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Employment Law Updates in 2022



Debra Ellwood Meppen
Partner
Brandon Saxon
Partner

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KEY TAKEAWAYS

FOR CALIFORNIA'S NEW 2022 EMPLOYMENT LAWS

Family and Medical Leave Expanded



- **AB 1033 expands CFRA *Effective Date January 1, 2022.***
- Expands the definition of “parent” to include parents-in-law.
 - Employers with five or more employees (lower threshold) must provide eligible employees with up to 12 weeks of leave annually to provide care to family members, including parents **and parents-in-law**, with serious medical conditions.

Settlement Agreements



Existing Laws Governing Settlement Agreements in CA:

- **AB 2143 (Effective January 1, 2021)**
 - **Expanded AB 749** to also allow a “no-rehire” provision if the employee engaged in “any criminal conduct.”
 - Employer must document a *good-faith determination* that the employee engaged in criminal conduct
 - The restriction on “no-rehire” provisions applies only to employees whose claims were filed in “good faith.”
- **AB 749 (Effective January 1, 2020)**
 - Created Code of Civil Procedure Section 1002.5, which prohibits the inclusion of “no-rehire” provisions in settlement agreements
 - **EXCEPTION:** a “no-rehire” provision is allowed in a settlement agreement with an employee whom the employer, in good faith, determined engaged in sexual harassment or sexual assault

Settlement Agreements (Con't.)



- **SB 331 - Silenced No More Act**
- A **settlement agreement** cannot contain a provision that restricts disclosure of **sex-based harassment; discrimination; and/or assault in the workplace;**
- Where a claim is filed before an administrative agency or in a civil action, related to:
- *****Expands the prohibition on settlement confidentiality and non-disparagement provisions to include all types of workplace harassment or discrimination.**
- Employers should ensure *separation-related agreements* contain:
 - **non-disparagement carve out language** permitting disclosure of unlawful conduct [*“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.”*]
 - **Notice of an employee’s right to consult an attorney** re agreement (5 day min.)

Personnel Record Retention & DFEH Procedural Changes



- SB 807 went into effect on January 1, 2022.
- Requires certain employers to maintain all applications and personnel records for at least 4 years from the date the records were created or received
- SB 807 also extends the DFEH right-to-sue statute of limitations for class actions to 2 years

AB 51 Update



- Under AB 51 California employers **would be prohibited from** requiring applicants and employees to enter into **mandatory arbitration agreements** as a condition of employment.
- This was slated to become effective on January 1, 2020 but was challenged

So Where Does That Leave Us?

- AB 51 WAS going to ban most employment arbitration agreements in CA starting January 1, 2020, BUT at present AB 51 is still not in effect pending the current litigation

What should employers do?

- *Conservative Approach:*
 - Do away with all mandatory arbitration agreements that require opt out, and make them voluntary for new hires and current workforce.
- *Less Conservative Approach:*
 - Wait and see if the decision is stayed pending further appeal

Cal/OSHA Enforcement Authority Expansion



- SB 606 expands the enforcement authority of California's Division of Occupational Safety and Health ("Cal/OSHA") by creating **two new workplace health and safety violations**:
 - *(1) enterprise-wide violations*
 - *(2) egregious violations*
- This provides Cal-OSHA with subpoena authority when an employer fails to provide the requested information

Electronic Posting of Workplace Notices – AB 657



- When employer is required to physically post information in the workplace, related to employee rights under applicable statutes, it may also distribute that information to employees via email.
- Electronic distribution via email is not a substitute for physical postings of required workplace notifications.



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COVID-19 IN THE WORKPLACE

COVID-19 Related Lawsuits



- From the beginning of the COVID-19 pandemic in March 2020 through Jan 20, 2022, approximately **4,797** COVID-19 related employment lawsuits have been filed in state and federal court, including **517** class actions. Most filings have been in the following states:
 - California: 1428
 - New Jersey: 425
 - New York: 341
 - Florida: 327
 - Ohio: 249
- More lawsuits are expected in 2022, especially as employers have begun recalling some (but not all) laid-off or furloughed employees, increasing hours or shifts for some (but not all) employees, or requiring more employees to report to work in-person, and requiring vaccines to return to work.

COVID-19 Exposure Reporting --Expanded - AB 654



- Within one day, employers must provide **all** employees who were at the same worksite as infected individual with:
 1. Written notice that the employee may have been exposed to COVID-19;
 2. Information regarding COVID-19-related benefits that the employee may be entitled to; and
 3. Notice of the cleaning and disinfection plan that the employer is implementing.
- Requires employer to notify the local public health agency of an “outbreak” within 48 hours. An **outbreak** is defined as **three or more probable or confirmed cases within a 14-day period**

COVID-19 Supplemental Paid Sick Leave



- **EXPIRED:** California's 2021 COVID-19 Supplemental Paid Sick Leave (2021 SPSL) law effective January 1, 2021, expired on September 30, 2021.
- **NEW:** On January 25, 2022, Governor Newsom and state lawmakers agreed to provide employees with up to **2 weeks of supplemental paid sick leave** to recover from COVID-19 or to care for a family member with COVID-19, through September 30, 2022
 - **Covered Employers:**
 - All businesses with *26 or more employees*
 - **Employer Obligations:**
 - **Full-time workers** would be entitled to **40 hours of flexible paid sick leave**, and **additional 40 hours with proof of a positive test**
 - **Part-time workers** would be eligible for sick leave **equal to the number of hours they typically work in a week**, or **twice that amount with a positive test**

Vaccine Mandates



Federal OSHA Emergency Regulation (ETS Mandate)

Coverage	Status
<ul style="list-style-type: none"> Mandated applied to employers with 100 or more employees Required covered employers to develop, implement and enforce mandatory vaccination or testing policies 	<ul style="list-style-type: none"> November 5, 2021, OSHA publishes the ETS Mandate November 12, 2021, the ETS Mandate is stayed by the 5th Circuit Court of Appeals December 17, 2021, stay on ETS Mandate is lifted by the 6th Circuit Court of Appeals January 13, 2022, U.S. Supreme Court re-issued the stay, preventing enforcement of the ETS Mandate for the foreseeable future January 24, 2022 – OSHA Withdrawals Vaccine Mandate

Vaccine Mandates



Centers for Medicaid and Medicaid Services Mandate (CMS Mandate)

Coverage	Status
<ul style="list-style-type: none">• Mandate applies to healthcare facilities participating in Medicare and Medicaid programs• Requires covered facilities to establish a policy ensuring eligible workers are vaccinated against COVID-19 with exemptions based on religious beliefs and recognized medical conditions	<ul style="list-style-type: none">• January 13, 2022, the U.S. Supreme Court lifted the injunction imposed by the Missouri District Court's which enjoined the CMS Mandate in the other 24 states; CMS has since issued new deadlines for compliance agencies in the following states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia and Wyoming

Vaccine Mandates



Federal Contractor Vaccine Mandate

Coverage	Status
<ul style="list-style-type: none"> Mandate applies to federal government contractors with certain types of contracts from solicitations or contracts Requires covered contractors to mandate vaccination and require masking and other COVID safety measures (subject to reasonable accommodation, religious beliefs and medical condition exemption) 	<ul style="list-style-type: none"> December 7, 2021, Georgia federal judge preliminarily enjoined the Mandate on a nationwide basis December 17, 2021, the 11th Circuit Court of Appeals denied the federal government's request to stay the injunction December 21, 2021, the 11th Circuit Court of Appeals adopted a briefing schedule on the government's appeal We should know if the Federal Contractor Vaccine survives by April 2022; it is unenforceable in the meantime

WAGE AND HOUR

CA Minimum Wage Increase



- **Minimum Wage in California**
 - \$14.00 per hour for employers with 25 or fewer employees, effective Date *January 1, 2022*
 - \$15.00 per hour for employers with 26 or more employees, effective Date *January 1, 2022* [*\$62,400 minimum wage exempt*]
- **Check your City**
 - \$17.13 - Emeryville
 - \$17.10 - Mountain View
 - \$16.32 – San Francisco
 - \$15.50 - West Hollywood
 - And Many Others.....

Meal and Rest Periods



- **Meal/Rest Premiums Must be Based on Regular Rate of Pay**
 - The California Supreme Court clarified that the “regular rate of compensation” as used in Labor Code Section 226.7 is synonymous with “regular rate of pay.” (Ferra v. Lowes Hollywood Hotel, LLC (Ca. S. Ct. 2021))
- **Rounding of Meal Periods Not Permissible**
 - The California Supreme Court established that rounding time punches is an unlawful employment practice. (Donohue v. AMN Services, LLC (CA S.Ct 2021))
- **Key Takeaways:**
 - When calculating premium pay owed to an employee for a noncompliant meal/rest period, employers must account for the employee’s hourly wages and other nondiscretionary payments.
 - No rounding
 - Premium pay is required for even seemingly minor violations.

Warehouse Distribution Center Quotas – AB 701



- Applies to companies with 100 or more employees at a single warehouse distribution center or more than 1,000 employees at multiple warehouses in California.
- Employer must provide non-exempt employees with a written description of each productivity quota that he/she is subjected too, and adverse action which may result if not met
- Current and former employees have a right to request a written description of his/her recent quotas and employers must comply with the request within 21 calendar days.

Wage Theft – AB 1003



- This expands an employer’s potential **liability for intentional wage theft under California’s Penal Code.**
- An employer **may be convicted of “grand theft”** for theft of wages exceeding \$950 for one employee, or \$2,350 in the aggregate from two or more employees.

Application of AB 1003

- The theft must be intentional, through fraud and while knowing that the wages are due to the employee.
- “*Wages*” is defined to include: “wages, gratuities, benefits, or other compensation”.
- Independent contractors are considered employees

Food Delivery Tips



- AB 286 amends the Fair Food Delivery Act of 2020
- AB 286 makes it unlawful for food delivery platforms to retain any portion of amounts designated as tips or gratuity.

Key Takeaway

- *Tips and gratuities must be paid in entirety to the person performing the delivery.*

Sub-Minimum Wage Permits for Disabled Employees – SB 639



- Phasing Out Sub-Minimum Wage Permits for Disabled Employees
- IWC licenses authorizing employers to employ persons with disability for less than the mandated minimum wage will be phased out:
 - Beginning January 1, 2022, no new licenses
 - By January 1, 2023, license holders must provide a transition plan
 - By January 1, 2025, it will be illegal to pay an employee with disabilities less than the minimum wage irrespective of prior license status

Computer Professional Exemption Increases



- ***Effective Date January 1, 2022***
 - California employers must compensate employees covered by the statute according to the minimum pay rate increases to:
 - \$50.00 per hour
 - \$8,679.16 monthly salary
 - \$104,149.81 annual salary

RECENT CASES OF NOTE

Cases of Note



- *Christian v. Umpqua Bank* (9th Circ. 2021)
- Bank employee was able to proceed with a hostile work environment claim due to repeated conduct by a bank customer. Despite the infrequency of the conduct, and gaps between interactions, employee was found to experience harassment as part of a pattern that made her feel afraid in her workplace.
- This evidence was sufficient to show that employer ratified this harassing conduct by not taking effective preventative/corrective steps to prevent it from occurring despite notice.

Cases of Note



- *Diaz v. Tesla Motors, Inc.: \$137 Million verdict against Tesla for Racial Harassment*
- A contractor working at a Tesla facility for less than a year was subjected to harassment including repeated use of N word, racist drawings and pictures left around his work area, among other claims.
- Employee complained to both Tesla and his staffing firm, but measures taken were not sufficient.

Cases of Note



- *Ibrahim v. Alliance for Sustainable Energy, LLC (10th Cir 2021)*
- A Pakistani employee was terminated in violation of employer's sexual harassment policy.
- Claim was able to proceed with race discrimination claim given that employer failed to terminate a white employee for the same policy violation.

Cases of Note



Arbitration

- *Sanfilippo v. Match Group LLC* (9th Cir 2021) – Employee must arbitrate claims against former employer despite the fact that claims arose BEFORE she signed an arbitration agreement
- *Patterson v. Superior Court* (Cal. App. 2021) – Arbitration agreements cannot authorize the recovery of attorney's fees for successful motion to compel arbitration of a lawsuit, unless employer can show that the opposition was baseless

Cases of Note



- *Allen v. Northeast Treatment Centers (E.D. PA 2021)*
- An employee was terminated soon after raising concerns that supervisor violated COVID-19 safety protocols.
- Permitted to proceed with retaliation claim.



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Questions?

- Debra Ellwood Meppen
dmeppen@grsm.com
- Brandon Saxon
bsaxon@grsm.com

Upcoming Webinars:

- April 28, 2022, 10 AM Pacific – Two Years in the Pandemic: A Brave New Workplace



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Partner
Brandon Saxon
Partner

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