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2021 RECAP: CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

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Agenda

- Federal OSHA ETS
- CDC/Cal-OSHA
- COVID-19
- Wage & Hour
- PAGA
- Discrimination
- Confidentiality
- Policies
- Arbitration
- Independent Contractors

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Federal OSHA ETS, Healthcare Settings & Federal Contractors

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Federal OSHA ETS: The Supreme Court Has Spoken!

- *This would have*: Required covered employers with 100+ employees to establish a vaccine policy that requires:
  - **Mandatory vaccination**, or
  - **Weekly testing** for unvaccinated employees

  Would have affected about **84 million** employees

- Legal landscape:
  - On November 12, 2021, the Fifth Circuit Court of Appeals granted a motion to stay enforcement pending final review of request for permanent injunction.
  - On December 17, 2021, a divided panel of the US Court of Appeals for the Sixth Circuit granted the federal government's emergency motion to dissolve the US Court of Appeals for the Fifth Circuit's stay of OSHA ETS. With the Sixth Circuit's ruling, the ETS was back in effect.
- Supreme Court – January 13, 2022 – 6-3 decision to **block OSHA ETS**
  - OSHA does not have the regulatory authority to issue the ETS.
  - *"It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."*
  - Currently stayed and will likely just expire on May 5, 2022 (for good).

States' OSHA ETS

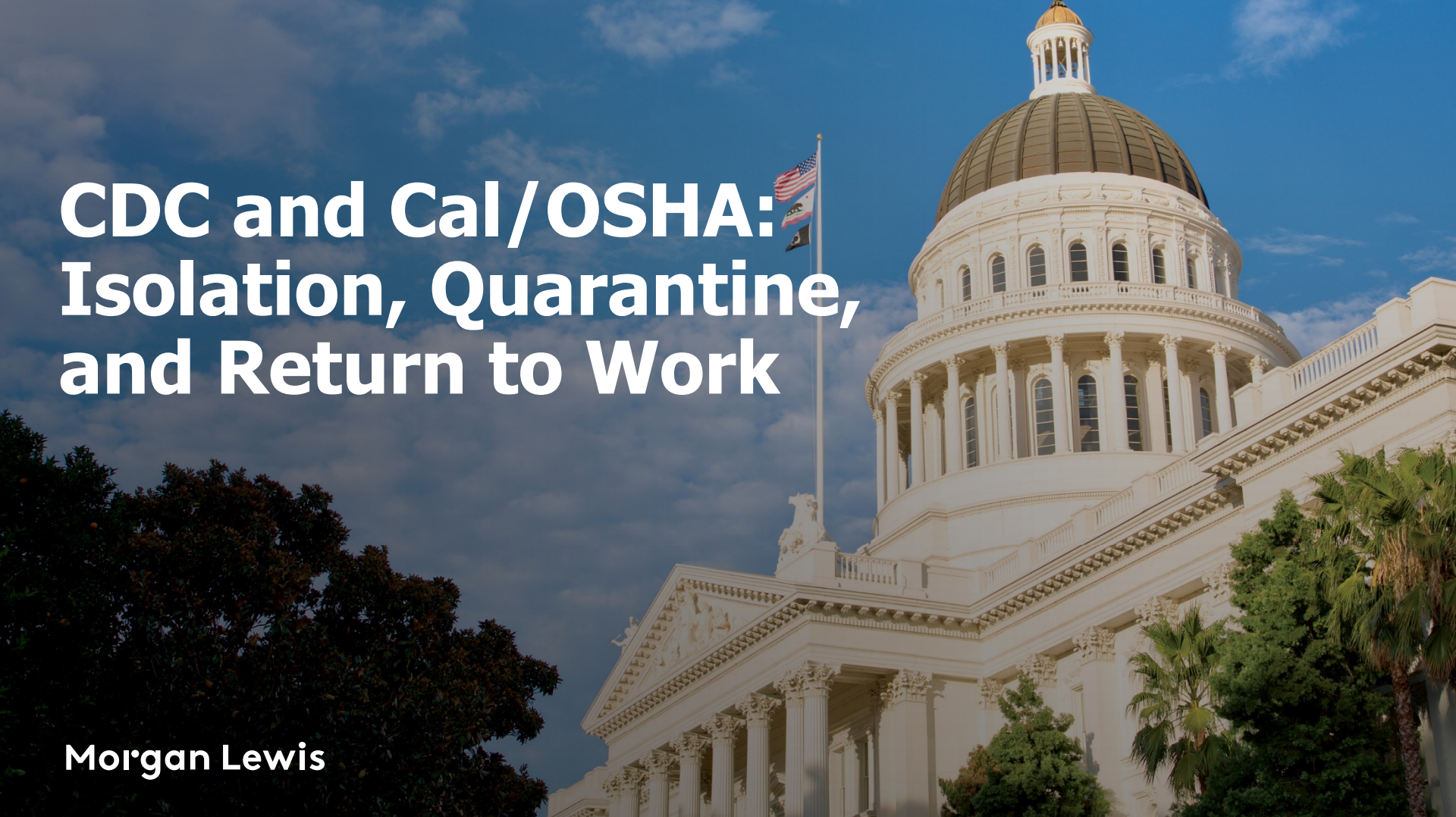
- States with their own OSHA-approved occupational safety and health plans may adopt their own ETS plans
  - 22 states impacted, including California.
  - These states can go above and beyond the federal ETS and therefore can implement a similar or even more expansive version of the original federal ETS.
  - Oregon OSHA has said NO to mandatory vaccines given the Supreme Court's decision.
  - Minnesota is the only state that has officially "adopted" the federal OSHA's ETS, but now that the federal ETS is stayed, it remains to be seen if Minnesota's will proceed.

CMS Interim Final Rule for Healthcare Workers

- The Centers for Medicare and Medicaid Services (CMS) at the Department of Health and Human Services (HHS) published an interim final rule (IFR) **requiring healthcare workers at facilities participating in the Medicare and Medicaid programs to be fully vaccinated.**
- The CMS IFR covers certain healthcare facilities and staff of nonhealthcare entities that **have service arrangements** with designated healthcare facilities.
- The CMS IRF does not incorporate a testing requirement as an option.
- The Supreme Court upheld the CMS IFR. The IFR is now in effect, and covered healthcare facilities should continue to implement policies and procedures requiring "staff" (as that term is defined in the IFR) to be fully vaccinated against COVID-19.
- However, the CMS IFR was always intended to be read in conjunction with the OSHA ETS. Given the Court's ruling against OSHA ETS, it is not clear how CMS intends to gap-fill those details of the ETS that the CMS IFR did not originally include.

Vaccine Mandate for Federal Contractors & Subcontractors – Currently Stayed (11th Cir.)

- On September 9, 2021, President Biden issued an executive order **mandating that federal contractors and subcontractors require their employees to be fully vaccinated against COVID-19**. No testing alternative.
- Any contractor or subcontractor who holds a contract awarded by an executive agency or executive department.
- Compliance deadline (was): January 18, 2021.
- Covered contractors and subcontractors:
  - Working under new federal contracts or contract-like instruments awarded on or after November 14, 2021 whose contracts **contain a clause requiring compliance with the guidance**; and
  - Existing contracts for which options to extend are exercised on or after October 15, 2021 and which **modify the contract to include the clause**.
- "Covered Workplace":
  - Any worksite controlled by a contractor or subcontractor where an employee of the covered contractor or subcontractor working on or in connection with a covered contract is likely to be present during the period of performance.
  - Employees performing duties necessary to the performance of a covered contract, but not directly engaged in the specific work called for by the covered contract (e.g., human resources, legal review, billing), qualify as working "on or in connection with" the contract.



CDC and Cal/OSHA: Isolation, Quarantine, and Return to Work

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CDC Isolation Guidance

- CDC shortened recommended time for **isolation and quarantine**. The change is motivated by science demonstrating that the majority of SARS-CoV-2 transmission occurs early in the course of illness, generally in the 1-2 days prior to onset of symptoms and 2-3 days after.

ISOLATION: Behavior after confirmed ***infection*** (regardless of vaccination status)

- Individuals with COVID-19 should isolate for 5 days.
  - If asymptomatic: Day 0 = date of positive test
  - If symptoms: Day 0 = date of first symptom
- Individuals may exit isolation after 5 days only if asymptomatic or if symptoms are resolving (without fever for 24 hours).
- Individuals must continue to wear mask for 5 additional days.
- If still symptomatic, must stay in isolation until symptoms are resolving and without fever for 24 hours.

Cal/OSHA: In addition to the above, individuals must test negative on Day 5 or later. If unable to take test, must isolate for at least 10 days (instead of 5).

CDC Quarantine Guidance and Cal/OSHA ETS (Close Contacts)

Quarantine refers to the time following ***exposure*** to the virus or ***close contact*** with someone known to have COVID-19.

- CDC: If asymptomatic: For close contacts who are **fully vaccinated**, **boosted,** OR received **second dose** of Pfizer/Moderna within past **5** months, OR received **J&J** vaccine within past 2 months (i.e., **not** booster eligible):
  - **No** need to **quarantine**.
  - Wear face covering for **10** days.
  - Test on **Day 5** (recommended).

- Cal/OSHA differs: If asymptomatic: **fully vaccinated** (but **not** booster-eligible) or **boosted**:

Test on **Day 5**. If can't test on **Day 5**, need not be excluded from workplace if:

1. Wear a face covering at the workplace for 14 days following the last date of the close contact.
2. Maintain six feet of distance from others at the workplace for 14 days following the last date of close contact.
3. Receive information from the employer about any additional applicable precautions from the CDPH.

- Cal/OSHA differs: If asymptomatic: For close contacts who are **fully vaccinated**, but **not yet boosted though booster eligible**:
  - No need to quarantine **if can test negative on Day 3-5**.
  - Must wear mask for 10 days post exposure.

CDC Quarantine Guidance and Cal/OSHA ETS (Close Contacts)

- If asymptomatic: For close contacts who are **unvaccinated** or those who are **more than 5 months out** from their **second** mRNA dose (or more than 2 months after the J&J vaccine) **and** not yet boosted:
  - CDC recommends **quarantine** for **5** days followed by strict mask use for **an additional 5 days**.
  - If unable to quarantine, must wear mask for **10** days.
  - Test negative on **Day 5** (recommended).

- Cal/OSHA differs: if asymptomatic: For close contacts who are **unvaccinated**:
  1. Follow CDC guidelines.
  2. Wear face covering for 10 days following exposure.
  3. Test negative on **Day 5**. If can't test on Day 5, quarantine for 10 days.

CDC and Cal/OSHA ETS – Symptomatic (Close Contacts)

- **CDC:** Regardless of vaccination status, if **symptoms** occur, individuals should immediately quarantine until a negative test on **Day 5** confirms that symptoms are not attributable to COVID-19. Wear a well-fitting mask around others for a total of **10** days.

- **Cal/OSHA:** Same.

Cal/OSHA/CDPH – What's New?

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Early Challenges to Cal/OSHA ETS Failed

- Cal/OSHA ETS applies to all employers, employees, and to all places of employment, with the following exceptions:
  - Work locations where there is only one employee who does not have contact with other people.
  - Employees who are working from home.
  - Employees working from a location chosen by the employee, which is not under the control of the employer (for instance, an employee teleworking from a café or a friend's home).
  - Employees who are covered by the Aerosol Transmissible Diseases regulation.
- Most controversial: mandate that employers continue and maintain an employee's earnings, seniority, and all other employee rights and benefits for employees **excluded from the workplace under the ETS regulations** unless the employee was unable to work for other reasons or the employer could demonstrate that the COVID-19 exposure was not **work-related**.
  - Various business groups challenged portions of the ETS in state court in San Francisco.
  - Court denied preliminary injunction to stay ETS.
  - Exclusion pay *may* expire on April 14, 2022.

Cal/OSHA ETS – Face Coverings

- Cal/OSHA: follow California Department of Public Health:
  - All employees must where face coverings when indoors through February 15, 2022.
  - Note stricter requirement in Los Angeles County: Employers must both provide and require "a well-fitting medical grade mask, surgical mask, or higher-level respirator, such as an N95 filtering facepiece respirator or KN95" beginning January 17, 2022.
- Face Coverings
  - Employees who are exempted from wearing a face covering due to a medical or mental health condition or disability and cannot wear a non-restrictive alternative must physically distance at least **6** feet from others and either be **fully vaccinated** or **tested** at least weekly for COVID-19.
    - Testing must occur during paid time and at no cost to the employee.

Cal/OSHA ETS – Testing/Costs of Testing

- Testing/Costs
  - Employers are required to make COVID-19 testing available at no cost and during paid time to employees who are fully vaccinated if in "close contact" with a COVID-19 case, regardless if symptomatic or asymptomatic.
    - Previously only those who were unvaccinated and symptomatic.
  - During outbreaks (3 or more cases in a 14-day period) and major outbreaks (20 or more cases in a 30-day period):
    - Employers must make weekly testing available for outbreaks, and
    - Employers must make twice-weekly testing available for major outbreaks.
    - Doesn't matter if symptomatic or asymptomatic.

SB 606: Expanding Cal/OSHA Citations

- Currently, Cal/OSHA may impose various penalties to employers for violating state occupational safety or health standards. These violations are currently categorized as follows: serious, uncorrected, willful, and repeated.
- SB 606 adds two additional categories to these violations:
  - "Egregious" violations: Cal/OSHA can issue these egregious violations in several scenarios including, but not limited to, if the employer intentionally made no reasonable effort to eliminate violations, if the violations resulted in worker fatalities or a large number of injuries, and if the employer has an extensive history of similar violations.
  - "Enterprise-wide" violations: SB 606 creates a rebuttable presumption that an employer with multiple facilities commits an enterprise-wide violation if (1) the employer has a non-compliant written policy or procedure or (2) there is evidence of a pattern involving the same violations committed in more than one of the employer's worksites.
  - These citations carry heavy penalties that are similar to willful or repeated citations.
  - Bill also includes specified requirements for a stay of abatement pending appeal of these types of citations.
- Not just COVID-related.

CDPH: Booster Requirement for Healthcare Workers

- All employees who provide services in any healthcare facility.
- Includes employees:
  - who work in indoor settings where care is provided to patients, or where patients have access for any purpose, including employees serving in healthcare settings who have the potential for direct or indirect exposure to patients or SARS-CoV-2 airborne aerosols.
  - who are directly involved in patient care, and employees who are not directly involved in patient care but could be exposed to infectious agents that can be transmitted in the healthcare setting (e.g., clerical, dietary, environmental services, laundry, security, engineering and facilities management, administrative, billing, and other personnel or contractors).
- February 1, 2022: Last day to receive a booster shot (if 5 months since 2-dose vaccine; or 2 months since J&J); otherwise, must receive a booster no later than 15 days after the recommended time frame above for receiving the booster dose.
- Testing: If booster-eligible but not yet received booster (or cannot due to legitimate exemption), must be tested at least once weekly.

COVID-19

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AB 654: COVID-19 Exposure Notifications

- AB 654 clarifies and eases some of the language of AB 685, which became effective on January 1, 2021.
- AB 685 requires employers to notify employees, employers of subcontracted employees, and representatives of employees (unions) of potential COVID-19 exposures at the workplace.
- AB 654 clarified exposure notifications:
  1. Employers must provide information about COVID-19-related benefits **only** to all employees who were on the premises at the same worksite as the positive case. This includes COVID-19-related leave, company sick leave, state-mandated leave, and supplemental sick leave.
  2. Employers' obligation to notify employees of the cleaning and disinfection plan now **only** involves employees who were present at the worksite with the positive case.
  3. Deadline change: Employers must notify local public health agencies of worksite outbreaks within 48 hours or one business day, whichever is later.
  4. The definition of "worksite" does not apply to buildings, floors, or other employer locations that a positive case did not enter; locations where the workers worked by themselves without exposure to others; or alternative work locations chosen when working remotely.
- Cal/OSHA adopted these requirements.

SB 93: Rehiring Workers Displaced Due to COVID-19

- Applies to (certain) hotels, private clubs, event centers, airport hospitality, airport service providers, and janitorial, building maintenance, or security service providers.
- Employers must offer their laid-off employees in writing of all job positions that become available for which the laid-off employees are qualified within five days of establishing the position.
  - Laid-off employees are those who were employed by the employer for 6 months or more in the 12 months preceding January 1, 2020 and whose most recent separation was due to a reason related to the COVID-19 pandemic.
- 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.
- The employee must have at least five business days to accept or decline the offer.
- Employers must retain specified records for at least three years.
- There is a notification requirement for an employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee.
- Expires December 31, 2024.

Supplemental COVID-19 Paid Sick Leave

- California COVID-19 supplemental paid sick leave has expired. But several local COVID-19 sick leaves remain:
  - LA City COVID paid sick leave – 500+ employees in LA or 2,000+ in the US
  - LA County COVID paid sick leave – no employee threshold – only unincorporated areas of LA
  - LA County paid vaccine leave – only unincorporated areas of LA
    - No employee threshold; recover from side effects of vaccine
    - Full-time employees must be provided with up to 4 hours per vaccine injection and up to 8 hours to recover from any vaccination-related side effect; Part-time employees are entitled to a prorated amount.
  - Long Beach COVID paid sick leave – 500+ employees
  - Oakland COVID paid sick leave – all sizes (but fewer than 50 employees are exempt)

COVID-19 Related Litigation

The Rise of Employment Claims Related to COVID-19

- As of January 14, 2022, over 3672 cases have been filed in court relating to COVID-19.
  - This does not include agency filings or union grievances.

Type of Claim

- Wrongful Termination (1157)
- Workplace Conditions (520)
- Discrimination (1466)
- Leaves of Absence (327)

State Claim Filed In

- California (1003)
- New Jersey (423)
- Florida (243)
- New York (242)

Industry

- Healthcare (717)
- Manufacturing (201)
- Hospitality (226)
- Essential Retail (166)

COVID-19 Related Litigation

- California is leading the way with at least 1,003 cases filed relating to COVID-19 employment issues
- Runner ups: New Jersey (423), Florida (243), New York (242)
- Most common complaints:
  - Discrimination (1,466)
  - Wrongful termination (1,157)
  - Retaliation for making complaints about workplace conditions (520)
  - Leaves (327)
- Top Industries Affected by Litigation:
  - Healthcare (717), Hospitality (226), Manufacturing (201), and Essential Retail (166)

Wage and Hour

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Donohue v. AMN Servs., LLC

- Factual background: A healthcare staffing company rounded employee time punches to the nearest 10-minute increment, which meant that meal breaks could have been recorded as 30 minutes long or starting within the first five hours, but in reality, the break could have been shorter or "late."
- For example: If an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:26 a.m., the employer would have recorded the time punches as 11:00 a.m. and 11:30 a.m.

First Key Holding: No Time-Rounding for Meal Breaks

1. Employers cannot engage in the practice of rounding time punches. Rounding time punches for employee meal periods "is not consistent with the purpose of Labor Code provision providing for premium pay for shortened or missed meal periods." The practice is incompatible with the overall objective of preventing even minor infringements on meal period requirements.

Second Key Holding: Employer's Burden to Prove Compliant Meal Breaks

A time record showing a late, short, or unrecorded meal break creates a rebuttable presumption that a meal-break violation occurred and that a meal premium is owed.

1. The presumption places the burden on the employer "to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods."
2. An employer can rebut the presumption "by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work." The latter evidence would need to show that employees voluntarily chose to work during meal periods recorded as short or delayed.

Ferra v. Loews Hollywood Hotel, LLC

- Factual background: Plaintiff, a bartender, was paid an hourly wage and received quarterly nondiscretionary incentive payments (bonuses). However, in instances where plaintiff was to be compensated for noncompliant meal or rest breaks the employer paid the plaintiff meal and rest period premiums solely at her hourly rate.
- **Key Holding**: The "regular rate of compensation" in Section 226.7(c) has the same meaning as "regular rate of pay" in the context of overtime premium pay. Under California law and the Fair Labor Standards Act (FLSA), an employee's "regular rate" for overtime purposes must be calculated using both hourly wages and other nondiscretionary wage payments, such as nondiscretionary bonuses, commissions, and shift differentials.
- **Takeaway**: Employers with nonexempt employees whose compensation includes nondiscretionary payments such as bonuses, commission, shift differentials, and other incentive pay should ensure that the hourly rates used to pay meal, rest, and recovery period premiums are the same as the higher "regular rate" used to calculate overtime pay.
- **Important Note: *This decision applies retroactively***

Levanoff v. Dragas

Issue: How do you properly calculate the "regular rate of pay" to determine the amount of overtime due to a non-exempt employee when they are paid more than one hourly rate across a single pay period?

- **Two Methods:**
  - Weighted Average Method (California Division of Labor Standards Enforcement Proposed Method): Where two rates are paid during a workweek, the California method for determining the regular rate of pay for calculation overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid. This rate is established by adding all hours worked in the week and dividing that number into the total compensation for the week.
  - Rate-in-Effect Method (Fair Labor Standards Act Method): Employers may pay employees no less than 1.5 times the applicable hourly rate for each type of work they perform. The regular rate depends on what rate was "in effect" when the employee worked the overtime.

The court held that California law did not mandate the use of the weighted average method, and defendants' dual rate employees, including plaintiffs, overall received net greater overtime pay under the rate-in-effect method than they would have received under the weighted average method.

- **Takeaway**: DLSE's opinions are not binding, and the weighted average method is perhaps not the only way to calculate overtime rates for "dual-rate employees."

AB 701: Regulating Quotas in Warehouse Distribution Centers

- AB 701 applies to all employers who have 100 or more employees at a single warehouse distribution center or 1,000 or more employees at multiple warehouse distribution centers in the state.
- This law governs **employee quotas**. Quotas include any work standards tied to speed, quantified number of tasks, or quantified number amount of material within a defined period of time. Quotas are usually tied to an adverse employment action if unfulfilled.
- AB 701 provides two new requirements tied to employee quotas:
  - First, employers must now disclose to employees upon hire (1) the exact description of each quota and (2) any potential adverse employment actions tied to the quotas.
  - Second, employers may not take any adverse employment actions on any failure to meet certain quotas that prevent compliance with Labor Code violations, OSHA standards, and the use of bathroom breaks for employees. If an employee believes that meeting a quota caused any of the above violations, the employee is entitled to written descriptions of each quota applicable to them and his/her own personal work speed data over the last 90 days.

AB 1003: Wage Theft Can Be Punishable as Grand Theft

- AB 1003 makes an employer's intentional theft of wages or gratuities in an amount greater than $950 for one employee or $2,350 for two or more employees, and in any 12-consecutive month period where such theft is "by unlawful means" with knowledge that the wages are due, punishable as grand theft.
  - Wages includes benefits or other compensation.
  - Independent contractors are included within the meaning of "employee."
  - Hiring entities of independent contractors are included within the meaning of "employer."
- Thus, AB 1003 increases the penalty for a crime and creates California Penal Code Section 487(m).
- Prosecutors now have the authority to decide whether to charge an employer with a misdemeanor (imprisonment in a county jail for up to 1 year) or felony (imprisonment in county jail for 16 months or 2 or 3 years), by a specified fine, or by a fine and imprisonment.

SB 62: Increased Liability for Garment Manufacturers and Brand Guarantors

- SB 62 prohibits employers from paying employees engaged in garment manufacturing (including dyeing, altering a garment's design, and affixing a label to a garment) to be paid by the piece or unit, or by piece rate. The law requires such employees to be paid at an hourly rate not less than the applicable minimum wage.
- SB 62 also creates liability for a "brand guarantor," which is defined as "any person contracting for the performance of garment manufacturing."
  - "[A] garment manufacturer, contractor, or brand guarantor who contracts with another person for the performance of garment manufacturing operations **shall be jointly and severally liable** with any manufacturer and contractor who performs those operations for the garment manufacturer or brand guarantor" for wage and hour violations under the statute, reasonable attorney fees, and civil penalties.
- The bill imposes compensatory damages of $200 per employee against a garment manufacturer or contractor, payable to the employee, for each pay period in which each employee is paid by the piece rate.
- Additionally, the law creates a rebuttable presumption that the brand guarantor or garment manufacturer is liable in a claim filed with the Labor Commissioner to recover unpaid wages and penalties where an employee has provided the Labor Commissioner with labels or other information that the commissioner finds credible relating to the identity of any brand guarantor or garment manufacturer.
- The law also imposes a recordkeeping requirement on employers engaged in the business of garment manufacturing and brand guarantors to keep all contracts, invoices, purchase orders, work orders, style or cut sheets, and any other documentation pursuant to which garment manufacturing work was, or is being, performed for four years.

SB 572: Lien on Real Property (Labor Code 98.8)

- Currently, Labor Code Section 98.2 allows the Labor Commissioner to record a certificate of lien on real property for amounts due under a final order in favor of an employee.
- SB 572 expands on that by creating Labor Code 98.8, which would allow the Labor Commissioner to record a lien on real property to secure amounts based not only under a final order, but all types of final findings and decisions such as **citations**.
- The lien shall continue until ten years from the date of its creation and can be renewed for additional periods of 10 years.

CA Minimum Wage

- Large employers (25 or more) = $15
- Small employers (under 25) = $14
- Exemption salary threshold (large employers) = $62,400

Labor Code 515.5: Salary Increase for California Computer Professional Exemption

- The California Department of Industrial Relations (DIR) issued a memo on October 18, 2021 increasing the compensation threshold for exempt computer professionals by 5.3% compared to the 2021 rates, based on a commensurate increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.
- Starting January 1, 2022, California employers must pay their computer professional employees a salary of at least $104,149.81 annually ($8,679.16 monthly) or an hourly wage of $50.00 for every hour worked in order to remain exempt from paying such employees overtime compensation.
  - Note that the California exemption differs from the federal one.
  - With respect to the federal exemption for employees in computer-related occupations under the Fair Labor Standards Act (FLSA), the US Department of Labor (DOL) lists a salary-level threshold of $684 per week ($35,568 per year).

PAGA

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PAGA – Standing to Pursue PAGA Claim

Magadia v. Wal-Mart Assoc., Inc. (9th Cir. 2021)

- The trial court decertified a meal break class because the named plaintiff suffered no violation, but permitted the plaintiff to pursue PAGA claim under *qui tam* doctrine.
- Post-trial appeal, the 9th Circuit held that the plaintiff lacked Article III standing (federal court) to pursue a meal break claim.
- The 9th Circuit also reversed a $96M judgment on the wage statement claim because Wal-Mart's retro OT adjustment on its quarterly bonus was not an hourly rate "in effect" during the pay period for purposes of Section 226(a)(9).

Santos v. El Guapo Tacos, LLC (6th Dist. – Nov. 20, 2021)

- Judgment on the pleadings based on an inadequate pre-filing PAGA notice letter that did not mention intent to pursue a claim on behalf of other employees.
- Reversed: no need for PAGA notice letter to expressly state intent to pursue a claim on behalf of others, especially when PAGA is representative by nature. Context of factual allegations in letter suggested systemic issues.

PAGA – Standing to Appeal/Intervene in Other PAGA Plaintiff's Settlements (Reverse Auction)

Amaro v. Anaheim Arena Mgmt., LLC (4th Dist. – Sept. 28, 2021)

- Nothing "inherently wrong" with later-filed case serving as settlement vehicle.
- Nothing in PAGA "prevents [plaintiff] from releasing claims outside the limitations period of her own claim."

Turrieta v. Lyft, Inc. (2nd Dist. – Sept. 30, 2021)

- Denial of intervention affirmed; no standing to appeal.
- "We are not persuaded that appellants' role as PAGA plaintiffs confers upon them a personal interest in the settlement of another PAGA claim."

Uribe v. Crown Bldg. Maint. Co. (4th Dist. – Sept. 30, 2021; modified Oct. 26, 2021)

- Settlement expanded reimbursement claim – only uniforms in PAGA letter; added cell phones in settlement.
- Sept. 30 Order: injury due to investment of "substantial time and resources" in pursuing her own PAGA cause of action.
- Oct. 26 Order (after considering *Turrieta*): injury due to inability to opt-out, and trial court permitted intervention.

PAGA – "Manageability" Requirement

Wesson v. Staples the Office Superstore, LLC (2nd Dist. – Sept. 9, 2021)

- PAGA claim that store GMs were misclassified as exempt.
- Defense filed a motion to strike PAGA as unmanageable: GM positions are not standardized; variation in non-exempt tasks across stores; many variables unique to each store and GM.
- Plaintiff agreed that trial would require mini-trials for each GM, but argued only prima facie case matters, not affirmative defenses (e.g., 6 days per GM = 8-year trial).
- Defense motion to strike PAGA claims as unmanageable was granted.

Holding:

(1) trial courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable;

(2) as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a trial court's manageability assessment should account for them; and

(3) given the state of the record and plaintiff's lack of cooperation with the trial court's manageability inquiry, the trial court did not abuse its discretion in striking his PAGA claim as unmanageable.

Discrimination

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Pollock v. Tri-Modal Distrib. Serv., Inc., 11 Cal. 5th 918 (2021)

- Holding: The statute of limitations for a failure to promote claim brought under the harassment provision of the Fair Employment and Housing Act (FEHA) begins to run at the point when an ***employee knows or reasonably should know*** of the employer's allegedly unlawful refusal to promote the employee.
- Background: Plaintiff, a customer service representative, dated the executive VP for 2 years. Plaintiff ended relationship and alleged that after she refused to have sex with the VP, Tri-Modal and the VP denied her a series of promotions even though she was most qualified candidate.
  - Gave promotion to co-worker.
- Procedure: On April 18, 2018, Plaintiff filed DFEH claim alleging that Tri-Modal and the VP had subjected her to quid pro quo sexual harassment. At that time, law provided that DFEH complaint must be filed within one year "from the date upon which the alleged unlawful practice . . . occurred." ***NOTE: current FEHA now permits individuals to file administrative complaints within 3 years.***
- Lower courts held that failure to promote Plaintiff "occurred' when Co-worker accepted promotion in March 2017 even though promotion didn't take effect until May 1, 2017 (granted MSJ).
- CA Supreme Court reversed, holding SOL runs when Plaintiff ***knew or reasonably should have known*** of the adverse promotion decision. SOL is affirmative defense so burden of proof is on defendants to show when Plaintiff knew/should have known. Record was devoid of those facts so remanded to the lower court for further proceedings.

Maner v. Dignity Health, 9 F.4th 1114 (9th Cir. 2021)

- Holding: An employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] sex" under Title VII.
- Facts: Maner worked as a biomedical design engineer in the obstetric and gynecological laboratory of Dr. Robert Garfield for several decades. Shortly after he joined the lab, Maner learned that Garfield and another researcher (Dr. Leili Shi) were engaged in a long-term romantic relationship. After Maner's position was eliminated based upon poor performance and his lab's lack of funding, he filed a complaint alleging Title VII sex discrimination in which he asserted that Dignity Health had protected Shi (a female) from the impact of reduced lab funding by terminating Maner (a male); Maner also alleged unlawful retaliation for protesting Garfield's "favoritism" toward Shi at the expense of other employees.
- "Paramour preference" claims posit that an employer engages in sex discrimination when there is workplace favoritism toward a supervisor's sexual or romantic partner. Such claims are not cognizable under Title VII's prohibition on sex discrimination.
- Title VII does not prevent employers from favoring employees because of personal relationships as long as such favoritism is not based on an impermissible classification.
- The statutory term "sex" does not encompass sexual *activity* between persons or romantic relationships between persons.
- *May be decided differently under CA law.

Wilkin v. Community Hospital, 2021 WL 5371427 (2021) (ordered published)

- Facts:
  - Long-time employee nurse had a documented history of absenteeism issues in years leading to termination. Numerous coachings and warnings issued.
  - After receiving complaint about nurse, internal investigation confirmed that nurse had improperly documented medication and controlled substances, in violation of hospital policies.
  - Decision was made to terminate the nurse's employment.
  - Nurse had taken leave of absence due to health.
- Complaint: Employee filed lawsuit for disability discrimination, violation of CFRA, wrongful termination, retaliation, unlawful denial of medical leave, and similar claims.
- Holding: Court granted summary judgment in the hospital's favor. Undisputed evidence presented that the employee had violated policies governing the handling of medication and had been regularly counseled for chronic absenteeism for more than a year leading up to termination. Plaintiff presented no evidence that decision was pretextual.

SB 807: DFEH Procedural Changes

- SB 807 adds procedural changes to DFEH's enforcement of California's civil rights laws, including the Fair Employment and Housing Act (FEHA). Here are some noteworthy changes:
  - The statute of limitations for individuals filing civil actions in courts based on civil rights violations is now tolled until either the DFEH files a civil action or one year after the DFEH issues written notice to the complainant that it has closed its investigation and elected not to file a civil action.
  - DFEH may now take up to two years to complete its investigation and issue a right-to-sue notice for a complaint treated as a group/class complaint.
  - The record-retention obligations for employers are now four years (instead of two) for all applications, personnel, membership, or employment referral records and files. This includes maintaining personnel files of applicants or terminated employees for up to four years after the date of the employment action taken.
  - If the DFEH brings a civil action against an employer involving class or group allegations, it may do so in any county in the state.

Confidentiality

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SB 331: Settlement Agreements

- Settlement Agreements (post civil or administrative action): SB 331 prohibits preventing and restricting the disclosure of factual information regarding workplace harassment/discrimination related to a claim filed in a civil action or a complaint filed in an administrative action.
- Acts of workplace harassment or discrimination, including not based on sex are now part of the information which employers cannot prevent disclosure of.
- Agreements can still bar the disclosure of the amount paid in settlement of a claim.
- The parties can include a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court*, at the request of the claimant* (provided that a government agency or public official is not a party to the settlement agreement).

SB 331: Non-Disparagement Agreements/No FEHA Release

- It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either:
  - Require employee to sign a release of a claim under FEHA (harassment or discrimination); or
  - Require employee to sign non-disparagement agreement/other document denying employee the right to disclose information about unlawful acts in the workplace.
- SB 331 requires specific language for a non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace:
  - ***"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."***

SB 331: Separation Agreements

- Severance/separation agreements:
  - Cannot prohibit the disclosure of information about unlawful acts in the workplace
  - Include: ***"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."***
  - Include: Employer must advise employee of the right to consult an attorney regarding the agreement and that employee has a period of not less than 5 business days to do so.
  - Employees can sign separation agreement before 5 business days if:
    - Employee's decision to accept such shortening of time is **knowing and voluntary** and is **not induced** by the employer through **fraud, misrepresentation, or a threat to withdraw** or alter the offer prior to the expiration of the reasonable time period, or by providing **different terms** to employees who sign such an agreement prior to the expiration of such time period.

- Does not apply to "negotiated settlement agreement" to resolve an underlying claim.
- Does not prohibit inclusion of general release of claims.
- Does not prohibit employers from protecting trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

Policies

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All of Us or None – Riverside Chapter v. Hamrick, 64 Cal. App. 5th 751 (2021)

- **Facts:** Plaintiffs filed an action against the Riverside County Superior Court and others, alleging that court records had been improperly maintained, namely that records of prior marijuana-related offenses hadn't been destroyed as mandated by a preexisting statute.
  - Also at issue was that users of the Riverside Superior Court's public website could search the court index by inputting personal identification such as date of birth or driver's license number (allegedly a violation of California Rules of Court, Rule 2.507).
- **Holding:** The court held that allowing the public to search an electronic index by inputting an individual's **known date of birth** or **driver's license number** constitutes a violation of Rule 2.507.
- **Implication:** The holding invalidates public records searches by use of Date of Birth, Driver's License Number, or other Personally Identifiable Information.
  - Where records might match others, e.g., two people have the same first or last name, it has become increasingly difficult, if not impossible, to distinguish between individuals' records.

AB 1033: Family Care and Medical Leave for Parent-in-Laws; Mediation Program for Small Employers

- The California Family Rights Act (CFRA) allows eligible employees with up to 12 weeks of unpaid, job-protected leave to care for their own serious health condition or a family member with a serious health condition, or to bond with a new child.
- AB 1033 expands family care and medical leave under the CFRA to include leave to care for a **parent-in-law**.
- Additionally, AB 1033 provides further information and procedural requirements regarding the small employer family leave mediation pilot program applicable to employers with 5 to 19 employees.
  - The program requires an employee of an employer with 5 to 19 employees to pursue mediation prior to filing a civil action for their employer's alleged violation of the CFRA, unless neither the employee nor employer requests mediation within the time allotted by the statute.

Arbitration

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SCOTUS Has Granted Certiorari to the Following:

- *Viking River Cruises, Inc. v. Angie Moriana*
- Question presented:
  - Whether the Federal Arbitration Act (FAA) requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.
  - In other words: Does the FAA preempt CA law prohibiting PAGA waivers?
  - Recommend: Updating arbitration agreements to remove carve out for PAGA claims (but keep collective waiver language severable).

Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021)

- Holding: California's prohibition of mandatory arbitration of Fair Employment and Housing Act (FEHA) and Labor Code claims as a condition of employment—even if including an opt-out provision—is not preempted by the Federal Arbitration Act (FAA). But the civil and criminal penalties prescribed by Sections 433 and 12953 are preempted by the FAA because they punish employers for the act of executing arbitration agreements.
- Reasoning: Labor Code Section 432.6 merely regulates *pre-agreement* employer behavior and does not invalidate or render unenforceable executed arbitration agreements governed by the FAA.
- Dissent: Majority's decision is inconsistent with California contract law, US Supreme Court precedent, and other circuits' precedent.
- Current Status: On October 20, 2021, Chamber of Commerce petitioned for rehearing en banc. As the Ninth Circuit has yet to issue a formal mandate, the district court's injunction remains in effect.

Garner v. Inter-State Oil Company, 52 Cal.App.5th 619 (2020)

- Holding: Based on language in the arbitration agreement, the parties had agreed to arbitrate the wage and hour claims on a *class* basis.
  - The Court relied on two sentences from the agreement:
    - "[Y]ou and Inter-State Oil Co. agree that any and all claims arising out of or related to your employment that could be filed in a court of law, **including, but not limited to, claims of . . . class action** shall be submitted to final and binding arbitration, and not to any other forum."
    - "This Arbitration Agreement Is A Waiver Of All Rights To A Civil Jury Trial Or Participation In A **Civil Class Action Lawsuit** For Claims Arising Out Of Your Employment."
  - The Court found that the word "**lawsuit**" generally refers to **court actions**, and that courts have distinguished lawsuits and arbitration. Inclusion of the term "lawsuit" only prohibited the plaintiff from filing class actions in court.

Alvarez v. Altamed Health Servs. Corp., 60 Cal. App. 5th 572 (2021)

- Challenge to Validity of Arbitration Agreement: Argument against enforcement was that agreement was not signed by employer. Provision of the employment offer which required the CEO's signature for any modifications to the at-will status of the employee, did not apply to every modification to the agreement.
- Procedural Unconscionability Challenges:
  - Plaintiff preferred that the agreement be provided in Spanish.
  - Employer did not provide a copy of the applicable arbitration rules.
  - Agreeing to arbitrate dispute was condition of employment.
- Substantive Unconscionability Challenge:
  - Appeal provision provided that either party could seek appellate review of an arbitration award by a second arbitrator.
  - But in practice only the employer was likely to do so, thus "unilaterally adding costs and time to the arbitration proceeding by seeking this review and thereby maximizing the employer's status as the better resourced party."
  - The court found the provision unconscionable but severed it and enforced the agreement because it was the only substantively unconscionable element of the agreement, and the agreement contained a severability provision.

SB 762: Speeds Up Arbitration Cases

- Requires consent from all parties before the adjustment of deadlines for the payment of fees and costs due to the arbitrator during the pendency of the arbitration.
- Requires an arbitration provider to issue an invoice for any fees and costs to all parties and specify the final due date of the initiation fees as soon as a worker or consumer completes their filing requirements.
- Seeks to prevent employers from slowing down arbitration cases by withholding payment of arbitration fees.
- If no time frame for payment of an arbitration invoice is established in the agreement, payment is ***due upon receipt***.
- If employer does not pay the arbitration fees within 30 days of the date they are due, employer is in breach of the agreement, in default of arbitration, and ***waives its right to compel arbitration***. Other sanctions can also apply.
- Recommend: Include date in arbitration agreement when arbitration fees/costs are ***due,*** and never exceed due date by 30 days.

Independent Contractor

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California Trucking Association v. Bonta, 996 F.3d 644 (2021)

- The Ninth Circuit held that California's independent contractor statute, AB-5, is not preempted by a federal statutory exemption which covers **prices, routes, or services** of motor carriers.
- The Ninth Circuit held that "AB-5 is a generally applicable labor law that affects a **motor carrier's relationship with its workforce** and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carrier" implicated by the federal law.
- The ABC test has 3 factors which, if not each satisfied, means the worker is an employee not a contractor: (A) individual is free from control and direction in connection with the performance of the service, both in contract and in fact; **(B) the service is performed outside the usual course of the business of the employer**; and (C) individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
- Without federal preemption, effectively all truck drivers should be classified as employees rather than independent contractors because they are performing under the usual course of the company's business, namely, hauling goods, and therefore could never satisfy "B" of the ABC test.
- Cert. with Supreme Court filed.

AB 1506: Employees and Independent Contractors: Newspaper Distributors and Carriers

- AB 1506 extends the exemption to the ABC test until January 1, 2025 for newspaper distributors working under contract with a newspaper publisher or a newspaper carrier.
- Accordingly, the determination of employee or independent contractor status for individuals in those occupations shall be governed by *Borello*.
- Every newspaper publisher or distributor that hires or directly contracts with newspaper carriers will be required to submit the following information to the Labor and Workforce Development Agency on or before March 1, 2022; March 1, 2023; and March 1, 2024:
  - The number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year.
  - The average wage rate paid to carriers classified as independent contractors and as employees.
  - The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law.
- *Becerra v. McClatchy Company* (Cal. Ct. App., Sept. 30, 2021, No. F074680) 2021 WL 4472635: Appellate court reversed trial court for not applying *Borello* test to newspaper carriers.

SB 727: Extended Liability for Direct Contractors

- Prior to SB 727, direct contractors for private construction contracts under Labor Code 218.7 were liable for any unpaid wages and benefits due to the employees of **subcontractors**; however, direct contractors were not liable for penalties or liquidated damages.
- For contracts entered into on or after January 1, 2022, SB 727 extends direct contractors' liability to include **penalties, liquidated damages, and interest** due to employees of subcontractors on account of the performance of the labor.
- The Division of Labor Standards Enforcement (DLSE) is required to notify the contractor and the subcontractor on a private work project within 15 days after receipt of complaint for failure of a subcontractor to pay wages or benefits due to subcontractor's employees.

Miscellaneous

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SB 657: Electronic Documents Distribution

- SB 657 provides that in any instance in which an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached.
- Bill does not alter the employer's obligation to physically display the required posting.
- Codified as Labor Code section 1207.

AB 286: Food Delivery Purchase Prices and Tips

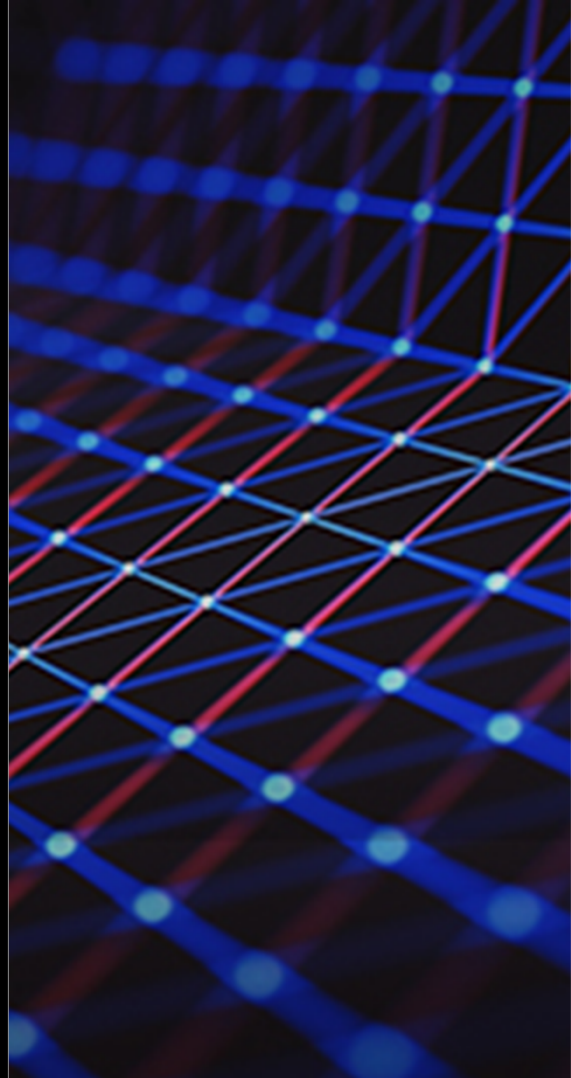
- AB 286 makes it unlawful for a food delivery platform to charge a customer any purchase price for food or beverage that is higher than the price posted on the food delivery platform's website by the food facility at the time of the order.
- A food delivery platform must pay any tip or gratuity for a delivery order, in its entirety, to the person delivering the food or beverage.
- A food delivery platform must also pay any tip or gratuity for a pickup order, in its entirety, to the food facility.
- A food delivery platform must disclose to the customer and to the food facility an itemized cost breakdown of each transaction which includes the following information:
  - (1) The purchase price of the food and beverage.
  - (2) A notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, unless the food facility directs that the food delivery platform disclose to customers the delivery fee charged to the food facility and each fee, commission, or cost charged to the food facility.
  - (3) Each fee, commission, or cost charged to the customer by the food delivery platform.

Coronavirus/ COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



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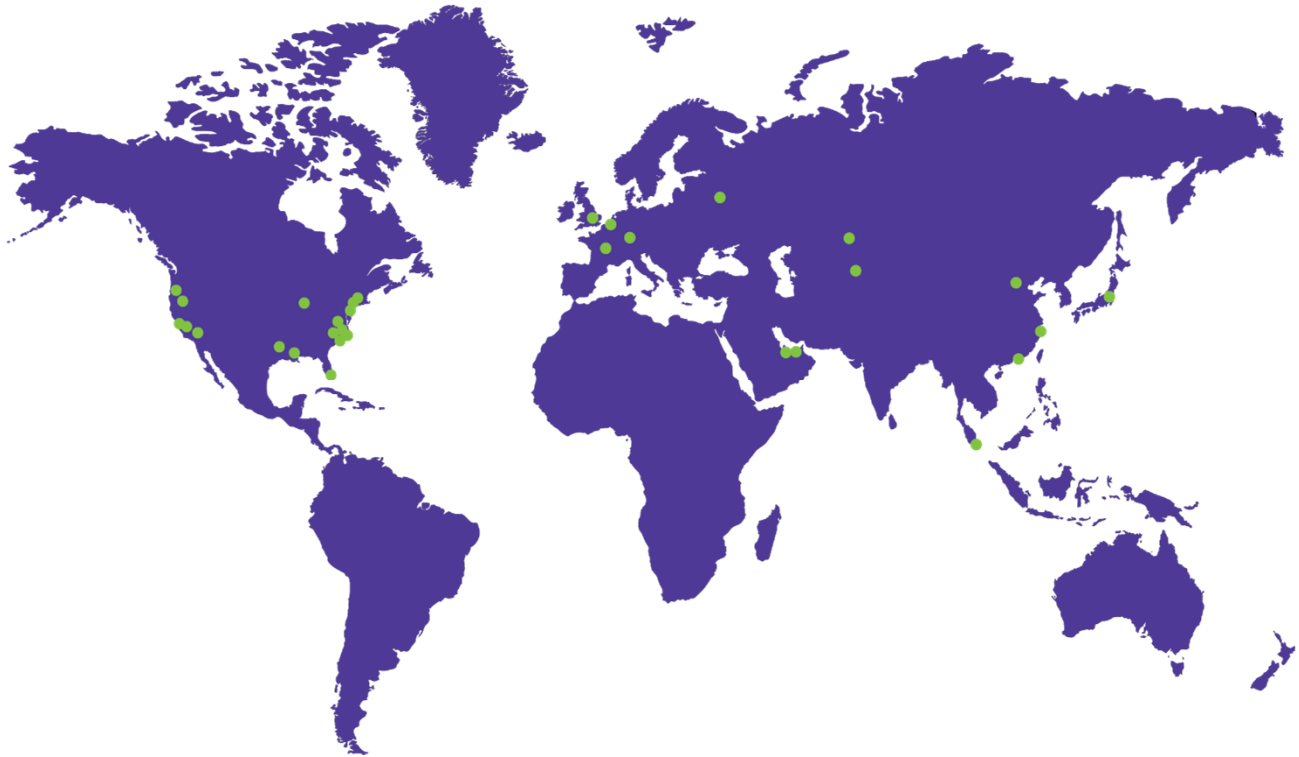

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THANK YOU