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2022 RECAP: CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

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Agenda

- Wage and Hour
- PAGA
- Discrimination
- Leaves
- Arbitration Agreements
- Pay Transparency
- Privacy
- COVID-19
- Restrictive Covenants
- Miscellaneous

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Wage and Hour

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Wage Statements: *Meza v. Pacific Bell Telephone Co.*, 79 Cal. App. 5th 1118 (June 17, 2022)

- Plaintiff alleges that employer violated Labor Code wage statement requirements by not including "rate" and "hours" for overtime true-up payments.
  - Payments were additional overtime wages paid for performance bonuses earned in earlier pay periods.
- Affirmed summary judgment in favor of employer, holding that employer did not violate Labor Code section 226(a) by failing to include wage rate and hours worked for overtime true-up payments.
- Consistent with Ninth Circuit's earlier ruling in *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021).

Applicants (Time and Expenses): *Johnson v. WinCo Foods, LLC*, 37 F.4th 604 (9th Cir. 2022)

- Putative class action on behalf of job applicants seeking wages and reimbursement of expenses for time and travel expenses for *pre-employment* drug tests.
- Ninth Circuit rejected plaintiff's theory that employer's control over pre-employment drug tests converted applicants into "employees."
- Beware: Holding would not apply to drug tests during employment and *may* not apply to other pre-employment activities required by the employer.

Rounding: *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022)

- Timekeeping system tracked "actual" time punches by non-exempt employees to the minute but rounded total shift time to the nearest quarter-hour. For the plaintiff, over a 5-year period, this amounted to a 7-hour difference.
- Vacated summary judgment for employer, finding that there was a triable issue of fact on whether the plaintiff was paid for all time worked.
- Invited the California Court of Appeal to revisit its prior holding in *See's Candy Shops v. Superior Court*, 210 Cal. App. 4th 889 (2012), holding that neutral time rounding is lawful in California.
- Takeaways:
  - Neutral rounding (i.e., rounding up and down) may no longer be a viable defense.
  - Simplifying wage statements not accepted as a defense because there is "no provision in California law that privileges arithmetic simplicity over paying employees for all time worked."

Off the Clock: *Cadena v. Customer Connexx, LLC*, 51 F.4th 831 (9th Cir. 2022)

- Collective action for unpaid overtime for (1) all time call center workers spent booting up computers before logging onto the employer's timekeeping system, and (2) time spent turning off computers.
- The Ninth Circuit reversed trial court's finding that boot up time was non-compensable, holding that because the employees' duties could not be performed without turning on and booting up their work computers, those boot-up activities were integral and indispensable from their principal duties and compensable. The Ninth Circuit remanded the case to the district court to determine whether shutting down computers at the end of a shift is compensable under any other theory.
- The Ninth Circuit declined to address two arguments asserted by the employer: (1) that the pre-shift time was *de minimis*; and (2) that the employer should not be held liable because it was not aware of the alleged unpaid hours worked. Without ruling on either issue, the Ninth Circuit concluded these were "disputed factual questions" to be decided on remand.
  - Call center employees alleged it took anywhere from 6 to 20 minutes to turn on their computers and open timekeeping system and 4 to 8 minutes wrapping up and shutting down their computers.
- Takeaway: Given that it will be difficult to argue that a computer is not "integral and indispensable" to most employees' principal duties, consider having computers already turned on when employees arrive to work.

Off the Clock: Case to Watch - *Huerta v. CSI Elec. Contractors, Inc.*, 39 F.4th 1176 (9th Cir. 2022)

- The California Supreme Court will decide the following issues:
  - (1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, having security guards peer into the vehicle, and then exiting a security gate compensable as "hours worked?"
  - (2) Is time spent on the employer's premises in a personal vehicle, driving between the security gate and the employee parking lots, while subject to certain rules from the employer, compensable as "hours worked" or as "employer-mandated travel"?
  - (3) Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as "hours worked," when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement?

On-Premises Meal Breaks: *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022)

- A true "on-duty" meal break does not require payment of the meal premium. An "on-duty" meal period does not operate as a waiver, but rather requires employees to receive a meal break, though the break will be on-duty (and they will be paid their regular compensation for the break). "On-duty" meal breaks are only permissible where the nature of the work prevents the employee from being relieved of all duty during the meal period – legally speaking, this is a ***very difficult*** test to meet.
- Here, employees brought PAGA action against employer for purported meal and rest period violations. At issue was employer's on-premises meal policy which provided that (1) employees were relieved of all duty, (2) employees were paid wages during their 30-minute meal periods, and (3) employees were not free to come and go as they pleased.
- Holding: Employer's on-premises meal policy was not compliant with California law because it prevented employees from leaving the facility during their 30-minute meal periods. Thus, employees were entitled to premium pay for meal period violations.
  - California Supreme Court granted the employer's petition for review, but review is limited to the issue of whether class action manageability requirements apply to PAGA claims. There is currently a split of authority in California appellate decisions which we will cover when we review PAGA updates.
- Takeaway: Employers must afford employees uninterrupted 30-minute meal periods in which they are relieved of any duty and all employer control, and are free to come and go as they please.

Derivative Penalties for Meal Break Violations: *Naranjo v. Spectrum Sec. Servs.*, 13 Cal. 5th 93 (2022)

- Failure to pay meal break premiums triggers waiting time penalties and wage statement penalties.
- The California Supreme Court reasoned that meal break premiums are *wages* that must be reported on wage statements and paid out on termination.
- Takeaways:
  - Confirm that wage statements separately itemize break premiums, describe the payment accurately (identifying it as a premium for meal or rest breaks, as applicable), and list the total pay of premiums, the premium rate of pay (i.e., the regular rate), and how many hours of premiums are being paid.
  - Consider implementing additional compliance measures to prevent break violations (e.g., update policies, train managers on policies, include meal attestations in timekeeping system, review timecards for repeat offenders, etc.)

Class Certification (Predominance): *Bowerman v. Field Asset Services,* 39 F.4th 652 (2022) – Damages/Class Cert.

- *Bowerman* involved the alleged misclassification of independent contractors retained by the defendant to perform pre-foreclosure property preservation services.
- The district court granted partial summary judgment in favor of the class members, finding that they had been misclassified as independent contractors and that, as a result, FAS was liable to them for failing to pay overtime and business expenses.
- The Ninth Circuit reversed the district court's grant of class certification because the class had failed to show that damages could be determined *without excessive difficulty*. In addition, the Ninth Circuit reversed the partial summary judgment, and an award of attorneys' fees. Petition for en banc review filed; not decided yet.
- Takeaways:
  - Failure to establish either liability or resulting damages by common evidence precludes class certification. While a question about "the calculation of damages" might not be enough to defeat class certification, a question about "the existence of damages in the first place" could do so.
  - The ABC Test under both *Dynamex* and AB 5 does not apply to joint employment claims.
  - Prior to 2020 (AB 5's effective date), in federal court, *Borello* applies to Labor Code § 2802 expense claims for insurance, cellphone charges, and mileage/fuel.
  - However, judges in state court actions are not required to follow *Bowerman* and there is conflicting state court California authority, with some courts broadly holding that expense claims are subject to the ABC test, not *Borello*.

Settlement Did Not Release Staffing Agency: *Grande v. Eisenhower Medical Center*, 13 Cal. 5th 313 (2022)

- A nurse at Eisenhower Medical Center settled with her staffing agency employer, FlexCare, and then brought a second lawsuit against Eisenhower, which sought to bar the action, citing the release of claims executed in connection with the first lawsuit.
- The California Supreme Court held that because Eisenhower Medical Center was not named as a released party in the FlexCare [the staffing company] settlement with Grande, Eisenhower Medical Center could not use the settlement against FlexCare as a shield (res judicata) against Grande's subsequent claims.
- The Court further held that FlexCare and Eisenhower Medical Center did not have "an identity or community of interest" in the first lawsuit, and further that Eisenhower Medical Center and FlexCare could not rely on the indemnification provision in their contract or the agency relationship between them.
- Takeaway: Carefully review releases in joint employer and/or staffing agency situations and expressly include in release all intended released parties.

Individual Liability for Labor Code Violations: Labor Code Section 558.1

- Under Labor Code Section 558.1, any employer or other person acting on behalf of an employer who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, may be held liable for such violation. Section 558.1 was intended to discourage business owners from rolling up their operations, walking away from their debts to workers, and starting a new company.
- *Espinoza v. Hepta Run, Inc.*, 74 Cal. App. 5th 44 (2022): The court held that "an owner's or officer's approval of a corporate policy that violates the Labor Code is sufficient to find that individual *caused* the Labor Code violation within the meaning of section 558.1."
  - Evidence that the sole owner of the defendant-employer had approved the unlawful policy supported the trial court's finding that the owner was individually liable under the statute.

Suitable Seating

- ***Meda v. AutoZone, Inc.*, 81 Cal. App. 5th 366 (2022) – employee wins**
  - Reversed summary judgment in favor of employer because employer (1) had not advised its workers they could use a seat and (2) did not provide seats at the employee's work stations.
  - Continues to be difficult to win summary judgment in suitable seating cases because courts often find triable factual issues around whether an employer "provided" seats.
- ***LaFace v. Ralphs Grocery Co.*, 75 Cal. App. 5th 388 (2022) – employer wins**
  - Suitable seating claim brought against Ralphs on behalf of grocery store cashiers.
  - Affirmed judgment in favor of Ralphs after a bench trial, finding that the wage order did not require Ralphs to provide a seat to cashiers because it would have interfered with the cashiers' duties, such as scanning, reaching, pushing, bagging, handling items, and moving in and around the checkstands as well as performing other customer service duties when not checking out customers, such as running products back to their aisles and arranging checkstand lanes.
  - No right to a jury trial in a PAGA case.

Increased Minimum Compensation/IRS Mileage

- California law has increased the minimum wage starting January 1, 2023 by 3.5% to ***$15.50*** per hour, for all employees based on inflation. This increase will also impact the state exemption salary threshold, bumping it up to ***$64,480***.
- Computer Professionals: the California Department of Industrial Relations (DIR) increased the compensation threshold for exempt computer professionals by 7.6% starting on January 1, 2023.
  - To qualify for the California computer professional exemption, California employers must pay their computer professional employees a salary of at least $112,065.20 annually ($9,338.78 monthly) or an hourly wage of $53.80 every hour worked.
- "Hourly" Exempt Physicians: the DIR also has increased the minimum hourly rate of pay for exempt licensed physicians and surgeons from $91.07 to $97.99, effective January 1, 2023. Not exempt from meal periods.
- New IRS Mileage: 65.5 cents per mile driven for business use, up 3 cents from midyear increase in 2022.

Berkeley's New Fair Work Week Ordinance

- Berkeley's Fair Work Week Ordinance, effective November 2023, provides that:
  - Employers provide "good faith" advanced written notice of work schedules and schedule changes.
  - Employers provide 1-4 hours of "predictability pay" if employer changes schedule without notice.
  - Before hiring new employees, employers must offer the additional hours to *current* part-time employees, who then have 24 hours to accept the hours.
  - Employers must allow 11 hours between shifts unless employee agrees, in writing, to less. In that instance, premium pay is required.
  - Employees have the right to request a flexible work schedule, including, but not limited to, changes in shift start times, working part-time, or having a reduction in work duties.
  - Employers must post a notice of the Fair Work Week Ordinance, give written notice to current and new employees, and retain records for at least 3 years.
- Does not apply to exempt employees or those receiving a monthly salary of at least 2x minimum wage.
- Applies to businesses with 10+ employees in the City of Berkeley that are primarily engaged in certain industries (building services, healthcare, hotel, manufacturing, retail or warehouse services, restaurant, non-profit corporations) and that employ a certain number of employees globally, by industry.
- Other CA cities with similar ordinances: Emeryville, Los Angeles (eff. April 2023), San Francisco, San Jose, and Mountain View passed a new Wage Theft Ordinance effective January 1, 2023.

AB 257: Wages, Hours, Health & Safety Standards in the Fast-Food Industry

The "Fast-Food Accountability and Standards Recovery Act" or the "FAST Recovery Act."

- Creates a Fast Food Council to establish and authorize minimum wages, working hours, and health and safety standards for fast-food restaurant workers.
- **Minimum wage:** Authorizes a minimum wage of up to $22/hr. in 2023—an increase of $6.50/hr. from California's $15.50/hr. (then increases with Consumer Price Index).
- **No retaliation:** Prohibits fast-food restaurant operators from discharging or retaliating against any employee who has made a health/safety complaint or refused to perform work that employee believes would violate health/safety laws.
- Creates a private right of action for employees to seek reinstatement, treble damages, lost benefits, and attorney's fees and costs for violations.

AB 257: Injunction issued! Wages, Hours, Health & Safety Standards in the Fast-Food Industry, *Cont'd.*

- Save Local Restaurants submitted to county and state officials over 1 million signatures in support of a referendum on AB 257.

- On December 30, Save Local Restaurants filed suit to enjoin enforcement of AB 257 pending verification of the petition signatures. Court issued TRO.

- On January 13, 2023, the California Superior Court enjoined enforcement of AB 257, finding that the Coalition had a "very high likelihood" of succeeding on its claims and that implementing the law during the referendum verification process would create significant confusion and uncertainty.

- Injunction will remain in effect unless and until either: (1) State determines that the referendum petition contains a disqualifying number of invalid signatures, or (2) the referendum qualifies and voters ultimately approve of AB 257 in the 2024 election.

PAGA

California Labor Code Private Attorneys General Act (PAGA) authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations.

PAGA: Manageability

- ***Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021)**
  - In store manager misclassification case, trial court granted a motion to strike the PAGA claim as "unmanageable" because individualized mini-trials needed to determine whether each GM was misclassified—if 6 days of trial per GM, then 8 *years* of trial to complete.
  - Held: trial courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and can strike unmanageable claims.
- ***Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022)**
  - Meal and rest break violation case that disapproved of *Wesson* on "manageability" requirement but approved use of other procedural devices to limit the scope of a PAGA claim, i.e., encouraged plaintiffs to "define a workable group" "for which violations can more easily be shown."
- The California Supreme Court accepted review of *Estrada* to resolve this split for California state law.
- ***Hamilton v. Wal-Mart*, 39 F.4th 575 (9th Cir. 2022)**
  - District court dismissed the PAGA claims for meal break/overtime violations as "unmanageable."
  - Ninth Circuit reversed. Rule 23(b)(3) manageability requirements do not apply to PAGA actions.

PAGA: Exclusive Concurrent Jurisdiction (Copycat Cases): *Shaw v. Superior Court*, 78 Cal. App. 5th 245 (2022)

- Plaintiff filed a PAGA action for wage and hour violations that overlapped completely with another PAGA lawsuit filed one year earlier in a different county.
- The court affirmed the trial court's granting of a motion to stay the second-filed action on the grounds of "exclusive concurrent jurisdiction":
  - "[W]hen two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of the others."
- The court *rejected* plaintiff's argument that because PAGA does not have an express "first to file" rule to promote Labor Code enforcement and discourage "reverse auction" settlements, plaintiffs should be allowed to concurrently litigate multiple overlapping PAGA actions.

Discrimination

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Websites and Title III Claims: *Martinez v. Cot'n Wash Inc.*, 81 Cal. App. 5th 1026 (2022)

- Plaintiff sued purely digital retail website for discrimination under the ADA, claiming the website was inaccessible to the plaintiff, who was blind.
- Court held that the ADA did not apply to an online-***only*** business; thereby rejecting plaintiff's attempt to enforce website accessibility requirements under California's Unruh Civil Rights Act, absent any allegation of discriminatory intent.
- Two-part holding:
  - (1) the discriminatory effect of a facially neutral policy or action is not, alone, a basis for inferring intentional discrimination under the Unruh Civil Rights Act; and (2) a website not connected with a physical place of business is not a "place of public accommodation" for purposes of Title III of the Americans with Disabilities Act.
  - Why: Evidence of disparate impact may be probative of intentional discrimination, but it cannot alone establish such intent under the Unruh Act.
- NOTE: Federal courts are split on whether websites that have no "nexus" to a physical aspect of a business are "places of public accommodation" under the ADA.

AB 2448: Recognition for Businesses Free from Discrimination and Harassment

- The Department of Fair Employment and Housing is now called the Civil Rights Department (CRD).
- The CRD governs both discrimination in employment (FEHA) and business establishments/housing (Unruh Act).
- The Unruh Civil Rights Act provides that all persons are entitled to full and equal accommodations in all *business establishments* regardless of specified characteristics, including sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status.
- Assembly Bill 2448 requires the CRD to establish a pilot program on or before January 1, 2025 to recognize businesses that are free from an environment of discrimination and harassment based on a number of criteria, in compliance the Unruh Civil Rights Act.
- CRD will provide a certificate to qualifying businesses that may be prominently displayed on-site and publish on its internet website a database of businesses receiving that certificate.
- However, recognition under the pilot program does not establish, and is not relevant to, any defense of claims brought under existing law.

AB 1632: "Employee Only" Restroom Access

- AB 1632: Businesses open to general public for sale of goods/services with "employee only" restrooms must permit access to non-employees if all of the following are met:
  - (1) The individual requesting use of the employee toilet facility has an eligible medical condition (e.g., Crohn's disease, ulcerative colitis, inflammatory bowel disease, irritable bowel syndrome, or another medical condition that requires immediate access to a toilet facility), or uses an ostomy device.
    - The place of business may require the individual to present reasonable evidence that the individual meets the above condition(s).
  - (2) Three or more employees of the place of business are working onsite at the time that the individual requests use of the employee toilet facility.
  - (3) The employee toilet facility is not located in an employee changing area or an area where providing access would create an obvious health or safety risk to the requesting individual or would create an obvious security risk to the place of business.
  - (4) Use of the employee toilet facility would not create an obvious health or safety risk to the requesting individual.
  - (5) A public restroom is not immediately accessible to the requesting individual.
- A willful or grossly negligent violation will be subject to a civil penalty not to exceed $100 per violation without creating or implying a private right of action.

Short-Term Impairments Actionable Under ADA: *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218 (9th Cir. 2022)

- Former employee brought ADA action alleging failure to accommodate, and termination because of, disability.
  - Surgery on plaintiff's right shoulder and arm required a three-day hospitalization and an extended recovery period. For several months, plaintiff was unable to fully use her right arm, shoulder, and hand, and could not lift, pull, push, type, write, tie her shoes, or use a hair dryer.
  - Job duties required plaintiff to use her hands to feel and handle objects, reach with her hands and arms, and occasionally lift and move up to two pounds. She was unable to fulfill these requirements.
  - Employer granted 8-week accommodation leave. She submitted another doctor's note, but employer terminated her, claiming "elimination of position."
- The District Court dismissed on the grounds that plaintiff had failed to plead facts sufficient to establish that she had an "impairment" or any "permanent or long-term effects for her impairment."
- The Ninth Circuit reversed, noting that both the ADA and the applicable EEOC regulations had been updated and broadened to encompass protection for the "effects of an impairment lasting or expected to last fewer than six months."
- Takeaway: Physical or mental impairments can be **substantially** limiting to constitute a "disability" under the ADA, even without showing any long-term effects of the impairment.
- **CA FEHA – physical or mental impairment that limits a major life function, even temporary conditions.**

Workers' Compensation and FEHA Claims: *Kaur v. Foster Poultry Farms LLC*, 83 Cal. App. 5th 320 (2022)

- A decision by the Workers' Compensation Appeals Board (WCAB) denying an employee's claim for disability discrimination under Labor Code section 132(a) does not mean that the employee cannot also sue in court for disability-related claims under FEHA.
- The issues decided by the WCAB were not "identical" to the issues implicated in the employee's FEHA disability discrimination claim. Rather, the employee's FEHA claims involved different inquiries from the plaintiff's section 132(a) claim (before the WCAB) and also involved a range of affirmative duties (and other requirements) applicable to the employer.
- Takeaway:
  - If there are differing applicable legal standards, employees can bring FEHA claims regardless of results of WCAB claims depending on the facts/issues in the different forums; issue preclusion does not automatically apply.
  - Be prepared that taking adverse actions against employees on workers' compensation leave may leave to (1) Section 132(a) claims and (2) civil disability claims under the FEHA.

Evidence Standard for Whistleblower Retaliation Claims Under Section 1102.5: *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022) – Resolved Split in CA Courts

- Section 1102.5 – California whistleblower statute - provides certain whistleblower protections to employees who disclose alleged wrongdoing.
- Section 1102.5, in part, prohibits an employer from retaliating against an employee for sharing information the employee "has reasonable cause to believe … discloses a violation of state or federal statute" or of "a local, state, or federal rule or regulation" with (1) a government agency; (2) a person with authority over the employee; (3) another employee who has authority to investigate, discover, or correct the violation; or (4) any public body conducting an investigation, hearing, or inquiry.
- Holding: The evidentiary standard set forth in Labor Code Section 1102.6 applies to whistleblower claims under Labor Code Section 1102.5, not the federal *McDonnell Douglas* burden-shifting standard.
  - Under *McDonnell Douglas*, a plaintiff would be unable to establish a claim for discrimination or retaliation absent evidence that the employer's stated reason for the adverse employment action was *false* and that the employer's *true motivation* for the employment action was unlawful discrimination or retaliation. Tough burden.
  - Applicable Evidentiary Standard – Section 1102.6
    - (1) The employee must show by a preponderance of the evidence that the employee engaged in whistleblowing activity that was a "contributing factor" to an adverse employment action.
    - (2) Then the employer must show by clear and convincing evidence that it would have taken the same action for legitimate reasons independent of the employee's whistleblowing activities.
- Takeaway: The application of Section 1102.6 significantly increases an employee's opportunity for establishing a whistleblowing claim and avoiding summary judgment.

California Equal Pay: *Allen v. Staples*, 84 Cal. App. 5th 188 (2022)

- Female employee, a field sales director whose employment was later terminated, brought action against employer alleging violations of the Equal Pay Act (EPA) and gender discrimination, sexual harassment, and retaliation under the Fair Employment and Housing Act (FEHA).
- Trial court granted summary judgment in favor of employer.
- Court of Appeal reversed, holding there was a factual issue as to whether pay disparity between the female plaintiff and male colleague in the same position(s) was permitted by one of EPA's four statutory exceptions (i.e., a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex).
- Takeaway: California courts will require employers to establish the "specific factors" justifying any pay disparity.

PWFA and PUMP Act: Congress Enacts New Employment Protections for Pregnant Employees and Nursing Mothers

- The Pregnant Workers Fairness Act ("PWFA") signed into law on December 29, 2022 takes effect 180 days after signature:
  - Applies to employers with more than 15 employees.
  - Must provide reasonable accommodations to qualified employees related to pregnancy, childbirth, or related medical condition unless the accommodation would impose an undue hardship.
  - Employers cannot require a qualified employee to take leave, whether paid or unpaid, if an alternative reasonable accommodation that allows the employee to continue to work can be provided.
  - An individual may still be "qualified" if they are temporarily unable to perform an essential function due to pregnancy, childbirth, or a related condition.
- The Protections for Nursing Mothers Act ("PUMP Act") signed into law on December 29, 2022 takes effect 120 days after signature:
  - Employers with fewer than 50 employees may be exempt if compliance would impose an undue hardship.
  - Expands existing federal law providing accommodations to express milk to both hourly and salaried employees.
  - Employees are entitled to reasonable break time and a private location, other than a bathroom. Break time is considered hours worked if employees are not completely relieved from their duties during the entirety of the lactation break.

SB 523: No Discrimination in Reproductive Health Decision-Making

- The Contraceptive Equity Act of 2022 makes it an unlawful employment practice to discriminate against an applicant or an employee based on reproductive health decision-making. It also prohibits an employer from requiring applicants or employees to disclose information relating to reproductive health decision-making as a condition of employment.
  - "Reproductive health decision-making" includes, but is not limited to, decisions to use or access a particular drug, device, product, or medical service for reproductive health.
  - Intended to increase the ability of Californians to exercise full control over their reproductive decisions and to expand coverage and decrease access barriers to reproductive health services following the reversal of *Roe v. Wade*.
  - Consider amending EEO policies.
- SB 523 also amends the California Government Code to require that most health benefit plans or contracts provide coverage for contraceptives and related services as well as coverage for vasectomies.

SB 1044: Retaliation to Work in Emergency Conditions

- SB 1044 prohibits employers from taking or threatening adverse action against any employee for refusing to report to, or leaving, a worksite because the employee has a reasonable belief that the workplace is unsafe due to an emergency condition.
  - "Emergency condition" is defined as:
    - Conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act.
    - An order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act.
    - Does not include a health pandemic.
- Certain job positions are exempt (i.e., first responders, disaster servicer workers, employees required by law to render aid, employee or contractor of a health care facility who provides direct patient care, an employee of a licensed residential care facility etc.).
- SB 1044 also prohibits employers from preventing an employee from accessing their mobile device or other communications device during an emergency.
- Going forward, employers should review existing cell phone policies and safety procedures to ensure compliance with SB 1044.

SB 657 and AB 2068: Workplace Postings

- **Email Postings**
  - SB 657 provides that in any instance in which an employer is required to physically post information, the employer may also distribute that information to employees by email with the document or documents attached.
  - The bill does not alter the employer's obligation to physically display the required posting.
- **Spoken Languages**
  - Existing law under the California Occupational Safety and Health Act (Cal/OSHA) requires employers to comply with certain standards ensuring healthy and safe working conditions, and requires citations, orders, and special orders issued by the department to be prominently posted.
  - AB 2068 provides that any time a citation or special order or action is required to be posted, the employer must also post an employee notification prepared by Cal/OSHA in multiple languages, i.e., the top seven non-English languages used by limited-English-proficient adults in California, as determined by the US Census Bureau's American Community Census, including Punjabi.
  - Allows Cal/OSHA to enforce this posting requirement by citations and civil penalties.

EEOC Posting Requirement

- The Equal Employment Opportunity Commission released a new version of the "Know Your Rights: Workplace Discrimination is Illegal" poster on October 19, 2022, replacing the previous "EEOC is the Law" poster.
- Uses "plain language" and bullet points – easier to understand.
- The poster summarizes federal laws and explains that employees, union members, or applicants can file a charge with the EEOC if they suspect they have experienced discrimination.
- No deadline to post/replace yet, but recommend swapping out postings as soon as possible.
- The new poster:
  - Clearly lists the protected classes.
  - Notes that harassment is a prohibited form of discrimination.
  - Clarifies that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, or gender identity.
  - Adds a QR code for fast digital access to the How to File a Charge webpage.
  - Provides information about equal pay discrimination for federal contractors.
  - Is available in English and Spanish.

What's Coming: *Raines v. U.S. Healthworks Medical Group*, 28 F.4th 968 (9th Cir. 2022)

- Question certified to the CA Supreme Court by the Ninth Circuit: Does FEHA permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?
  - CA law not clear on the answer.
- In this case, third party screeners employed by the defendant, U.S. Healthworks Medical Group (USHW), asked questions of applicants of employer, Front Porch Communities and Services, that were allegedly invasive and unrelated to the job(s) for which they were applying.
  - Front Porch conditioned the job offer – cleaning and maintaining work area, transporting trash disposal, and re-stocking dishes, kitchen utensils and food supplies – on applicant passing a pre-placement medical examination, which was administered by USHW.
  - Plaintiff/applicant refused to answer questions, and Front Porch rescinded her offer.
  - Plaintiff sued Front Porch and USHW. (Settled with Front Porch)
- The trial court dismissed the action against USHW, finding that FEHA does not impose direct liability on third parties who act as employers' agents and screen prospective employees.
- The Ninth Circuit certified the question as follows: "whether [the FEHA] allows employees to hold a business entity directly liable for unlawful conduct when the business entity acted only as the agent of an employer, rather than as an employer itself."
  - Decision is expected in 2023.

What's Coming: AB 2188 – Cannabis Use

- Effective January 1, 2024, AB 2188 prohibits discrimination based upon:
  - (i) an employee's or applicant's use of cannabis off the job and away from the workplace, or
  - (ii) an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.
  - Certain exceptions: employees in the building and construction trades; employees in positions requiring a federal background investigation or clearance; and employees to be tested for controlled substances, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.
- Employers may still refuse to hire based on results of scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.
- Employers may still implement drug- and alcohol-free policies that prohibit employees from possessing, using or being impaired by cannabis on the job.
- Next year, consider adding "off-duty cannabis use" to protected classes in EEO policies.

Leaves

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AB 1041: Expands California Family Rights Act (CFRA) & Paid Sick Leave – "Designated Person"

- AB 1041 expands CFRA and paid sick leave rights to allow an employee to take such leave to care for a "designated person," in addition to other family members previously specified by law. Different definitions:
  - Under CFRA, "designated person" is defined as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."
  - Under California Paid Sick Leave, "designated person" is defined as "a person identified by the employee at the time the employee requests paid sick days."
    - Note: This broadens the scope of who qualifies as a designated person.
- Under both CFRA and CA Paid Sick Leave, an employer may limit an employee to one designated person per 12-month period.

AB 1949: Bereavement Leave

- AB 1949 amends the California Family Rights Act (CFRA) to require covered employers (employers with five or more employees) to provide eligible employees (employees who have been employed for at least 30 days prior to requested leave) **with up to five days of bereavement leave** for the death of a qualifying family member (spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law).
- Bereavement leave is unpaid ***unless*** the employer has an existing bereavement policy that provides for paid leave or the employee elects to use another source of accrued paid leave.
- Employers can request documentation (e.g., a death certificate).
- Going forward, employers should add bereavement leave to handbook policies and/or update existing bereavement leave policies to ensure compliance with AB 1949.

Arbitration Agreements

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Compelling Arbitration of Individual PAGA Claims: *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022)

- **Background**: Employee brought representative PAGA action, and the employer moved to compel arbitration of the employee's individual PAGA claim. The lower court denied the motion, holding that, under the CA Supreme Court's decision in *Iskanian*, the waiver of PAGA claims was invalid.
- **Issue**: Does the FAA preempt the *Iskanian* rule that categorical waivers of PAGA claims are invalid?
  - Two senses of "representation" in PAGA cases: (i) representing Labor Commissioner in a type of *qui tam* action, and (ii) representing other employees.
  - FAA "preempts *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."
  - FAA does not preempt bar on "wholesale" waivers of PAGA standing—i.e., of individual and non-individual claims.
  - CA's prohibition against contractually dividing individual and non-individual PAGA actions limits parties' freedom to determine which issues are subject to arbitration. The FAA allows parties to individualize arbitration procedures even if bifurcated proceedings are the inevitable result.
- **Holding**: PAGA waiver was invalid to the extent it prohibited plaintiff from bringing any PAGA claims. But, based on a severability clause, *Viking River* was entitled to enforce the agreement insofar as it mandated arbitration of plaintiff's individual PAGA claim.

Compelling Arbitration of Individual PAGA Claims: *Adolph v. Uber Technologies*, Inc., Case No. S274671 (2022)

- **Effect of *Viking River***:
  - Standing Question: Interpreting state law, the Supreme Court also held that a trial court must dismiss non-individual PAGA claims for lack of statutory standing once a plaintiff is compelled to arbitrate their individual PAGA claims.
  - Justice Sotomayor's dissent in *Viking River*: PAGA standing is a state court question (and the CA legislature is free to modify the scope of statutory standing).
- **Currently under review in *Adolph***: to stay or to dismiss?
  - Issue: Was Supreme Court correct in *Viking River*, namely, that an employee loses their statutory standing to pursue non-individual PAGA claims after a court compels arbitration of individual PAGA claims?
  - Status: *Adolph* was fully briefed as of November 2022, and the deadline to file amicus curiae briefs was December 29, 2022. The CA Supreme Court will likely issue a decision in the coming months.
- **Key Takeaways**:
  - Amend arbitration agreements to remove wholesale waivers of "representative" actions, and instead limit waivers to individual PAGA claims.
  - Determine whether arbitration agreements should have a "severability clause" that effectively permits a court to sever only terms found to be illegal while enforcing the other provisions.

Scope of FAA's Transportation Worker Exemption: *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (U.S. 2022)

- **Background**: Class action waivers are generally enforceable under FAA for businesses that are engaged in "interstate commerce", but not all workers can be compelled to arbitrate their claims.
  - FAA's "transportation worker exemption": exempts certain "transportation" workers, i.e., a "class of workers engaged in foreign or interstate commerce".
- **Holding**: A ramp supervisor who trains and supervises ramp agents and frequently loads and unloads cargo on planes alongside agents falls under the FAA's "transportation worker exemption" and therefore is exempt from arbitration agreements.
- **Impact of *Saxon***: The "transportation worker exemption" covers any class of workers "directly involved" in transporting goods across state or international borders. But many questions remain about the scope of the exemption.
  - Includes employees who physically load/unload cargo for planes travelling in interstate commerce.
  - Does not broadly cover all airline employees.
  - Does not narrowly cover only workers who physically move goods or people across borders.
  - What about employees who pick up/drop off goods in the transportation chain but do not actually touch the airplane or cross interstate lines?

Waiver: *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022)

- **Background**: Employee filed a collective action against her employer. When the employer moved to stay the litigation and compel arbitration, employee argued that employer waived its right to arbitrate by litigating for so long. Here, Defendant employer engaged the machinery of litigation for nearly 8 months before moving to compel—e.g., employer answered the complaint, engaged in mediation, and moved to dismiss.
- **Issue**: Did employer waive their right to compel arbitration? Eighth Circuit applied an arbitration-specific waiver test, which said that a party waives if it acted inconsistently with its arbitration right and its actions prejudiced the other party.
- **Holdings**:
  - The FAA does not require a party resisting arbitration on the grounds of waiver to show they suffered prejudice from a failure to compel arbitration sooner.
  - Judges may not "create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.'"
- **Key Takeaways**: Move quickly to compel arbitration, and discuss with opposing counsel at the earliest possible moment. Undue delay can result in a waiver of the right to compel.

Arbitration Agreement as Condition of Employment: *Chamber of Commerce of United States v. Bonta*, 45 F.4th 1113 (9th Cir. 2022)

- **Background**: Labor Code § 432.6 (AB 51) prohibits requiring an agreement to arbitrate as a condition of employment, continued employment, or receipt of a benefit of employment.
- **Holding**: In September 2021, a Ninth Circuit panel found that Labor Code § 432.6 merely regulates pre-agreement employer behavior and does not invalidate or render unenforceable executed arbitration agreements governed by the FAA.
- **Dissent**: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the [FAA], the state bounces back with even more creative methods to sidestep the FAA."
- **Status**: In August 2022, the Ninth Circuit voted *sua sponte* to grant panel rehearing.
  - Some practitioners think it is likely that the Ninth Circuit panel will eventually conclude the FAA preempts AB 51 in its entirety.
  - However, in the meantime, the district court's preliminary injunction enjoining enforcement of AB 51 remains in place pending a new opinion by the Ninth Circuit panel.

Payment of Arbitration Fees: *Espinoza v. Sup. Ct. of Los Angeles Cnty.*, 83 Cal. App. 5th 761 (2022)

- **Background**:
  - Defendant successfully compelled arbitration, but due to a clerical error failed to pay the arbitrator's fees within 30 days, in violation of C.C.P. § 1281.97.
  - Plaintiff moved to lift the stay on litigation based on defendant's failure to pay timely.
- **Holding**: Failure to pay arbitration fees by the statutory 30-day deadline is a material breach of an arbitration agreement and constitutes waiver of the right to arbitrate.
  - The Court of Appeal held that the statutory deadline must be strictly enforced.
  - The Court of Appeal also held that C.C.P. § 1281.97 was not preempted by the FAA.
- **Key Takeaways**: Employers must ensure arbitration fees are paid before the 30-day deadline. Set calendar reminders for due dates!

Mass Arbitration/Bellwether Arbitrations – Case to Watch: *MacClelland v. Cellco Partnership*, 9th Cir. Case No. 22-16020

- **Background**: Case involved a consumer class action where the defendant filed a motion to compel the named plaintiffs into individual arbitrations.
  - The arbitration agreement had a batching procedure known as a "Bellwether provision" that was activated if 25+ consumers who were represented by the same counsel raised similar claims.
  - The batching provision required that counsel for the parties select 5 cases for a "Bellwether" proceeding. The remaining cases could not be filed in arbitration until the first 10 were resolved.
- **Holding**: A California federal court refused to enforce the arbitration agreement. The Court reasoned that the batching provision could create unconscionable delays.
- **Status**: Case is on appeal to the 9th Circuit. Answer is due in late February, and the Reply is due mid-March. A decision is expected sometime this year.
- **Key Takeaways**: Evaluate arbitration agreements and the need for mass arbitration defense strategies, including, but not limited to, bellwether procedures.

Pay Transparency

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SB 1162: Pay Transparency in Job Postings

- Under SB 1162, effective January 1, 2023, employers with 15 or more employees must include a pay scale for a position with every job posting that they post directly or through a third party.
- The pay scale should include the *salary or hourly range* that the employer *reasonably expects* to pay for the position.
- Employees may request the pay scale for their current job position.
- These new requirements are *in addition* to pay disclosure obligations that are already in place:
  - Applicants may reasonably request the pay scale for the job position that they are applying for.
  - Employers cannot ask applicants for their salary history information, including compensation and benefits.
  - Employers cannot rely on the salary history information of an applicant as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

SB 1162: Pay Transparency in Job Postings, *Cont'd.*

- Potential Penalties:
  - The Labor Commissioner may order the employer to pay a civil penalty of $100 to $10,000 per violation.
  - No penalty applies on the first violation of the law, provided that the employer demonstrates that they have updated their job postings to include a pay scale as required.
  - Individuals may file civil actions for injunctive relief and "other relief the court deems appropriate."

SB 1162: Pay Data Reporting Requirements

- SB 1162 also expands employer pay data reporting requirements (Government Code Section 12999).
  - By May 2023, private employers with 100+ employees are required to include yearly reports analyses of the median and mean hourly pay rates, within various job categories, for each race, ethnicity, and sex.
  - Reports are due the second Wednesday of May each year.
  - Private employers with 100+ employees hired through *labor contractors* must file a separate report covering those employees.
    - *Labor contractor* is defined as "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business."
  - Adds potential civil penalties of $100-$200 per employee for failure to file the report.

Privacy

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CCPA & CPRA

The California Consumer Privacy Act (CCPA) sets forth restrictions and requirements with respect to the collection, storage, and sale of consumer data. Prior to January 1, 2023, the following categories of personal information had been *exempted* from some of the CCPA's requirements:

Business-to-Business (B2B) Exception: Personal information collected in the context of due diligence or the provision/receipt of products or services to another organization.

AB 2891 would have extended these exceptions to January 1, 2026, and AB 2871 would have extended the exceptions indefinitely. However, California Legislature adjourned 2022 legislative sessions without passing this proposed legislation.

Workforce Personal Information (HR) Exception: Personal information collected about job applicants, employees, owners, directors, officers, medical staff members, or contractors, but only when collected and used:

- within the employment context;
- for that individual's emergency contact information; or
- to administer that individual's benefits.

Accordingly, the HR and B2B exemptions expired on January 1, 2023, pursuant to the California Privacy Rights Act (CPRA).

CCPA & CPRA, *Cont'd.*

- CPRA extends to HR and B2B data and requires:
  - Providing privacy notices – with the same level of detail currently required for consumer-facing privacy notices – to personnel, job applicants, and business contacts.
- Honoring requests from personnel, job applicants, and business contacts to:
  - ***know*** how their personal information is used and shared;
  - ***access*** a copy of their personal information;
  - ***delete*** personal information they provided;
  - ***correct*** personal information;
  - ***opt out*** of certain uses and sharing of personal information, including any sale of personal information, sharing of personal information for behavioral advertising purposes or use of sensitive personal information for certain purposes; and
  - ***exercise*** rights free of discrimination.
- Ensuring vendors with access to HR or B2B data are subject to specific contractual data-use prohibitions is necessary to qualify the vendors as "service providers" or "contractors" and that granting such access does not constitute restricted "selling" or "sharing" of personal information, from which Californians can opt out.
- Ensuring third parties to whom HR or B2B data is sold, or with whom it is shared for behavioral advertising purposes, are subject to contractual obligations specified in the CPRA.

Recommendations: Update privacy notices for applicants/employees/contractors, develop processes to address and respond to privacy inquiries/requests, add privacy addendum to servicer provider contracts, and update HR data retention policies.

AB 984: Vehicle Location Technology

AB 984 requires the Department of Motor Vehicles to allow vehicle location technology on fleet vehicles – digital license plates.

This bill also permits employers to use such technology to monitor employees if the tracking is "strictly necessary" to the employee's duties and only done during work hours. Employers that install monitoring devices on vehicles must provide a detailed notice of the monitoring, including:

- dates, times, and frequency that the monitoring will occur;
- who will have access to the data;
- where the data will be stored and the length of time it will be retained;
- how the data will be used, including whether it will be used for employment decisions; and
- notice of the employee's right to disable the device during non-work hours.

Penalties for non-compliance are $250 for each employee for the initial violation. For subsequent violations, penalties are $1,000 for each employee per day. Employers may face additional exposure for retaliating against an employee for removing/disabling monitoring devices outside of work hours.

COVID-19

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COVID-19 Related Employment Laws

- AB 2693 extends and changes certain notice and reporting requirements:
  - Extended to January 1, 2024 – employer's obligation to post notices of prohibition in conspicuous place if Cal/OSHA determines workers are at risk for COVID-19 so as to constitute an imminent hazard.
  - Employers can now satisfy notice requirements to potentially exposed employees by either (1) providing written notice, as was previously required or (2) displaying a worksite notice in an area where notices to employees are customarily posted.
    - If employers use employee portal for postings, *must* post there.
    - Employers must continue to provide individual written notice to employees who have been identified as *close contacts*.
  - Employers are no longer required to report COVID-19 *non* major outbreaks to local public health agencies unless local health departments require reporting. i.e. LA County still requires.
    - Employers must now report major outbreaks to Cal/OSHA.
  - California's COVID-19 Supplemental Paid Sick Leave law expired on December 31, 2022.

COVID-19 Related Employment Laws, *Cont'd.*

- Cal/OSHA Emergency Temporary Standards (ETS):
  - Current ETS set to expire.
  - December 15, 2022 - Cal/OSHA Standards Board voted to approve new COVID-19 *non*-emergency prevention.
    - Office of Administrative Law (OAL) has 30 days to complete its review and approve.
    - If enacted, will expire in two years.
  - Several major changes, including:
    - Removal of exclusion pay during isolation/quarantine for work exposures.
    - Removal of daily symptom screening and no-cost tests for *symptomatic* employees.
      - Still required to pay for testing for close contacts and/or during outbreak.
    - Removal of the requirement that employers maintain records of the steps taken to implement written COVID-19 Prevention Program.

COVID-19 Related Employment Laws, *Cont'd.*

- Cal/OSHA Emergency Temporary Standards (ETS):
  - Several major changes, including:
    - Outbreaks now "end" when there is one or fewer new COVID-19 cases detected in the exposed group for a 14-day period.
    - COVID-19 training can now be implemented within an employer's IIPP training requirements.
    - Incorporates AB 2693, new notice requirements (just discussed).

COVID-19 Related Litigation

The Rise of Employment Claims Related to COVID-19

- As of January 12, 2023, over 6,336 cases have been filed in court relating to COVID-19.
  - This does not include agency filings, arbitrations or union grievances.

Type of Claim

- Discrimination (2834)
- Wrongful Termination (1771)
- Workplace Conditions (1003)
- Leaves of Absence (402)

State Claim Filed In

- California (1662)
- New Jersey (594)
- Florida (348)
- New York (428)

Industry

- Healthcare (1395)
- Hospitality (324)
- Education (352)
- Essential Retail (287)
- Manufacturing (281)

Restrictive Covenants

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The "Speak Out Act": Limitations on Confidentiality Agreements for Sexual Harassment and Sexual Assault

- **Overview**: On December 7, 2022, President Biden signed the "Speak Out Act" into law. The Act provides that nondisclosure and nondisparagement agreements are judicially unenforceable with respect to sexual harassment or sexual assault disputes that arise after the agreement is signed.
- **Effects**:
  - The Act applies to any agreement—including those with independent contractors and customers as well as current, former, and prospective employees.
  - The Act does not prohibit the use of nondisclosure/nondisparagement agreements, nor does it require that employers include certain language in those agreements.
  - The Act does not place any limitations on confidentiality agreements reached in the settlement of sexual harassment and sexual assault claims.
  - Not clear whether the Act applies to agreements made prior to December 7, 2022. This will likely be a subject of litigation this year.
- **Key Takeaways**: The Act underscores the importance of effective sexual harassment prevention training and protocols. Employers should evaluate all related policies and practices, including procedures for responding to complaints of sexual harassment and sexual assault.

Federal Trade Commission: Proposed Ban on Noncompete Clauses for Workers

- On January 5, 2023, the FTC announced a notice of proposed rulemaking that would ban employers from entering into and maintaining noncompete clauses with workers, or from representing to their workers that they are subject to such a clause without a good faith basis to believe they are in-fact subject to legally enforceable noncompete restrictions.
  - "Worker" would include all employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provide a service to a client or customer. Justifications for noncompete clauses would differ by employee type.
  - A "noncompete clause" includes any contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer. Includes clauses that amount to de-facto noncompete clauses.
    - Possible exception for agreements between sellers and buyers of businesses.
  - Would require employers to rescind noncompete clauses with workers no later than the final rule's compliance date (TBD).
- **Next Steps**: Employers should begin reviewing existing noncompete agreements and considering the effect this proposal would have on them. Additionally, employers should begin analyzing the breadth of their confidentiality clauses and tightening up trade secret protection plans by properly identifying, classifying, and protecting trade secrets with reasonable measures.

Miscellaneous

SB 731: Expands Criminal History Relief

- SB731 will impact the type of records employers can lawfully rely upon for hiring decisions when conducting employment background checks.
- Existing law authorizes a defendant with a felony conviction (not resulting in jail time) to petition to withdraw their guilty or nolo contendere pleas and have their arrest and conviction records sealed if they have already completed their sentence and have not been convicted of an additional felony.
- SB 731 extends this relief to felony convictions that did result in a sentence of prison incarceration, except those requiring registration as a sex offender or those convicted of violent or serious felonies such as murder, manslaughter, kidnapping, rape, assault with a deadly weapon, robbery, and similar offenses.
- As a practical matter, employers will be unable to rely on these criminal records when making hiring decisions since the records will be sealed — even if there would be a nexus between the felony and the specific duties of the job.

AB 1601: Call Center Employment Protections: Terminations, Relocations, and Mass Layoffs

- Effective January 1, 2023, Assembly Bill 1601 amends Labor Code section 1400 (Cal-WARN) to include additional Labor Commissioner enforcement mechanisms for Cal-WARN notice violations. The Labor Commissioner may investigate the alleged violation and order appropriate temporary relief pending the investigation's completion.
- AB 1601 also adds Labor Code sections concerning call center relocations. These sections specify that Cal-WARN notices apply to call center relocations when the employer intends to move its call center, or a substantial portion of the call center operations, to a foreign country.
  - Call center is defined as a facility or other operation where employees, as their primary function, receive telephone calls or other electronic communication for the purpose of providing customer service or other related functions.
  - Call center employers that do not provide the required notice are "ineligible to be awarded or have renewed any direct or indirect state grants or state-guaranteed loans … for five years after the date" that the California Employment Development Department publishes a list of call center employers that complied with providing notice.
  - A call center employer that fails to provide notice is also "ineligible to claim a tax credit for five taxable years beginning on and after the date that the list is published."

AB 2206: Parking Cash-Out Program

- To combat air pollution, existing law requires that employers with 50+ employees who are located in "air basins designated as a nonattainment area" (as determined by the State Air Resources Board in compliance with the California Health & Safety Code), and who provide a parking subsidy, also offer a "parking cash-out program."
- To overcome flaws, effective January 1, 2023, AB 2206:
  - Defines "employer" to mean an employer that provides a parking subsidy to employees that can reduce, without penalty, the number of paid parking spaces it maintains for its employees by providing employees with a cash-out option.
  - Defines "parking cash-out program" as a program where the employer offers to provide employees a cash allowance equal to or greater than the parking subsidy that the employer would otherwise pay to provide the employee with a parking space.
  - Defines "parking subsidy" as the difference between the price charged to an employee for the use of parking spaces not owned by the employer and made available to that employee by the employer and the market rate cost of parking.
  - Requires employers to inform employees who receive a parking subsidy of their right to receive the cash equivalent and maintain records of that communication.
  - Requires employers to provide parking cost information to employees upon request.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
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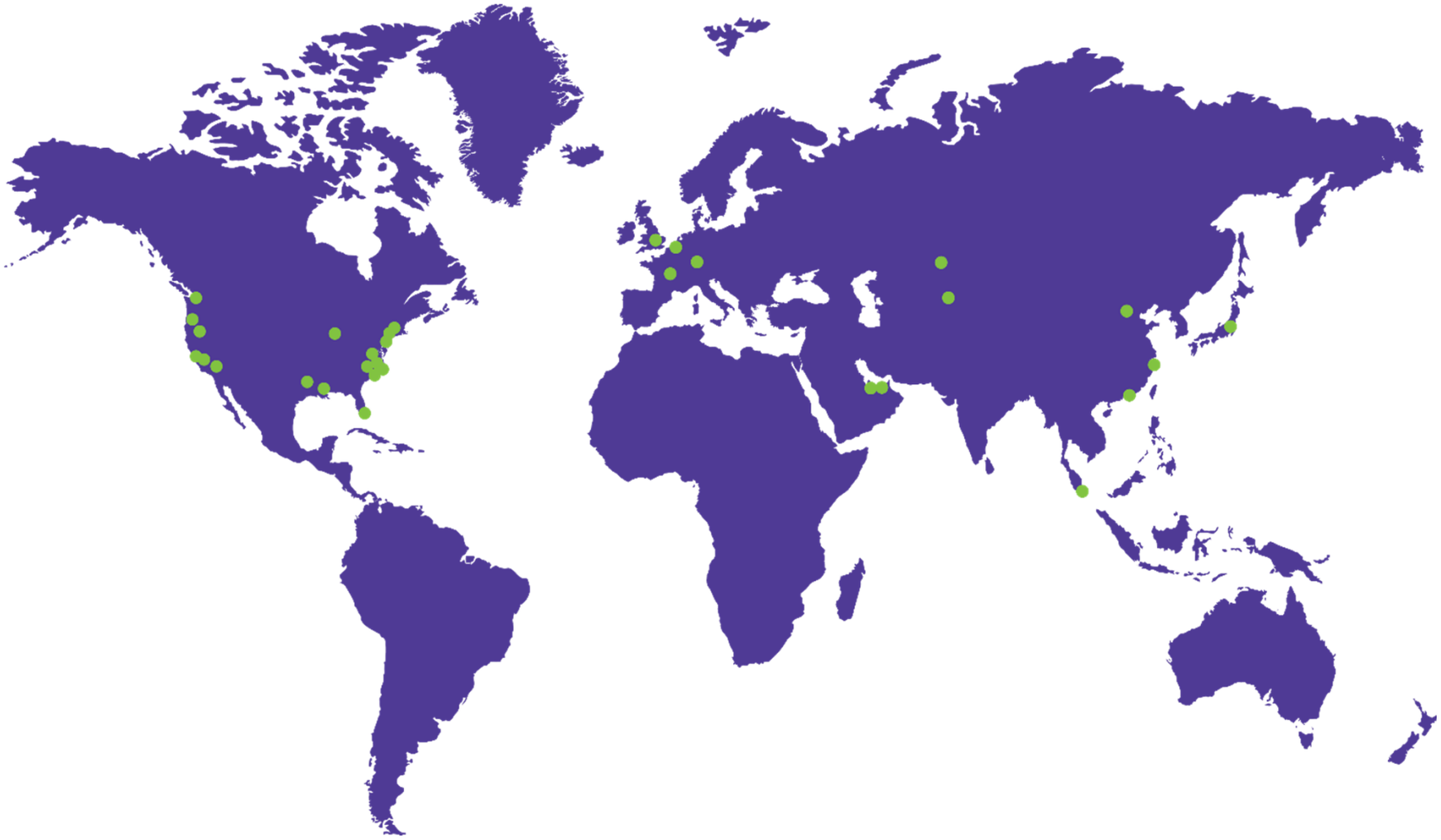

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THANK YOU