Boutin Jones INC
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Employment Law Year-In-Review 2024

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Agenda

- Housekeeping
- Hiring and Firing
- Workplace Safety
- Leaves of Absence
- Wage and Hour
- PAGA and Arbitration
- Employment-Related Contracts and Trade Secrets
- Discrimination, Harassment, and Retaliation
- NLRA and Union Issues
- Questions?

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Housekeeping

California State Minimum Wage

- Effective January 1, 2025, California's general minimum wage increases to $16.50 per hour statewide

  NOTE: Some municipalities have a higher minimum wage (e.g., San Francisco, Emeryville)

California State Minimum Wage

- Fast Food Minimum Wage: $20/hour
  - Fast Food Council could increase this by up to 3.5% but has not yet implemented any increase for 2025 yet
- Health Care Worker Minimum Wage
  - Varies depending on size and other factors for covered health facilities, ranging from $18-$23/hour
  - Took effect October 16, 2024
  - Physician groups with 24 or fewer physicians not covered

California Exemption Salary Threshold

- Minimum salary for exempt employees under California law is $68,640/year ($1,320/week) for general workers
  - Tied to minimum wage (2x applicable minimum wage) so minimum salary will be higher for covered fast food workers
  - Salaried health care employees must have a salary of at least 150% above the new minimum wage or 200% of the standard minimum wage—*whichever is higher*

Federal Exemption Salary Threshold

- Federal Department of Labor final rule increased the salary threshold for white-collar overtime exemptions to $844/week under federal law
- **BUT**, vacated by a federal court in Texas, which stopped the rule nationwide
- Old threshold remains in effect: $684/week ($35,568/year)
  - Subject to higher industry standards

Computer Software and Physician Overtime Exemptions

- Computer Software = $56.97/hour or $118,657.43/year
- Physician = $101.22/hour

2025 IRS Mileage Reimbursement Rate

- 70 cents per mile

  https://www.irs.gov/tax-professionals/standard-mileage-rates

Workplace Postings in Labor Code

- New poster covering employee rights and responsibilities under whistleblower laws (AB 2299)
  - Effective January 1, 2025
  - Labor Commissioner model poster, available at https://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf
- Updated workers' compensation notice (AB 1870)
  - Adds right of injured employee to consult a lawyer

Hiring and Firing

SB 1100
Driver's License Discrimination

- Effective January 1, 2025, employers prohibited from including a driver's license as a requirement in a job posting, application, or related materials *unless*:
  - Driving is reasonably expected to be an essential function, and
  - Employer reasonably believes that function cannot be performed using an alternate mode of transportation

SB 988
Freelance Worker Protection Act

- Requires written agreements for contracts with freelance contractors of $250+
  - Only applies to professional services listed in Labor Code § 2778(b)(2) (e.g., marketing, human resources, graphic design, translator, and writer/copy editor)
- Hiring entity must pay freelancer on or before date in agreement; if no date, then no later than 30 days after completion of the services

Compliance Reminders

- Labor Code § 2810.5 Notice (i.e., wage theft notice)
- Unemployment benefits pamphlet to departing employees (termination or resignation) (Unemployment Insurance Code § 1089)
  - Hard copy
  - Employees technically must opt in to receive electronically

Workplace Safety

COVID-19

- Regulations governing COVID-19 protections, including COVID-19 Prevention Plan requirement, will sunset February 3, 2025
  - Recordkeeping requirements for COVID-19 cases remain until February 3, 2026
  - COVID-19 may still be a workplace hazard covered by a general injury illness prevention plan

Indoor Heat Illness Prevention Plan

- Effective July 23, 2024, a written Indoor Heat Illness Prevention Plan may be required
- Covers indoor workplaces where temperature is 82+ degrees
- Similar to outdoor heat illness prevention standards – covered employers must: (1) provide access to fresh, cool water at no charge, (2) provide access to a cool-down area, and (3) encourage cool-down rest periods

Workplace Violence Prevention Plan

- Effective July 1, 2024, most employers need a written plan under Labor Code § 6401.9
  - Only exception is fewer than 10 people present at any given time **and** premises is not open to the public
- Employees must be trained on the plan initially and annually

Leaves of Absence

AB 2123
Paid Family Leave

- Employers in California can no longer require employees to use accrued vacation before accessing Paid Family Leave benefits as of January 1, 2025

  PRACTICE TIP: Review written policies to ensure compliance

AB 2011
Family Leave Mediation Program Expansion

- Small employers with 5–19 employees can participate in fast-track mediation of allegations involving CFRA and bereavement violations
- Now the program also covers reproductive loss leave claims
- Pilot program is now permanent

SB 1105
Agricultural Worker Sick Leave

- Agricultural employees as defined in Wage Orders 14, 13, and 8
- Ability to use paid sick leave to cover absences due to smoke, heat, or flooding conditions and where the state or local government declares an emergency

AB 2499
Protections for Victims of Violence

- Law effective January 1, 2025, but mandatory notice requirement does not take effect until July 1, 2025 (Labor Commissioner will create a form notice)
  - Must provide at time of hire and annually thereafter
- Recasts leave for jury duty, employee-victim to attend court proceedings, and crime victims to Government Code § 12948.8, to be enforced by Civil Rights Department
  - New anti-retaliation prohibitions added
  - Repeals Labor Code sections 230 & 230.1

NOTE: Newly enacted Govt. Code § 12948.8 overlaps with, but differs from, Labor Code 230.2.

AB 2499
Protections for Victims of Violence

- Reasons for crime victim leave expanded to a "qualifying act of violence"
  - Still includes domestic violence, sexual assault, and stalking
  - Also includes causing bodily injury/death, brandishing a weapon, actual or perceived threats of force
- Employers with 1 – 24 employees must provide time off for an employee who is a victim to "obtain or attempt to obtain relief"
  - "Relief" includes a temporary restraining order or other injunctive relief to ensure the safety of the employee-victim or their child

AB 2499
Protections for Victims of Violence

- Employers with 25+ employees must provide time off for an employee if they ***or a family member*** are a victim
  - Expanded reasons for leave, including seeking: medical attention, relief, counseling, services from a victim services organization, participate in safety planning, legal service, and relocation
  - Leave can be limited to 12 weeks, or in some cases to 10 days (or 5 days for relocation)
    - Runs concurrently with leave under the CFRA and FMLA
- All employers required to allow employees to use paid sick leave or other accrued paid leave to cover unpaid leave for covered reasons, including jury duty

AB 2499
Protections for Victims of Violence

- Detailed reasonable accommodation obligations apply to employers with 1+ employees for an employee who requests accommodation for safety at work
  - Applies if the victim is the employee or their family member
    - Employee **must** disclose the victim's status to qualify
    - Once notified, employer must engage in interactive process
  - Lax certification and notice requirements
- Employer must keep information about victim status (employee or family member) confidential

FMLA
Case Law Developments

***Perez v. Barrick Goldstrike Mines, Inc.* (9th Cir. 2024) 105 F.4th 1222**

- Employee claimed an injury after a car crash on the job; took off 18 days per doctor's note
- Employer had ample evidence employee faked injury
  - No evidence of a car crash
  - Received a report the employee was faking injury to work on his rental properties, which was corroborated and recorded by a private investigator

FMLA
Case Law Developments

***Perez v. Barrick Goldstrike Mines, Inc.* (9th Cir. 2024) 105 F.4th 1222**

- Employer terminated employment, and employee sued for wrongful termination in violation of the FMLA
- Employer prevailed at trial, but employee appealed, arguing non-medical evidence cannot counter certification from a health care provider
- The Ninth Circuit disagreed—while FMLA regulations permit an employer to seek recertification or a second opinion, that is not required

FMLA
Opinion Letter 2024-1-A

- Employee participating in prescription drug trials qualified for FMLA
- Medical trials were voluntary, but that did not put the time off outside the scope of FMLA—that was not relevant to coverage

Wage and Hour

DOL Opinion Letter, FLSA 2024-01 (November 8, 2024)

- Employer paid $25 daily reimbursement stipend for employee use of their own tools and equipment
- If the employer increased the daily stipend to $150-$200/day, would any portion be includable in the regular rate of pay?
- Any amount not reasonably approximated to reimburse actual expenses is included in the regular rate of pay
  - Remember! Labor Code § 2802 obligations

DOL Independent Contractor Rule

- Implemented a 6-factor economic realities test, rescinding prior Trump administration rule
- Potential to revert back to less stringent test with new administration
- ABC Test in California more stringent
  - If under ABC test exemption, must consider both federal and state independent contractor tests

Case Law Developments

Cadena v. Customer Connexx LLC (9th Cir. 2024) 107 F.4th 902

- Call center employees' time spent booting up computers before clocking in may be compensable if not *de minimis*
  - **NOTE**: *De minimis* rule applies under FLSA, not California law so it is important to consider computer login time as a potential area of exposure to claims of unrecorded and unpaid time

Case Law Developments

Huerta v. CSI Electrical Contractors (2024) 15 Cal.5th 908

- Time spent waiting to clear employer security checkpoint to leave constitutes compensable "hours worked"
- Driving between security gate and parking lot is generally not compensable travel time
  - Exception – Wage Order 16
    - Unique "employer-mandated travel" rule
    - Compensable if security gate is the first location where the employee's presence is required for an employment-related reason other than the necessity of accessing the worksite
    - Here, employees were told that was the "first place" they had to be for their workday and there was a brief security check (badge scan, and sometimes a quick look into the vehicle)

Case Law Developments

Huerta v. CSI Electrical Contractors (2024) 15 Cal.5th 908

- Wage Order 16
  - Employees can collectively bargain for voluntary on-duty meal periods even where the nature of the work does not prevent the employee from being relieved of all duties
    - BUT, when the employer requires the employee to remain on premises for meal periods, they are not off-duty and must be paid plus premium if no on-duty meal period agreement

Cases We Are Still Watching…

- *Camp v. Home Depot USA, Inc.* (2022) 84 Cal.App.5th 638, *review granted* Feb. 1, 2023
  - Rounding "total time" is unlawful
  - Dicta: If the employer has captured the exact amount of time worked during a shift, the employer must pay for all time worked (i.e., pay to the minute)
- *Woodworth v. Loma Linda Univ. Med. Ctr.* (2023) 93 Cal.App.5th, *review granted* Nov. 1, 2023
  - If an employer can capture the exact minutes worked, the employer must pay for all time (i.e., rounding is unlawful)

PRACTICE TIP: Stop Rounding! Pay the precise amount you capture.

PAGA and Arbitration

PAGA Reform
AB 288 and SB 92

- Employee must have personally suffered the alleged violations in the one (1) year prior to filing the PAGA Notice
- Wage statement penalties reduced and capped
- Lower penalties for technical violations (e.g., inaccurate employer name) where employee can easily determine all required information
- No derivative penalties for substantive violations (i.e., no stacking)
- Provides additional tools for courts to limit evidence and/or scope of claims to ensure manageability of trials

PAGA Reform
AB 288 and SB 92

- Small employers (<100 employees)
  - 33 days from receipt of PAGA Notice to submit cure plan to Labor and Workforce Development Agency (LWDA), which oversees the process
- Large employers (100+ employees)
  - Cannot cure, but can apply for early neutral evaluation with a mandatory stay

PAGA Reform
AB 288 and SB 92

- Reduced and potentially no penalties if an employer cures a violation and takes all reasonable steps to comply with the law (e.g., payroll audits, lawful policies, discipline for rogue supervisors)
  - Penalties capped at 15% if reasonable steps at compliance *before* receiving a PAGA Notice and request for personnel records, even if there is no cure
  - Penalties capped at 30% if reasonable steps at compliance *after* receiving a PAGA Notice, even if there is no cure
  - Penalties capped at $15 per employee, per pay period if the employer cures but does not take all reasonable steps to be in compliance

NOTE: Curing can be expensive and speculative (required to make employees whole, plus interest)

PAGA Reform Takeaways

- Compliance efforts are critical
  - Legally compliant policies
  - Training for supervisors on wage and hour compliance
  - Periodic payroll audits
  - Discipline for employees/supervisors for non-compliance
- Enforceable arbitration agreements with class action waivers (and agreement to stay PAGA pending individual arbitration) are even more important

Case Law Developments

- Federal Arbitration Act ("FAA") Transportation Worker Exemption exempts covered workers from arbitration under the FAA
  - Recent cases are expanding this exemption beyond what is typically considered transportation
- ***Bissonette v. LePage Bakeries Park St., LLC* (2024) 601 U.S. 246**
  - Focus is on the work the employee performs, not the industry
  - Two "distributors" for a producer of baked goods fell within the exemption

Case Law Developments

- ***Ortiz v. Randstadt Inhouse Services, LLC* (9th Cir. 2024) 95 F.4th 1152**
  - Warehouse worker was covered employee even though he did not drive or unload trucks because he was integral to supply chain
- ***Lopez v. Aircraft Service Int'l, Inc.* (9th Cir. 2024) 1077 F.4th 1096**
  - Airline fuel technician is a covered employee
  - There is no requirement that a worker has hands-on contact with goods and cargo or be directly involved with the transportation of goods

TAKEWAY: Employers with workers moving goods/people should consider reviewing arbitration agreements with legal counsel for options to avoid the FAA exemption

Waiver of Right to Arbitrate

- Failure to timely pay arbitration fees pursuant to Code of Civil Procedure § 1281.97 waives right to arbitration (*Suarez v. Superior Court* (2024) 99 Cal.App.5th 32)
- Unreasonable delay and participation in litigation waives right to arbitration (*Semprini v. Wedbush Securities, Inc.* (2024) 101 Cal.App.5th 518)

Case Law Developments

***Mondragon v. Sunrun Inc.* (2024) 101 Cal.App.5th 592**

- Arbitration agreement stated that the employee waived claims except those brought as a representative of the state under PAGA
- **HELD**: Since the provision did not distinguish between the *individual* PAGA claims and the *representative* PAGA claims, the employer could not compel arbitration of the individual PAGA action

Case Law Developments

***Vazquez v. SaniSure, Inc.* (2024) 101 Cal.App.5th 139**

- Employee signed an arbitration agreement at the time of hire in 2019, but she resigned in 2021, and was later rehired in 2022. She did not sign a new arbitration agreement
- **HELD**: The arbitration agreement was unenforceable
  - Claims applied only to second period of employment, rendering first arbitration agreement unenforceable for second period
  - Employee had, in effect, revoked that prior agreement by terminating her employment in 2019; she testified she did not believe documents she signed during the first period of employment applied to the second period of employment

TAKEAWAY: Rehired employees should sign new arbitration agreements

Case Law Developments

***Soltero v. Precise Distribution, Inc.* (2024) 102 Cal.App.5th 887**

- Staffing company client was not covered as an intended beneficiary of an arbitration agreement between the staffing company and the employee
- Agreements can (and should) be drafted to include various entities, including staffing agencies, worksite/client employers, consultants, and other third parties

Case Law Developments

***Ramirez v. Golden Queen Mining Co., LLC* (2024) 102 Cal.App.5th 821**

- Employee claimed arbitration agreement was unenforceable because he did not recall signing it and employer could not authenticate his signature
- **HELD**: Agreement was enforceable because employee recognized his own signature and did not dispute it was his signature
  - 3-part burden shifting framework applied
    - Employer provides *prima facie* evidence (i.e., a signed agreement)
    - Employee must present evidence of a factual dispute as to agreement's authenticity
    - Employer must then prove the signature is authentic

Case Law Developments

***Ramirez v. Golden Queen Mining Co., LLC* (2024) 102 Cal.App.5th 821**

- BUT, there is a circuit split
  - Some California courts held an employee can overcome a signed agreement by submitting a declaration stating they do not remember signing the agreement

Case Law Developments

***Garcia v. Stoneledge Furniture LLC* (2024) 102 Cal.App.5th 41**

- Denial of employer's motion to compel arbitration upheld because employer did not demonstrate that only Garcia could have affixed her electronic signature to the arbitration agreement
- Employer could have presented evidence that Garcia was required to use a unique, private login and password to electronically sign, as well as evidence detailing the procedures Garcia had to follow (including security precautions)

Arbitration Agreement Takeaways

- Must be carefully drafted (including to address FAA exemption and include potential third parties)
- Ensure signatures can be authenticated (especially for electronic signatures)
- Consider taking additional steps to document the process (e.g., attestation of when/how it was presented and signed)

Employment-Related Contracts and Trade Secrets

Why The Focus on Contracts and Trade Secrets?

- Contracts are critical to protecting your company's confidential information
- Confidential information protection contracts provide broader protection than do applicable statutes
- In California, employee handbooks are very rarely considered contracts (and for good reasons)
  - The absence of a confidential information protection agreement can leave you compromised and implicitly encourage brazen conduct
- Potential new employees often have signed contracts in California or elsewhere with former employers
- Contracts that are not up to date can be legal liabilities for your company
- Trade secrets: nearly every company has the potential to have them
- Trade secrets: can be incredibly valuable, but can be easily lost

What Happened in 2024 That You Should Know and Reminders on Best Practices

- **New Section 16600 language with additions of Sections 16600.1 and 16600.5, effective January 1, 2024:**
  - (b) (1) This section shall be read broadly, in accordance with *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, to void the application of any **noncompete agreement** in an employment context, or any noncompete clause in an employment contract, ***no matter how narrowly tailored***, that does not satisfy an exception in this chapter
  - (2) This subdivision does not constitute a change in, but is declaratory of, existing law
  - (c) This section ***shall not* be limited to** contracts where the person being restrained from engaging in a lawful profession, trade, or business ***is a party to the contract***

Business & Professions Code § 16600.1 = New in 2024

- (a) It shall be unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy an exception in this chapter
- (b) (1) For **current employees**, **and** for **former employees who were employed after January 1, 2022**, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy an exception to this chapter, ***the employer shall, by February 14, 2024***, notify the employee that the noncompete clause or noncompete agreement is void
  - (2) Notice made under this subdivision ***shall* be in the form of a written individualized communication to the employee or former employee**, and ***shall* be delivered** to the last known address ***and*** the email address of the employee or former employee
- (c) A violation of this section constitutes an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200)

Business & Professions Code § 16600.5 = New in 2024

- (a) Any contract that is void under this chapter is unenforceable **regardless of where and when the contract was signed**
- (b) An employer or former employer ***shall not* attempt to enforce** a contract that is void under this chapter **regardless of whether the contract was signed and the employment was maintained *outside of California***
- (c) An employer ***shall not*** enter into a contract with an employee or prospective employee that includes a provision that is void under this chapter
- (d) An employer that **enters into** a contract that is void under this chapter or **attempts to enforce** a contract that is void under this chapter **commits a civil violation**
- (e) (1) An employee, former employee, or prospective employee **may bring a private action to enforce this chapter** for injunctive relief or the recovery of actual damages, or both
  - (2) In addition to the remedies described in paragraph (1), a prevailing employee, former employee, or prospective employee in an action based on a violation of this chapter ***shall* be entitled to recover reasonable attorney's fees and costs**

What Have We Seen from §§ 16600.1 and 16600.5 So Far?

- Confusion and Litigation
  - "Noncompete agreement" as used in these provisions remains undefined
    - Is an overbroad definition of "Confidential Information" a "noncompete agreement" under these new provisions?
  - "Any contract that is void under this chapter is unenforceable **regardless of where and when the contract was signed**" (Section 16600.5(a) (emphasis added).) ***But….***
    - Courts outside of California have, in certain circumstances, rejected this language to the extent that it is interpreted as preventing a foreign court from applying state law other than California

What Have We Seen from §§ 16600.1 and 16600.5 So Far?

- *See, e.g., DraftKings Inc. v. Hermalyn* (1st Cir. Sept. 2024) (MA resident who moved to work for a new employer in CA; court of appeal noted CA did not have a materially greater interest in regulating noncompetes than MA and affirmed injunction against Hermalyn entered by MA trial court)
- *Bowser v. Foundation Building Materials, LLC* (C.D. Cal. Sept. 2024) (TN resident sued CA-based employer under Section 16600.5; CA federal court permitted case to be transferred to TN because nearly all relevant events occurred in TN)
- *Poer v. FTI Consulting, Inc.* (N.D. Cal. Nov. 2024) (NV based employee sued MD-based former employer in CA for injunctive relief under Section 16600.5; court denied relief because plaintiff was not a Californian and MD, home of the former employer, had a materially greater interest in the dispute, concluding MD, not CA law, was likely to apply; court also concluded that plaintiff had failed to show irreparable harm justifying issuance of an injunction)

Why Should You Care about This Stuff?

- Employment agreements containing unlawful language = a problem waiting to happen
  - You may really want or need to make use of the language that has problems and if a court determines it is unenforceable, you will be out of luck and may in fact face liability because of the problem language
- Do you have employees who live and work outside of California?

Why Should You Care about This Stuff?

- Do you sometimes hire people whose last job was for an employer outside of California and the prospective employee lived and worked outside of California?
  - High level managers and executives present the most risk (monetarily, strategically, and from a litigation perspective)
- If your agreements are missing key language, you are missing opportunities to: manage risk, establish a framework to most effectively manage important information and access to it, implement strategic goals, and save/make money

Employment-Related Contracts—Scrutinize Your Own and Those of Potentially Inbound New Employees

- Employment agreements:
  - Formal contract
  - Offer letter signed and counter-signed (employee/employer)
  - California = very broad as to what is an employment agreement
    - But, an employee handbook, even when acknowledged/signed very rarely = a contract
- Confidentiality agreements
- Invention assignment and IP agreements
- Incentive compensation and equity grant agreements
- Sale or partial sale of equity interest

Reminder: Types of Post-Employment Contractual Restrictions

- **Confidentiality agreements:**
  - Apply during and after employment and restrict post-employment possession or use of employer confidential information
  - "Confidential information" defined too broadly = may be unenforceable/unlawful
- **Non-compete clauses**: employer/employee post-termination non-compete clauses = unlawful
  - Narrow exception under Labor Code § 925(e)—lawyers involved on both sides of negotiated agreement
  - Non-compete during employment = permissible if properly limited to relevant activity
- **Customer non-solicitation clauses** post-termination = unlawful if bare restriction
- **Employee non-solicitation clauses** post-termination = historically potentially-to-likely unlawful if bare restriction

Emerging Issues That Test Limits

- **Extended notice periods**: employment agreement requires the employee to provide more than two week's notice, e.g., 60 days notice
  - Plays on the tension between:
    - Employee mobility and right of employers to dictate employee (as opposed to former employee) conduct
    - Possible "back door" noncompete vs. "reasonable restraint" or "restraint of substantial character"
    - Litigation tools that might quickly address such provisions vs. facts needed to understand the nature and extent of the restraint
    - California state courts vs. federal courts: standards applied/tolerance for restraints

Emerging Issues That Test Limits

- **Confidential information definition**: how broad is too broad?
- **Rule of Reason** anti-trust standard creeping in (more forgiving standard than Section 16600):
  - Partial sale of interest in business (*Samuelian v. Life Generations Healthcare, LLC* (2024) 105 Cal.App.5th 331)

What to Do in Response to These Changes and Trends?

- **Check your employment agreements** for overly broad definitions of "confidential information" and prohibited noncompete language
- **Check your employment agreements** for presence of appropriate computer access language; consider stand-alone computer use and access policy
- **Identify and protect** company trade secrets
  - California employees are the most "mobile" in the U.S., but they still cannot take company trade secrets
    - Proactively address this—waiting until an employee leaves with your most important confidential information may be too late
    - Possession alone may not be actionable: put tools in place now to help show possession was not accidental

What to Do in Response to These Changes and Trends?

- **Outbound and inbound senior managers and executives** require special attention
- **Contracts with business partners and vendors** = the second leading leak point for trade secret theft (your employees and former employees are the first leak point). *See, e.g., Propel Fuels Inc. v. Phillips 66 Co.* (Alameda County Sup. Ct. October 2024) ($604.9 million in damages; now seeking an additional $1.2 billion in exemplary damages for alleged misappropriation of proprietary strategies, formulas, financial data, and other confidential information)

Discrimination, Harassment, and Retaliation

Crown Act Amendments (AB 1815, amends Civ. Code § 51, Ed. Code § 212.1, Govt. Code § 12926)

- Definition of race included "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles"
  - New definition removes "historically"
  - Requires policy amendments

FEHA Amendment (SB 1137, amends Govt. Code §§ 12920, 12926)

- Expands FEHA protection to explicitly address claims for discrimination on more than one basis (e.g., race and gender)
- Similarly amends the Unruh Civil Rights Act (Civ. Code § 51) and Education Code (Ed. Code §§ 200, 210.2)

Pregnant Workers Fairness Act (PWFA) Regulations

- Covers employers with 15+ employees
- Requires employers to provide reasonable accommodations for "limitations" related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (unless undue hardship)
  - "Limitation" is broader than disability under the ADA

Pregnant Workers Fairness Act (PWFA) Regulations

- Employers can only ask for a medical certification or doctor's note if it is reasonable
  - Not reasonable for certain "predictable assessments"
    - Allowing employees to keep water nearby and drink
    - Additional restroom breaks
    - Allowing employees to sit/stand as needed
    - Additional breaks to eat and/or drink
- Presumption that a pregnant employee will be able to return to performing their essential job functions in forty (40) weeks (i.e., a presumption that a 40-week accommodation is reasonable)
- More generous than FEHA accommodations in some respects

EEOC Unlawful Harassment Guidelines

- https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace
- Generally consistent with what we understand under the FEHA, with some more express statements, for example:
  - Prohibition on "outing" an employee's sexual orientation, misgendering employees, using an employee's "dead name"
  - Prohibition on harassment/discrimination for reproductive decisions (including abortion or use of contraceptives), as well as race, age, ethnic stereotypes (positive or negative)

EEOC Unlawful Harassment Guidelines

- Provides numerous examples for educational purposes
- Currently the subject of a lawsuit filed by several states arguing the guidance goes beyond Title VII protection and the EEOC was without authority to issue such guidance

Case Law Developments

***Bailey v. San Francisco District Attorney's Office* (2024) 16 Cal.5th 611**

- FEHA, Gov't Code § 12923
  - Single incident of harassing conduct is sufficient to create a triable issue of fact regarding the existence of a hostile work environment if it interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive work environment
- African American employee alleged a single incident of a racial slur
  - Bailey had startled at the sight of a mouse, and a coworker walked up to her and quietly said "You [N-words] is so scary"
  - Supervisor learned of the incident and reported it

Case Law Developments

***Bailey v. San Francisco District Attorney's Office* (2024) 16 Cal.5th 611**

- Use of an unambiguous racial epithet might be severe enough to alter the conditions of the work environment
- Remanded to appellate court to determine if it was severe enough under the facts and circumstances of this case

Case Law Developments

***Okonowsky v. Garland* (9th Cir. 2024) 109 F.4th 1166**

- Corrections lieutenant at federal prison created and managed an Instagram page containing hundreds of sexist, racist, anti-Semitic, homophobic and transphobic posts that either implicitly or explicitly referred to the prison, prison staff, and inmates
- Some posts were graphic and depicted or were suggestive of violence against women, including discussions of planned acts of sexual violence against a prison staff psychologist and other female coworkers
- Psychologist discovered the Instagram page and made several complaints, but the posts continued even after she was reassigned to another facility

Case Law Developments

***Okonowsky v. Garland* (9th Cir. 2024) 109 F.4th 1166**

- New management comes in, conducts a threat assessment and determines the lieutenant violated policies and he was counseled in writing, but he did not stop and, despite another complaint from the psychologist, nothing further was done
- Psychologist sued, district court granted summary judgment for the employer on grounds that she failed to show her workplace was objectively hostile because the Instagram posts occurred "entirely outside the workplace"
- 9th Circuit reversed stating that it was "illogical" to consider social media posts about a workplace to occur "outside" the workplace and noting that courts must consider the totality of the circumstances when evaluating conduct on social media

Case Law Developments

***Wawrzenski v. United Airlines, Inc.* (2024) 106 Cal.App.5th 663**

- Flight attendant made posts on social media in her uniform, alongside sexually suggestive photos of her in a bathing suit, with links to her OnlyFans page
- United Airlines investigated, found her conduct in violation of several policies, and asked her to take down all photos in her uniform. She agreed and was set to be issued a final warning when the investigator discovered she had missed one photo. The final warning was turned into a termination.

Case Law Developments

***Wawrzenski v. United Airlines, Inc.* (2024) 106 Cal.App.5th 663**

- She sued alleging, among other things, discrimination based on sex. At summary judgment she put forth evidence that three men had made similar posts in uniform, alongside sexually suggestive photos, and one had linked to his drag business account. All had only received warnings and been asked to take their photos down.
- Trial court granted summary judgment in favor of United Airlines finding these three men were not proper comparators. The appellate court reversed, noting that whether or not the men were proper comparators was an issue for the jury to decide.
- **TAKEAWAY**: Do not ignore off-duty conduct when it impacts the workplace. However, make sure you are treating similar situations similarly.

NLRA and Union Issues

California Worker Freedom from Employer Intimidation Act (SB 399, adds Labor Code § 1137)

- Prohibits employers from retaliating against employees who choose not to attend meetings discussing religious or political matters
  - Employees who are working at the time and decline to participate must still be paid while the meeting is held
  - Political matters include issues relating to joining or supporting any labor organization (i.e., union)
- Civil penalties of $500 per employee for each violation
- Several business groups have filed a federal lawsuit challenging the law on federal constitutional grounds, as well as a violation of the NLRA

Case Law Developments

Amazon.com Services (373 NLRB No. 136)

- "Captive audience" meetings are unlawful because they interfere with employees' rights under section 7 of the NLRA
  - Interferes with an employee's right to decide whether, when, and how to participate in a debate concerning union representation;
  - Allows employers to observe employees in exercise of section 7 rights; and
  - Requiring attendance on threat of discipline lends a coercive character to messages regarding unionization

Case Law Developments

***Home Depot USA, Inc.* (373 NLRB No. 25)**

- Employee complained about race discrimination and regularly discussed offensive conduct of one coworker with other employees of color
- Employer noticed BLM initials on employee's work apron, asserted it was a violation of its dress code policy, and instructed him not to return to work until it was removed
- **HELD**: Employee demonstrated BLM was connected to protected concerted activity

Questions?

For additional resources, text "2024" to (888) 688-3084
or use the QR code below:

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