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CALIFORNIA EMPLOYMENT LAW UPDATE

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AGENDA

INDEPENDENT CONTRACTOR/JOINT EMPLOYER
WAGE AND HOUR
TITLE VII & FEHA
COVID 19
ARBITRATION

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INDEPENDENT CONTRACTOR/JOINT EMPLOYER

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Employee vs. Independent Contractor

- **Employees:**
  - Subject to employer's control and oversight
  - Have taxes withheld from paychecks
  - Covered under labor and employment laws
  - May be entitled to certain benefits
  - Receive a Form W-2

Employee vs. Independent Contractor, cont'd.

- **Independent Contractors:**
  - Perform services for a company
  - Not employees
  - Typically engaged for a term to perform specific task or service
  - Do not have taxes withheld from invoice/payment
  - Receive a Form 1099

Employee vs. Independent Contractor, cont'd.

- **Importance of Correct Classification**
  - Federal and state wage and hour laws (e.g., overtime, minimum wage) apply to employees, but not independent contractors
  - Consequences can be severe
  - Misclassification can result in fines, penalties, and payment of uncollected taxes and wages
  - Exposure to class actions and PAGA penalties in California

Prop 22

- **Voting Yes = supports defining app-based transportation and delivery drivers as independent contractors; Voting No = California AB 5 (2019) could be used to decide whether app-based drivers are employees or independent contractors**
- On August 30, 2019, three companies (Uber, Lyft, and DoorDash) each contributed $30 million to fund Prop 22
- On September 4, 2020, InstaCart and Postmates also contributed capital to fund Prop 22

History of AB 5

- **Signed into effect in September 2019 codifying the California Supreme Court's ruling in *Dynamex v. Superior Court***
- **Established a three-factor test (ABC test) to decide a worker's status as an independent contractor**
  - A: the worker is free from the hiring company's control and direction in the performance of work;
  - B: the worker is doing work that is outside the company's usual course of business; and
  - C: the worker is engaged in an established trade, occupation, or business of the same nature as the work performed

Before *Dynamex: S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 48 Cal. 3d 341 (1989)

- **Primary factor: Whether the contracting entity has the right to control the worker both as to the work performed and the manner and means of performing the work**
  - Secondary factors
    - Whether the worker engaged in a business distinct from the contracting entity
    - Whether the work is part of the contracting entity's business
    - Whether the worker supplies the instrumentalities, tools, and place of work
    - The worker's investment in his/her business and potential for profit and/or loss
    - Whether the service requires special skill
    - Whether the work is usually done by a specialist without supervision
    - The duration of the contract
    - The degree of permanence of the working relationship
    - The method of payment, whether by time or by the job
    - Whether the parties believe they are creating an employment relationship

AB 5: *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (Oct. 22, 2018) – The "ABC" Test

- Workers are presumed to be employees of the hiring company unless ***all three*** of the following conditions are met and the worker:

  A. Is free from the control and direction of the hirer in the performance of the work, both under the contract for the performance of the work and in fact (similar to *Borello*).
     - Free from control and direction ***under the contract*** and ***in fact***
     - Principal cannot control performance of services to the "type and degree" of control a business typically exercises over employees – but "broader" control may suffice

  B. Performs work that is outside the usual course of the hirer's business.
     - Usual course of business may be found in advertising, contracts, or other summaries of the business
     - Contractors perform the same functions as employees
     - Work is a "key component" of the business, customary and regular vs. sporadic and subordinate

  C. Is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
     - Worker is free to operate independent enterprise and does so in fact
     - Worker's independent enterprise is not interconnected or dependent on the hiring company, and would survive without it
     - Look for purchasing own tools, equipment, incorporation/registration, licensure, offering services to the public or other potential customers, advertising, separate place of business, separate clientele and income, and managing own liability insurance

AB 5: Exceptions – Recently updated by AB 2257

Assuming any of these exceptions apply to the worker, then AB 5 would not apply but the Borello test would:

1. **Licensed Service Providers**
   - Insurance salesperson (licensed by the California Department of Insurance)
   - Physician or surgeon, dentist, podiatrist, psychologist, or veterinarian (licensed by the state and performing services to or by a health care entity)
   - Lawyer, architect, engineer, private investigator, or accountant (licensed by state)
   - Securities broker-dealer or investment advisor, or its agents and representatives (registered with the SEC, FINRA, or state license)
   - Commercial fishermen (long list of requirements)

2. **Direct Sales (defined by Unemployment Insurance Code section 650)**
   - In-person demonstration or sales presentation of consumer products or services – in the home, or to a buyer on a buy-sell basis, a deposit-commission basis, or a similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment
   - Substantially all remuneration is directly related to sales rather than to the number of hours worked
   - The services are performed pursuant to a written contract that provides that the individual will not be treated as an employee with respect to the services for state tax purposes

AB 5: Exceptions, cont'd.

3. **Professional Services**

- The contract is for professional services
  - Marketing, provided that the work is original and creative
  - Human resources administrator, provided that the work is intellectual and varied and output cannot be standardized in relation to a given period
  - Travel agent, graphic designer, grant writer, or fine artist (AB 2257 provides clearer definition of "fine artist")
  - Enrolled agent of US Dep't of Treasury or IRS
  - Payment processing agent through an independent sales organization
  - Still photographer or photojournalist, videographer, photo editor
  - Freelance writer, editor, newspaper cartoonist, translator, copy editor, or illustrator
  - Content contributors, advisors, producers, narrators, or cartographers for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media
  - Specialized performers hired by a performing arts company or organization to teach a master class for no more than one week
  - Licensed esthetician, electrologist, manicurist, barber, or cosmetologist (long list of requirements)

And

- The individual maintains a business location separate from the hiring entity, but may choose to perform services at the hiring entity's location
- The individual has a business license
- The individual has the ability to set or negotiate his or her own rates for services
- The individual has the ability to set his or her work hours
- The individual is customarily engaged in the same type of work or holds himself or herself out to customers as available to perform the same type of work
- The individual customarily and regularly exercises discretion and independent judgment

AB 5: Exceptions, cont'd.

4. Business to Business (BSP)

- does not apply to a worker
- the service provider must be a business entity, but the BSP may operate out of their residence
- could be "joint employer" situation
- both the contracting business and business service provider may be a "sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation"; now also includes public and quasi-public entities under AB 2257
- BSP is free from control and direction of contracting business for performance of the work both under the contract and in fact
- BSP provides services directly to the contracting business rather than to customers of the contracting business (limited to certain situations by AB 2257)
- prior to AB 2257, BSP was required to actually contract with other businesses, but now the BSP just needs to be able to contract with other businesses
- long list of other requirements: business license, separate location, independent business, clientele, has own tools/equipment/vehicles, can set own hours and rates, etc. (some of this is now limited by AB 2257)

AB 5: Exceptions, cont'd.

5. **Referral Agency (RA)/Service Provider (SP) Exception – whether the SP is an employee of the RA is determined by *Borello* as follows:**

- AB 5 provides an exemption for RAs referring clients to SPs for the following services: (1) graphic design; (2) photography; (3) tutoring; (4) event planning; (5) moving; (6) minor home repairs; (7) home cleaning; (8) errands; (9) furniture assembly; (10) animal services; (11) dog walking; (12) dog grooming; (13) web design; (14) picture hanging; (15) pool cleaning; or (16) yard cleanup; expanded by AB 2257 to include: (17) consulting, (18) youth sports coaching, (19) caddying, (20) wedding planning, (21) services provided by wedding and event vendors, and (22) interpreting services.
  - If the service in question is not on this list then it does not qualify for this carve-out.
- To show that AB 5 does NOT apply, referring agency must show:
  - SP is free from control and direction of the RA both as a matter of contract and in fact
  - SP has a mandated business license and tax registration and now RA must keep records of the certifications for at least 3 years under AB 2257
  - SP has a required contractor's license
  - SP delivers services to clients under SP's name, not RA's name
  - SP provides own tools and supplies
  - SP is no longer required to be customarily engaged in an independently established business that is the same nature of the work to be provided to the client under AB 2257
  - SP maintains its own clientele without restriction from RA and can provide services through competing RAs
  - SP negotiates the hours and terms of work under AB 2257 and is free to accept or reject clients or contracts
  - SP negotiates their rates with the client either through the RA or directly with the client, or is free to accept or reject rates set by the client
  - SP is not penalized for rejecting clients or contracts

AB 5: Exceptions, cont'd.

6. Occupations involving sound recordings and musical composition

- AB 2257 added the following to the exemptions list: recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers, directors, musical engineers and mixers engaged in the creation of sound records, musicians engaged in the creation of sound records, vocalists, photographers working on recording photo shoots, independent radio promoters, etc.
- Excludes: film and television unit production crews working on live or recorded performances for audiovisual works and publicists who are not independent music publicists

Additional occupational exemptions under AB 2257 available

AB 5: Miscellaneous Exceptions

- The status of individuals holding a real estate license is determined by section 10032 of the Business and Professions Code, and, if not, by other codes.
- The status of repossession agents is determined by the Business and Professions Code.
- Construction industry subcontractors (long list of requirements).
  - Subcontract is in writing, subcontractor is licensed, has the required business licenses, has an independent business and location, has the authority to hire and fire the persons who provide the services, has its own insurance, performance bonds and warranties, etc.
- Construction trucking services subcontractors – hauling and trucking provided in the construction industry under a contract with a licensed contractor utilizing vehicles that require a commercial driver's license or have gross vehicle weight rating of 26,001 pounds or more, etc. (exception only applies until January 1, 2022).
- Newspaper distributor and carrier under contract with publisher (exception only applies until January 1, 2021).
- *Borello* test applies.

AB 5: Retroactivity

- **Wage Order Claims**
  - AB 5 declares that it does not constitute a change in, but rather is declaratory of, existing law with regard to violations of the Labor Code relating to Wage Orders (such as meal and rest breaks, overtime, and minimum wage).
  - Holding: ABC test adopted in *Dynamex* is retroactively applicable to pending litigation on wage and hour claims. *Gonzales v. San Gabriel Transit Inc*. 40 Cal. App. 5th 1131 (2019).
  - This gives AB 5 a retroactive effect to misclassification-type claims - which effectively already have a four-year statute of limitations under California’s Unfair Competition Law.

AB 5: Joint Employment

- Joint employment: An employee deemed to have two (or more) "employers."
  - Workers typically supplied by employee leasing firms or temporary staffing agencies.
- *Henderson v. Equilon Enters. LLC*, 40 Cal. App. 5th 1111 (2019)
  - Plaintiff brought wage and hour claims against Defendant Equilon Enterprises, LLC, doing business as Shell Oil Products US, under a "joint employer" theory.
  - Plaintiff was employed as the station manager of a gas station and convenience store ***operated*** by Danville Petroleum, Inc. (i.e., the direct employer).
  - Plaintiff alleged that while he had been fired by Danville, Shell was liable as a "joint employer" for wage and hour violations.
- Holding: ABC test does not apply to joint employment cases.
- Policy concerns of avoiding wage laws are not present under a joint employer theory of liability because "the worker is an admitted employee of a primary employer, and is subject to the protection of applicable labor laws and wage orders."

AB 5: Joint Employment, cont'd.

- Even though AB 5 may not apply to joint employment, Labor Code section 2810.3 still does:
  - Applies to labor contractor that supplies a client employer with workers to perform labor within the client employer's *usual course of business*
    - ***Note: labor contractor is the direct employer***
  - A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following:
    - The payment of wages
    - Failure to secure valid workers' compensation coverage
  - A client employer shall be held liable for the labor contractor's owed wages, damages, penalties, and workers' compensation obligations to the labor contractor's employees, even if client employer already paid labor contractor.

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WAGE AND HOUR

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California Minimum Wage

- Current minimum wage in California:
  - $12.00 per hour for employers with 25 employees or less
  - $13.00 per hour for employers with 26 employees or more
- Minimum Wage Schedule - $15.00 per hour by 2023:

Date	25 employees or less	26 employees or more
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour

- However, each jurisdiction within California has different MW:
  - Los Angeles: $14.25/$15.00 per hour
  - Mountain View: $16.05 per hour

Exempt vs. Non-Exempt

- Non-exempt Employees – they are not exempt from Fair Labor Standards Act and California Labor Code requirements, such as:
  - Overtime pay
  - Meal and rest breaks
  - Minimum wage
- Exempt Employees – they are exempt from certain wage and hour requirements, due to their duties and pay
- An employer cannot make an employee exempt by simply providing a:
  - High salary
  - Management title

Types of Exemptions

- Exemption categories
  - Executive/Managerial Exemption
  - Administrative Exemption
  - Professional Exemption
  - Computer Professional Exemption
  - Outside Salesperson Exemption
- Each category has its own requirements
  - Independent judgment
  - Duties and responsibilities
  - License
  - Salary requirement
- Employers can still decide to make an employee non-exempt

Federal and CA: Salary/Minimum Wage Increases

- Employees who make less than $35,568 per year will be eligible for overtime pay under a final rule issued on Sept. 24, 2019 by the DOL. The new rate took effect Jan. 1, 2020.
- To be exempt from overtime under the federal FLSA, in addition to meeting a “duties” test, employees must be paid a salary of at least $35,568 per year. If not, employees will be deemed to be nonexempt.
  - The new rule will raise the salary threshold to $684 a week ($35,568 annualized) from $455 a week ($23,660 annualized).
- **But beware:** Effective January 1, 2020, the California minimum hourly wage increased to $12.00/hr. (up from $11.00/hr.) for employers with 25 or fewer employees, and $13.00/hr. (up from $12.00/hr.) for employers with more than 25 employees.
  - Accordingly, the minimum salary larger CA employers must pay to ensure several of the professional exemptions is **$54,080**. Employees paid less than this amount will be deemed nonexempt and subject to overtime/meal and rest period laws.
- Los Angeles minimum wage to increase on July 1, 2020 - $15.00/hr. for employers with 26 or more employees and $14.25/ hr. for employers with 25 or fewer employees.
- Computer Professional Exemption increase - $96,968.33 annually ($8,080.71 monthly) or an hourly wage of $46.55 for every hour worked in order to remain exempt from paying overtime compensation. Computer professionals must also still satisfy a very stringent “duties” test (Labor Code section 515.5).

Overtime

- Non-exempt employees are entitled to overtime
- Employees receive overtime at the rate of 1.5x their hourly rate for:
  - Any hours worked over 8 hours in workday but less than 12 hours
  - Any hours worked over 40 hours in a week (but no stacking)
  - The first 8 hours of work on the seventh consecutive day of work in a workweek
- Employees receive overtime at the rate of 2.0x their hourly rate for:
  - All hours worked in excess of 12 hours in a workday
  - All hours worked in excess of 8 hours on the seventh consecutive day of work in a workweek

Meal & Rest Periods

Under California law, non-exempt employees are entitled to:

- Rest Breaks
  - At least 10 minutes for each 4 hours worked
  - Rest breaks must be paid
- Meal Breaks
  - At least 30 minutes if employee works over 5 hours in a day
    - May be waived by mutual consent if employee works <6 hours
  - Second meal period of at least 30 minutes if employee works over 10 hours in a day
    - May be waived by mutual consent if employee works <12 hours

Hamilton v. Wal-Mart Stores, Inc., No. 5:17-cv-01415-AB (KKx), 2019 WL 1949456 (C.D. Cal.)

Security Checks and Meal Breaks

- Walmart required its employees to go through a security checkpoint during meal periods and at the end of a shift.
- Holding: This security check ***impeded or discouraged*** employees from taking meal breaks in violation of *Brinker Restaurant Corp. v. Superior Court*. In addition to other alleged violations, this resulted in a $6M verdict.
- In *Brinker*, the court held that employers must, among other things, refrain from impeding or discouraging employees from taking an uninterrupted 30-minute break.
  - Although plaintiffs' expert testified that there were more than 30,000 instances of class members taking their 30-minute breaks outside of the facility, the court reasoned that plaintiffs showed enough evidence to defeat summary judgment—based on the evidence, a jury could conceivably conclude that the security check impeded or discouraged them from taking their breaks.

Wage Statements

- All California employers must provide each employee with an accurate, itemized written pay statement.
- Statements must be provided each time wages are paid, or at least semimonthly, and must contain the following information:
  - Gross and net wages earned;
  - Total hours worked (for non-exempt employees)
  - Applicable piece rate and piece rate units earned (for piece-rate employees)
  - All deductions
  - Inclusive dates of the pay period
  - Employee’s name, the last four digits of employee’s SSN or employee ID number
  - Employer’s name and address
  - All applicable hourly rates and the number of hours worked at each rate
  - If paying OT from previous pay period, indicate OT as a correction and that pay period dates from when the OT was earned

Mays v. Wal-Mart Stores, Inc., 354 F. Supp. 3d 1136

- Wage statements displayed “Wal-Mart Associates, Inc.,” the payroll company that provides payroll services to Wal-Mart employees.
- The entity alleged to be the employer was “Wal-Mart Stores, Inc.”
- Both entities have the same address, which was displayed on the pay statements.
- Holding: Plaintiffs had sufficiently pleaded a violation of Labor Code section 226(a).
- Reasoning: Because multiple entities shared the same address, the court concluded that employees could not discern the name of their employer from the pay statements alone.

Magadia v. Wal-Mart (N.D. Cal. 2019): $102M Verdict for Pay Stubs

- Case now on appeal to Ninth Circuit (being briefed; Chamber and others just filed amicus briefs).
- Judge Koh ordered Walmart to pay $48 million in statutory damages and $54 million in penalties under the state's PAGA – she reduced from $131 million sought by plaintiff (maximum PAGA penalties would be "unjust and oppressive").
  - True-up payments for overtime on incentive pay were bundled together as "OVERTIME/INCT" that allegedly did not include sufficient information about ***hours*** and ***rates*** such that employees could determine how overtime was calculated.
  - Final paystubs did not include start and end dates.

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TITLE VII & FEHA

DISCRIMINATION/ HARASSMENT/ RETALIATION

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Anti-Discrimination Laws

- Title VII of the Civil Rights Act
  - Federal law that applies to employers with 15 or more employees.
  - Prohibits discrimination in employment based on race, color, sex, national origin, or religion.
- Equal Pay Act (EPA)
  - Prohibits wage discrimination based on sex and requires equal pay for men and women who perform substantially the same work in the same business establishment.
- Pregnancy Discrimination Act (PDA)
  - Prohibits discrimination based on pregnancy, childbirth, or related medical conditions.

California Fair Employment and Housing Act (FEHA)

- California Fair Employment and Housing Act (FEHA)
  - Applies to public and private employers with 5 or more employees, labor organizations and employment agencies.
  - Prohibits discrimination and harassment based on a protected category against an employee, an applicant, an unpaid intern, a volunteer, or a contractor.
- Protected Classes Under FEHA:
  - Race, color
  - Ancestry, national origin
  - Religion, creed
  - Age (40 and over)
  - Disability, mental and physical
  - Sex, gender (including pregnancy, childbirth, breastfeeding and related medical conditions)
  - Sexual orientation
  - Gender identity, gender expression
  - Medical condition
  - Genetic information
  - Marital status
  - Military and veteran status

Discrimination

- Employer may not discriminate in employment opportunities or terms and conditions of employment:
  - Advertising for open positions
  - Conducting interviews
  - Making offers/rejecting applicants
  - Compensating employees
  - Promotions/demotions
  - Termination

Harassment

- Workplace harassment is defined as a form of employment discrimination that violates:
  - California Fair Employment and Housing Act (FEHA)
  - Title VII of the Civil Rights Act of 1964
  - Age Discrimination in Employment Act of 1967 (ADEA)
    - Prohibits discrimination against those 40 years or older
  - Americans with Disabilities Act of 1990 (ADA)
    - Prohibits discrimination against individuals with disabilities; requires reasonable accommodation unless it creates an undue hardship on the employer
- Employers can be liable for harassment committed by both employees and non-employees (e.g., independent contractors, interns, volunteers).

Sexual Harassment

- Sexual harassment is unwanted sexual advances, or visual, verbal, or physical conduct of a sexual nature when:
  - **Quid pro quo (“this for that”):**
    - (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
    - (2) submission to or rejection of such conduct is used as the basis for employment decisions; or
  - **Hostile Work Environment**:
    - (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

Sexual Harassment, cont'd.

- Employers
  - Strictly liable for harassment by supervisors
  - Civil liability
- Individual Harasser
  - Civil liability
  - May also be subject to criminal charges for sexual assault

Retaliation

- California law prohibits employers from retaliating, discriminating, or taking adverse action against an employee or a prospective employee for exercising any right under the Labor Code, including:
  - Filing or participating in a complaint with the company, or any local, state or federal agency
  - Whistleblowing
  - Filing a civil suit against an employer

AB 9: Extending Statute of Limitations for FEHA Discrimination/Harassment/Retaliation Claims

- Under current law, plaintiffs pursuing a DFEH complaint must file within one year of the occurrence of the allegedly unlawful act. Following receipt of an agency right-to-sue letter, plaintiffs have one year to file a civil action.
- Under the new law, plaintiffs will have an expanded ***three-year*** period (after the occurrence of the allegedly unlawful act) within which to file their DFEH complaint. They would continue to have one year after receiving a right-to-sue letter to file their civil action.
  - Additional 90 days following the deadline, if the plaintiffs first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the filing deadline.
  - Applies generally to all forms of discrimination, harassment, and retaliation prohibited by FEHA.
  - Does not apply to the Unruh Civil Rights Act (barring discrimination by businesses), the Ralph Civil Rights Act (barring political/labor dispute discrimination), or disability equal access claims.
- Will not revive lapsed claims – but Senate Judiciary Committee analysis of the bill advocates for **retroactive effect** as to claims that accrued and did not expire prior to passage of the bill.

Preventing Discrimination, Harassment, Retaliation

- FEHA requires California employers to take “reasonable” steps to prevent and correct discrimination, harassment, and retaliation.
- Employers must create detailed policies preventing discrimination, harassment, and retaliation. The policies must:
  - List all protected groups
  - Allow employees to report to someone other than a direct supervisor
  - Instruct supervisors to report all complaints
  - State that:
    - All complaints will be followed by a fair, complete, and timely investigation
    - Employer will maintain confidentiality to the extent possible
    - Remedial action will be taken if any misconduct is found
    - Employees will not be retaliated against for complaining or participating in an investigation
    - Supervisors, co-workers, and third parties are prohibited from engaging in unlawful behavior under the FEHA

Preventing Discrimination, Harassment, Retaliation, cont'd.

- Adopt and communicate a clear policy
- Train supervisory and non-supervisory employees
- Adopt grievance procedures
- Investigate complaints promptly and confidentially
- Take prompt and appropriate corrective actions
- Monitor compliance with policies

Cost of Prevention vs. Litigation and Damages

Prevention

- Creating policies and grievance procedures
- Training
- Investigation
- Monitoring

Litigation

- Attorney's fees
- Actual damages
- Punitive damages
- Loss of clients/ business due to bad publicity

Training

- Employee handbooks/personnel manuals should cover all local, state, and federal laws applicable to employees, as well as specific employer policies:
  - Employment is "at-will"
  - Overtime policy
  - Anti-discrimination, harassment, and retaliation policy
  - Drug abuse policy
  - Probationary period/raises
  - Leave, payroll, work hours
  - Safety & training
  - Discipline & grievances
  - Termination
  - Receipt and acknowledgment of these policies

- All training time/hours count as time worked and must be paid.

SB 778: Mandatory Sexual Harassment Training

- Government Code section 12950.1 required employers with five or more employees to provide sexual harassment training to *all employees.*
  - Originally applied a deadline of January 1, 2020 to complete such training.
    - Amendment extends the deadline to January 1, **2021**, with additional training every two years thereafter.
    - If training was provided in 2019, no new training is required for two years.
- Training requirements:
    - Supervisory workers – at least two hours of classroom or “effective interactive training”;
    - Non-supervisory workers – same training as above, but one hour;
    - Training must occur within six months of hire or assuming supervisory position; and
    - Seasonal or temporary employees (six months or less) must be trained within 30 days of hire or 100 hours worked.
- Went into effect August 30, 2019.

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COVID-19 ISSUES

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COVID-19 TOPICS

- Wage and Hour Issues – Expense Reimbursement
- Health and Safety Compliance and Risk
- Retaliation/Whistleblowing
- Disability Accommodation/Privacy Issues
- Leaves of Absence

Working from Home – Cal. Labor Code Section 2802

- "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer…"
- *Cochran v. Schawn's Home Serv. Inc.*, 228 Cal. App. 4th 1137 (2014)
  - When employees must use personal cellphones for work-related calls, Section 2802 requires the employer to reimburse them a reasonable percentage of their phone bills
  - "Otherwise, the employer would receive a windfall because it would be passing operating expenses on to the employees."
  - "It does not matter whether the phone bill is paid for by a third person, or at all. In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss. It is irrelevant whether the employee changed plans to accommodate work-related cell phone usage. Also, the details of the employee's cell phone plan do not factor into the liability analysis."

Working from Home – Cal. Labor Code Section 2802, cont'd.

- *Herrera v. Zumiez, Inc.*, 953 F.3d 1063 (9th Cir. 2020)
  - Employer allegedly failed to pay retail employees "reporting time pay" for "call in" shifts, and failed to reimburse for cost of pre-shift confirmation phone calls
  - "If the use of the personal cell phone is mandatory, then reimbursement is always required, regardless of whether the employee would have incurred cell phone expenses absent the job." (Citing *Cochran*.)
  - "[U]sing WhatsApp or Skype often requires personal expenses associated with internet service and a phone or computer, for which a ruling consistent with *Cochran* might require reimbursement of a portion of the bills."
  - The employer may be liable even if the employee never asks

Working from Home – Cal. Labor Code Section 2802, cont'd.

- So when is the employer liable? Two standards.
  - **Majority view:** An employer "has the duty to exercise due diligence and take any and all reasonable steps to ensure that the employee is paid for the expense" when the employer "know[s] or has reason to know that the employee has incurred an expense." *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901, 904 (N.D. Cal. 2009).
  - **Minority view:** One federal court rejected this standard as too lenient, criticizing *Stuart* and holding that, because Section 2802 does not contain a notice requirement, "[t]he duty to reimburse does not need to be triggered by notice, actual or constructive. It exists so long as the uncompensated employee expenditures or losses are reasonably necessary to the work." *Espinoza v. West Coast Tomato Growers, LLC*, 2016 WL 4468175 (S.D. Cal. Aug. 24, 2016).

Working from Home – Cal. Labor Code Section 2802, cont'd.

- *Novak v. Boeing Co.*, 2011 WL 9160940 (C.D. Cal. July 20, 2011)
  - Employee could not recover work from home expenses where he was not required to work from home, chose to do so voluntarily, and employer made physical workspaces with computers, phones, and other necessary equipment available at its offices to employees so that they do not have to work remotely.
- *Lawson v. PPG Architectural Finishes, Inc.*, 2019 WL 3308827 (C.D. Cal. June 21, 2019)
  - Employee could not recover home internet costs where company provided him an iPhone and company tablet that could be used as hotspots, and use of personal internet was unnecessary.
- *Aguilar v. Zep Inc.*, 2014 WL 4245988 (N.D. Cal. Aug. 27, 2014)
  - Where outside sales employees worked from home, employer was required to reimburse mileage costs between home and customer locations and cellphone and internet expenses needed to execute job duties.

Working from Home During COVID-19

- In response to lockdowns, employers have required employees to work from home. Strong argument that many expenses needed to facilitate work from home are reimbursable.
- Possible reimbursable expenses:
  - Use of personal computer
  - Home internet service
  - Home phone or personal cellphone
  - Teleconference software
  - Other equipment needed to work from home
  - Printing costs?
  - Electricity bills?
  - Potential litigation in the future

Retaliation and Whistleblowing

- Likely source of claim: Labor Code section 1102.5
- Retaliation for raising concerns about health and safety practices (e.g., PPE, no testing)
  - *King v. Trade Joe's East, Inc.*, No. 20-CI-002406 (Ky. Cir. Ct.)
- Retaliation for refusing to work or violate stay-at-home order
  - *Romines v. SSA Group, LLC*, No. 2:20-cv-10745 (E.D. Mich.)
- Retaliation for warning co-workers about exposure
  - *Woolslayer v. Driscoll*, No. 2:20-cv-00573 (W.D. Pa.)
- On the horizon: retaliation claims for refusal to return to work after stay-at-home is lifted?

Disability-Related Inquiries

- Prior to making a conditional job offer, disability-related inquiries and medical exams are generally prohibited
- Inquiries are permitted between the time of an offer and the start of work, if required for everyone in the same job category
- When an employee begins work, disability-related inquiries or medical exams must be job-related and consistent with business necessity

EEOC Guidance: Who Can You Ask?

- During a pandemic, employers may ask employees if they are experiencing symptoms of the pandemic virus before they enter the workplace, but not if they are working from home and not physically interacting with coworkers or others
- Under the Genetic Information Nondiscrimination Act (GINA), employers may not ask employees medical questions about family members. However, employers may ask employees if they have had contact with anyone diagnosed with COVID-19 or who may have symptoms
- Employers may ask (or test) only particular employees if they have a reasonable belief based on objective evidence that the employee may have the virus

EEOC Guidance: What Can You Ask?

- Employers may bar employees from physical presence in the workplace if they refuse to answer questions or submit to temperature checks and virus tests
- For COVID-19, fever, chills, cough, shortness of breath, sore throat, and other symptoms identified by public health authorities and reputable medical sources
- Under GINA, employers may not ask questions about family members, but may ask if the employee may have had contact with anyone diagnosed with the virus or who may have symptoms

EEOC Guidance: Can Tests Be Required?

- Mandatory medical tests of employees under the ADA must be job related and consistent with business necessity. Per the EEOC, this permits employers to screen employees entering the workplace for COVID-19 because an individual with the virus poses a direct threat to the health of others
  - Body temperature checks OK
  - Tests for presence of virus OK
- Antibody tests
  - Per CDC, should not be used to determine if an individual is immune or to test for the presence or absence of the virus
  - CDC recommends not using them to make decisions about returning person to the workplace, and EEOC says that such tests cannot satisfy the “business necessity” requirement of the ADA

EEOC Guidance: Confidentiality

- Private medical information must be stored separately from the employee’s personnel file to protect confidentiality, including information relating to COVID-19
- An employer may disclose the name of an employee with COVID-19 to a public health agency
- Employers may not, however, disclose the name of an employee with COVID-19 to others
  - Disclosure of identity is limited to those in a company with a specific need to know
  - Employers may interview an employee to obtain a list of people with whom the employee possibly had contact. The employer may then notify those employees, but without disclosing the identity of the individual with COVID-19
  - Starting January 1, 2021, AB 685 requires notice to all employees who were on premises at the same worksite if they may have been exposed to COVID-19

EEOC Guidance: Accommodations

- Some people may have disabilities that place them at a higher risk from COVID-19 (e.g., chronic lung disease, serious heart conditions)
- There may be reasonable accommodations that could offer protection to such people
  - Reduced contact with others through one-way aisles, plexiglass tables, or other barriers that minimize contact between coworkers and customers
  - Temporary job restricting or marginal job duties
  - Temporary transfer to a different position
  - Modification of work schedule or shift assignment
- Does not extend to employees with a disabled family member, but employers may provide such accommodations anyway

Paid Sick Leave During COVID-19

- Families First Coronavirus Response Act (FFCRA)
  - Emergency Paid Sick Leave Act
  - Emergency Family & Medical Leave Expansion Act
- Paid leave provisions are effective April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020
- Covered Employers:
  - Employers with fewer than 500 employees in the US (includes employees on leave, temporary employees who are jointly employed, day laborers supplied by temp agency, but does not include independent contractors)
  - Small business exemption: Fewer than 5 employees and providing the relief would jeopardize viability of business as a going concern

FFCRA – Benefits for All Employees

- Two weeks (80 hours) of paid sick leave at regular rate of pay if employee is unable to work:
  - Because of quarantine (pursuant to federal, state, or local government order or advice of a health care provider); and/or
  - Employee is experiencing COVID-19 symptoms and seeking a medical diagnosis
- Rate is higher of regular rate of pay or minimum wage rate, not to exceed $511 per day and $5,110 in total
- Two weeks (80) hours of paid sick leave at two-thirds regular rate of pay if employee is unable to work because:
  - Bona fide need to care for an individual subject to quarantine
  - Need to care for a child under 18 whose school or childcare provider is closed
  - Employee is experiencing a substantially similar condition
- Cap is two thirds of the regular rate or of minimum wage, up to $200 per day and $2,000 total

FFCRA – Benefits for Persons Employed >= 30 Days

- Up to an additional 10 weeks of paid expanded family medical leave at two thirds employee's regular rate of pay when employee is unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is closed
- Cap is $200 daily and $12,000 total
- Employers may exclude Health Care Providers or Emergency Responders from eligibility for this leave

FFCRA – Qualifying Reasons for Paid Sick Time

- Employee qualifies for paid sick time if employee is unable to work or telework because the employee is:
  - Subject to federal, state, or local quarantine or isolation order
  - Has been advised by a healthcare provider to self-quarantine
  - Is experiencing COVID-19 symptoms and is seeking a medical diagnosis
  - Is caring for an individual subject to a quarantine order or self-quarantine advice or professional
  - Is caring for a child whose school or place of care is closed
  - Is experiencing any other substantially similar condition specified by the Secretary of Health & Human Services

AB 1867 & SB 1383

- AB 1867 – Signed on September 9, 2020
  - Requires employers with 500 or more employees nationwide to provide California employees with paid sick leave for COVID-19 related reasons
  - Includes coverage for public and private employers of first responders and healthcare employees who did not provide leave under federal law and other employees who might fall within exemptions of the FFCRA
  - Total hours available for leave depends on employee's regular work hours (Ex.: employee who works 40 hours per week in two weeks preceding leave is entitled to 80 hours)
  - Capped at $511 per day or $5,110 in the aggregate
  - Employers must provide notice of the amount of CSPSL available each pay period on either the employee's wage statement or in a separate writing
- SB 1383 – Signed on September 17, 2020
  - Expands job protection under California Family Rights Act
  - Employers with as few as five employees must provide leave to employees effective January 1, 2021
  - Expands definition of "Family Members" and allows eligible employees to take unpaid leave to care for all children (whether or not an adult and a dependent), spouse, siblings, parents, grandparents, grandchildren, and domestic partners

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ARBITRATION

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AB 51: Prohibits Waivers and Releases of Claims and Forums as a Condition of Employment or Receipt of an Employment Benefit

- Prohibits employers from requiring an applicant or employee to waive any "right, forum, or procedure" for violation of FEHA or the Labor Code.
  - as a condition of employment,
  - as a condition of continued employment, or
  - as a condition for receipt of any employment-related benefit.
- Intent:
  - Exhibits legislature hostility to arbitration, class action waivers, and certain FEHA (discrimination/harassment/retaliation) releases. Extends to any right to file and pursue a civil action or complaint with any court or other (sanctioned class action waivers) governmental agency waivers of any alleged violation.
  - Attempts to circumvent the federal Supreme Court's ruling in *Concepcion*
    - Addresses formation and consideration
    - Creates liability for wrongful termination and failure to hire
  - Eliminates releases that are not "negotiated" and
  - Clarifies that "opt-out" agreements (in arbitration agreements) will not suffice.
- AB 51 prohibits employers from threatening, retaliating, or discriminating against, or terminating any applicant or employee because of the refusal to consent to the waiver of any right, forum, or procedure for violation of FEHA or the Labor Code.
- Adds Gov. Code section 12953 and Labor Code section 432.6. Applies to agreements entered into after January 1, 2020.

AB 51: Prohibiting Mandatory Employment Arbitration

- Exceptions:
  (1) Person registered with SEC or FINRA (but likely only as to arbitration provided by applicable regulations)
  (2) Nothing is intended to invalidate a written arbitration agreement that is otherwise enforceable under the FAA – this is key!
  (3) Post-dispute settlement agreements
  (4) Negotiated severance agreements

AB 51: Prohibiting Mandatory Employment Arbitration, cont'd.

- Open questions:
  - Does the FAA apply?
    - Transportation workers (see next slide)
    - No connection with interstate commerce
  - Is invalidation of the class waiver preempted by the FAA?
  - Does wrongful termination or failure to hire survive the FAA?
  - Can employment alone constitute valid consideration?
  - Can continued employment constitute valid consideration?
  - What is a negotiated severance agreement?
  - Are severance agreements mandated by a severance plan unlawful?

AB 51: Prohibiting Mandatory Employment Arbitration, cont'd.

- Practical implications:
  - Violations potentially subject to criminal sanctions
  - Legal challenges have already begun:

    (1) FAA preemption

    – December 30, 2019, US District Judge Mueller in Sacramento granted a temporary restraining order against California's anti-arbitration bill, AB 51.

    – On January 10, TRO was extended (i.e., it is still in effect).

    Stay tuned!

    (2) Continued uncertainty with "transportation worker" exemption

FAA Exemptions (Not Subject to FAA)

- If FAA exemption applies, then AB 51's prohibition against mandatory arbitration applies.

  (1) **Transportation workers** – contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

  - Holding: Employees can fall under the transportation worker exception to the FAA without ever crossing state lines. Even intrastate delivery drivers may be exempt from the FAA. *Nieto v. Fresno Beverage Co., Inc.*, 33 Cal. App. 5th 274 (2019).
  - Holding: The FAA transportation worker exemption applies to both employees and independent contractors. *New Prime Inc. v. Oliveria*, 139 S. Ct. 532 (2019).

  (2) **Public injunctive relief**

  - Holding: The FAA does not preempt California's McGill rule that waivers of the right to seek public injunctive relief in any forum are unenforceable. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019). Public injunctive relief = "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public."

- Court decides FAA exemption
  - Holding: A court, not an arbitrator, must decide whether an arbitration agreement falls within the FAA's coverage. *See New Prime Inc.* Parties cannot delegate this issue to an arbitrator.

SB 707: Arbitration Enforceability - Amends CCP 1280 and 1281.96, Adds 1281.97-1281.99

- If an employer in an arbitration agreement is required to pay fees to initiate arbitration, and the employer fails to pay the fees within 30 days of the due date, then it:
  - Is material breach of the arbitration agreement,
  - Is default of the arbitration, and
  - Waives the right to compel arbitration.
- Employee can then choose to:
  - Compel arbitration, and the employer shall pay reasonable attorney fees and costs; or
  - Proceed in court, and the statutes of limitations for all claims brought or that relate to any claim brought in arbitration are tolled as of the first filing in any forum.
- Effective January 1, 2020
- **Employer Tip:** California law requires employers to pay all fees unique to arbitration (i.e., arbitration forum's administrative fees, arbitrator's fees).

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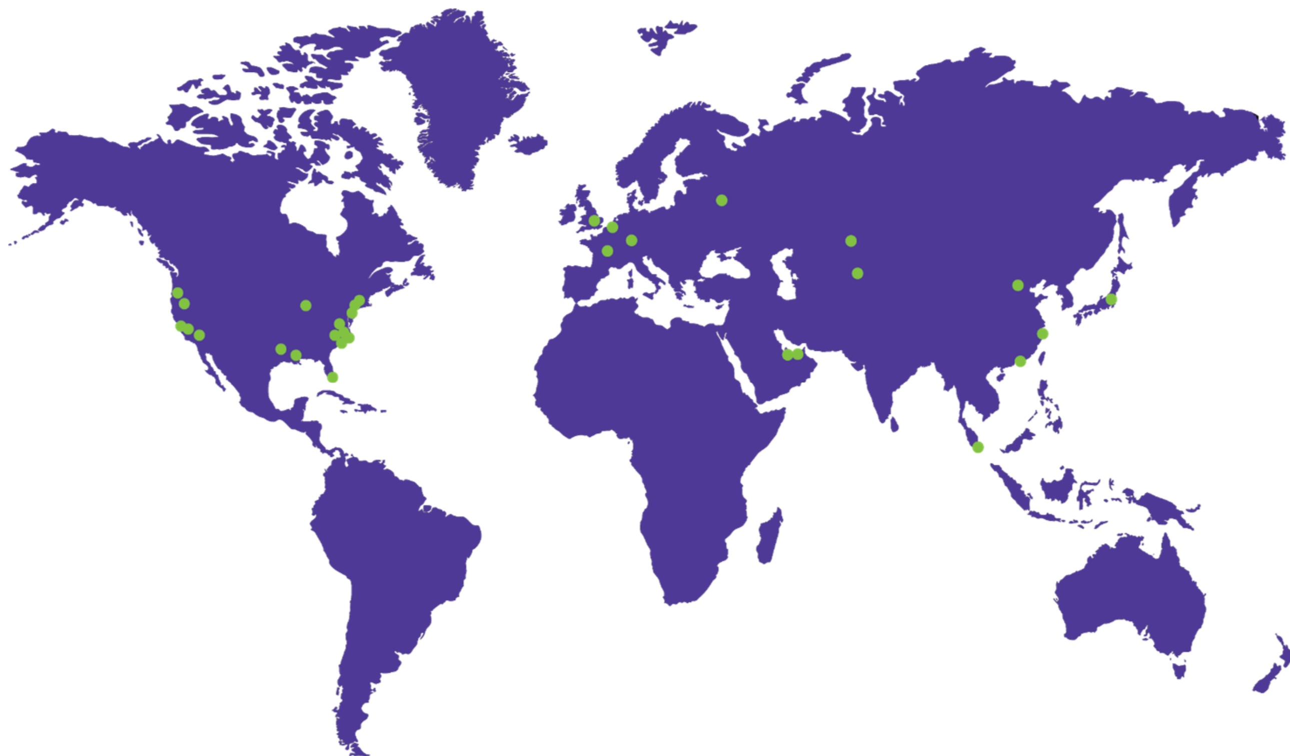

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