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Employment Law Update: Everything You Need to Know to Stay Ahead of the Curve in 2024

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Employment Law Developments for 2024



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What We Will Cover:

- **Wage/Hour Law, Including Class Actions and PAGA**
- **California Consumer Privacy Act Compliance**
- **National Labor Relations Act/Union Developments**
- **EEO Law (Discrimination, Harassment, Retaliation, Whistleblower, DEI)**
- **Handbook Changes (including arbitration agreements)**
- **Workplace Violence Prevention Plans (7/1/24)**
- **Non-Competition and Non-Solicitation Agreements**



Wage/Hour Developments

Spoiler Alert: The train is moving in one direction only, and, with limited exceptions, it is not to the benefit of employers.



PAGA

- **Staying civil actions while individual arbitrations are pending. *Coinbase, Inc. v. Bielski***
- ***Rocha v. U-Haul Co. of Cal.*, 88 Cal. App. 5th 65 (2023) (not aggrieved in arbitration, no standing in civil case)**



PAGA

- ***Wood v. Kaiser Found. Hosps.*, 88 Cal. App. 5th 742 (2023) (CA Sick Leave can be basis for PAGA)**
- ***Patacsil*, 2023 WL 3964908 (Bankr. E.D. Cal. June 9, 2023) (PAGA not dischargeable in BK)**
- ***Accurso v. In-N-Out Burgers*, 2023 WL 5543525 (Cal. Ct. App. 2023) (permissive intervention versus as a matter of right)**



COVID-19

- “[a]n employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees’ household members.” *Kuciemba v. Victory Woodworks, Inc.*, No. S274191 (Cal. July 6, 2023)

HK Expense Reimbursement (Labor Code section 2802)

- ***Thai v. International Business Machines Corporation, California Court of Appeal Case No. A165390 (reimbursement turns not on cause for employee's need to work at home, but whether the expenses were actually due to performance of the employee's duties)***



Exempt or Nonexempt?

- **Be thoughtful about use of exemptions:**
Espinoza v. Warehouse Demo Servs., Inc., 86 Cal. App. 5th 1184 (2022) (employee not properly classified as outside salesperson; employer exercised significant control over employee's hours of work and work location)
- *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. ____, 143 S. Ct. 677 (2023) (employee not exempt-\$200K per year, paid on daily rate)



Independent Contractors

- **Written Agreement required under the Los Angeles Freelance Worker Protections Ordinance**
- **Perhaps most notably, for any contract between a hiring entity and a freelance worker valued at \$600 or more, the contract must be in writing and include:**
- **the name, mailing address, phone number, and email address of both the hiring entity and the freelance worker;**
- **an itemization of all services to be provided by the freelance worker, the value of the services to be provided pursuant to the contract, and the rate and method of compensation; and**
- **the date by which the hiring entity must pay the contracted compensation or the manner by which such date will be determined.**



Good Faith as Defense to “Knowing and Intentional”

Naranjo v. Spectrum Sec. Servs., Inc., 2023 WL 2261253 (Cal. Ct. App. 2023):

- **Meal and rest period violations are wages, but was failure to pay “willful” (as to waiting time penalties) or “knowing and intentional” (as to wage statements).**
- **Good news, Part 1: “willful” and “knowing and intentional” are functionally the same: “when an employer “presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee.”**
- **Good news, Part 2: the fact that the defense is ultimately unsuccessful does not preclude finding of good faith. Only defenses that “are unsupported by any evidence, are unreasonable, or are presented in bad faith” will preclude.**
- **Bad News: Very fact specific. Mere ignorance of the law will not suffice.**



Privacy

- ***Militello v. VFARM 1509*, 89 Cal. App. 5th 602 (2023) (company emails—have an express policy re monitoring and no expectation of privacy)**



CCPA/CPRA

■ **Are you covered?**

- Generally, for-profit entities doing business in California that collect consumers' personal information, whether directly or through a third party, who meet any one of the following:
- Buy, sell, or share the personal information of 100,000 or more California residents or households;
- Derive 50% or more of their annual revenue from selling or sharing California residents' personal information; or
- Have gross annual revenue of over \$25 million for the prior calendar year.



CCPA/CPRA

- **LOCKED” (Limit, Opt-Out, Correct, Know, Equal, and Delete).**



CCPA/CPRA

■ Compliance Steps

1. Inventory
2. Privacy Policy/Notice at Collection
3. “Reasonably Limit” Collection, Use and Retention of PI/SPI
4. Timely Acknowledge and Respond to Consumer Requests



Union Organizing/NLRA Developments

- **Cemex:** The NLRB in the last three months has literally re-written the law on union organizing to make it dramatically easier for unions:
- **Demand for recognition; if not challenged by management within 14 days, you are stuck.**
- **No captive audience speeches**
- **If there is aggressive anti-union campaigning, the board will set aside the results and force you to recognize the union**
- **Micro units and odd ball units are allowed and it is now very hard for management to object to them.**



Unions Are on the Rise: the 10 questions every business should ask and answer:

- 1. Does your company's culture reflect the needs and desires of its millennial and GenZ workforce?**
- 2. Has your business decided whether and how to address social justice issues which may resonate with your workforce?**
- 3. Have you recently conducted an employee satisfactory survey and, if so, have you carefully considered and addressed the issues uncovered?**
- 4. Have you implemented an effective strategy to prevent and address harassment, bullying and discrimination?**
- 5. Do your employees have confidence that your HR department will take their concerns seriously?**



Unions

- 6. Have you recently reviewed your solicitation/distribution policy and is it being consistently enforced?**
- 7. Have you conducted an audit to ensure that your wage-hour practices are legally compliant?**
- 8. Do your employees have confidence that you are doing everything possible to protect their safety and health?**
- 9. Have you conducted management training on preventative labor relations?**
- 10. Do you have a plan in place on what to do if a union comes knocking at your door?**



NLRB: *McLaren Macomb*, 372 NLRB 58 (2023)

- **The decision impacts any employer communication to employees that tends to interfere, restrain, or coerce an employee’s Section 7 rights (i.e., the right to engage with others regarding their working conditions or employment relationship). This means that any employer communication to employees “would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers’ rights.”**
- **What is Potentially Impacted: Severance Agreements, Employee Conduct, Investigations, Work Rules and Beyond.**
- **Ask yourself: what do you really need?**



Handbook/Policy Changes and Arbitration

- **CA Sick Leave Expanded**
- **Reproductive Loss Leave**
- **Prohibition Against Discrimination for Cannabis Use/Drug Testing**
- **Arbitration Agreements/Developments**



PSL: Expanded CA Sick Leave

- From 24 hours or 3 days to **40 hours or 5 days, *whichever is greater.***
- **Accrual and Carryover:** From 6 days or 48 hours to **10 days or 80 hours, *whichever is greater.***
- **Alternative Accrual:** Accrue at least **24 hours within the first 120 days**, and at least **40 hours by the 200th day** of employment.



PSL: What does 40 hours or 5 days mean?

- Five regularly scheduled workdays.
 - If an employee works four, 10-hour days, the employee will be entitled to use 50 hours of paid sick leave.
 - If an employee works only 6 hours a day and takes five days of paid sick leave, for a total of 30 hours, the employee will still have 10 hours remaining.



PSL: Continuous Accrual Cap and Carryover

- Default Accrual Rate: 1 hour for every 30 hours
- Continuous Accrual Cap Method:
 - Stop accruing when they bank the accrual cap; restart accruing when they use PSL and fall below the cap
 - Carry over accrued but unused PSL up to cap at the end of the year
- Accrual Cap and Carryover: from 6 days or 48 hours to 10 days or 80 hours



PSL: Alternative Accrual Method

- Not based on hours worked (e.g., flat rate of sick leave accrued per pay period or month)
- Must accrue at least 24 hours within the first 120 days of employment, and at least 40 hours by the 200th day of employment



PSL: Updated Written Policy – Now What?

1. Train managers and supervisors on changes affecting their workforce.
2. Train your human resources and benefits specialist. Make sure you are correctly carrying over and capping the appropriate amounts of PSL.
3. Ensure payroll processor implements the correct accrual and frontloading allowances and that wage statements accurately reflect the new PSL.
4. Download updated paid sick leave poster and wage theft notice.



Reproductive Loss Leave

- Employers with at least five employees must provide five days of unpaid time off following a reproductive loss event.
- Can use accrued paid sick leave, paid time off or vacation.
- Eligible if they worked at least 30 days at the time of the request.



What is Reproductive Loss Event?

- The day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction (such as artificial insemination or embryo transfer)



How often can employees take this leave?

- Employee is entitled to take five days of unpaid time off for each reproductive loss event;
- Maximum of 20 days of reproductive loss leave within a 12-month period.



Reproductive Loss Leave: Interplay with Other Leave Laws

- Cannot require employees to take all five (5) days of reproductive loss leave consecutively but can require to complete the leave within three (3) months of the date of their reproductive loss event.
- Extended if the employee takes leave under the California Family Rights Act, the Family and Medical Leave Act, Pregnancy Disability Leave Law or any other state or federal leave-entitlement law
 - Three-month completion period is tacked on to end of other protected leave



Reproductive Loss Leave: Rules Regarding Documentation

- Cannot require documentation of reproductive loss or proof to support reproductive loss leave request.
- But, if employee provides information in connection with leave, leave must be maintained as confidential and not disclosed except to internal personnel or counsel, as necessary, or if required by law
- Employers must maintain confidentiality of employees requesting reproductive loss leave.



Cannabis Use/Drug Testing

- Expands Fair Employment and Housing Act (FEHA) to prohibit employers from discriminating against applicants or employees because they have
 1. used cannabis off the job and away from the workplace, or
 2. were found to have non-psychoactive cannabis metabolites in their hair, blood, urine or other bodily fluids by a drug screening test.



Can you still test employees for Marijuana?

- The test must detect active THC for present impairment instead of simply the presence of marijuana.



Can you still have a Drug-Free Workplace Policy?

- Yes!
- BUT, there must be a caveat that legal use of marijuana is permitted only if it does not impair the employee's ability to perform the essential functions of the job effectively and in a safe manner that does not endanger others in the workplaces.



Arbitration: Revise those agreements!

- ***Duran v. EmployBridge Holding Co.*, 92 Cal. App. 5th 59 (2023) (unfortunate failure to revise post-*Viking River* and *Adolph*, carved out PAGA)**
 - Demonstrates importance of regularly reviewing arbitration agreements due to the shifting legal landscape surrounding arbitration agreements.



Arbitration: Mandatory is OK

- ***U.S. Chamber of Commerce v. Bonta*: 9th Circuit does an about-face and strikes down AB 51.**
- Employers cannot be penalized or criminally charged for executing a consensual mandatory arbitration agreement



Arbitration: Enforcement

- **The “I don’t remember signing that” defense and the value of “wet ink” signatures: *Iyere v. Wise Auto Group***
 - Employers who do not have their employees provide handwritten signatures should ensure that their e-signature procedure is secure and that, if necessary, can demonstrate the security of that procedure with admissible evidence



EEO Updates

- **Religious Accommodation**
- **Harassment**
- **DEI**



Religious Accommodation, Title VII

- ***Groff v. DeJoy*, 600 U.S. _____, 143 S. Ct. 2279 (2023): undue hardship requires showing of “substantial increased costs”**



Music as Harassment?

- ***Sharp v. S&S Activewear, LLC*, 69 F.4th 974 (9th Cir. 2023) (9th Circuit dumps the equal opportunity harasser defense)**



The End of DEI?

- **Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (“SFFA”), 143 S. Ct. 2141 (2023)**
- **Federal Anti-Discrimination Laws**
 - No changes yet, but new interest in SFFA-type claims
- **What Should Companies Do Now?**



Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (“SFFA”), 143 S. Ct. 2141 (2023)

- **Pre-SFFA**
 - Fisher v. University of Texas (“Fisher I”)(2013)
 - Fisher II (2016)
- **SFFA Decision**
 - Separately analyzed undergraduate admissions practices at Harvard and UNC
 - Majority found both practices violated the Equal Protection Clause of the 14th Amendment/Title VI
 - Student Body Diversity Not Sufficiently Measurable to Qualify as a Compelling Interest
 - Both Admissions Programs Failed to Satisfy Strict Scrutiny
 - Justice Gorsuch’s Concurring Opinion and Title VII





Hiring & Recruitment after SFFA

- Federal Anti-Discrimination Laws
 - No changes yet, but new interest in SFFA-type claims
- The State Attorneys General letter
- EEOC Guidance and Voluntary Affirmative Action Programs
- State Anti-Discrimination laws





What Should Companies Do Now?

- Review current DEI policies and practices
- Define goals and objectives for DEI initiatives
- Expand applicant pool
- Recent developments
 - Phillips v. Starbucks
 - EEOC letters – Mars Candy and McDonald's
 - Mark Cuban





Workplace Violence Prevention Plans

- **July 1, 2024 Compliance Date**
- **Seemingly based upon WVPP requirements for hospitals**
- **Requirements:**
 - Written workplace violence prevention plan;
 - Creation and implementation of a workplace violence incident log and ensuring understanding of record-keeping and reporting requirements (in compliance with the requirement to report “serious” injuries or fatalities, and in keeping with the OSHA Form 300 log requirements);
 - Creation of workplace violence prevention curriculum specific to to workplace context(s); and
 - Training for all employees concerning identification and internal reporting of workplace violence concerns.



WVPP: Considerations

- **Training: Content, Duration and Type**
- **Multidisciplinary Workplace Violence Prevention Team (Not Required, but a *very* good idea)**
- **Data Gathering/Intake specific to WVPP**



WVPP: Reminder

- **All of this is in addition to employers' existing obligation under Section 527.8 of the Code of Civil Procedure to seek a temporary restraining order and permanent injunction where an employee 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.**



Non-Competition/Non-Solicitation

- **Effective January 1, 2024, a new law, [AB 1076](#), forbids California employers from entering into non-competes with any of their employees unless they expressly fall into one of the narrow exceptions allowed by California law.**



Non-Competition/Non-Solicitation

- **Don't forget your love letters on Valentine's Day (*"Dear John, remember that non-competition agreement you signed? Don't worry about it."*)**
- **California employers will be required to send "candy grams" to former (if they were employed after January 1, 2022) and existing employees with unenforceable non-competes informing them that those provisions are void.**
- **Complicating this new legal requirement is an expanded definition of what constitutes an unenforceable non-compete and the creation of a new private cause of action that can be brought against an employer who pursues enforcement of an invalid non-compete.**



Non-Competition/Non-Solicitation

- Don't forget your love letters on Valentine's Day (*"Dear John, remember that non-competition agreement you signed? Don't worry about it."*)
- California employers will be required to send "candy grams" to former and existing employees with unenforceable non-competes informing them that those provisions are void.
- Complicating this new legal requirement is an expanded definition of what constitutes an unenforceable non-compete and the creation of a new legal claim that can be brought against an employer who pursues enforcement of an invalid non-compete.

What to do now?

- 1. Consult with your legal counsel to review all existing non-competes to determine if they must be revised.**
- 2. Prepare a list of individuals who must be contacted by February 14th to inform them that their non-competes are void along with a letter meeting this notice requirement.**
- 3. Don't automatically assume that every applicant with a non-compete will be prohibited from working for your company. Consult your lawyer to do an individual assessment as the need arises.**
- 4. Consult with legal counsel to determine what, if any, circumstances going forward will your company have the legal right to require new employees to sign a non-compete particularly those employees working remotely outside of California.**



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