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# Your 2022 California Employment Law Update & Survival Guide

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# Lessons learned from 2021 / What to expect in 2022

- Ongoing challenges in dealing with retaliation claims
- Virtual workplace and right to disconnect
- Artificial intelligence in recruitment and hiring
- RIFs and layoffs
- Non-competes
- Union activity



# Ongoing HR challenges involving COVID

- How to ensure compliance with federal, state and local laws and regulations
- Latest CDPH Guidance
- Latest OSHA Standards: Exclusion Pay and New COVID Sick Leave
- Remote Work
- Workers' Comp Issues
- Timekeeping: Meal, Rest, Overtime
- Masking, Testing, Distancing, Quarantine, Leave, Other Measures
- Mandatory Vaccination?
  - Key point: what is required by law, and what can an employer do as a matter of its own choice
  - Religious and Disability Exemptions



## Latest developments in harassment and bullying

- New requirements in settlement agreements: all forms of harassment, discrimination and retaliation (not limited to sex)
- Keep amounts of settlement confidential
- 5 days consideration period for unrepresented employees/separation agreement
- Litigate meritless cases since no nondisclosure (effectively)?
- Bullying of the unvaccinated?



# Practical tips on conducting internal investigations

- **Remember how you want to end:** a reasonable conclusion after a good faith investigation
- **“Good faith”** doesn’t mean perfect, omniscient or even correct
  - But: take a hard look at the claims, potential witnesses, and documentary/other evidence
- **When and how to follow up**
- **Zoom challenges**
  - camera on
  - laptop positioning
  - well lit
  - alone, no background noise
  - set up expectations
  - consider recording—California mutual consent



# Shifting landscape of mandatory arbitration agreements

- The Future of “Voluntary” Arbitration Agreements: AB 51
- *Viking River Cruises, Inc. v. Moriana*
  - Private Attorneys General Act (“PAGA”)
- H.R. 4445 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021
  - Sexual Harassment and Sexual Assault



## *Viking River Cruises, Inc. v. Moriana*

- *Iskanian v. CLS Transportation Los Angeles, LLC*  
59 Cal. 4th 348 (2014)
  - PAGA waivers in arbitration agreements are unenforceable under state law
  - Federal Arbitration Act does not preempt California state law prohibiting PAGA waivers
  - Effect of *Iskanian* Rule:
    - While arbitration agreements can include class action waivers under the FAA, they cannot include a waiver to bring a representative action under PAGA
    - Trend of plaintiff's lawyers abandoning class claims in favor of PAGA-only actions



# *Viking River Cruises, Inc. v. Moriana*

- **Whether the FAA preempts California's *Iskanian* rule**
  - Granted certiorari on December 15, 2021
  - Anticipated decision by late June/early July 2022
- **What happens now?**
  - If SCOTUS overturns the *Iskanian* rule, potential for PAGA-only actions decrease significantly
  - Review arbitration agreements
  - Include waiver of representative actions
  - Include carve-out provisions
  - Pending PAGA-only lawsuits – move for stay, compel arbitration



## **H.R. 4445 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**

### **■ Key Provisions**

- Invalidates an arbitration agreement and class/collective action waiver of sexual harassment/sexual assault claims
- Permits the person alleging sexual harassment or sexual abuse to voluntarily choose to arbitrate his or her claims



## H.R. 4445 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

### ■ Key Provisions

- court to determine whether a claim constitutes sexual harassment or assault
- Applies to any “dispute or claim that arises or accrues” on or after the date the legislation is enacted



## H.R. 4445 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

### ■ What happens now?

- Likely lead to increase in sexual harassment lawsuits
- Bifurcation of claims
- Amend or replace existing arbitration agreements?
  - Do you have a carve-out provision?
  - New agreements for new employees?



## **Most common discrimination complaints employers experienced in 2021**

- DFEH's annual report statistics
- Retaliation
- Association discrimination
- COVID related claims
- Stray remarks to support discrimination



# Key wage-hour violations

- Why this should be a priority
- DOL and NLRB Initiatives
- Wage theft is now a penalty
- Liens can be used to recover penalties
- Areas where employers get into trouble
  - Meal periods – *Donahue* case
  - Regular rate of pay – *Ferra*
  - Misclassification
  - Remote work
- Why conducting a wage-hour audit is the most effective strategy to avoid an expensive class action lawsuit



## What to look for as you review your employee handbook and personnel practices

- Why this is important
- What sections to include
- CFRA expansion
- COVID addendums
- Acknowledgment and receipt
- Separate arbitration agreements
- In light of new laws and legal challenges

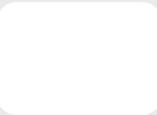


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# Conclusion and Wrap-up

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