care employers." California's legislature declared that substantial pay increase to a national high minimum wage is critical because the COVID-19 pandemic worsened already existing health care worker shortages and, "Higher wages are needed to attract and retain health care workers to treat patients, including being prepared to provide necessary care in an emergency." SB 525 is a very complex and extensive piece of legislation defining a multi-part minimum wage phase-in for covered health care employers according to, among other factors, facility type, size, and "governmental payor mix." This short summary cannot cover all the necessary details, and covered health care employers are advised to review this bill in detail, as it pertains to their specific operations.

A "covered health care facility" includes any of the following 20 entity types:

> "(1) a facility or other work site that is part of an integrated health care delivery system; (2) a licensed general acute care hospital … including a distinct part of any such hospital; (3) a licensed acute psychiatric hospital … including a distinct part of any such hospital; (4) a special hospital; (5) a licensed skilled nursing facility… if owned, operated, or controlled by a hospital or integrated health care delivery system or health care system; (6) a patient's home when health care services are delivered by an entity owned or operated by a general acute care hospital or acute psychiatric hospital; (7) a licensed home health agency; (8) a clinic … including a specialty care clinic, or a dialysis clinic; (9) a psychology clinic; (10) outpatient and teaching clinics; (11) a licensed residential care facility for the elderly, if affiliated with an acute care provider or owned, operated, or controlled by a general acute care hospital, acute psychiatric hospital, or the parent entity of a general acute care hospital or acute psychiatric hospital; (12) a psychiatric health facility; (13) a mental health rehabilitation center; (14) a community clinic licensed … an intermittent clinic exempt from licensure under subdivision (h) of Section 1206 of the Health and Safety Code, or a clinic operated by the state or any of its

political subdivisions, including, but not limited to, the University of California or a city or county that is exempt from licensure under subdivision (b) of Section 1206 of the Health and Safety Code; (15) a rural health clinic; (16) an urgent care clinic; (17) an ambulatory surgical center that is certified to participate in the Medicare Program; (18) a physician group (with a total of 25 or more physicians); (19) a county correctional facility that provides health care services; and (20) a county mental health facility."

Not included in that definition is, "(1) a hospital owned, controlled, or operated by the State Department of State Hospitals and (2) a tribal clinic exempt from licensure … or an outpatient setting conducted, maintained, or operated by a federally recognized Indian tribe, tribal organization, or urban Indian organization."

A "covered health care employee" includes, "An employee of a health care facility employer who provides patient care, health care services, or services supporting the provision of health care, which includes, but is not limited to, employees performing work in the occupation of a nurse, physician, caregiver, medical resident, intern or fellow, patient care technician, janitor, housekeeping staff person, groundskeeper, guard, clerical worker, nonmanagerial administrative worker, food service worker, gift shop worker, technical and ancillary services worker, medical coding and medical billing personnel, scheduler, call center and warehouse worker, and laundry worker, regardless of formal job title." It also includes a "contracted or subcontracted employee" in certain circumstances. Not included in the definition are (1) outside salespersons, (2) public sector work, if the primary duties performed are not health care services, (3) delivery or waste collection work on the premises, or (4) medical transportation services in or out of a covered health care facility, so long as (for both (3) and (4)) the worker is not an employee of any person that owns, controls, or operates a covered health care facility.

The minimum wage phase-in for covered employers with 10,000 or more full-time equivalent employees ("FTEE") or a covered employer that is part of an integrated health care delivery system or health care system with 10,000 or more FTEEs, any covered dialysis clinic employer or that is a person that owns, controls, or operates a dialysis clinic, or a covered health facility owned, affiliated, or operated by a county with a population of more than 5,000,000 as of January 1, 2023, will be as follows: (A) from June 1, 2024, to May 31, 2025, inclusive, twenty-three dollars ($23) per hour; (B) from June 1, 2025, to May 31, 2026, inclusive, twenty-four dollars ($24) per hour; and (C) from June 1, 2026 onward, unless adjusted, twenty-five dollars ($25) per hour.

The minimum wage phase-in for any hospital that is a hospital with a high governmental payor mix, an independent hospital with an elevated governmental payor mix, a rural independent covered health care facility, or a covered health care facility that is owned, affiliated, or operated by a county with a population of less than 250,000 as of January 1, 2023, will be as follows: (A) from June 1, 2024, to May 31, 2033, inclusive, eighteen dollars ($18) per hour, with 3.5 percent increases annually; and (B) from June 1, 2033 onward, unless adjusted, twenty-five ($25) per hour.

Other covered health care facility employers (clinics, community clinics, rural clinics, urgent care clinics, etc.) have different phase-in rates. For example, there is a catch-all for "all other covered health care facility employers" with a phase-in as follows: (A) from June 1, 2024, to May 31, 2026, inclusive, twenty-one dollars ($21) per hour; (B) from June 1, 2026, to May 31, 2028, inclusive, twenty-three dollars ($23) per hour; and (C) from June 1, 2028 onward, unless adjusted, twenty-five dollars ($25) per hour. As well, there is a short compliance reprieve (until January 1, 2025) for any county owned, affiliated, or operated health care facility employer.

Finally, once the rate hits $25 per hour, thereafter, the minimum wage will increase by the lesser of 3.5 percent or the rate of change in the averages of the most recent July 1 to June 30 period over the preceding July 1 to June 30 period for the United States Bureau of Labor Statistics non-seasonally adjusted U.S. CPI-W. The result will be rounded to the nearest ten cents ($0.10). Each such minimum wage increase will take effect on the following January 1.

To be considered a salaried exempt employee under SB 525, the employee must earn a salary (paid on a salary basis) of no less than "150 percent of the health care worker minimum wage or 200 percent of the minimum wage."

SB 525 also requires the Department of Health Care Access and Information to publish, on or before January 31, 2024, and on the department's internet website, specified information, including a list of hospitals that qualify under certain classifications. Once published and until January 31, 2025, there is a process to request classification. There will also be a process for seeking a waiver that will be implemented no later than March 1, 2024, through which certain covered health care facility employers can request a temporary pause or alternative phase-in schedule.

Finally, SB 525 also explicitly preempts any local rules that would offer less wages or protections to covered employees. It states, "Any ordinance, regulation, or administrative action taken by any city, county, or city and county, including charter cities, charter counties, and charter cities and counties, that is enacted or takes effect after September 6, 2023, related to covered health facilities, that establishes, requires, imposes, limits, or otherwise relates to wages, salaries, or compensation for covered health care facility employees … is void." SB 525 does not preempt local legislation that would establish higher wages for covered health care workers, nor local legislation that establishes, "… a minimum wage that would apply uniformly to all employees across all industries and sectors and not exclusively to employees employed by covered health care facilities." See:
https://leginfo.legislature.ca.gov/faces/billN"avClient.xhtml?bill_id=202320240SB525.

54. WAGE THEFT: UPDATED FORM ON THE WAY

AB 636 amends Labor Code Section 2810.5 to require additional information be added to the Wage Theft Prevention Notice ("WTPN"). Since 2011, most employers have been required to provide the WTPN to employees at the time of hire and within seven calendar days of any time there are changes to the WTPN information, unless "(1) all

changes are reflected on a timely wage statement ... [or] (2) notice of all changes is provided in another writing required by law within seven days of the changes." In 2015, the form was amended to add a paid sick leave section. The DLSE current form WTPN can be accessed here: https://www.dir.ca.gov/dlse/governor_signs_wage_theft_protection_act_of_2011.html.

AB 636 will require the DLSE to once again amend its form by March 1, 2024, to add two additional categories of information. First, the form will add a section with information on "the existence of a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, and that was issued within 30 days before the employee's first day of employment, that may affect their health and safety during their employment." Second, for those employees admitted under an H-2A agricultural visa, the form will also include a new section, in Spanish (although the employee can also request the information in English), that includes the following: "…information addressing the federal H-2A program wage rate required to be paid during the contract period; overtime wage rates; frequency of pay; pay for piece rate workers; 10-minute rest periods; 30-minute meal periods; transportation travel time compensation when required, including transportation from housing to work sites; employee housing rights; non-retaliation protections for complaints or organizing; contents of itemized wage statements; sexual harassment prohibitions; toilets; requirements regarding availability of potable water and handwashing facilities; requirements relating to hot weather working conditions and the availability of shade; pesticide exposure protections; workplace safety requirements, training and correction of hazards; transportation in defined farm labor vehicles; prohibitions against tool or equipment charges; prohibitions against deductions for meals not taken; training and necessary equipment and lighting for night work; prohibitions against use of short-handled hoes and limits on hand weeding; employee-paid health insurance; right to accrue and take sick leave; workers' compensation coverage, disability pay, and medical care for injuries; and the right to complain to state or federal agencies and to seek advice from collective bargaining representatives or legal assistance organizations." See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB636.

55. WORK PERMITS: WORKPLACE READINESS WEEK

AB 800 adds Education Code Section 49110.5 to require that all public high schools (and charter schools) annually observe "Workplace Readiness Week" (the date must include April 28). During that week, the schools will provide information to pupils on their rights as workers, including, among other topics, "local, state, and federal laws regarding each of the following issues: (1) prohibitions against misclassification of employees as independent contractors; (2) child labor; (3) wage and hour protections; (4) worker safety; (5) workers' compensation; (6) unemployment insurance; (7) Paid Sick Leave, Paid Family Leave, State Disability Insurance, and the California Family Rights Act; (8) the right to organize a union in the workplace; and (9) prohibitions against retaliation by employers when workers exercise these or any other rights guaranteed by law…" 11th and 12th grade students will also receive this education as part of their regular history-social science curriculum. AB 800 requires that, "beginning August 1, 2024, any minor seeking the signature of a verifying authority on a Statement of Intent to

Employ a Minor and Request for a Work Permit-Certificate of Age …shall be issued, before or at the time of receiving the signature of the verifying authority, a document clearly explaining basic labor rights extended to workers." According to the legislature's declarations, the purpose of this bill is to "…equip pupils with this knowledge to protect them from retaliation and discrimination, to ensure that these young workers receive all wages and benefits to which they are entitled, to empower them to refuse unsafe work when necessary, and to prepare them to assert their labor rights whenever these rights are threatened." See: https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB800&showamends=false.

MORNING BREAKOUT SESSIONS

10:40-11:40

Cummins & White, LLP

NEW NLRB RULES AND THE IMPACT ON NON-UNION EMPLOYERS

Erick J. Becker

Senior Partner
Cummins & White, LLP

Erick Becker

Senior Partner, Cummins & White

Erick Becker leads the labor and employment practice group at Cummins & White.

With 30 years of practical experience in labor and employee relations, his expertise centers on helping employers maintain compliance with the myriad laws and regulations governing employment. He also advises employers on strategies to maintain their union free status and assists unionized employers with negotiations, contract administration, strike management and communications.

Mr. Becker also represents employers in all areas of employment litigation, and has extensive experience handling matters before administrative agencies, including the NLRB, EEOC, and California Labor Commissioner. He works with clients in a wide variety of industries, including construction, manufacturing, transportation, non-profits, and health care.

Mr. Becker teaches a course on "Human Resources and the Law" for the Human Resources Management program at the University of California, Irvine, and regularly speaks on employment and labor issues for industry and professional organizations.

Bar Admissions

- U.S. District Court (Central District of California)
- U.S. Court of Appeals, Ninth Circuit

Practice Areas

- Labor & Employment
- Union Negotiations
- Labor Relations
- Employment Litigation
- Employment Law Counseling

Education

- BA (Political Science), University of California, Santa Barbara
- JD, University of California, Berkeley (Boalt Hall)

New NLRB Rules and the Impact on Non-Union Employers

Erick Becker, Senior Partner

What's in Store for '24?

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Why Should You Care About the NLRB?

- NLRB mainly focuses on disputes involving unions
  - Unfair Labor Practices by unionized employers or unions
  - Attempts by unions to organize non-union employees
- NLRB is political
  - President appoints majority of Board members and General Counsel
- Current NLRB is more favorable towards unions than ever in history
- NLRB's impact on non-union employers has dramatically expanded
  - Rulings in the past two years have been designed to affect all employers

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Rulings on Work Rules and Policies

- *Stericycle* decision changed the standard on legality of workplace policies
  - Section 7 of the NLRA gives employees rights to engage in protected activity
  - If an employee could reasonably construe a policy to chill protected activity, it is presumed unlawful unless…
  - Employer proves it had a substantial and legitimate purpose for the policy and
  - It could not have achieved the purpose by a more narrowly tailored policy
- Practical impact of the *Stericycle* standard
  - The employer's intent or the application of the policy is irrelevant
  - Cannot argue that the obvious or practical interpretation of a policy makes it lawful
  - Very difficult to prove that a more narrow policy was not possible

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Rulings on Work Rules and Policies

- Potentially unlawful policies
  - Workplace civility (rude or discourteous behavior, requiring respectful behavior)
  - Non-disparagement of the company, employees or managers
  - Confidentiality (pay, personnel issues, complaints and investigations)
  - Social media restrictions
  - Use of company email
  - Use of cameras or recording devices
  - Prohibiting comments to media
  - Insubordination

Rulings on Work Rules and Policies

- Consequences of maintaining possibly unlawful policies
  - Chances of a ULP are pretty slim
  - Employee termination based on unlawful rule could be challenged
  - Possibility of a bargaining order in the event of organizing activity
- Savings clauses
  - "Nothing in this policy should be construed to prevent employees from exercising their rights under Section 7 of the NLRA, such as the right to discuss terms of employment with others"
  - Good practice, but not going to save an unlawful policy

Rulings on Work Rules and Policies

- What should you do with your handbook rules?
  - Discard any rules that are duplicative or unnecessary
  - Rewrite overbroad rules – example, define what is insubordination
  - Focus on conduct towards customers and other external stakeholders, as opposed to management or fellow employees
  - Add in language setting forth the business justification for a rule – example, cameras and recordings prohibited in areas where company has trade secret information/processes
  - Tie rules to other important policies, such as harassment and discrimination
  - Use examples to illustrate the reasonable interpretation of the rule

Rulings on Severance Agreements

- *McLaren Macomb* decision held certain provisions in severance agreements violate the Act
  - Did not rule that severance agreements are per se unlawful
  - Offering severance agreement with unlawful terms is a violation, even if the employee does not sign
- Key terms called into question
  - Non-Disparagement
  - Confidentiality of the agreement
  - Release of NLRA claims to enforce Section 7
  - Cooperation in litigation
  - Non-solicitation/poaching

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Rulings on Severance Agreements

- Practical impact of ruling
  - Severance agreement is not voided by unlawful provisions
  - Doesn’t apply to supervisors/managers, only non-exempt employees
  - Not unlawful to require confidentiality regarding amount of severance
  - Not likely to result in a ULP filing
- Revisions to severance agreements
  - Savings clauses (release, confidentiality, cooperation, non-solicit)
  - Non-disparagement only included on case-by-case basis

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Rulings on Protected Concerted Activity

- Definition expanded in *Miller Plastic Products*
  - Two elements for activity to be considered covered by Section 7: protected and concerted
  - Traditionally, advocacy or complaints on behalf of individual interests was not concerted activity
- *Miller* says even individual complaints can be concerted
  - Even if other employees do not support or join in, or issue is not discussed with others in advance
  - NLRB returned to a “holistic” approach to determine if conduct appears to have some relation to group action

Rulings on Protected Concerted Activity

- Practical impact of broader definition of protected concerted activity
  - More opportunities for employees to challenge a termination by filing an unfair labor practice charge
  - Do not assume that only one individual complaining about a policy or practice is unprotected conduct
  - Consider alternates to termination if employee was arguably engaged in protected concerted activities

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Rulings on Union Organizing

- *Cemex* ruling makes it easier for unions to organize
  - Rule for 50 years was an employer does not have to respond to a union demand for recognition
  - Instead, unions would file a petition with the NLRB for a secret ballot election
- Under *Cemex,* unions do not have to file a petition for an election
  - Union can make a demand for recognition based on having majority support
  - Can be verbal or written
  - Can be made to any agent of the employer (supervisor level or higher)

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Rulings on Union Organizing

- What are your options if a demand for recognition is made?
  - Ask the union to produce majority support and recognize without a vote
  - File an RM petition seeking an election
  - Refuse to bargain with the union and challenge that they have majority support
- Filing for an election
  - Must be filed within 14 days of receipt of demand; otherwise, union is automatically recognized
  - Can challenge the scope of the unit sought by the union
  - Election held within 21 days of filing of the petition

Rulings on Union Organizing

- Bargaining Order will result for any unlawful act after recognition demand
  - Prior rule was that unlawful acts prior to an election would usually result in a rerun election, even if union previously could show majority support
  - NLRB would only issue an order to bargain where serious and multiple violations made it impossible to have a fair rerun election
  - *Cemex* rule is any one ULP can result in a bargaining order, even if union loses an election
  - Discipline or discharge of union supporters is an automatic bargaining order
  - Other unlawful acts (maintaining unlawful policies, interrogation, promises) will result in bargaining order unless so minimal or isolated that it is impossible they affected the election

Key Takeaways

- Have your policies and work rules reviewed for compliance
- Don’t rely on older severance agreement templates
- Take protected concerted activity into account when analyzing termination decisions
- More important than ever to train managers and supervisors on how to lawfully respond in the event of union organizing
- Keep paying attention to what the NLRB is up to!

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Thank You for Attending!

Erick Becker, Senior Partner
Cummins & White, LLP

ebecker@cwlawyers.com

949 852-1800

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Fisher & Phillips LLP

NON-HUMAN RESOURCES: AI AT WORK

Erica Wilson

Associate
Fisher & Phillips LLP

Vice Chair of the Artificial Intelligence Team

Erica is an attorney in Fisher Phillips' Pittsburgh office and is Vice Chair of the firm's Artificial Intelligence Team. Her unique enthusiasm for data analysis, storytelling through numbers, and exploring compliance issues raised by workplace software have made her a go-to for AI advising and wage and hour matters, from internal audits to class action defense. She also has significant experience with eDiscovery, forensic examinations, and other digital breadcrumbs, enabling her to tailor litigation strategies and solutions to the facts—wherever they may be. Passionate about the intersection of law and technology, Erica is frequently asked to present on employment issues implicated by the use of AI, social media, and cryptocurrency and other blockchain technologies.

- **NOTE:** This policy is designed to address your employees' use of third-party generative AI tools like ChatGPT, Google's Bard, Microsoft Bing, and DALL-E 2 to perform their duties – with or without your knowledge – where the tools being used are not made available by the Company. This policy is not intended to establish guidelines for other, approved AI or GenAI tools made available by the Company for employee use.

Acceptable Use of Generative AI Tools *[Sample Policy]*

Purpose

Publicly available applications driven by generative artificial intelligence (GenAI), such as chatbots (ChatGPT, Google's Bard, Microsoft Bing) or image generators (DALL-E 2, Midjourney) are impressive and widely popular. But while these content-generating tools may offer attractive opportunities to streamline work functions and increase our efficiency, they come with serious security, accuracy, and intellectual property risks. This policy highlights the unique issues raised by GenAI, helps employees understand the guidelines for its acceptable use, and protects the Company's confidential or sensitive information, trade secrets, intellectual property, workplace culture, commitment to diversity, and brand.

Scope

This policy applies to the use of any third-party or publicly available GenAI tools, including ChatGPT, Google Bard, DALL-E, Midjourney, and other similar applications that mimic human intelligence to generate answers, work product, or perform certain tasks. (This policy does not cover other GenAI or AI tools formally approved or installed for your use by the Company.) *Optional: list any GenAI tools that you have approved or installed.*

Guidelines

DO:

- Understand that GenAI tools may be useful but are **not a substitute** for human judgment and creativity.
- Understand that many GenAI tools are prone to "hallucinations," false answers or information, or information that is stale, and therefore **responses must always be carefully verified by a human**.
- Treat every bit of information you provide to a GenAI tool as if it will **go viral on the Internet**, attributed to you or the Company, regardless of the settings you have selected within the tool (or the assurances made by its creators).
- Inform your supervisor **when you have used a GenAI tool** to help perform a task.

- Verify that any response from a GenAI tool that you intend to rely on or use is **accurate, appropriate, not biased, not a violation of any other individual or entity's intellectual property or privacy, and consistent** with Company policies and applicable laws.

DO NOT:

- Do not use GenAI tools to make or help you make **employment decisions** about applicants or employees, including recruitment, hiring, retention, promotions, transfers, performance monitoring, discipline, demotion, or terminations.

- Do not upload or input any **confidential**, **proprietary**, or **sensitive** Company information into any GenAI tool. Examples include passwords and other credentials, protected health information, personnel material, information from documents marked Confidential, Sensitive, or Proprietary, or any other non-public Company information that might be of use to competitors or harmful to the Company if disclosed. This may breach your or the Company's obligations to keep certain information confidential and secure, risks widespread disclosure, and may cause the Company's rights to that information to be challenged.

- Do not upload or input any **personal information** (names, addresses, likenesses, etc.) about any person into any GenAI tool.

- Do not **represent work** generated by a GenAI tool as being your own original work.

- Do not **integrate any GenAI tool** with internal Company software without first receiving specific written permission from your supervisor and the IT Department.

- [*If applicable*] Do not use GenAI tools other than those on the **approved list** from the IT Department. Malicious chatbots can be designed to steal or convince you to divulge information.

Violations

Violating this policy may result in disciplinary action, up to and including immediate termination, and could result in legal action. If you are concerned that someone has violated this policy, report this behavior to your supervisor or any member of Human Resources.

Disclaimer

Nothing in this policy is designed or intended to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment or any other rights protected by the National Labor Relations Act.

NOTE: Before implementing this policy, coordinate with your Fisher Phillips attorney to determine if you need to integrate this policy with your specific circumstances and any possible related policies, such as:

- Confidentiality and Trade Secrets
- Data Security
- Acceptable Use of Computers and Electronic Media
- Equal Employment Opportunity
- Discrimination and Harassment
- Workplace Code of Ethics

If your company is regulated by HIPAA/HITECH, GLBA, or FCRA, or you are federal contractor subject to affirmative action laws, contact your Fisher Phillips attorney to determine the extent to which you need to integrate this policy into your existing policies. Additional customizations may be also warranted for certain industries and/or workplaces.

Non-Human Resources: AI at Work

What's in Store for '24?

Erica G. Wilson – Fisher Phillips
Vice-Chair, Artificial Intelligence Team

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Agenda

- What is artificial intelligence (AI)?
- How is AI being used?
- What are the risks of using AI?
- How is AI being regulated?
- Q&A

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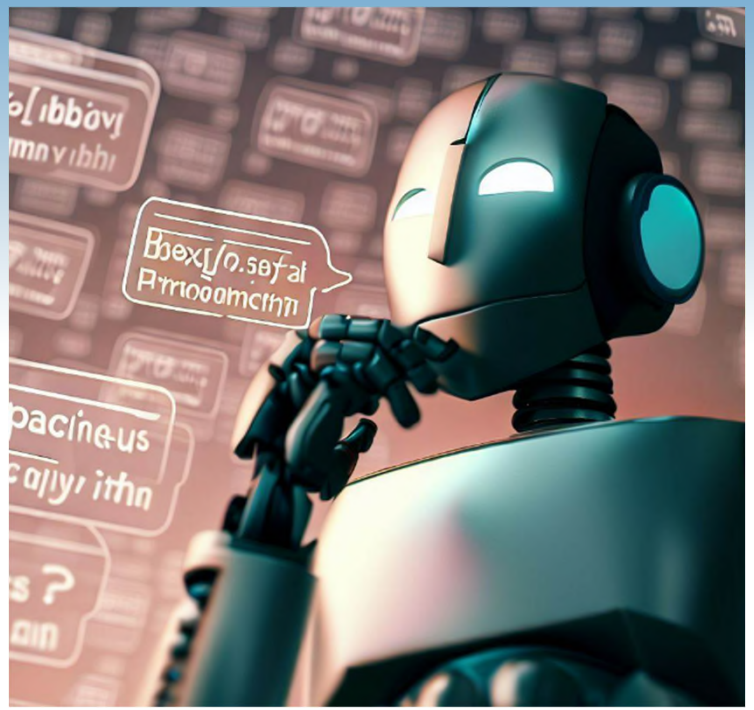
EEOC Guidance: Disparate Impact Refresher



- Facially neutral policy that has a disparate/disproportional impact on a protected class
- Evidence is on statistics, not motive
- Some vendors promise “bias-free” assessments—but can they prove it?
- Proxy discrimination

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EEOC Guidance: ADA and AI

- Is the applicant offered a reasonable accommodation that will allow them to be **rated fairly and accurately** by the algorithm?
- Does the algorithm screen out individuals with a disability even if they could perform the job with a **reasonable accommodation**?
- Does the software make pre-offer **disability-related inquiries** or ask for information that could qualify as a **medical examination**?

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EEOC Guidance: Title VII and AI

- Does the algorithm disproportionately screen out individuals based on their race, color, religion, sex, or national origin?
- If it does, is the selection rationale **job-related and consistent with business necessity**?
- Was a less discriminatory alternative available?
- **Employers are responsible** for the use of algorithmic decision-making tools, even if they are designed by a software vendor.

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Takeaways

- Adapt or die
- Spot risks by understanding how the AI works
- Free AI tools are imperfect, but irresistible; employees *will* experiment
- Laws on the books apply, and more are coming

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Q&A

Erica G. Wilson
Fisher Phillips
Vice Chair, Artificial Intelligence Team
ewilson@fisherphillips.com

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Universal Background Screening

AVOID HIRING PITFALLS - BACKGROUND SCREENING COMPLIANCE IN 2024

Kate Kearns

Senior Account Executive
Universal Background Screening

With over 26 years' experience in background screening, Kate Kearns has been focused on compliance and safety-sensitive populations and has worked with thousands of clients in helping consult on best practice procedures. As a former LA County Deputy Sheriff and Private Investigator out of the state of California, Kate has been instrumental in supporting the community and helping clients reduce hiring risk.

Universal Background Screening

AVOID HIRING PITFALLS - BACKGROUND SCREENING COMPLIANCE IN 2024

Brianna Bruington

Senior Account Executive
Universal Background Screening

Brianna is based in California and has over 6 years' experience in the California healthcare-related industries. She is focused on regulatory and safety-sensitive populations. Brianna provides white-glove service in consulting with clients to help them understand California and federal requirements pertaining to employment background screening and works with clients of all vertical markets to help reduce hiring risk.

Universal

BACKGROUND SCREENING

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.

HRO Today Baker's Dozen Customer Satisfaction Ratings
PRE-EMPLOYMENT SCREENING
2021 Enterprise Winner

ACCREDITED PBSA PROFESSIONAL BACKGROUND SCREENING ASSOCIATION UNITED STATES EMPLOYMENT SCREENING

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

877-263-8033 EXT. 4 | universalbackground.com

Avoid Hiring Pitfalls

Background Screening Compliance in 2024

What's in Store for '24?

Presenters:

Kate Kearns – Senior Account Executive

Brianna Bruington – Senior Account Executive

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Partnership and Value.

- Over 50 years experience in Healthcare.
- Focused on Regulatory, Multi-State, Safety-Sensitive Populations
- Nationally Accredited and **‘0’** Litigation Compliance Experts
- Top Enterprise Screening Firm 14 years by HRO Today (Client Survey-Based)

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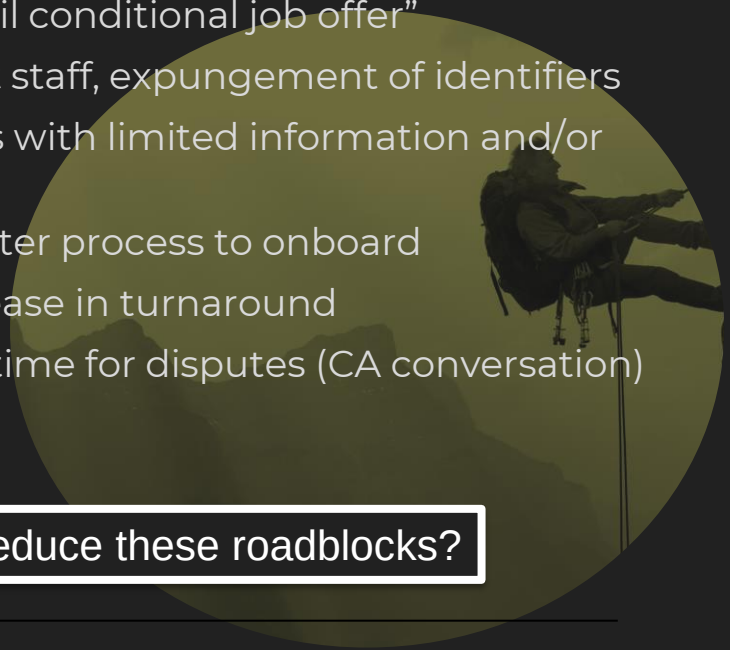
Challenges of Screening

"Onboarding a new candidate to make their start date has become a much more challenging process" -

- Fair Chance/Ban the Box regulations: "…until conditional job offer"
- Court delays due to limited or remote court staff, expungement of identifiers
- Verification delays due to 3rd party agencies with limited information and/or remote verifiers
- Candidates/Requestors want easier and faster process to onboard
- International Searches – Post COVID – increase in turnaround
- Adverse Process: 10-day conservative wait time for disputes (CA conversation)



What are the best ways to reduce these roadblocks?

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Compliance 2024

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

November 2022 - CFPB reported screening firms have failed to conduct reasonable investigations of consumer disputes and to spend the time necessary to resolve inaccuracies. Increased litigation will follow.

Equal Employment Opportunity Commission

- Federal agency that administers and enforces civil rights laws against workplace discrimination

9/2023 - According to preliminary data, the EEOC filed 143 new employment discrimination lawsuits in fiscal year 2023, representing more than a 50% increase over fiscal year 2022 suit filings.

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)

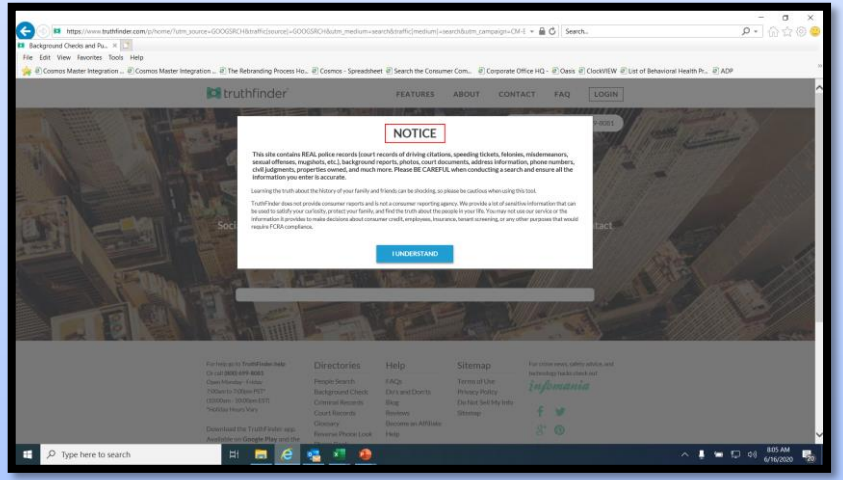
As federal law, it applies to everyone, in all states.

- However, states can (and some have) extend and expand upon the law

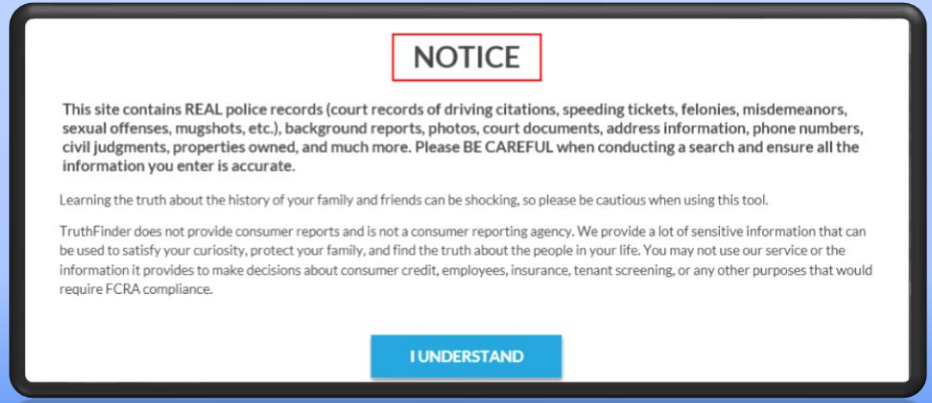
It is designed to:

- Ensure accurate information is reported
- Restrict/Limit what information is reported
- Provides a dispute mechanism for consumers

Why not use an Online screening firm?



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.

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EEOC – "Guidance Factors" April 25, 2012 (Requirements)

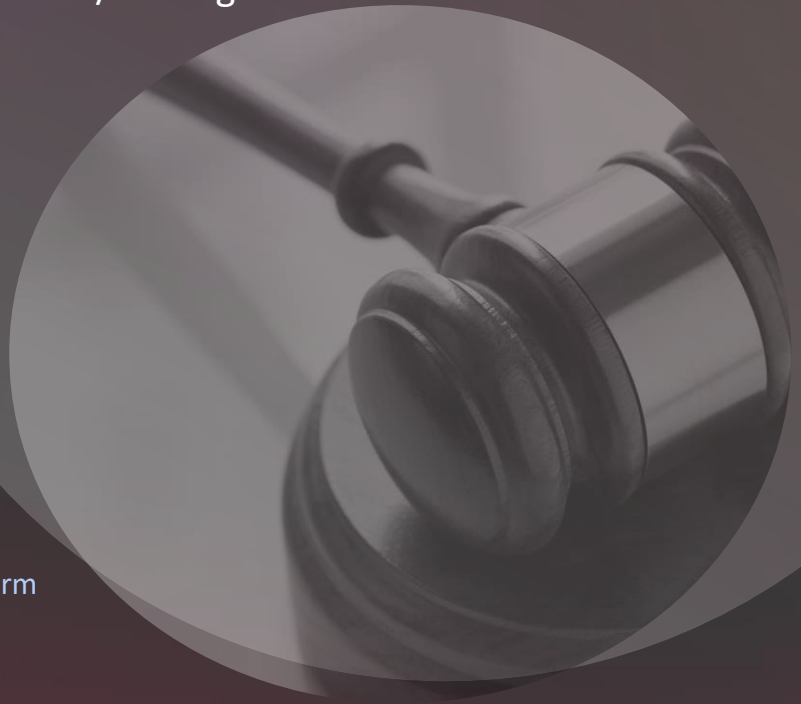
- Criminal
  - Review "nature and gravity" of the offense
  - Substantially job related / standardized
  - Severity of the offense
  - How long ago it occurred
  - Is person a repeat offender
- No "blanket" policies / no hire rules
  - ~~A felony conviction is an immediate disqualification~~
- Reduce Risk By:
  - Speaking with Legal and have a program in place
  - Case by case basis – yet standardized
  - Training for hiring process/procedures

Created by EEOC but enforced and supported by FTC/CFPB

GRADING/ADJUDICATION – High risk

- Background Screening Firms should not be “Scoring” or “Grading” reports for clients due to the final “pure” determination by the “end user”/EEOC guidance factors:

- Cases
  - Branch v. GEICO
    - Screening firm coded plaintiff as “Fail”
  - Culberson v. Walt Disney
    - Screening firm coded plaintiff as “no hire”
    - Alleged action is “pre-notice coding”
  - Manuel et. Al. v. Wells Fargo Bank
    - Screening firm coded as “ineligible”



- Next Steps
  - Speak with Legal on best practice of review per candidate
  - Review the candidate’s entire report
  - Don’t adjudicate with blanket policies or using your screening firm
  - Provide clear training of adverse process to hiring team

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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 –Federal law 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."

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High Industry Risk and Importance of Compliance

(Large Healthcare) Foundation Hospitals FCRA $4M class action settlement - Top Class Actions - Failed to obtain authorization for background checks through the disclosures required by the FCRA. The class action lawsuit also claims these background checks violated California's Investigative Consumer Reporting Agencies Act and Consumer Credit Reporting Agencies Act.

Charter Communications ordered to pay family $1.1 billion over murdered relative - CBS News – "Charter didn't properly screen Holden before hiring him".

Inflection Risk Solutions incorrect background checks $4M class action settlement - included inaccurate criminal record information on background checks.

O'Reilly Auto Parts FCRA background check $950K class action settlement- Company allegedly included extraneous information on its disclosure forms that violated FCRA requirements.

Pride Industries background check disclosures $600K class action lawsuit settlement - …Failed to give applicants and employees proper disclosures when running background checks on them.

A $15 million settlement has been reached to resolve a outdated background check class action lawsuit - including outdated information in background check reports.

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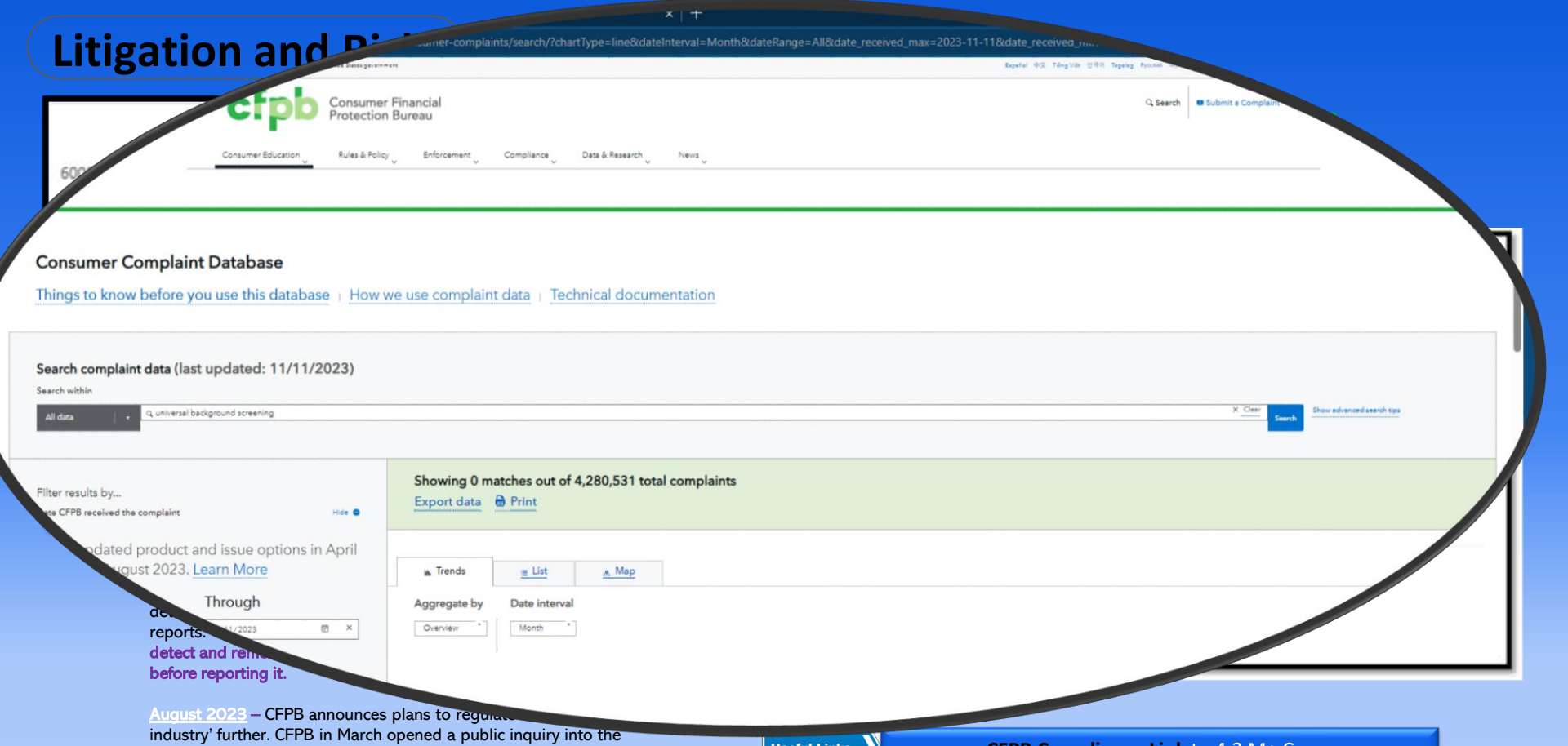
Litigation and Ri



reports.
detect and rem
before reporting it.

August 2023 – CFPB announces plans to regul
industry' further. CFPB in March opened a public inquiry into the conduct of companies including background screening firms.

Useful Links **CFPB Compliance Link** to 4.2 M+ Cases

Salary Verification Restrictions

JD SUPRA 2023 - Legally-mandated pay transparency is a trend to which employers must be attuned.

29 Statewide Bans | (Salary Bans Link 2023)

- Aimed at ending the cycle of pay discrimination Law ban pay history questions
- Prohibit employer from relying on an applicant's pay history to set compensation
- Prohibit an employer from taking disciplinary action against employees who discuss pay with coworkers
- **CA Law -** Employers cannot seek pay history, and even if the information is already known, it can't be used to determine pay or to screen applicants. Employers must give applicants pay scale information if they request it.

October 2018 | EEOC Lawsuit in Denton County, TX

- County Public Health Department agreed to pay $115,000 to female doctor after federal court ruled violations of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964

January 2019 | Pay Discrimination Lawsuit filed

- Maryland Insurance Administration paid three female fraud investigators lower salaries than it paid to several male fraud investigators, all performing equal work. $36,802 in monitory relief

August 2023 | Most Recent Case

- The University of Texas, agreed to pay $46,000 in damages and to furnish other relief to settle a pay discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC)

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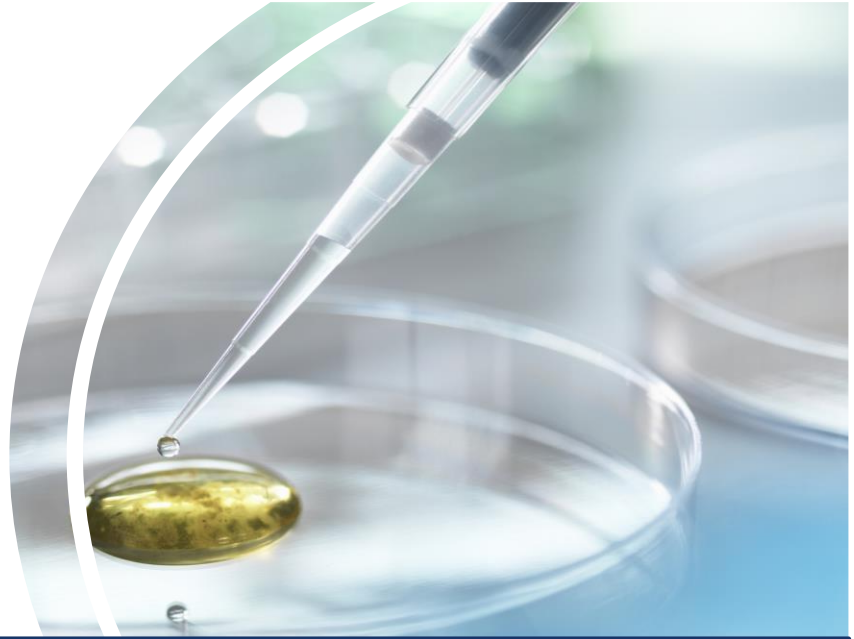
Medical Marijuana Laws



Number of post-accident drug tests that came up positive for marijuana grew 204 percent from 2012 to 2022

California Nevada, New York, New Jersey, Connecticut, Montana and Rhode Island
All have passed laws in recent years protecting recreational cannabis users' employment rights

39 states which protect those rights for medical cannabis users
Notably, Philadelphia, Washington DC, New York City, and Atlanta have also enacted ordinances protecting the rights of workers in their cities who use cannabis.

- **CA** | Jan 2024- Assembly Bill 2188 unlawful for employers to discriminate against applicants/employees for the "use of cannabis off the job and away from the workplace." Prevents discrimination against applicants/ employees that fail drug tests detecting "non-psychoactive cannabis metabolites in their urine, hair, or bodily fluids

- NJ | February 2021 - Prohibits employers from rejecting applicants testing positive for marijuana. designating a "Workplace Impairment Recognition Expert" (WIRE) who must be trained to detect/identify employee's use/impairment from drugs and to assist in the investigation of workplace accidents.

TIPS FROM SHRM ARTICLE 2023

1. "Employers should create clear policies advising employees that cannabis use during work hours—including meal breaks and rest breaks—is not permitted, and that cannabis use is not permitted on company premises, including in an employee's car in the company parking lot,"
2. "Employees in safety-sensitive jobs should be requested to refrain from marijuana use for at least six to eight hours prior to reporting for work to ensure that they can perform their job duties safely,"

Link 1 – by state - Link 2- by state - Link 3 – Tips

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BAN THE BOX - FAIR CHANCE AND CLEAN SLATE LAWS

BAN THE BOX AND FAIR CHANCE LAWS

"Have you ever been convicted of a misdemeanor and/or felony?"

- Over 150 municipalities and 37 states / DC
- 15 states and 22 cities/counties extend laws to private employers
  - Laws add more teeth – EEOC Guidelines
  - 10-day Adverse Action "Reasonable Time"
- December 2021 | Federal Law
  - Prohibits most federal agencies/contractors from requesting information on a job applicant's arrest and conviction record until after conditionally offering the job to the applicant.

CLEAN SLATE LAWS (RESOURCE)

Michigan, Oklahoma, New Jersey, Connecticut, Arizona, California (July 2023), Pennsylvania, Virginia, Delaware, Colorado, Illinois, Utah and Maryland

- Trends: Automatic Sealing – 3 years to 10 year wait period, violent crimes still supposedly kept in system.

"Earlier this year, Pennlive.com reported that 80% of all criminal cases in Franklin County, including rape and murder cases, were removed from public view."

10/2023 - NJ State Police Sued For Failing To Clear Expunged Records - Backlog of nearly 50,000 expungement orders, some of which have languished for more than a year.

Currently, Clean Slate 60 bills across 19 states and Washington D.C. are under consideration by lawmakers in 2023 (March 13th, Forbes Magazine)

CA Fair Chance Law

https://calcivilrights.ca.gov/fair-chance-act/fca-forms/ - **Process from Government**

On July 24, 2023, the Office of Administrative Law approved the California Civil Rights Council's proposed modifications to the regulations applicable to employer use of criminal history, which are effective **October 1, 2023**.

- Employers remain prohibited from requesting and using criminal history information until after a conditional offer of employment
- Employers cannot put anything in a job advertisement or posting that indicates a person with a criminal history will not be considered (No blanket policy)
- Unless an exception applies, if an individual volunteer's information about their criminal history before receiving a conditional offer, the employer may not consider the information until after it has decided whether to make a conditional employment offer
- Regulations require an employer's individualized assessment to include consideration of (a) the nature and gravity of the offense or conduct, (b) the time that has passed since the offense or conduct and/or completion of the offense, and (c) the nature of the job held or sought. The new regulations provide employers greater clarity when conducting this assessment by including numerous examples of evidence that may be relevant to each of the three factors (EEOC Guidance Factors)

- The regulations now require an employer to conduct an "initial" individualized assessment *before* sending the notice of preliminary decision (a notice that is similar but not identical to a FCRA pre-adverse action notice)
- The preliminary decision notice still must (a) identify the criminal history that is potentially disqualifying, (b) include a copy of the conviction history report and any other document that includes information about the conviction history, and (c) notice of the right to respond before the employer makes a final decision. Applicants or employees have at least five business days from ***receipt*** of this notice to respond

- five calendar days if mailed within California; (b) 10 calendar days if mailed outside of California; (c) 20 calendar days if mailed outside of the United States; and (d) two business days if emailed

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Forms and Process

Compliant Forms

- **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”
    - O’Reilly Auto Parts $900K+, 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, 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: 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
  - Revised and required March 2024
    - Ancillary changes
  - "Solely of Rights Document"

Solution:

- Provided when giving the disclosure and authorization on its own/sole form
- Always provided during Adverse Action Process (pre and final)
- Do not staple with other documents

Adverse Action 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

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Adverse Action: 4 Easy Steps – Pre-Adverse Forms

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/*
- *October 2023 – CA New Law Updates* – Preliminary decision notice must (a) identify the criminal history that is potentially disqualifying, (b) include a copy of the conviction history report and any other document about the conviction history, and (c) notice of the right to respond before the employer makes a final decision. Applicants or employees have at least five business days from ***receipt*** of this notice to respond.

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Adverse Action: 4 Easy Steps – Final Adverse Forms

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/*

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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

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solutions

Start the screening process asap, taking Ban the Box and Fair Chance laws into consideration. Have a streamlined process with your requestors

Increase efficiencies in technology with an Applicant Tracking Process / candidate driven process

- All forms signed electronically
- Connect as many fields as possible for pre-populating data

Clear instruction to candidate with strong emphasis of completing information to meet orientation dates to start

Review of package(s) in what is essential and best practice to conduct

-Consult with legal counsel and your screening firm

Q&A

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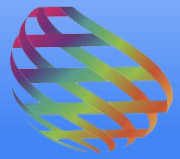

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Thank You!

Kate Kearns
Senior Account Executive
kkearns@universalbackground.com

Brianna Bruington
Senior Account Executive
brianna.bruington@universalbackground.com

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LUNCH AND LEARN: WHAT'S ON YOUR MIND? RESULTS AND ANALYSIS FROM THE WELU POLL ON 2024 WORKPLACE PLANNING

Bill Stephens

CEO
Employers Group/EverythingHR

WELU 2023 Flash Poll –

Results and Analysis

What's on Your Mind?

Presented by…
Bill Stephens, CEO
Employers Group/EverythingHR
November 28, 2023

EverythingHR

About Our Flash Poll – A New WELU Feature

- **97 Respondents** as of Monday, 11/27
- 100% in HR role
  - 2/3 dedicated HR; 1/3 hybrid HR role
- 100% representing companies with employees in CA
  - 49% with employees in multiple states and 14% with international employees
- 22% with over 500 employees; 25% with 250 – 500; 28% with 100 – 249; 26% with 25 – 99 and 9% with under 25
- 14 different industries including manufacturing, education, professional services and healthcare

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2024 WELU Flash Poll – Key Takeaways

- **Complying with federal, state and local employment laws will be a challenge for HR professionals in 2024**
- **Finding good employees continues to be a major concern for HR**
- **Keeping employees happy through competitive and fair pay is a major priority for 2024**
- **Remote vs Onsite is in the rear-view mirror, while workplace security and union concerns have not become top-of-mind just yet**
- **There are some positive 2024 expectations for both businesses and employees**

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Taking Care of EEs (Compliantly!) is Biggest Concern for ‘24

Poll Question: ***Looking ahead to 2024, what are the biggest workplace concerns you expect your organization to face?***

- **While staying compliant is the top concern - developing, paying competitively and, therefore, retaining employees are all big concerns.**
- **Remote workforce considerations and union concerns lag behind the more day-to-day issues.**
- **Write-in (“Other”) choices included compliance, wage and hour, AI, productivity and mental health.**

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Biggest Concerns for 2024

Response	Major Concern	Minor Concern	Insignificant Concern
Staying compliant with federal, state and local employment laws	64.44%	31.11%	4.44%
Effectively developing employees to be successful	63.04%	33.70%	3.26%
Paying employees competitively relative to market	62.37%	35.48%	2.15%
Retaining good employees	60.87%	30.43%	8.70%
Recruiting and hiring	45.65%	45.65%	8.70%
Internal pay equity	40.86%	48.39%	10.75%
Offering competitive employee benefits (healthcare, etc.)	39.36%	43.62%	17.02%
Ensuring a safe and secure workplace	36.96%	48.91%	14.13%
Other (Please specify)	31.58%	10.53%	57.89%
Effective Diversity, Equity and Inclusion	31.18%	46.24%	22.58%
Recognizing the need for accommodations and leaves	29.67%	58.24%	12.09%
Harassment claims	22.83%	51.09%	26.09%
Properly addressing new cannabis laws	22.58%	37.63%	39.78%
Bringing remote employees back to the workplace	13.19%	36.26%	50.55%
Understanding causes of union organizing campaigns	9.78%	29.35%	60.87%

Finding Employees is the Most Intense Concern

Poll Question: Based on the Major Concerns you selected in the previous question, please rank those items from top to bottom

- Compliance is second to finding good employees when looking at intensity level of top concerns.
- As a top three concern, compliance and retention are neck and neck behind recruiting and hiring.

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Biggest Concerns for 2024 By Intensity

Response	1st	2nd	3rd
Recruiting and hiring	55.10%	6.12%	8.16%
Staying compliant with federal/state/local employment laws	36.51%	9.52%	11.11%
Retaining good employees	22.22%	20.63%	15.87%
Paying employees competitively relative to market	20.63%	19.05%	22.22%
Effectively developing employees to be successful	12.70%	17.46%	17.46%
Other (Please specify)	7.14%	7.14%	0.00%
Effective Diversity, Equity and Inclusion	5.41%	13.51%	8.11%
Ensuring a safe and secure workplace	5.00%	12.50%	15.00%
Properly addressing new cannabis laws	3.70%	11.11%	18.52%
Harassment claims	3.70%	7.41%	3.70%
Bringing remote employees back to the workplace	0.00%	5.56%	22.22%
Internal pay equity	0.00%	26.67%	20.00%
Offering competitive employee benefits (healthcare, etc.)	0.00%	13.64%	11.36%
Understanding causes of union organizing campaigns	0.00%	5.88%	5.88%
Recognizing the need for accommodations and leaves	0.00%	17.14%	8.57%

Employee Counts Projected to Rise in 2024

Poll Question: ***Do you expect your employee count in 2024 to...***

- **By a 10:1 margin, respondents project increases to employee counts in 2024**
- **Decreases (though not heavily anticipated) will be minimal**

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Anticipated Change in Employee Count in 2024

Response	%
Stay about the same	54.35%
Increase by up to 10%	26.09%
Unsure	9.78%
Increase by more than 10%	6.52%
Decrease by more than 10%	3.26%
Decrease by up to 10%	0.00%

More Employees and Higher Pay in 2024

Poll Question: ***In 2024, do you expect to provide pay increases for…***

- **Employers expect to share the love (and the dough) as pay increases in 2024 will not just be the result of minimum wage increases**
- **Impact of pay equity initiatives begins to materialize**

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Projected Pay Increases in 2024

All employees	51.00%
Pay Equity Adjustments	21.65%
Cost of Living Adjustments	21.65%
Employees impacted by increases in minimum wage	20.62%
High-performing employees	16.50%
Still unsure	14.43%
Managers/Supervisors	6.19%
Executives	6.19%
Other - Please Specify	4.12%
On-Site Employees	3.10%
No employees	0.00%

Projected Pay Increases will be More Traditional in 2024

Poll Question: ***For those that will be receiving pay increases, do you expect the increases to average***

- **Pay increases, while being common, will be more in line with pre-pandemic levels**
- **Only a scarce few projecting above 5%**

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Projected 2024 Pay Increase Amounts

Between 3% and 5%	64.13%
Less than 3%	8.70%
Above 5%	2.17%
Still unsure	25.00%

Thank You for Taking Our Flash Poll

- Consider the results of this poll in relation to some of the insights being provided by today's presenters. To what extent is it aligned?
- Would you answer differently based on what you have learned today at WELU?
- Still time to participate if you have not done so yet
- Results provided in materials package will be updated through 12/5/23

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2024 Leadership Academy

This program has been designed for all leaders, including those who are leading others remotely. It is facilitated by an Employers Group/EverythingHR instructor from 8:30am-12:30pm (PST) once per week for eight weeks (breaks will be provided). Trainees must be able to access Zoom to participate.

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

- Are your leaders capable of effectively influencing employees to align with the organization's plans and strategy?
- 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 basic supervisory laws and practices?
- Are leaders effectively communicating and collaborating for results?

Each Registration Includes

- Eight highly-interactive facilitated small group sessions (Each attendee will need a (1) web connection, (2) web camera-enabled computer (3) downloaded Zoom software and (4) two-way audio via computer or phone connection)
- One behavioral assessment, which is provided directly to only the trainee.
- Electronic copy of materials for eight (8) courses, including job aids, reports and resources. Hard copy materials mailed via USPS available at $96 per participant).
- Five-module online Fundamentals of Supervisory Laws package
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Sheppard Mullin

JUDICIAL AND EMPLOYMENT LAW UPDATE

Richard Simmons

Partner
Sheppard Mullin

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Richard J. Simmons

Richard J. Simmons is a Partner in the law firm of Sheppard, Mullin, Richter & Hampton LLP in Los Angeles. He 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 d iscipline and termination, employee benefits, affirmative action, union representation proceedings, and arbitrations. Mr. Simmons received his B.A., *summa cum laude*, from the University of Massachusetts, where he was a Commonwealth Scholar and graduated in the Phi Kappa Phi Honor Society. He received his J.D. from Boalt Hall School of Law at the University of California at Berkeley where he was the Editor-in-Chief of the Industrial Relations Law Journal, now the Berkeley Journal of Employment and Labor Law.

Few management attorneys have prevailed in cases before the California Supreme Court in the past 10 years. Not only is Richard on of the few, he was the only management attorney to win an employment case before the Supreme Court in 2018. He was recently recognized as the Labor and Employment Attorney of the Year by the *Los Angeles Business Journal* and was inducted into the Employment Lawyers Hall of Fame. He has lectured nationally o n wage a nd hour, employment discrimination, wrongful termination, and other labor relations matters. He is a member of th e National Advisory Board to the Berkeley Journal of Employment and Labor Law, published by the Boalt Hall School of Law at the University of California at Berkeley. He was also appointed by the California Industrial Welfare Commission as a member of three Minimum Wage Boards for the State of California.

Mr. Simmons is a member of the California State Bar, the California Society for Health Care Attorneys, the American Society for Health Care Attorneys, and the labor law section of the American and Los Angeles Bar Associations. 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 on the CBS Evening News, NBC News, as well as radio and television talk shows.

Mr. Simmons has authored and co-authored numerous publications including the following:

1. Wage and Hour Manual For California Employers
2. Employer's Guide to COVID-19 and Emerging Workplace Issues

3. California's Private Attorneys General Act (PAGA) — Litigation and Compliance Manual
4. Wrongful Discharge, Staff Reduction and Employment Practices Manual
5. Employment Discrimination and EEO Practice Manual For California Employers
6. Employee Handbook and Personnel Policies Manual
7. Book of Human Resources Forms
8. Family and Medical Leave Manual for California Employers
9. Leaves of Absence and Time Off From Work Manual
10. California's Paid Family Leave Law and FTDI Benefits
11. California's Employee vs. Independent Contractor Rules Under *Dynamex*, AB 5 and AB 2257
12. Hospital Wage-Hour Manual
13. WARN Employer's Guide to California and Federal Mass Layoff and Plant Closing Rules
14. Wage and Hour Manual For New York Employers
15. COBRA-Employer's Guide to the Federal Health Insurance Rules
16. California's Meal and Rest Period Rules: Proactive Strategies For Compliance
17. California Employer's Guide to the Federal Overtime Exemptions
18. California's Anti-Business Employment Laws - Monuments To Inefficiency
19. California's "Sue Your Boss" Law - Compliance Audits Under the California Labor Code and Private Attorneys General Act
20. AB 60 - The Reform of California's Wage And Hour Laws
21. Employer's Guide to the Americans With Disabilities Act
22. Compliance Manual for California Health Care Organizations
23. Sexual Harassment Training Manual and Prevention Kit
24. Wage and Hour Manual For California Hotels, Motels, and Restaurants
25. Employer's Guide to Workplace Security and Violence Prevention
26. Guide to EEO Practices and Employment Discrimination Laws for Hotels, Motels, and Restaurants
27. Management Guide to Equal Employment Opportunity and Affirmative Action, Institute of Industrial Relations, UCLA

28. The Hospital Equal Employment Opportunity Manual

29. The Employer's Guide to the Federal Family and Medical Leave Act

30. Employer Obligations Under the Federal Plant Closing Law

31. The Federal Immigration Law—The Immigration Reform and Control Act of 1986

32. "COBRA--Federal Health Insurance Rules for the 1990's"

33. Employer's Guide to S.B. 198 Injury and Illness Prevention Programs and the California Corporate Criminal Liability Act

34. The Federal Polygraph Law—The Employee Polygraph Protection Act of 1988

35. "Coping with COBRA--The New Federal Health Insurance Law", Labor and Employment Law News of the State Bar of California

36. "Employer Rights: An Endangered Species," The 28th Annual Personnel and Industrial Relations Association Conference

37. "Wrongful Discharge," California Society for Health Care Attorneys Journal

38. "Wage Setoffs: The Do's and Don'ts of Deductions," Los Angeles Lawyer

39. "Comparable Worth: An Emerging Doctrine," Rural Telecommunications Journal

40. "Labor and Employment in the Theatre Industry," ShoWest Intro by Boxoffice Magazine

41. "The New California Fair Employment and Housing Regulations: A Case of Administrative Overreaching," Employee Relations Law Journal, Vol. 6, No. 2

42. "Sexual Harassment in the Work Place," Rural Telecommunications Journal

43. "A Lawyer's Guide to U.S. Wage and Price Standards," Los Angeles Lawyer

44. "Application of WARN Rules to Hospitals," Healthcare Human Resources Management Association of California News

45. First Amendment Protection of Shopping Center Picketing," Industrial Relations Law Journal, Boalt Hall School of Law

Honors

Lawdragon 500 Leading U.S. Corporate Employment Lawyers, *Lawdragon*, 2020-2024

Bar Register of Preeminent Lawyers, 2020

National Law Journal's list of Employment Law Trailblazers, 2020

Labor and Employment Attorney of the Year, *Los Angeles Business Journal*, 2017

Employment Lawyers Hall of Fame Inductee, *Lawdragon*, 2017, 2022

The Nation's Most Powerful Employment Attorneys,
Human Resource Executive, 2015-2017, 2019

Most Powerful Employment Lawyers, *Lawdragon*, 2016-2017

Leading lawyer in Labor and Employment, *Chambers USA*, 2006-2023

Recognition as expert in Labor and Employment, *The Legal 500*, United States California

Hospital Association Certificate of Distinction, 2015

International Who's Who of Management Labour & Employment Lawyers, 2012, 2015

Best Lawyers in America, *Best Lawyers*, 2009-2024

Recognized, Labor & Employment and Labor & Employment Litigation,
Legal 500, 2011-2014, 2016-2018

Labor and Employment Star - California, *Benchmark Litigation*, 2020-2022

"10 Leading Rainmakers," *Daily Journal*, 2009

Top Labor & Employment Attorney, *Daily Journal*, 2009-2014, 2016-2022

Employment MVP, *Law360*, 2011, 2019

Litigation Star, *Benchmark Litigation*, 2011-2012

Who's Who Legal: California, 2008-2009

Southern California Super Lawyer, *Super Lawyers*, 2008-2023

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

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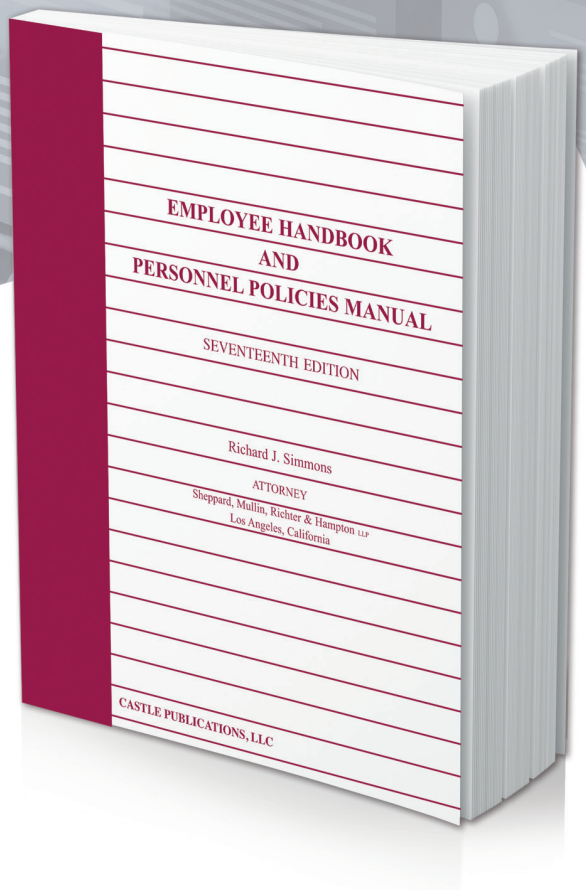

Castle Publications is pleased to announce that the New 2023 edition of the Employee Handbook and Personnel Policies Manual by Attorney Richard J. Simmons is now available. Order your copy today!

The Employee Handbook and Personnel Policies Manual is a unique publication by Attorney Richard J. Simmons of Sheppard, Mullin, Richter & Hampton LLP. It is a one-stop reference manual for personnel policies with guidance on how to draft policies and avoid common pitfalls. As an indispensable manual for every HR and law library, it is the best guide to personnel policies in the country. It offers a non-technical review of the laws and regulations governing personnel policies. In addition to 10 chapters discussing the practical and legal concerns in drafting handbooks, the book includes literally hundreds of sample policies.

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NAVIGATING EMPLOYEE LEAVES AND ACCOMMODATIONS IN THE MODERN WORLD

Danielle Moore

Partner
Fisher & Phillips LLP

Danielle H. Moore

Partner – Fisher & Phillips LLP

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.

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)

Navigating Employee Leaves and Accommodations in the Modern World

What's in Store for '24?

Danielle Hultenius Moore
Partner, Fisher Phillips

dmoore@fisherphillips.com
858-597-9600

EverythingHR

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Putting the Puzzle Together: Different Laws Involving Leaves and Accommodation

- Family and Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)
- Pregnancy Disability Leave Act (PDL)
- California Fair Employment & Housing Act (FEHA)
- Americans With Disabilities Act (ADA / ADAAA)
- Bereavement Leave
- Workers' Compensation
- USERRA
- Other leaves
  - Bone Marrow, Domestic Violence, Jury Duty, Witness, Voting, School Activities, Crime Victims

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Today's Roadmap

1) THE BASICS:
   - FMLA / CFRA
   - ADA / FEHA
   - PDL / Other
2) Tracking
3) Remote Work & Mental Health
4) Top Ten Practical Takeaways

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FMLA / CFRA – Essentials

- 12 weeks, unpaid leave, or 26 weeks of leave to care for military service member (FMLA only).
    - *NON-WORK TIME – employee must not work at all*
- Return to work:
    - Same or equivalent position (virtually identical)
    - Same seniority as time leave begins
- Unpaid unless PTO, vacation, sick time taken.
- Maintaining benefits

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FMLA / CFRA – Employee Eligibility

- Employee has worked for the Company for at least 12 months total (e.g. 52 weeks).
  - *12 months need not be consecutive*
  - *What about while on leave?*
  - *How far back should you look?*

- 1,250 hours during the 12 *consecutive* months *preceding* the start of the leave (not the date of the requested leave).
  - *Only time worked; Leave, PTO not counted for hours purposes*
  - *BUT military service credited with time would have worked*

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FMLA / CFRA – Qualified Requests

1) Employee's own "serious health condition".
2) Care for employee's immediate family member with "serious health condition" (For birth, and to care for a newborn child) – or "designated person" under CFRA.
3) Placement of a child with employee for adoption or foster care.
4) Care for a Covered Servicemember with a serious injury or illness related to certain types of military service. **Next of Kin*
5) Exigent Circumstances Military Leave.

   Includes: short notice deployment, military events, childcare and school activities, financial and life arrangements, counseling, rest and recuperation, post-deployment activities

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The Basics – Employer's Obligations

1. Postings
2. General Notice (at hire / handbook)
3. Eligibility Notice (within 5 days of request)
4. Rights and Responsibilities Notice
   (if eligible for FMLA)
   a. Medical certification; release to duty
   b. Benefits?
   c. PTO/Sick required
   d. Right to Reinstatement
   e. Key employee
5. Designation Notice (within 5 days of receipt of information to make designation)
   a. Can be retroactive (if doesn't cause harm)
   b. Can force leave

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FMLA / CFRA – Intermittent Leave

- Must be medically necessary

- Can temporarily transfer during intermittent leave
  - Better accommodates Employee
  - Employee Qualified
  - Equivalent Pay / Benefits
  - Temporary

- Unscheduled & unpredictable absences not okay
  - Employee must make reasonable effort to minimize disturbance

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WARNING | CFRA vs. FMLA – The Differences

- CFRA - Covers registered domestic partner, parent-in-law, grandparent, grandchild, sibling.
- CFRA - Covers "Designated Person" – designated at the time; one per year
- CFRA - Covers employers with 5 or more employees (vs 50 within 75 mile radius)
- CFRA - Pregnancy disability is not covered.
- FMLA - Military service member leave is available.
- Medical Certification: CFRA privacy considerations; cannot ask nature of Serious Health Condition.
- CFRA does not allow 2nd & 3rd medical exams for family members.
- Bonding: FMLA = one leave increment; CFRA increments of 2 weeks.
- CFRA - No split for same employer
- CFRA - No key employee exception

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Today's Roadmap

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ADA & FEHA – Essentials

- Employers are required to *accommodate* a qualified individual *with a disability* unless it would pose an *undue hardship*.

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ADA & FEHA – Essentials

Who is Disabled:

Officially: A qualified individual with a disability is an individual with a physical or mental impairment, who, with or without reasonable accommodation, can perform the essential functions of the job that he/she holds or desires.

Unofficially?

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ADA & FEHA – What is a Disability?

Major life activities include:

- Seeing, hearing, walking, talking, eating, breathing
- Sitting, standing, lifting, bending, reaching
- Interacting with others
- Caring for oneself
- Learning, reading, concentrating and communicating
- Working
- Sleeping
- Major bodily functions such as digestive, bowel, bladder, neurological, respiratory, circulatory, endocrine, reproductive and immune systems

**Morbid Obesity may count*

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ADA & FEHA – What is an Accommodation?

Reasonable accommodations may include:

- Modified work schedule
- Additional leave of absence
- Job restructuring
- Transfer or reassignment
- Work at home arrangements
- Modification of policies or training
- Temporary duty adjustment

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ADA & FEHA – What is an Undue Hardship?

- Employer need not make an accommodation that would amount to an "undue hardship"
- ***BUT*** "undue hardship" is a *difficult standard*, primarily defined in terms of financial cost:
  - Nature and cost of the accommodation
  - The financial resources of the employer (i.e. Court's will look at the size of the employer)
  - The number of employees at the facility involved

***Indefinite leave, however, is not reasonable*

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ADA & FEHA – What is an Undue Hardship?

Other Unreasonable Accommodations: Courts have held that certain accommodations are not reasonable…

- Elimination of essential functions
- Providing stress-free working environment
- Providing a new supervisor
- Indefinite leave of absence
- Rescinding discipline
- Creating a new position
- Lowering production standards

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ADA & FEHA – The Interactive Process

Duty to engage in Good-Faith Interactive Process:

- Step 1: Determine the "essential functions" of the position
- Step 2: Consult with disabled employee regarding limitations
- Step 3: Identify potential accommodations
- Step 4: Select and implement the accommodation that is most appropriate for *both the employee and employer.*

REMEMBER:** **It's an ongoing obligation** **and to** **respect their medical needs

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ADA & FEHA – What is an Essential Function?

A job function is essential if:

- It constitutes the job's fundamental duties or,
- If the job exists to perform that function, or
- A limited number of employees are available to perform this function, or
- The function is highly specialized and the person is hired for this particular expertise or skill

Do not include:

- "Marginal" functions
- Functions that, if not performed, would not eliminate the need for the job

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ADA & FEHA – What is an Essential Function?

Humphrey v. Memorial Hospital Ass'n (9th Cir. 2001) Medical transcriptionist with Obsessive-Compulsive Disorder would come to work late or not at all. She asked to work at home but instead she was fired for poor attendance.

- Court rejected employer's argument that employee was not qualified for her job because she could not show up for it:

  "Regular and predictable attendance is not per se an essential function of all jobs."

- Court held that working at home may be a reasonable accommodation when the essential functions of the job can be performed at home without an undue hardship for the employer.

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Today's Roadmap

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Pregnant Employees

PDL Requirements:

- Employers with 5 or more employees.
- Employees are entitled to up to 4 months (17&1/3 weeks) of unpaid leave for *disabilities associated with their pregnancy and childbirth*
  - Per pregnancy
  - Morning sickness / prenatal care / miscarriage
  - NOT bonding
- Employers must temporarily transfer employees if it's medically advisable or reasonable.

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Pregnant Employees

- Must be reinstated to their *same* or, under limited circumstances, a comparable position
  - Plant closing or layoff
- Must maintain benefits for up to 4 months - if bonding time follows, there must be 7 months of "benefits-protected" leave (if CFRA baby bonding applies)
- Intermittent leave / light duty / other accommodations apply as well
- Eligibility: all pregnant females as of date of hire
- First 12 weeks: FMLA Qualifying – NOT CFRA Qualifying

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Sick & Bereavement Leave

- Sick – *expanded*
  - Jan. 1, 2024 – expanded to 5 days
  - Self, family member + designated person
  - Don’t forget retaliation
  - Don’t forget your local municipalities
- Bereavement –
  - Jan. 1, 2023 – 5 days unpaid, but can use PTO, vacation, sick; need not be consecutive, but within 3 months
  - Death of a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law of the employee.

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FMLA / CFRA	ADA / FEHA	PDL
Eligibility Requirements	No requirements	No Requirements
12 (26) weeks depending	No set amount	17&1/3 weeks
Employee, Family Member or Designated Person	Employee Only (except Castro – potential associational)	Employee Only
Includes Bonding	No Bonding	No Bonding
No undue hardship defense	Yes undue hardship defense	No undue hardship defense
Provides leave only	Provides accommodation, which includes leave	Provides leave and/or accommodation, as needed
50 employees FMLA **5 employees CFRA**	15 employees ADA 5 employees FEHA	5 employees PDL/FEHA
No waiting period	12 months / 1250 hours	No waiting period
Must maintain benefits	No such requirement	Must maintain benefits

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Putting it all together –

let's practice!

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Hypothetical #1 – Pregnant Paige

Pregnant Paige is expected to give birth to her first child on June 1st. She has worked full time for a company that has 100 employees in Los Angeles for the past 5 years.

Paige calls the HR Manager four months prior to her due date to let the HR Manager know that she is pregnant but she intends to work up until the baby's birth.

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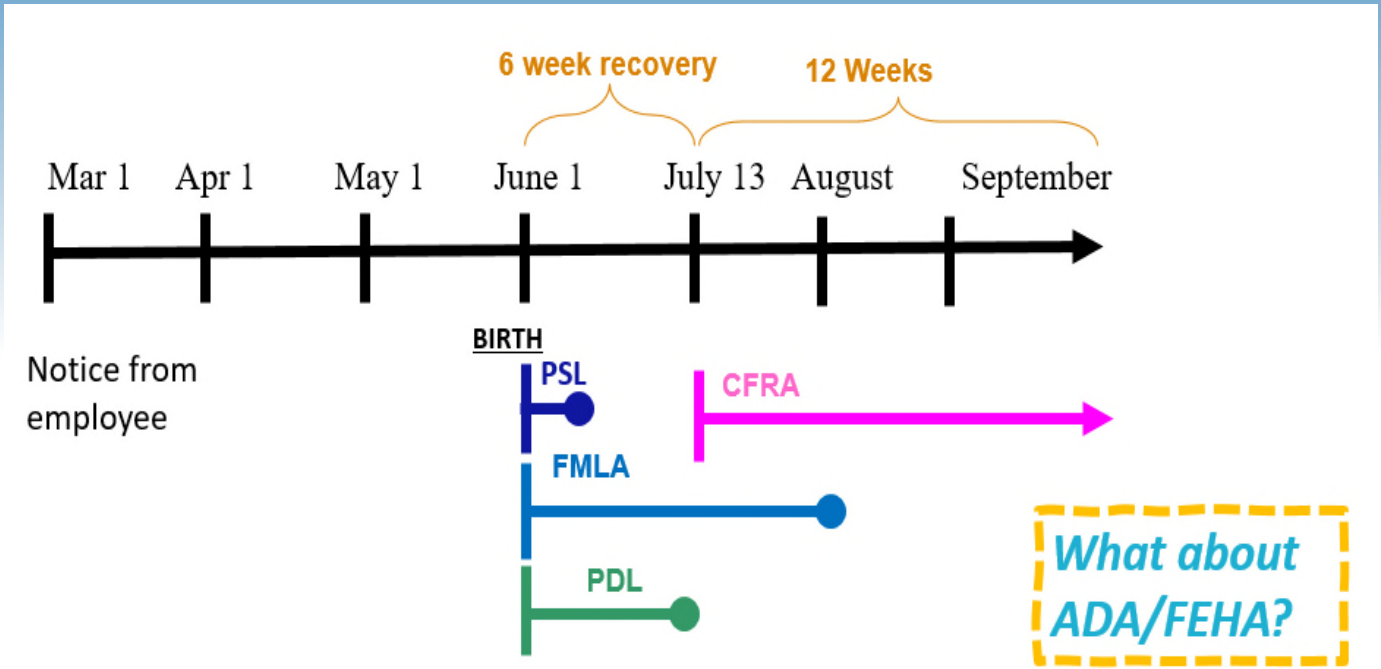
Hypothetical #1 – Putting it Together



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Hypothetical #2 – Complications

About one week after giving notice, Paige experiences complications with her pregnancy.

She approaches HR and states that she will need time off to attend appointments every Friday.

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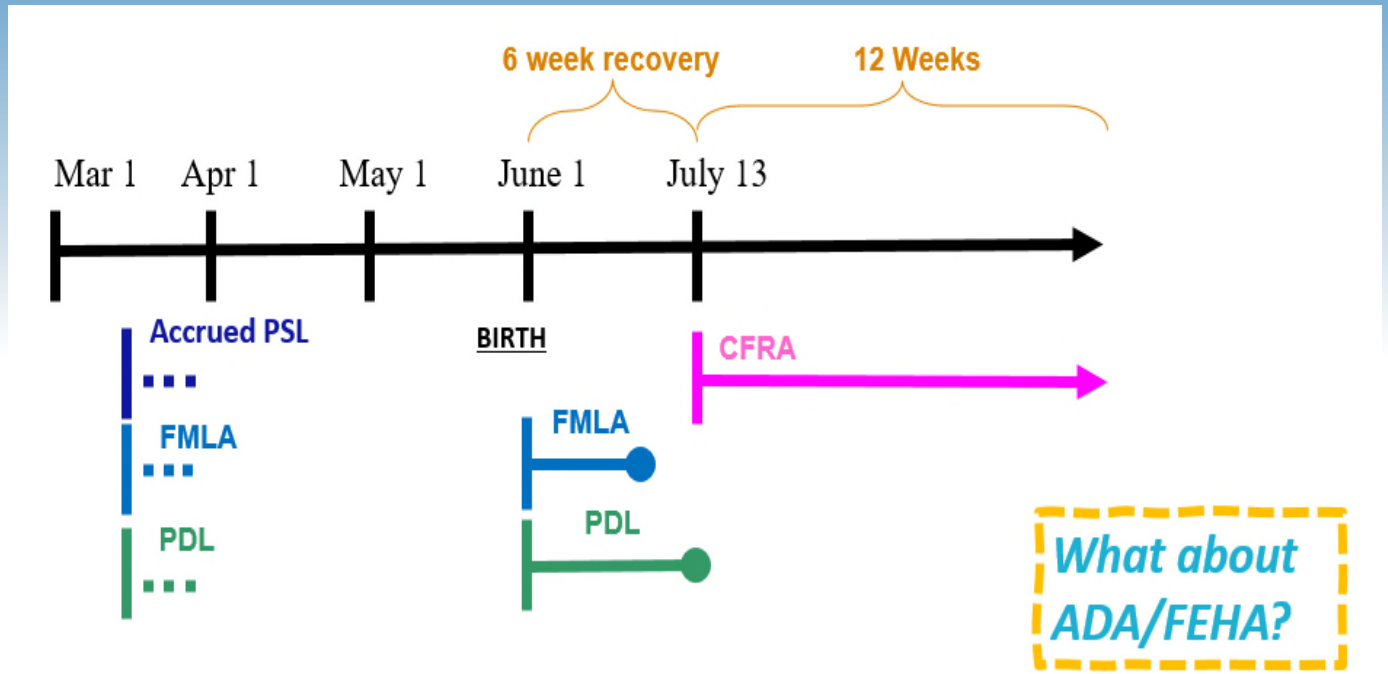
Hypothetical #2 – Putting it Together



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Hypothetical #3 – Things Get Messy

Paige has her baby on June 2nd. She recovers within four weeks and takes 12 weeks of bonding time with the baby. Shortly before returning, Paige sends in a doctor's note stating that she is suffering from post-partum depression and needs another 60-days off work.

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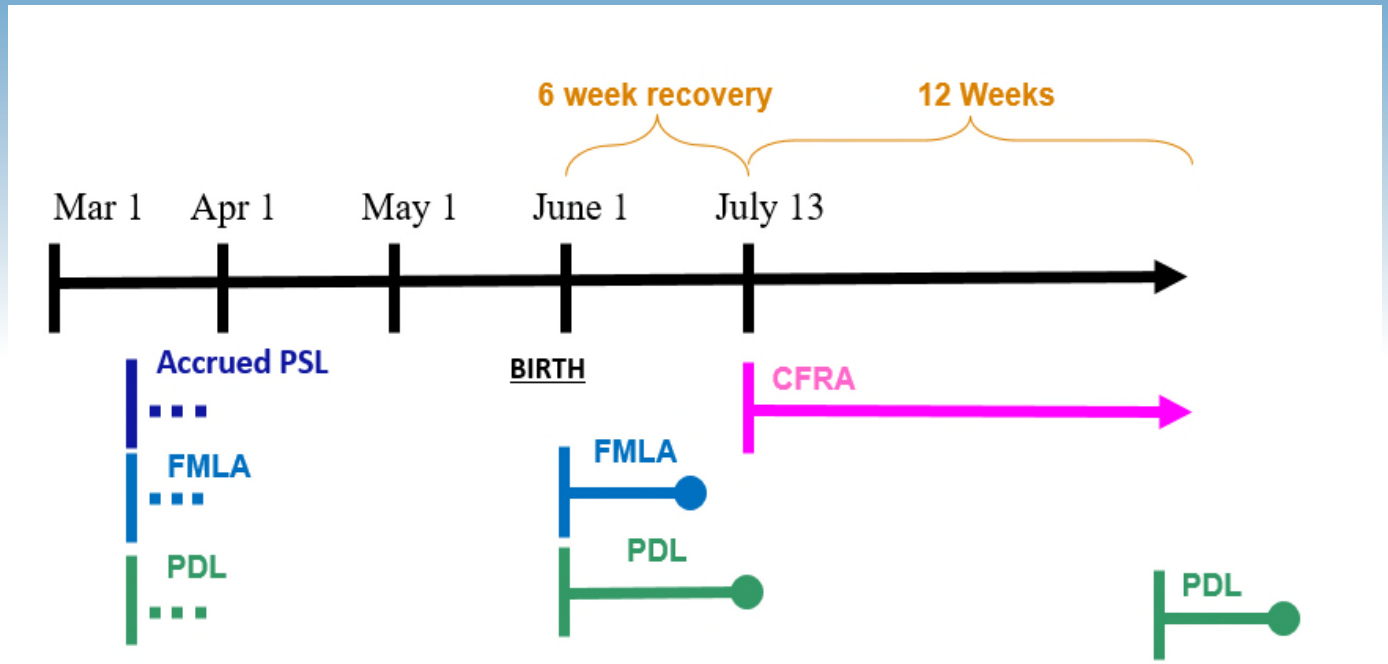
Hypothetical #3 – Putting it Together



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Hypothetical #4 – Things Get a Bit Messier

What if Paige notifies you in the 2nd week of the bonding leave that she is suffering from post-partum depression and needs 60-days off work.

What happens to her bonding leave?

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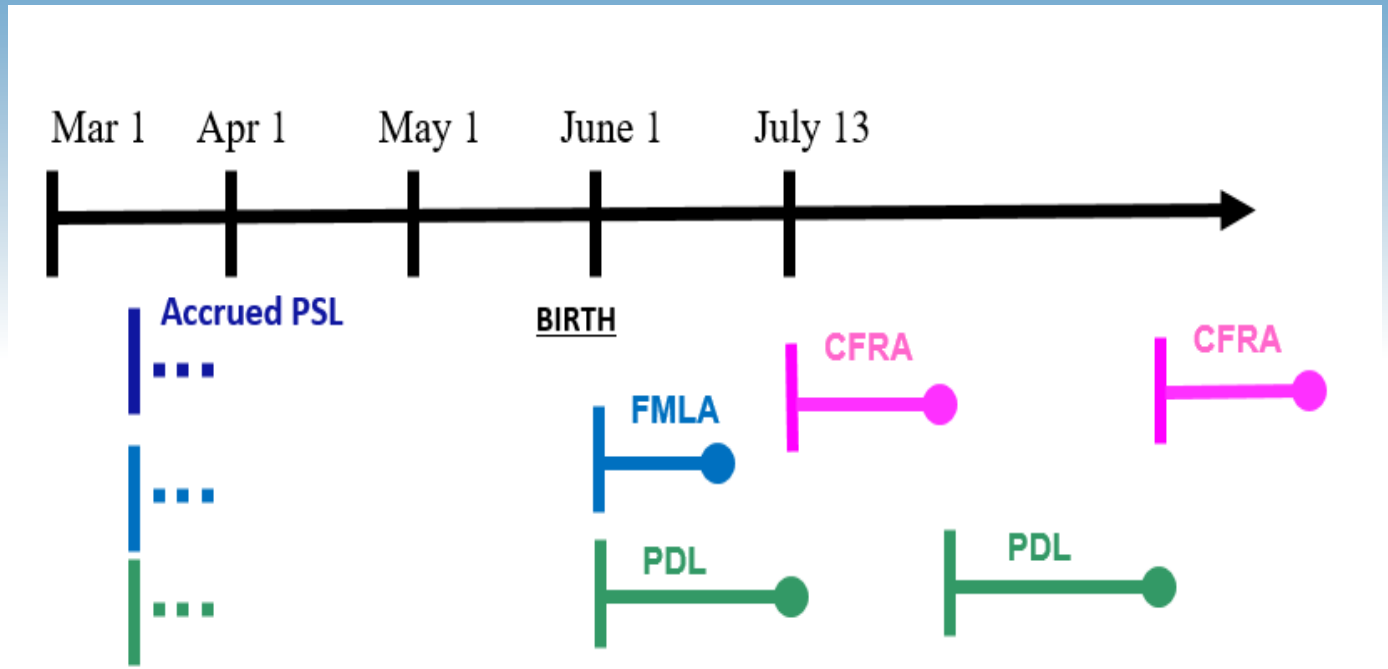
Hypothetical #4 – Putting it Together



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Hypothetical #5 – One Last Wrench

Assume that Paige had complications from the start of her pregnancy and was placed on bed rest during the third month of her pregnancy.

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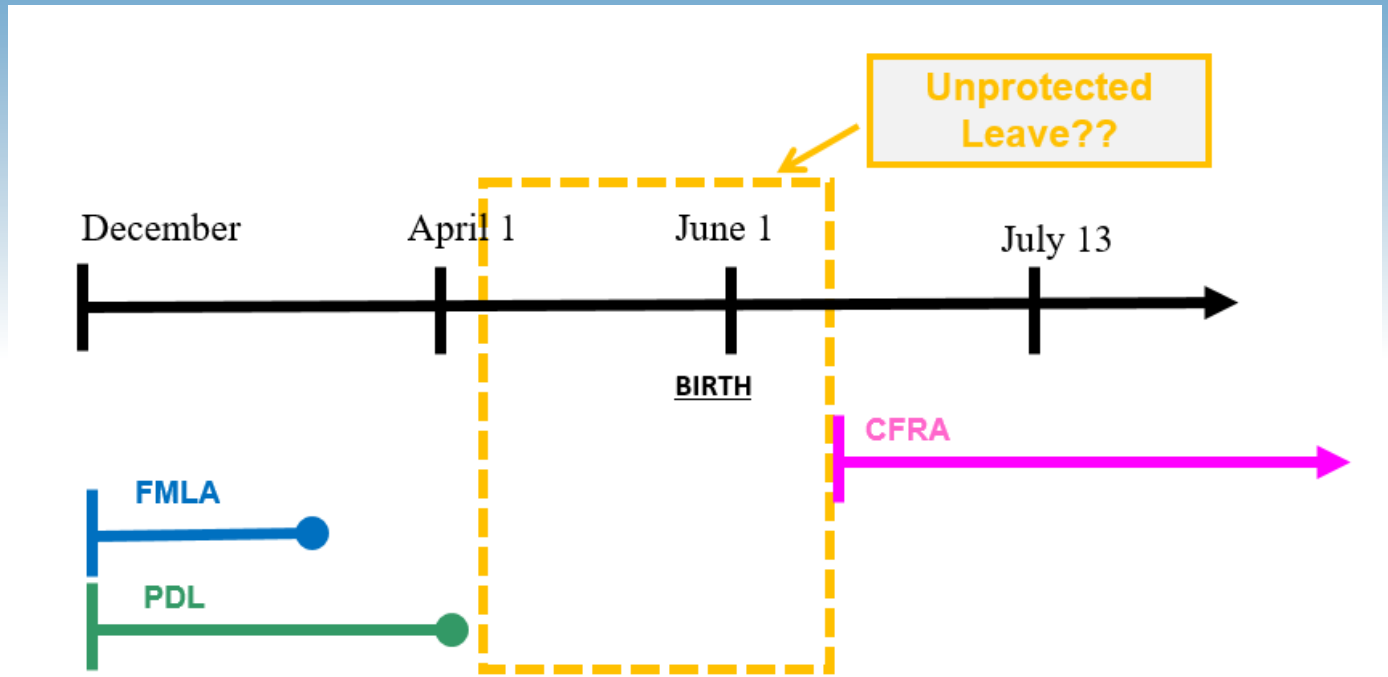
Hypothetical #5 – Putting it Together



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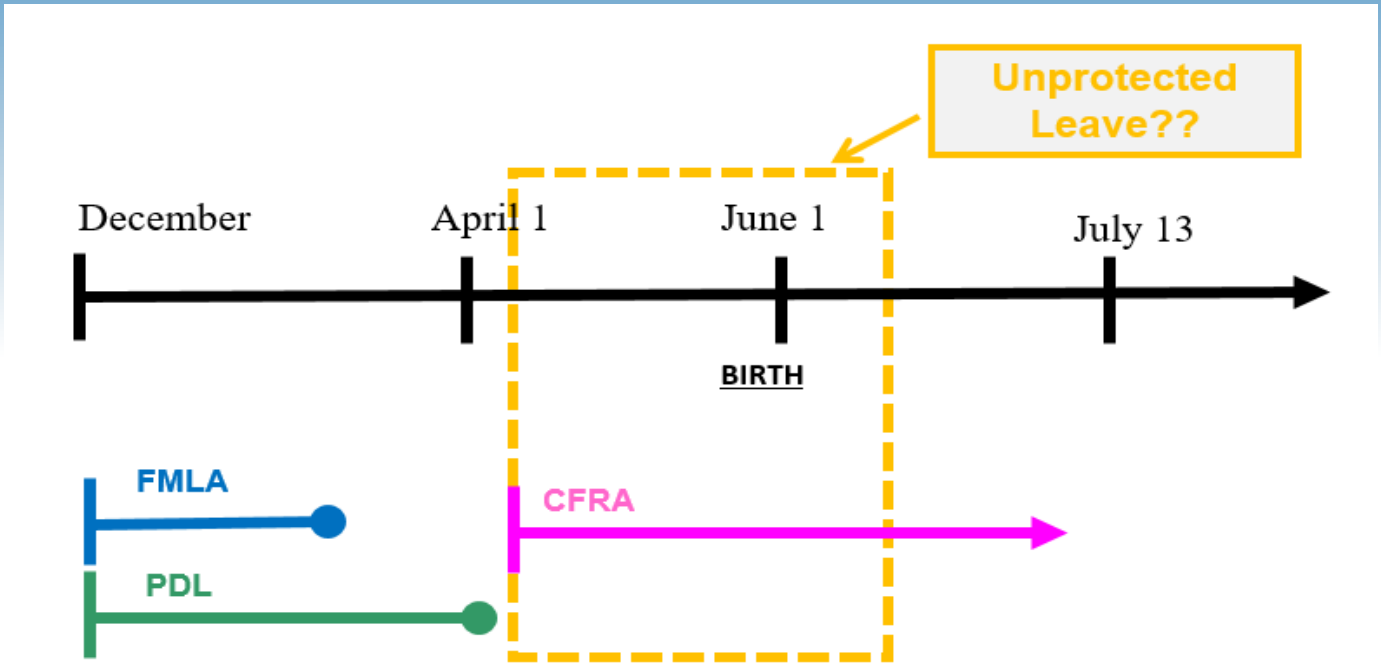
Hypothetical #5 – Putting it Together



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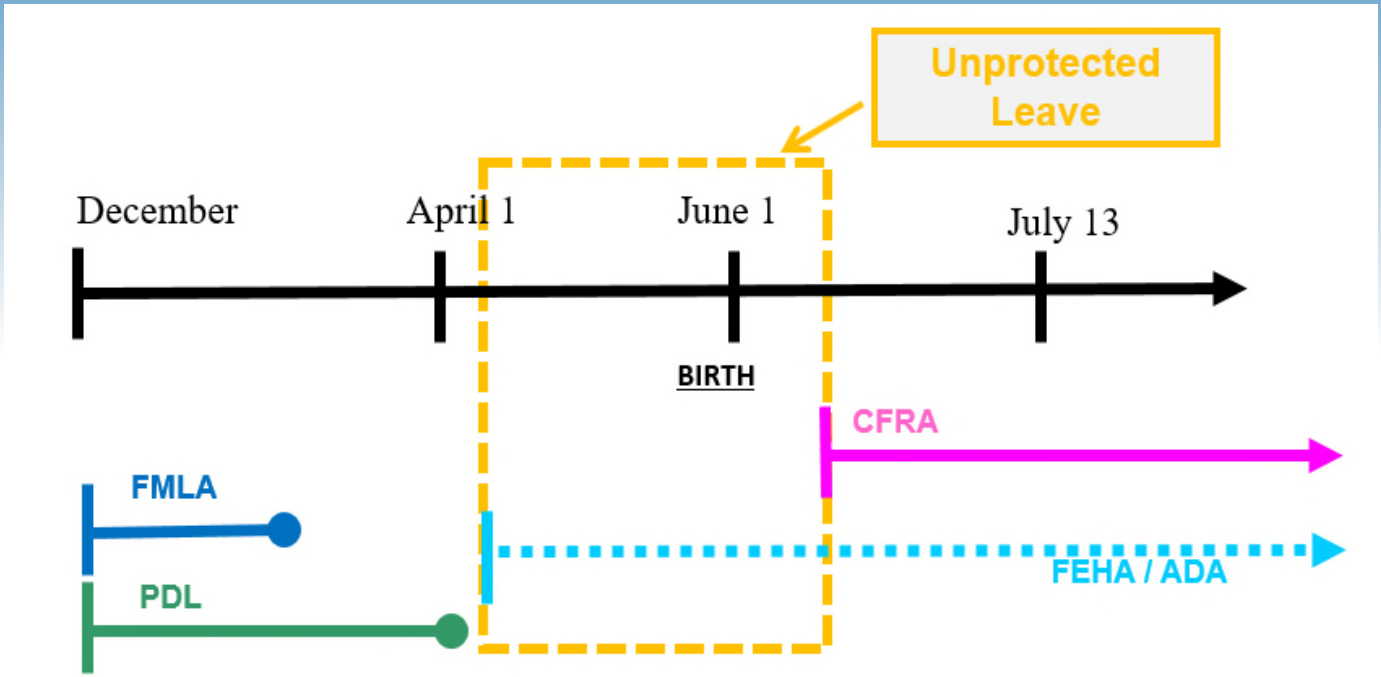
Hypothetical #5 – Putting it Together



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Hypothetical #6 – Workers Comp Chase

Chase severely injures his back on February 28, while lifting boxes at a major corporation employing hundreds of employees. He immediately leaves work. His doctor determines he needs to have back surgery and then will require physical therapy before he can return to work. He will be out for 9 weeks.

How do you designate the leave of absence?

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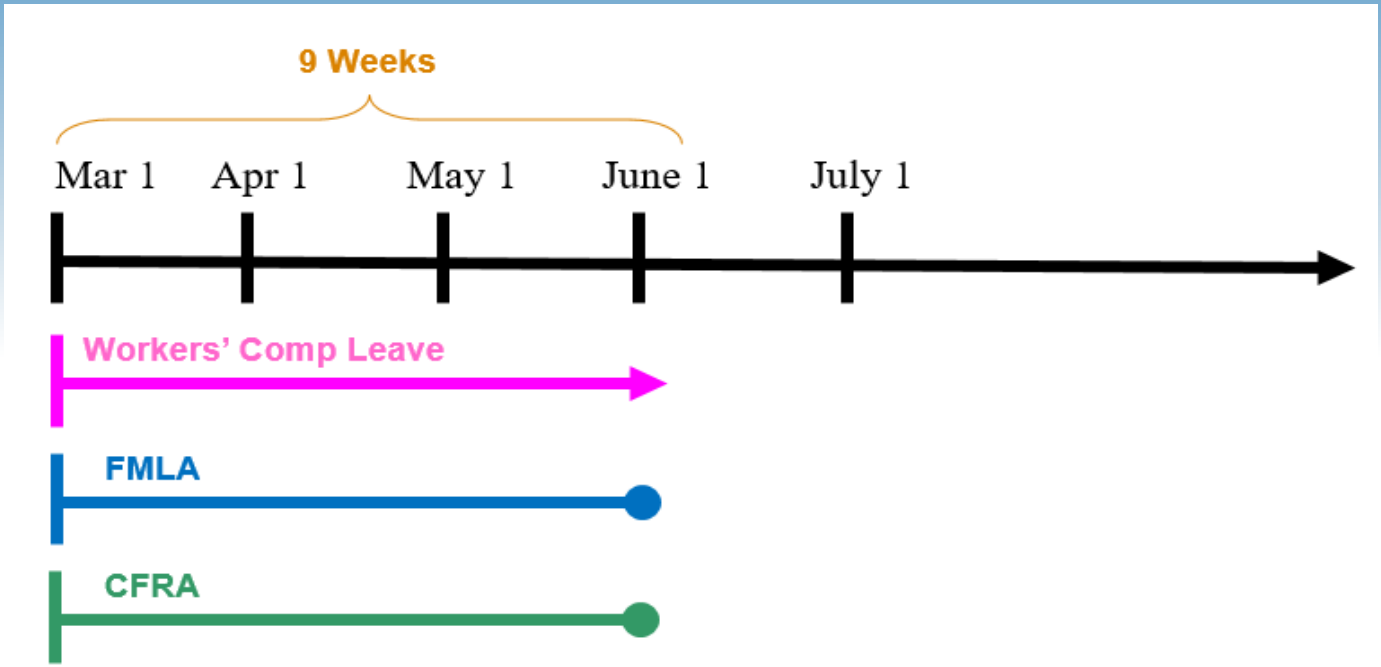
Hypothetical #6 – Putting it Together



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Hypothetical #7 – Chase Needs More Time

After 9 weeks, Chase is not ready to return. He has had complications with his surgery and needs another 10 weeks of leave.

- How do you designate?
- Is it job protected?
- Is it an undue hardship?
- Can you terminate?

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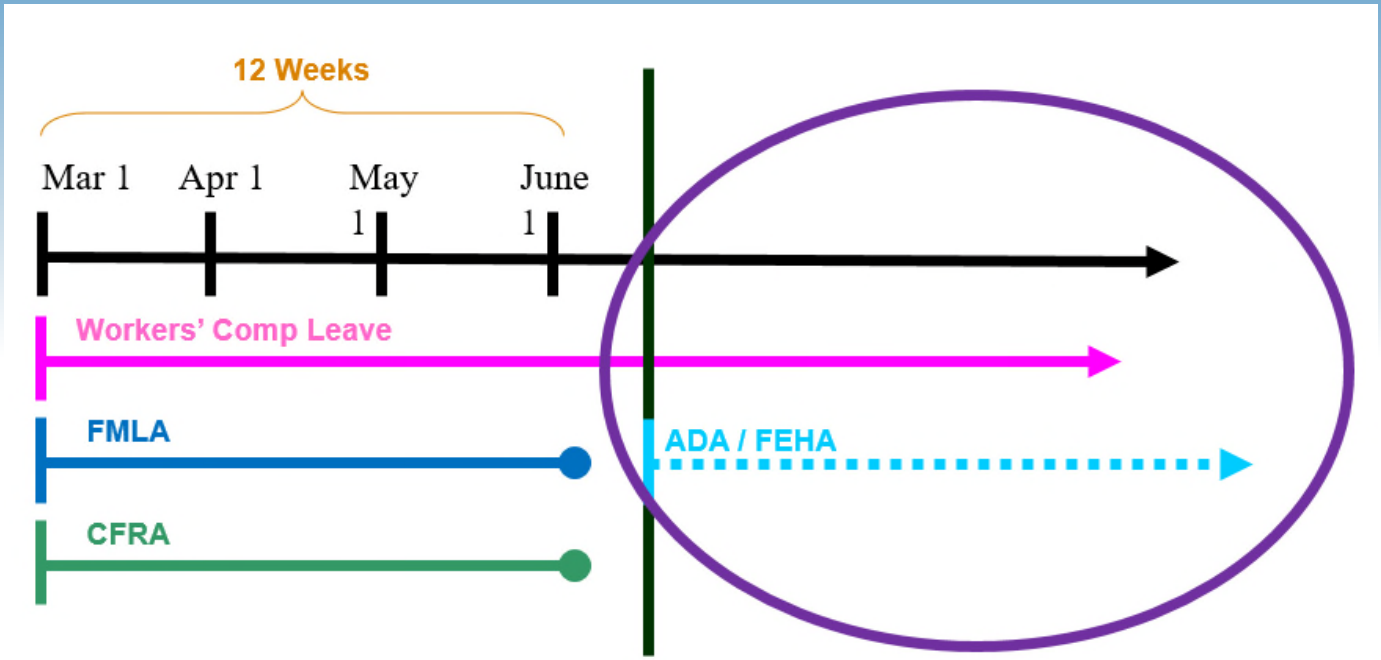
Hypothetical #7 – Putting it Together



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Today's Roadmap

1) THE BASICS:
   - FMLA / CFRA
   - ADA / FEHA
   - PDL / Other
2) Tracking
3) Remote Work & Mental Health
4) Top Ten Practical Takeaways

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Is Remote Work Unreasonable?

- Prior to Pandemic employers were not necessarily required to offer remote work.
- If a job was able to be performed remotely for two years, it may be difficult to assert remote work is not a reasonable accommodation.
- But, it's not impossible – removal of an essential function during the Pandemic does not necessarily mean an employer has to continue to remove that essential function.
- May effectively address the need with another reasonable accommodation at the worksite.

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Is Remote Work an Unreasonable Accommodation?

- Reasonable when the essential functions can be performed at home and would not cause an undue hardship.
- Not reasonable where the job requires close in-person supervision, or the essential functions involve in person teamwork and coordination with others at workplace.
- **Employees with disabilities who are being asked to return to work but want to continue remote work will not automatically be granted remote work as a "reasonable accommodation."** The interactive process will be critical here.

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Is Remote Work an Unreasonable Accommodation?

- Consider your written job descriptions and/or essential functions checklist
- What factors can be considered in determining whether an employee can work remotely:
  - Interactive responsibilities (in-person interaction with each other / side-by-side interactions)
  - Leading a team that reports to a physical location (coordination of work with others)
  - Immediate access to documents or information located only in the workplace
  - Bandwidth speed and access to equipment and solid internet

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Case Study – Remote Work

Jazmin worked from home during the pandemic, but now the company is returning everyone to the office. After hearing about the planned return to the workplace, Jazmin calls to tell you that she is pregnant, it is high risk, and her doctor is recommending against her commuting to the office before giving birth.

- Do you have to accommodate?
- Should you tell her that pregnancy is not a disability and she must come into work?
- What are you permitted to inquire about/consider?
- Can you ask whether the concern is exposure, drive time or otherwise?

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Case Study – Remote Work

Payton's college friend and roommate who just had a heart transplant lives with him. She is on immunosuppressant medications that make her susceptible to COVID 19 and other illnesses. Payton requests that he be permitted to continue working from home 5 days a week so as not to jeopardize her.

- Is there a legal obligation to grant this request as a disability accommodation?
- Is there any other information that you should obtain from Payton to determine whether you have any other obligation to him?
- Is your answer different if Payton's request involves him caring for his mother instead?

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Case Study – Remote Work

Regan was diagnosed with a reoccurrence of cancer and is undergoing chemotherapy. She needs family support, and her home is located 2 hours from the office. During the pandemic she worked remotely but she has only been in the position for 1 year and could benefit from side-by-side learning. The company is returning all employees in her position back to the office.

- Do you have to accommodate her request?
- How do you handle when you get similar, but less sympathetic requests?
- How should you approach the interactive process?

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Is an Inability to Commute to Work Unreasonable?

- What if the employee can't drive?
- Are employers required to accommodate an employee's commute to work?
- Jurisdictions are split.

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What About Accommodating Mental Health?

- At any one time, 1 in 6 employees within a workplace will be struggling with their mental health.
- Stress, anxiety and other mental health concerns are on the rise
- "Traits or behaviors are not, in themselves, mental impairments. … Stress, however, may be shown to be related to a mental or physical impairment."
  - EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

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Case Study – Mental Health

Maddie calls and tells you that she is fearful of returning to the workplace and has anxiety about being around people following the pandemic. She asks if she can continue to work 100% from home.

Maddie is in internet sales and has only been in the position for a year. She could benefit from being around others. She also needs solid bandwidth to perform her job and during the pandemic, her home internet was a real problem.

- If she has no medical condition, can you require her to return?
- What do you do if she presents a doctor's note that says she needs "permanent work from home"?
- Can you fire her if she refuses?

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Case Study – Mental Health

Billie informed her supervisor that she has been suffering from migraine headaches that makes her unable to work at times. Billie requests to use intermittent leave on those days. On the days she feels better, she works from the office. Billie has requested that her workstation be moved near a window so she can get fresh air, which she says helps her migraines.

Billie has also requested to bring her dog to the office because she says the dog calms her down, and when she is not stressed out, she gets fewer migraines.

- What factors should you consider in determining whether to grant the accommodation?
- What are possible alternative accommodations?

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Case Study – Mental Health

Megan is routinely late to work, her work becomes sloppy, and you find her sleeping at her desk. You finally decide that you need to discipline her, so you schedule a meeting. The morning of the meeting Megan comes in frantic. She tells you that she has been suffering from a medical condition and has started taking a mediation to help her improve but it makes her drowsy.

- Can you still discipline?
- What do you do going forward?

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Case Study – Mental Health

You go ahead and discipline Megan. It does not go well. In response, Megan first apologizes for being such a failure and then proceeds to talk about she feels that she can't do anything right and knows that she is worthless to the business.

A few days later a concerned coworker approaches you and says that Megan is talking about how she has no one that cares about her and she should just 'end it.'

- What do you do?

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What About Accommodating Mental Health?

When Can You Ask?

The company cannot ask about mental health unless you have a legitimate, business-related reason. Examples:

1. After a job offer but before employment begins and then only if others in the same position have been asked;
2. The information is needed to establish eligibility for benefits under other laws, such as the FMLA;
3. If there is objective evidence that the employee is not able to do the job or poses a safety risk to others because of their mental health; and
4. The employee has asked for a reasonable accommodation.

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Today's Roadmap

1) THE BASICS:
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4) Top Ten Practical Takeaways

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Top Ten Practical Takeaways

1. Report and pay attention to any sick, medical issue or disability immediately!
2. Watch what you say and what you put in email
3. Be careful about your timing in disciplining, manage performance proactively on the front end
4. Be patient
5. Track each and every leave
6. Watch for retaliation amongst the team
7. Be prepared to bring the employee back
8. Consider the optics of your decision
9. Stay up-to-date on the law
10. Document, Document, Document!

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QUESTIONS?

Danielle Hultenius Moore
Partner, Fisher Phillips

dmoore@fisherphillips.com
858-597-9600

What's in Store for '24?

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Cal/OSHA Consultation Service

DIRECT FROM THE SOURCE: CAL/OSHA UPDATES ON NEW AND PROPOSED REGULATIONS, ENFORCEMENT VISITS, AND CONSULTATION SERVICES

Patrick Corcoran

Regional Manager
Cal/OSHA Consultation Service

Patrick Corcoran MPH, CIH is the Regional Manager for Cal/OSHA's Consultation Service. Mr. Corcoran has more than 20 years' experience with Cal/OSHA, including 11 years in Cal/OSHA Enforcement, 5 years as Cal/OSHA's Training Coordinator, and 7 years as the Senior Industrial Hygienist for the Consultation Service. He is a Past-President of the Sacramento Valley Section of the American Industrial Hygiene Association, and he worked for 12 years as a faculty member in the Department of Public Health at California State University, Sacramento where he taught courses in Occupational Health and Occupational Safety & Health Laws and Regulations.

Cal/OSHA Updates

Employers Group 2023 Workplace Employment Law Updates

Patrick Corcoran MPH, CIH
Regional Manager
Cal/OSHA Consultation Service

Cal/OSHA Updates

DIR EST. 1927 State of California Department of Industrial Relations

Agenda

Why are we here?

- New or proposed regulations
- Emphasis Programs
- Cal/OSHA Investigations
- Cal/OSHA Consultation
- Q&A

New Regulations (8 CCR)

Of Interest to Employers Group

- 3205, 3205.1, 3205.2, 3205.3 - COVID-19 Prevention - Non-Emergency Regulation, Feb. 3, 2023
- 3203(a)(8) – IIPP Employee Access, Mar. 3, 2020
- Various Sections within CSO, HVESO and GISO - Consolidate Construction Safety Orders, Article 15 (Cranes and Derricks in Construction), into General Industry Safety Orders, Group 13 (Cranes and Other Hoisting Equipment), Jul. 26, 2022
- Sections 1504, 1526, 3361, 3364, 3437, 3457 and 5192 - Single-User Toilet Facilities, Mar. 3, 2020
- Sections 3420 and 3425 - Tree Work, Maintenance or Removal - Use of Portable Power Saws - Jul. 30, 2020
- New Section 5141.1 - Protection from Wildfire Smoke - Feb. 1, 2021

Proposed Regulations

At the OSHSB (August 2023)

- Section 1532.1, Section 5155 and Section 5198 – Lead
  - Public Hearing: Apr. 20, 2023

- New Section 3396 - Heat Illness Prevention in Indoor Places of Employment
  - Public Hearing: May 18, 2023

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

Advisory Committees

Cal/OSHA

- Workplace Violence in General Industry - May 17, 2022
- Heat Illness Prevention in Indoor Places of Employment - March 31, 2023 (now in formal rulemaking)
- Section 5204 Occupational Exposures to Respirable Crystalline Silica - August 9, 2023
- AB 1643 - California Heat Study: Advisory Committee - September 26, 2023

Workplace Violence

Discussion Draft

- §3343. Workplace Violence Prevention.
  - (a) Scope and Application
  - (b) Definitions.
  - (c) Workplace Violence Prevention Plan
  - (d) Violent Incident Log
  - (e) Training
  - (f) Recordkeeping

https://www.dir.ca.gov/dosh/doshreg/Workplace-Violence-in-General-Industry/

Workplace Violence Prevention

Discussion Draft – Written Plan Elements

Written procedures with the following elements:

1. Responsible person
2. Employee involvement
3. Multi-employer
4. Reporting & anti-retaliation
5. Compliance
6. Communication
7. Responding to emergencies
8. Training procedures
9. Hazard identification
10. Hazard correction
11. Post-incident response and investigation

Special Emphasis Programs

Cal/OSHA

- 2023 Special Emphasis Program: Occupational Exposure to Respirable Crystalline Silica Cut Stone and Stone Product Manufacturing

- 2022 Special Emphasis Program: Heat Illness Prevention

National Emphasis Programs

Federal OSHA

- Trenching and Excavation
  - OSHA Instruction - CPL 02-00-161 - National Emphasis Program on Trenching and Excavation - 10/01/2018
- Silica, Crystalline
  - OSHA Instruction - CPL 03-00-023 - National Emphasis Program – Respirable Crystalline Silica - 02/04/2020
- Fall Prevention/Protection
  - OSHA Instruction - CPL 03-00-025 - National Emphasis Program - Falls - 05/01/2023

https://www.osha.gov/enforcement/directives/nep

Cal/OSHA Investigations

- Why do they happen?
  - Complaints, Accidents, Construction Permits, High Hazard
  - CSHO cannot tell employer the name of complainant or the complaint item. **P&P C-7, Labor Code 6309**
- What to do before they happen?
  - Be Prepared (CCR, T8)…
  - Know your process…**Safety –ask process ?'s**
  - Care…
  - Separate required programs…
  - Remove low hanging fruit…
- When they happen?
  - Give them what is asked for…
  - They will interview employees…
  - Document the inspection…

Purpose of the Walk-Around Inspection

- **Identify** and Evaluate Hazards
- **Communication** with employees and employer
- Evaluate the **effectiveness** of the ER's **IIPP**
- **Gather Evidence** – collect and document
  - Establishing employer/employee relationship
  - Establishing employee **exposure**
  - Nature and **Severity** of hazard
  - Potential **abatement** or information demonstrating abatement during inspection
  - Establishing a citation

Cal/OSHA Investigations

- **Exit** Conference
  - No violations observed:
    - Inform the employer that no violations were observed
    - Notice of No Violation After Inspection issued to the employer
  - If violations are observed:
    - **Citations** are going to be issued at a **Closing Conference** to be scheduled at a later
      - Preliminary report about any violations observed
      - Anticipated date when a closing conference will be held and citations will be issued at that time.
      - Information about any recommended interim corrective action(s).

Be Prepared!

Cal/OSHA Investigations

- **Photographs**
  - Site, equipment, machinery, and other items of importance (can request copies of photos from other government agencies)
- Diagrams, Maps & Sketches

DOSH - Consultation Service

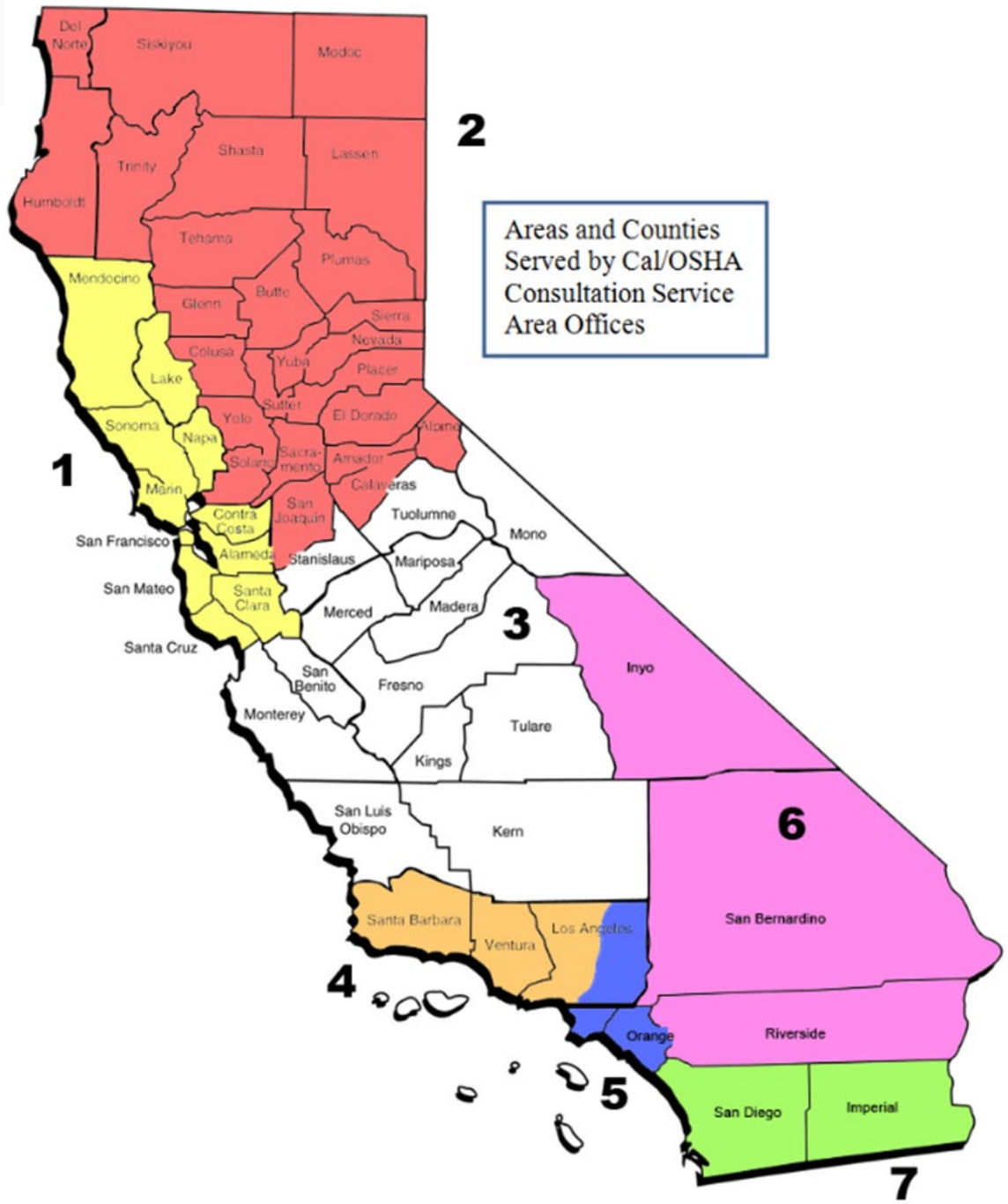
Topic

- Program Manager
- Regional Manager
- 7 Area Offices, 1 VPP Unit
- Employer On-site assistance
- Educational outreach
- Recognition and incentive programs for employers
- Targeted Consultation
- Toll-free telephone number

Our Offices

Program Manager	Regional Manager
Eugene Glendenning	Patrick Corcoran

1. San Francisco Bay Area Manager: Nick Gleiter OaklandConsultation@dir.ca.gov	1515 Clay Street, Suite 1103 Oakland, CA 94612 (510) 622-2891
2. Northern California Manager: Michele Grubbs Saccon@dir.ca.gov	1750 Howe Avenue, Suite 490 Sacramento, CA 95825 (916) 263-0704
3. Central Valley Manager: Darrin Stephens Fresnoconsultation@dir.ca.gov	2550 Mariposa Mall Room 2005 Fresno, CA 93721 (559) 445-6800
4. San Fernando Valley Manager: Carla Slepak SFVConsultation@dir.ca.gov	6150 Van Nuys Boulevard, Suite 307 Van Nuys, CA 91401 (818) 901-5754
5. Los Angeles, Orange Manager: Zohra Ali Lapalmaconsultation@dir.ca.gov	1 Centerpointe Drive, Suite 150 La Palma, CA 90623 (714) 562-5525
6. San Bernardino Manager: Ray Acree SanBernConsultation@dir.ca.gov	464 W. 4th Street, Suite 339 San Bernardino, CA 92401 (909) 383-4567
7. San Diego Manager: Carmen Cisneros Sandiegoconsultation@dir.ca.gov	7575 Metropolitan Drive, Suite 204 San Diego, CA 92108 (619) 767-2060



Consultation Service

On-Site Assistance Program

- Priority service to small high-hazard employers
- Emphasis on safety and health programs to make the employer self-sufficient
- Responds to over 60,000 telephone and e-mail safety and health inquiries annually

Consultation Service

- Must be invited to the facility
- Consultants work proactively with employers
- No citations or penalties
- Free

- Information is not shared with Enforcement
- Develop publications
- Answer questions by telephone

The Catch

- Serious and Imminent hazards are expected to be corrected in a timely manner.
- Serious - 30 days
- Imminent - immediately
- Employee involvement required
- Posting of identified serious hazards

Health & Safety Resources

- OSHA.gov home and topic pages
  - https://www.osha.gov/
  - Topic pages
- Cal/OSHA home page
  - https://www.dir.ca.gov/dosh/dosh1.html
  - Publications & e-tools
- Cal/OSHA regulations
  - https://www.dir.ca.gov/samples/search/query.htm

Health & Safety Resources

- Cal/OSHA Consultation
  - https://www.dir.ca.gov/dosh/consultation.html
- Call your nearest District Office
  - Office locator: https://www.dir.ca.gov/asp/DoshZipSearch.html
- Call a Consultation Area Office @ 1(800) 963-9424
  - Email @ InfoCons@dir.ca.gov

Thank you!

Any questions?

Patrick Corcoran MPH, CIH
pcorcoran@dir.ca.gov
(916) 263-0704

fpSOLUTIONS

FULL REVIEW OF THE 2023 OFCCP AUDIT SCHEDULING LETTER & ITEMIZED LISTING

Suzanne Oliva

Sr. Manager, Compliance Programs at fpSOLUTIONS

Suzanne Olivia / Sr Compliance Manager

Suzanne Oliva is the Sr. Affirmative Action Manager at FP Solutions, LLC (FPS) and providing full-service Equal Employment Opportunity, Affirmative Action (EEO/AA) and Diversity consulting services. She has over 24 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 directs the FP Solutions team to assist covered federal contractors understand their affirmative action obligations and procedures for plan implementation.

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 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.

OFCCP Scheduling Letter & Itemized listing 2023 Review

What's in Store for '24?

EverythingHR

Suzanne Oliva
Sr. Affirmative Action Compliance Manager
fpSOLUTIONS

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OFCCP CSAL

Corporate Scheduling Announcement Letters

The Corporate Scheduling Announcement List (CSAL) is a courtesy notification to an establishment selected to undergo a compliance evaluation. OFCCP sends the CSAL in advance of the OMB approved scheduling letter.

They post a CSAL list once or twice a year.

To check the CSAL lists go to
https://www.dol.gov/agencies/ofccp/scheduling-list

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OFCCP CSAL

Corporate Scheduling Announcement Letters

Take advantage of CSAL lead time

Employers Group®

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Official Notification (Q&A)

I received my Scheduling Letter and Itemized Listing by email, return receipt.
Is this the official notification?
Will I receive a hard copy in the mail?

- OFCCP may send the Scheduling Letter and Itemized Listing by **email with a read receipt requested**. This allows OFCCP to provide faster delivery and confirmation of receipt, promoting the timely exchange of information.
- **Contractors will not receive a hard copy of the Scheduling Letter and Itemized Listing in addition to the emailed letter.** The emailed Scheduling Letter and Itemized Listing is the official notification.

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Affirmative Action Program for Women & Minorities, Individuals with a Disability and Qualified Veterans

For the desk audit, please submit the following information:

a copy of your current Executive Order 11246 Affirmative Action Program prepared in accordance with the requirements of 41 CFR §§ 60-1.40 and 60-2.1 through 60-2.17;

a copy of your current Section 503 AAP prepared in accordance with the requirements of 41 CFR §§ 60-741.40 through 60-741.47;

a copy of your current VEVRAA AAP prepared in accordance with the requirements of 41 CFR §§ 60-300.40 through 60-300.45;

the information, including the support data, specified in the enclosed Itemized Listing.

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Post-secondary Institution ***New

If you are a post-secondary institution or Federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution, or company located in [city and state only].

Submission No Later Than 30 Calendar Days ***Updated

- Please submit your AAP(s) and the Itemized Listing information as soon as possible, but no later than 30 calendar days from the date you receive this letter.

- The prior letter request was 30 Business Days from the date you receive this letter.

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Executive Order 11246 Items # 1-6 No Change

1. An organizational display or **workforce analysis** prepared according to 41 CFR § 60-2.11.
2. The formation of job groups (covering all jobs) consistent with criteria given in 41 CFR § 60-2.12.
3. For each job group (**Job Group Analysis**), a statement of the percentage of minority and female incumbents as described in 41 CFR § 60-2.13.
4. For each job group, a determination of **minority and female availability** pursuant to 41 CFR § 60-2.14.
5. For each job group, the **comparison of incumbency to availability** as explained in 41 CFR § 60-2.15.
6. **Placement goals** for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability as described in 41 CFR § 60-2.16.

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Executive Order 11246 Item #7 *** New

- **Pursuant to 41 CFR § 60-2.17(c), provide documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).**
- **The documentation should cover action-oriented programs addressing problems areas identified for the immediately preceding AAP year.**

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Executive Order 11246 Item #7 *** New

- Pursuant to 41 CFR § 60-2.17(c), provide documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).
- The documentation should cover action-oriented programs addressing problems areas identified for the immediately preceding AAP year.
- OFCCP is looking for documentation of what you are doing.

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Disability, Section 503 – Item # 8 (formally #7 - expanded)

- Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified individuals with disabilities, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60741.44(f).
- This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-741.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective.
- The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified individuals with disabilities, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60741.44(f)(3).

Disability, Section 503 Item # 9

Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-741.44(h).

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Disability, Section 503 Item # 10

- **Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and,**
- **if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.**

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Section 503 Item # 11

- **The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR § 60741.45.**

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Section 503 Item # 11 (formally #10 expanded)

- **If any underutilization of individuals with disabilities is identified, provide a description of the steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 CFR § 60-741.45(e).**
- **Pursuant to 41 CFR § 60-741.45(e) and (f), this description shall include your assessment of personnel processes, the effectiveness of your outreach and recruitment efforts (if different than Item 8), the results of your affirmative action program audit, any other areas that might affect the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas.**

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Section 503 Item # 11

- **Provide this information for the immediately preceding AAP year.**
- **If you are six months or more into your current AAP year on the date you receive this listing, provide the information that reflects your progress for at least the first six months of the current AAP year.**

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VEVRAA Item # 12 (formally #11)

- **Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified protected veterans, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60-300.44(f).**

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VEVRAA Item # 12 (formally #11 expanded)

- **This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-300.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective.**
- **The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified protected veterans, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60300.44(f)(3).**

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VEVRAA Actions Taken to Comply Item # 13

Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-300.44(h).

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VEVRAA Item # 14

- **Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and,**
- **if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.**

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VEVRAA Benchmark Item # 15

- **Documentation of the hiring benchmark adopted, and the methodology used to establish it if using the five factors described in 41 CFR § 60-300.45(b)(2) for the current AAP year.**
- **If you are six months or more into your current AAP year on the date you receive this listing, please also submit current year hiring data to measure against your benchmark.**

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EEO-1 Survey – Item # 16

- Copies of Component 1 of your Employer Information Report EEO-1 (Standard Form 100 Rev.) for the last three years.[7]

  ***NEW

- If you are a post-secondary institution, submit copies of your Integrated Postsecondary Education Data System (I PEDS) Human Resources Survey Component data collection reports for the last three years.

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Collective Bargaining Agreement/s Item # 17- no change

A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, *etc*. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.

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Employment Activity Item # 18 expanded

- Data on your employment activity (applicants, hires, promotions, terminations, and incumbency) for the immediately preceding AAP year.
- You should present this data by job group (as defined in your AAP) or by job title.[8]

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Employment Activity Item # 18a no change

- Applicants: For each job group or job title, this analysis must consist of the total number of applicants identified by gender and by race/ethnicity.[9]
- For each job group or job title, applicants for whom race and/or gender is not known should be included in the data submitted. However, if some of your job groups or job titles (most commonly, entry-level) are filled from the same applicant pool, you may consolidate your applicant data for those job groups or titles.
- For example, where applicants expressly apply for or would qualify for a broad spectrum of jobs (such as "Production," "Office," *etc.*) that includes several job groups, you may consolidate applicant data.

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New Hires Item # 18b no change

Hires: For each job group or job title, this analysis must consist of the total number of hires identified by gender and race/ethnicity.

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Promotions Item # 18c (expanded)

- Promotions: Provide documentation that includes established policies and describes practices related to promotions.
- Additionally, for each job group or job title, provide the total number of promotions by gender and race/ethnicity.
- Where the contractor maintains data on whether the promotion is competitive or non-competitive, it may also provide this information in its submission.

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Terminations Item # 18d no change

Terminations: For each job group or job title, provide the total number of employee terminations by gender and race/ethnicity. When presenting terminations by job title, also include the department and job group from which the person(s) were terminated.

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Employment Activity Item # 18e ***New

- For each job title or job group, provide the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year.

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Compensation Item # 19 (expanded)

- 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) 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.

- 2 Years of Snapshot Data

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Compensation Item # 19

- For each snapshot, provide a single file that contains for each employee, at a minimum, employee name or numerical ID, gender, race/ethnicity, hire date, job title, EEO- 1 Category and job group.[10] If the requested data is maintained in an accessible electronic format, please provide it electronically.
- Additionally, for each employee, provide the following information, as applicable. If the contractor does not maintain any of these items, please notate that in your submission:

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Compensation Item # 19a

- Base salary and/or wage rate, annualized base compensation, and hours worked in a typical workweek.
- Other compensation or adjustments to salary such as, but not limited to, bonuses, incentives, commissions, merit increases, locality pay or overtime shall also be identified separately for each employee.

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Compensation Item # 19b

Provide relevant data on the factors used to determine employee compensation such as education, experience, time in current position, duty location, geographical differentials, performance ratings, department or function, job families and/or subfamilies, and salary level/band/range/grade.

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Compensation Item # 19c

Provide documentation and policies related to the contractor's compensation practices, including those that explain the factors and reasoning used to determine compensation (e.g., policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments, the use of salary history in setting pay, job architecture, salary calibration, salary benchmarking, compensation review and approval, etc.).

Previous Year Placement Goals Item # 20

Information on your E.O. 11246 affirmative action goals for the immediately preceding AAP year.
This report must include information that reflects:

a. **job group representation at the start of the AAP year (i.e., total incumbents, total minority incumbents, and total female incumbents);**
b. **the placement goals established for minorities and women at the start of the AAP year; and**
c. **the actual number of placements (hires plus promotions) made during the AAP year into each job group with goals (i.e., total placements, total minority placements, and total female placements). For all placement goals not attained, describe the specific good faith efforts made to remove identified barriers, expand equal employment opportunity, and produce measurable results.**

- **If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects progress on goals established in your current AAP year and describe your implementation of action-oriented programs designed to achieve these goals.**

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Policy to Recruit, Hire & Screen Using AI
Item # 21 *** New

Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.

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Compensation Analysis 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). Include documentation that demonstrates at least the following:

a. When the compensation analysis was completed;
b. The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;
c. Which forms of compensation were analyzed and, 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.);
d. That compensation was analyzed by gender, race, and ethnicity; and
e. 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.).

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Reasonable Accommodation Policy Item # 23
(expanded)

Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any, for the immediately preceding AAP year. If you are six months or more into your current AAP year when you receive this listing, provide this information for at least the first six months of the current AAP year.

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Company Policies Item # 24 ***New

- Copies of **equal employment opportunity (EEO) policies**, including **antiharassment** policies, policies on **EEO complaint procedures**, and policies on **employment agreements** that impact employees' equal opportunity rights and complaint processes (e.g., **policies on arbitration agreements**).
- Please provide this information for policies in place for the immediately preceding AAP year.
- If you are six months or more into your current AAP year when you receive this listing, provide this information for at least the first six months of the current AAP year.

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Assessment of Its Personnel Processes Item # 25

- **The contractor's most recent assessment of its personnel processes, as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b).**
- **This assessment shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment.**

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Assessment of Physical & Mental Qualifications Item # 26

The contractor's most recent assessment of its physical and mental qualifications, as required by 41 CFR §§ 60-300.44(c) and 60-741.44(c), including the schedule of the assessment and any actions taken or changes made as a result of the assessment.

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Questions?

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CLOSING GENERAL SESSION - LEADING THROUGH CRISIS - WORKPLACE CRISIS MANAGEMENT, CONFLICT RESOLUTION, AND NAVIGATING EXTREME CHANGE

Paul Falcone

Best-Selling Author and Principal
Paul Falcone Workplace Leadership Consulting, LLC

ABOUT PAUL FALCONE

Paul Falcone is principal of Paul Falcone Workplace Leadership Consulting, LLC, specializing in management and leadership training, executive coaching, international keynote speaking, and facilitating corporate offsite retreats. He is the former CHRO of Nickelodeon and has held senior-level HR positions with Paramount Pictures, Time Warner, and City of Hope. He has extensive experience in entertainment, healthcare/biotech, and financial services, including in international, nonprofit, and union environments.

Paul is the author of a number of books, many of which have been ranked as #1 Amazon bestsellers in the categories of human resources management, business and organizational learning, labor and employment law, business mentoring and coaching, business conflict resolution and mediation, communication in management, and business decision-making and problem-solving. His books have been translated into Chinese, Korean, Vietnamese, Indonesian, and Turkish.

Paul is a certified executive coach through the Marshall Goldsmith Stakeholder Centered Coaching program, a long-term columnist for SHRM.org and HR Magazine, and an adjunct faculty member in UCLA Extension's School of Business and Management. He is an accomplished keynote presenter, in-house trainer, and webinar facilitator in the areas of talent and performance management, leadership development, and effective leadership communication.

PAUL FALCONE

WORKPLACE LEADERSHIP CONSULTING, LLC

310-795-4581

MEET PAUL. . .

Paul is the former CHRO of Nickelodeon and a bestselling author for HarperCollins Leadership and the American Management Association as well as a columnist for the Society for Human Resource Management.

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Leading Through Crisis - Workplace Crisis Management, Conflict Resolution, and Navigating Extreme Change

Paul Falcone, Principal
Paul Falcone Workplace Leadership Consulting

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Paul Falcone (www.PaulFalconeHR.com) is the principal of Paul Falcone Workplace Leadership Consulting, LLC, specializing in leadership and management training, executive coaching, keynote speaking, and facilitating corporate offsite retreats.

Paul is the former CHRO of Nickelodeon and head of international human resources for Paramount Pictures. He has also worked in healthcare/biotech and financial services across union, nonprofit, and international environments. Paul is a columnist for SHRM, an instructor in the UCLA Extension School of Business and Management, and a top-rated presenter and webinar facilitator in the areas of talent and performance management, leadership development, and effective leadership communication.


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Today's Agenda

Part 1: Individual Crises

Part 2: Departmental Crises

Part 3: Company (Global) Crises

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Workplace Application

- Workplace crisis management and intervention helps HR & Operational leaders hone their communication and teambuilding skills in today's tumultuous business environment.
- 2024 ushers in volumes of sweeping changes, from concerns in the Middle East and Eastern Europe to continuing to manage through post-Covid reintegration, union strikes, silent quitting, remote work, and returning employees to the office. How HR leads its operational management teams through extended periods of upheaval directly ties to organizational effectiveness, culture change, and the bottom line.
- By no means a "gloom and doom" approach to the many changes before us, this workshop places a healthy and constructive spin on reinventing your role in light of your organization's and team's changing needs and provides timely tools and guidance to help you every step of the way.

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Crisis and Disruption

- Management and leadership are consumed with unforeseen challenges that seem to come at increasingly alarming speeds with increasingly more dire consequences.
- Technology and globalization changes are exponential in nature, and today in the new millennium, we face evolutionary change at revolutionary speed.
- Crises seem to abound all around us, and business cycles are shortening to the degree that we often experience whiplash from extremes where, for example, severe talent shortages are followed quickly by layoffs from falling demand and excessive headcount, only to be met with the challenges of new talent shortages in specialty areas that didn't even exist several years prior.

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Crisis and Disruption (cont.)

- For the first time, we're experiencing five generations in the workplace simultaneously.
- Unions are aggressively attempting to make a comeback, women in leadership initiatives are a core focus of many organizations' strategic workforce planning efforts, and DEI&B (diversity, equity, inclusion, and belonging) and Wellness & Wellbeing initiatives are meeting the challenges of labor force scarcity, while ensuring that everyone has a voice as well as a seat at the proverbial table.
- Demographics is destiny. Gen-Y Millennials and Gen-Z Zoomers are the most studied generational cohorts in world history. Employers would be wise to study their motivators and drivers.
- Industrialized nations will continue to suffer from lack to talent through the end of this century. "Talent development" will become a key driver of organizational success, even more so than talent acquisition.

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Crisis and Disruption (cont.)

- You'll benefit most from learning how to hire effectively, how to manage and motivate your team, how to act ethically and morally, and how to communicate, lead, and build teams successfully. But as is so often the case, the rubber meets the road at the point of conflict, confrontation, and crisis.

- Managers are left to figure this all out on their own, leaving hard-won experience to be their greatest teacher. If they're wise, however, they'll look to get ahead of the curve by drawing on the wisdom of those who have gone before them.

- We've lost the ability as a society to sit around the campfire and have elders pass wisdom down to the younger generations. This is our opportunity to do just that. . .

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Gen Y and Gen Z Priorities

- Career and professional development
- Diversity of thoughts, ideas, and voices
- Work-life-family balance/control/equilibrium
- Corporate social responsibility and environmentalism
- An ethical employer, meaningful work, and a management team that cares about them personally

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Part 1: Individual Crises

- Terminations and Layoffs: Grace under Pressure
- EAPs and Dealing with Employees in Crisis (ADA “Regarded as” Claims)
- Encouraging Employees to Leave When There is No Progressive Discipline on File
- Whistleblowers vs. Character Assassins: When You’re the Accused
- Performance Appraisal Bombshells

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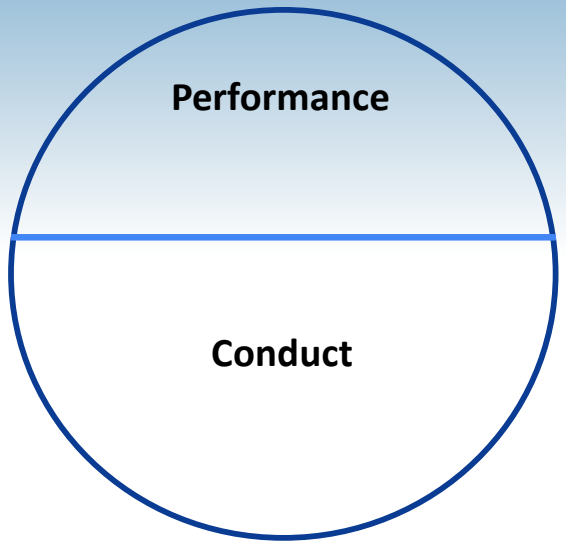
The Performance-Conduct Circle



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Solution: The Performance-Conduct Circle

"Tony, I wanted to meet with you privately to discuss something that I think is important to your career. You know they say that the most important decisions about your career will be made when you're not in the room. That's the same for you as it is for me and for everyone else.

"There's something that might be missing awareness that could potentially hold you back over the long term, and I'd like to discuss that with you if you'll allow me. In other words, I want to help you by having your back as you learn to manage and master this so that you can influence what's being said about you in that proverbial room at some point in the future while you're not there to defend yourself. Do I have your permission to continue?" [Yes]

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Performance-Conduct Circle (cont.)

- *"Right now, you're knocking it out of the park with your performance, which is great. But that only accounts for half of your overall contribution to our company or any other. You're equally responsible for what I'd call your conduct or behavior—in other words, how you're coming across to others, your reputation for building up those around you, and for serving as a role model in the leadership and communication space. That's where you're falling short from my vantage point and where I'd like to help.*

- *"If I had to issue an annual performance review right now, I'd say that you're only meeting half of the expectations on this circle, and 50% is not a passing grade. That's why I'm bringing this up now—so that you can show demonstrable improvement by the time annual performance reviews come due.*

- *"I'm not saying this to offend or judge you or otherwise hurt your feelings, but your peers tend to avoid you, using words like* confrontational, aggressive, *and* condescending *to describe you at times. Does it shock you to hear that? [No, but.. . .] There's no need to defend yourself right now—we're just talking. There's no judgment here. But it's important that we discuss this together to see what, if anything, you want to do to improve this* ***perception problem*** *that exists—and how I can help you get there and what my expectations are."*

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Performance-Conduct Circle (cont.)

- *"I'd like to be the person so help you with this—a career mentor and coach who has your back while you make your way through this. I'd like to see you fix this now so that it never holds you back in your career in the future. I want people to say, "I know Tony's a top performer, **and** he's a great teambuilder" as opposed to "I know Tony's a top performer, **but** he has difficulty working with peers and garnering other people's trust."*

- *"Whether you'd like me to serve as a coach and mentor through this is up to you, but my **expectations** will remain the same nevertheless: You'll need to contribute more to fostering greater teamwork and camaraderie, or else I'll have to question your ultimate fit factor on our team. Does that make sense? [Yes] Okay, so what might that look like?"*

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The Termination Discussion

- “David, we've gone through a number of interventions with you regarding your overall performance on the job, via a combination of both verbal and documented notices, and I'm afraid that we've made the decision to *go our separate ways and end your employment with us*.

- *“I know you've been trying to meet the expectations outlined in the notices you received, and I appreciate that.* **Please don't think that we see this as a lack of effort on your part.** It's just that sometimes we come to the realization that our interventions are not really sustainable in terms of matching a person's efforts with our needs, and it becomes best to separate employment.”

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Termination Discussion (cont.)

- “To the extent you’re comfortable, please make me your concierge. I’ll help you with your resume, we can roleplay an interview, and I’ll be happy to answer any questions you have regarding your COBRA insurance, unemployment claim, or anything else that comes your way.
- “I’ll always prioritize your call and be here if you need anything.
- “I’m sorry that this has happened, and I want to say thank you for your efforts over the past two years. I’ll miss working with you.”

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Part 2: Departmental Crises

- Mediating Employee Disputes: Conflict Resolution and Healing
- Dealing with Burnout and Conquering “Quiet Quitting”
- Motivating Staff without Money or Promotional Opportunities
- Putting a Quick End to Bad Habits: F-Bombs and Harassment/Bullying
- Toxic Team Turnarounds

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Values-Based Leadership

“Folks, the challenges we’re facing can be difficult at times, and I want you to know that I have your back. My goal is to help you do your very best work every day with peace of mind. But it’s important that I share my professional values with you so that you understand what motivates me and what I believe in.

“I’m sharing my expectations so you can reset yours. Pretty much any challenge I’ve faced throughout my career can be captured on this one-sheet, even more so than what’s in an employee handbook, policy & procedure manual, or code of business conduct.

“I’m happy to discuss these with your one on one, and I invite you to share with me or others your own core values at some point.”

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Paul’s Great 8 Rules of the Road

1. Have one another's backs and always bring out the best in others.
2. Practice selfless and role-model leadership.
3. Demonstrate accountability in all you do for both your performance and conduct.
4. Follow the leader-as-coach model: Teach what you choose to learn.
5. Focus on career and professional development. Building your resume and LinkedIn profile stems from an achievement mindset that focuses on quantifying accomplishments.
6. Have fun—lighten things up a bit and celebrate successes.
7. Do your very best work every day with peace of mind.
8. No drama! Life's too short, and we spend more time with each other than with our own families. Let's create a work experience that brings out the best in all of us.

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“Great 8” (cont.)

- “Please keep this one-sheet front and center on your desk going forward. We’ll use it to diagnose any situations gone wrong and to improve ourselves, both individually and as a team.

- “Otherwise, I appreciate having the opportunity to share my career and personal values with you, and I’m happy to answer any questions that you can think of now or once you sleep on this.”

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Multi-Generations at Work

- The Traditionalist/Silent/Veterans Generation: Born 1928 – 1945 (55 million)
- The Baby Boom Generation: Born 1946 – 1964 (77 million)
- The Baby Bust Generation (Gen X): Born 1965 – 1980 (44 million)
- Millennials (Gen Y): Born 1981 – 1996 (80 million)
- Zoomers (Gen Z): Born 1996 – 2012 (68 million)

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Multi-Generations at Work (cont.)

- *Cross-generational mentoring and coaching*
- *Collaborative and rotational work assignments and projects*
- *Opportunities to cross-train on the latest technologies (reverse mentoring)*
- *Training workshops on leadership and communication (emotional intelligence)*
- *A social atmosphere of community at work, including environmental awareness and social causes that make the world a better place*
- *Team-building events that heighten awareness of others' backgrounds*
- *Networks of cross-functional councils and boards that serve as a primary source of leadership and decision making*
- *Social networking tools that build relationships, increase collaboration, and enhance employee engagement*
- *Movie: "The Intern" with Robert DeNiro and Anne Hathaway ☺*

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Making It Safe for Employees to Vent About Non-Job-Related Concerns

- “Everyone, I invited you to this meeting on a voluntary basis to discuss—in a very professional and respectful manner—how you’re feeling. So much is changing before our very eyes. . . truths, laws, and values we’ve held as givens our entire lives.

- “I sense an underlying tone of anger and aggression, not just in our department or company but in society as a whole. I want to make it safe for you to express your concerns, but we have to do so carefully. As such, before we begin talking about how you’re feeling and what you’re experiencing, I’ll ask you to follow some simple rules:

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Non-Job-Related Concerns (cont.)

“First, there can be no attacking and there’s no need for defending. We’re here to support one another and make sure we can lower the level of tension that sometimes arises within the workplace.

“Second, this can’t be about personal opinions: only about how we’re feeling about the pace of change and how it affects us. In other words, if you’re shocked by politics, angry about school shootings, exhausted from pandemics, or simply frustrated about the amount of work or stress you’re experiencing, I’d welcome your sharing it here in a safe setting. But this isn’t a forum for debating your personal opinions. I have to make sure we’re all clear and in agreement on that.

“Third, I get to blow the whistle and act as referee if anything gets too hot or contentious. In such cases, my pressing the relief valve has to be respected by everyone in the room. Is that fair?” [Yes]

Non-Job-Related Concerns (cont.)

At the conclusion of the meeting:

“Folks, I hear you. And I think we’ve done a good job hearing one other out just now. I’m sorry for what we’re all going through. And I’m realistic enough to realize that one sit-down meeting as a team isn’t going to resolve these ongoing issues and the frustrations that we’re all experiencing, no matter what side of the divide we fall on. But it does give us a chance to level set, to reset expectations regarding civil and professional behavior toward one another, and to understand that there’s a lot more that we have in common than sets us apart.

Non-Job-Related Concerns (cont.)

“Let’s all agree to take it down a notch when dealing with one another. As the saying goes, each to his own without judgment. What you want for yourself give to another. And when in doubt, err on the side of compassion.

“There’s an awful lot of confusion out there, and this is unfortunately something our nation and our world have to endure right now. But we’re in control of minimizing its effects on our coworkers, and a little bit of goodwill can go a long way nowadays. With that, I’ll end the meeting and remind you all that you’re safe and respected here and that you’re equally responsible for making everyone else feel safe and respected as well.”

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Part 3: Company Crises, Global Crises, and Natural Disasters

- Talent Scarcity and Creative Alternatives for New Talent Pipelines
- Grade Inflation on Performance Reviews: A Landmine Waiting to Explode
- Avoiding Wage & Hour Crises
- Demands for Remote and Hybrid Work: Not Going Away Any Time Soon
- Employee Threats to Organize and Form a Union / Strikes & Lockouts / Union Decertification Efforts
- Action Plans to Minimize Workplace Violence (Active Shooter Preparation)
- Surviving M&A

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Global Crises

- Pandemics, war declarations, social unrest, economic crashes, or natural disasters can become reality at any time for any of us. What's your role when disruption creates a "new normal" in the workplace? More important, how do you develop a reputation for successful leadership when exceptionally stressful conditions beyond your control leave your employees lacking for information, afraid for their or their families' health and safety, or worried about supply chain issues and other practical outcomes of severe disruption?

- **GOAL**: Build a **leadership framework** to formulate your response based on human emotional needs.

- This isn't meant to be easy, but facing severe struggle helps you grow and evolve as a leader faster than just about anything else. And in that growth, you hone your character, your leadership mettle, and your definition of self.

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Global Crises (cont.)

- First things first: When catastrophe strikes, tend to the health and safety of your team members immediately, including finding a proper safe zone or shelter to shield yourselves from further harm.
- Second, listen to your senior management team and inform yourself of current priorities and resources, including the key message points that your organization wants all employees to follow and be aware of.
- Third, as the situation begins to normalize, ensure that employees and their families have access to food, water, and medical care, as needed.
- Fourth, as a stabilization phase comes into play, determine where work falls on the spectrum of family-safety-company and ensure that your employees understand that we're all in this together and that in times of crisis, we are all friends and neighbors in addition to coworkers. No one will be left behind. Put the human element first and keep a healthy perspective of the priorities that your staff members are likely to be concerned about.

Global Crisis Template

- **Step 1: Go into immediate “Crisis Management Mode”**
  - Inform senior leadership and authorities of injuries and significant property damage
  - Tend to the wounded / minimize hazards
  - Set up an **Incident Command Center** where centralized decision-making can occur

- **Step 2: Communicate, Communicate, and Over-Communicate**
  - Use email, posters, **robocalls**, texts, and any other communications means at your disposal
  - Provide updates frequently to all stakeholders
  - Create a public question and answer forum
  - Remember, it is far better to say, “We don’t know” and “We’ll look into it and get back to you” rather than leave a matter unaddressed

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Global Crisis Template (cont.)

Step 3: Be Clear about Roles and Next Steps (Table Top Exercises)

- Assign those willing to volunteer to help others in specific areas or with specific tasks
- Disseminate updates regarding onsite work expectations, amended hours of operation, or restricted locations
- Begin discussions about next steps, including cleanup and restoration

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Global Crisis Template (cont.)

Step 4: Normalcy and Healing Begin as a Marathon, not as a Sprint

- Demonstrate empathy, goodwill, and selflessness
- Recognize that humans heal at different speeds and in different ways; patience and flexibility are key
- Check in on your team's wellbeing and provide resources to help them and their families navigate through significant change

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Global Crisis Template (cont.) – Check Lists

- Office hours for the days/weeks ahead (including modified or regular schedules)
- Flexibility to work remotely or part-time (if that's an option)
- How to log time off work due to a disaster (e.g., "excused time off")
- Whether it's okay to bring children (or pets) into the office if school is out
- How often staff members need to update their supervisor on their availability
- Which parts of the building or complex are unsafe or not functional
- Dress codes, if relaxed from your usual protocol
- Customer and vendor updates, especially if any are temporarily closed
- Road conditions and traffic workarounds
- Ongoing support from the authorities (i.e., fire, police, National Guard)

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Global Crisis Template (cont.)

<u>Step 5</u>: Remember that Normalcy and Healing Begin as a Marathon, Not as a Sprint

- Disaster resiliency depends on open communication, goodwill, and empathy above all else.
- Crises jolt our physical and emotional systems, requiring on-the-spot solutions that include emergency response plans, incident command centers, communications measures, and so much more.
- And that's the way it will always be. We can't prepare for everything, and certain people may panic and lose their sense of self during an emergency. That's where role model leadership comes in. **Holistic disaster management** looks not only at economic, operational, and environmental factors but most importantly at the human side of impact.

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Global Crisis Template (cont.)

- There’s no rulebook or set timeline for getting back to normal, or even establishing a “new normal.” Everyone processes change differently.
- Check on your team’s wellbeing throughout the weeks following a disaster or disruptive event.
- Recognize that recovery may takes weeks or months, and sometimes even years, depending on the level of loss that people may have suffered.
- That’s why it’s important that you provide your team members with resources to help themselves and their families navigate through this.

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Global Crisis Template (cont.)

- Finally, keep things as simple as possible.
- Make it easy for employees to give back to the community by volunteering and donating goods and services. Allowing employees to help others in need creates a sense of healing and peace of mind better than just about anything else. Never underestimate the power of even the simplest acts of kindness.
- Lead by example, and practice selfless leadership by putting others' needs before your own. Rarely will selfless leadership be more needed than during the time of disaster or its aftermath. You may just find that compassion, empathy, goodwill, and clear communication will foster long-lasting results, such as increased camaraderie among employees and loyalty that build strong ties that bind.

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Paul Falcone
Principal, Paul Falcone Workplace Leadership Consulting, LLC
(310) 795-4581
www.PaulFalconeHR.com
PaulF@PaulFalconeHR.com
www.linkedin.com/in/paulfalcone1
amazon.com/author/paulfalcone
https://www.harpercollinsleadership.com/catalog/paul-falcone/
https://www.shrm.org/authors/pages/paul-falcone.aspx

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THANK YOU FOR ATTENDING

SEE YOU NEXT YEAR!

WRAP UP & RECERTIFICATION CREDITS

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