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Labor and Employment Attorneys

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SOUND ADVICE
FOR EMPLOYERS

Mid-year Employment Labor Law Seminar

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INTRODUCTION

Presentation Available

- Link on blog site:
  - https://www.rybickiassociates.com/blog

NEW LAWS AND REGULATIONS

Laws and regulations adopted by federal, state & local governments

Local Minimum Wages

Minimum Wage

- Local ordinances – throughout the Bay Area – changing on July 1, 2023 (!)
  - Consider workers who spend some time in different jurisdictions (delivery, telecommute, etc.)
- Remember: Labor Commissioner can now recover amounts owed under *local* wage statutes!

Minimum Wage (No. Cal)

- Alameda ($16.52)
- Berkeley ($18.07)
- Emeryville ($18.67)
- Fremont ($16.80)
- Milpitas ($17.20)
- San Francisco ($18.07)
- San Mateo County ($16.50)
  - April 1, 2023
  - Unincorporated areas *only*

Local Ordinances

- Review *all* jurisdictions employees visit or work in
- Local ordinances proliferate:
  - Sick and family leave
  - Benefit contributions
  - Scheduling requirements
  - Many other varied local ordinances

Local Ordinances

- New San Francisco Ordinance:
  - Military Leave Pay Protection Act
  - Requires covered employers to provide supplemental pay to San Francisco-based reservist employees when called to active duty
  - Guidance at: https://sf.gov/information/understanding-military-leave-pay-protection-act

Local Ordinances

- COVID-19:
  - Most local ordinances have *ended* with the end of pandemic conditions – (but see Oakland ordinance)
  - *BUT:* The end of the pandemic has other effects (discussed below)

COVID Regulation

No 1: Pandemic Status

Pandemic Status

- Existence of a pandemic typically maps the Centers for Disease Control (CDC) designation.
- CDC declared the end of pandemic on May 11, 2023
  - https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html
- California implemented the same day:
  - https://www.chhs.ca.gov/end-of-covid-emergency/

No. 2: Supplemental Paid Sick Leave

Supplemental Paid Sick Leave

- State SPSL is *over* - no more SPSL obligations for employers under statewide law
- SPSL ended on December 31, 2022:
  - https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html

No. 3:
2023 Exposure Notices

COVID Notice

- (AB 2693) (Labor Code § 6409.6):
  - *Removes* prior individual notice requirements
  - Requires prominent display of exposure notification in places where postings are customarily displayed
  - Post within one business day of notice to employer and remain in place for fifteen calendar days

COVID Notice

- Posted notice must contain:
  - Dates on which an employee, or employee of a subcontracted employer, was on the worksite premises
  - Location of the exposures, including the department, floor, building, or other area, but need not be so specific to allow individual workers to be identified.
  - Contact information for employees to receive information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws
  - Contact information for employees to receive the cleaning and disinfection plan that the employer is implementing (though this is no longer required!)

COVID Notice

- Posted notice must be in English and the language understood by the majority of employees
- Must also be placed on any web or electronic portal maintained by the employer for communications
- Record of posting must be maintained for three years

COVID Notice

- Employers may send out individual notices as previously required by state law rather than posting

- Notice must be provided to any union or other labor representative containing the same information as required for Cal-OSHA Form 300 injury and illness logs

COVID Notice - Definitions

- "Worksite" means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period. Does not apply to:
  - buildings, floors, or other locations of the employer that an individual with a confirmed case of COVID-19 did not enter,
  - locations where the worker worked by themselves without exposure to other employees, or
  - to a worker's personal residence or alternative work location chosen by the worker when working remotely

COVID Notice - Definitions

- "Close contact" includes:
  - for indoor airspaces of 400,000 or fewer cubic feet: sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period
  - for indoor airspaces of greater than 400,000 cubic feet: being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period

COVID Notice - Definitions

- "Notice of potential exposure" means :
  - notification from an employee, emergency contact, public health official, or licensed medical provider that employee has a confirmed case of COVID-19 and was on the worksite premises within the infectious period
  - notification through the testing protocol of the employer
  - notification from a subcontracted employer

COVID Notice

- Note: these notification requirements are not fully integrated with DOSH standards
- New DOSH requirements took effect in 2023 – discussed below

No. 4: Cal-OSHA *Non-Emergency* Standards

COVID Regulation

- DOSH has developed new non-emergency regulations that will take effect in January, 2023
- The regulations apply to employers not covered by the state Aerosol Transmissible Diseases (ATS) standards
- A new fact-sheet is available from Cal-OSHA at:

  https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary.pdf

COVID Regulation

- Employers must continue to:
  - provide face coverings and ensure they are worn by employees as required by the California Department of Public Health (CDPH)
  - report information about employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA
  - make COVID-19 testing available at no cost and during paid time to employees following a close contact
  - exclude COVID-19 cases from the workplace until no longer an infection risk
  - implement policies to prevent transmission after close contact
  - develop, implement, and maintain effective methods to prevent COVID-19 transmission by improving ventilation

COVID Regulation

- Under the permanent rules:
  - standalone COVID-19 Prevention Plan no longer required; IIPP must address COVID-19 as a workplace hazard
  - employers must provide effective COVID-19 hazard prevention training
  - employers must provide face coverings when required by CDPH, respirators upon request
  - employers must identify COVID-19 health hazards and develop methods to prevent transmission in the workplace
  - employers must investigate and respond to COVID-19 cases and certain employees after close contact
  - employers must make testing available at no cost to employees, including to all employees in the exposed group during an outbreak or major outbreaks
  - affected employees must be notified of COVID-19 cases in the workplace

COVID Regulation

- Under the permanent rules:
  - employers must maintain records of COVID-19 cases and immediately report serious illnesses to Cal/OSHA and to the local health department when required
  - employers must now report major outbreaks to Cal/OSHA
  - employers ARE NOT REQUIRED to pay employees while they are excluded from work
  - excluded employees must receive information regarding COVID-19 related benefits they may be entitled to under federal, state, or local laws; their employer's leave policies; or leave guaranteed by contract

COVID Regulation

- NOTE: the permanent rules have been approved and are in effect
- DOSH has published the regulation text and guidance:

  https://www.dir.ca.gov/dosh/coronavirus/Non_Emergency_Regulations/

  https://www.dir.ca.gov/dosh/coronavirus/

- Also monitor CDPH standards:

  https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/EmployeesAndWorkplaces.aspx

No. 5: End of Leeway under COVID

End of Leeway

- As the *pandemic* is over, state and federal agencies will not be so flexible with employers on many issues
- Example: mandatory vaccination policies *no longer* subject to exemption from various accommodation laws
- Example: privacy and religious objection now may outweigh prior COVID measures

End of Leeway

- *See* the EEOC discussion:

  https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

- Review and reconsider COVID-era policies such as mandatory vaccination, illness inquiries, etc.!

COVID CONCLUSION

Conclusion

- State law will have individual notice requirements under *law* through 2023
- State *regulation* will have COVID-related requirements through early 2025
- But: much of the leeway provided for vaccination, inquiries, exclusion, etc., has *ended* with the end of the pandemic!!!

Immigration

I-9 Compliance

- Employers were provided flexibility when examining I-9 documents during the pandemic, but many misunderstood the exceptions (!)
- Employers with employees "taking physical proximity precaution" allowed to provide remote inspection of Section 2 documents
- Employers required to perform a remote inspection (e.g., over video link, fax or email, etc.) and the obtain, inspect, and retain copies of the documents, *within three business days*.

I-9 Compliance

- Problem: Employers did not always get the 'copies' within three days and keep them

- Bigger problems:

  - exception applied *only* to remote workers
  - Employers must provide written documentation of their remote onboarding and telework policy for each employee
  - Employers required to perform new physical inspection within three days of resumption of non-remote work

I-9 Compliance

- The temporary accommodations will end on July 31, 2023
- Employers must complete in-person physical document inspections for employees whose documents were inspected remotely during the temporary flexibilities by August 30, 2023
- New regulations have been proposed but, for now, I-9 materials must be reviewed in the employee's presence and *not* remotely (as of July 31)
  - https://www.uscis.gov/i-9-central/form-i-9-related-news/temporary-policies-related-to-covid-19

Criminal Background Checks

Fair Chance Act

- CCRC (formerly FEHA) regulations proposed that will add to and clarify "Fair Chance Act" terms regarding criminal background checks
- The regulations are in process and merely waiting final approval
- Review discussion on CCRD website at: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/06/Text-of-Proposed-Modifications-to-Employment-Regulations-Regarding-Criminal-History-PDF.pdf

Fair Chance Act

- The pending changes include language:
  - Explaining that employers do not have a legal obligation to check criminal history but must abide by the regulations if they do
  - Clarifying that employers must be *directly* required to do a criminal background check to qualify for an exemption (as opposed to a third party's requirement, such as a licensing board)
  - Adding to the level of detail required in an individualized assessment prior to taking an adverse action based on the applicant's conviction history

Fair Chance Act

- The pending regulations describe evidence of rehabilitation or mitigating circumstances that an applicant voluntarily may provide, including:
  - conduct during incarceration, including participation in work and educational or rehabilitative programming and "other prosocial conduct;
  - employment since the conviction or completion of sentence;
  - community service and engagement and/or
  - other rehabilitative efforts since the completion of sentence or conviction or mitigating factors

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  - community service and engagement and/or
  - other rehabilitative efforts since the completion of sentence or conviction or mitigating factors

Fair Chance Act

- The revisions also include:
  - the requirement to maintain Work Opportunity Tax Credit materials in confidential files separate from the applicant's general personnel file and to limit their use and availability among managers
  - expansion of the definition of "employer" to include "any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list."

Hearing Disabilities

Hearing Disabilities

- EEOC has issued new guidance on hearing disabilities under the Americans with Disabilities Act (ADA)
- ADA applies to employers with 15 or more employees; but state law is likely to apply the same standard to employees with 5 or more employees
  - Fair Employment and Housing Act (FEHA)

Hearing Disabilities

- The guidance is not unusual – it covers much of the same ground that applies to other disabilities:
  - Pre-employment inquiries and medical examinations
  - Reasonable accommodation and an interactive process
  - 'Direct threat' and undue hardship exceptions
  - Other common ADA principles

Hearing Disabilities

- The 2023 guidance is significant for several reasons:
  - Attorneys and agencies will *focus* on hearing disabilities
  - The guidance is an *excellent guide* to the principles applicable to *all* disabilities!
- *See* https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act

Religious Accommodation

Religious Accommodation

- Supreme Court is considering claims by a postal worker who refused to work Sundays and could not consistently find replacements to cover for his religious objection
- Court accepted case to consider whether "inconvenience to coworkers" would cause an "undue hardship" allowing employer to refuse accommodation
- While the USPS is a quasi-governmental entity, the *co-workers* have a right not to have another employee's religious requirements placed on them by the employer – a very different standard than in other contexts

Religious Accommodation

- It is not clear how the case (*Groff v. DeJoy*) will turn out, but it is a good example of religious accommodation principles

- *See* the EEOC discussion of "undue hardship" and religious accommodation at https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation

Pregnant Workers Fairness Act

Federal Pregnancy Law

- Pregnant Worker Fairness Act took effect June 27, 2023
- Act applies to private employers with 15 or more employees (and others such as public employers)
- Act is administrated by the Equal Employment Opportunity Commission (EEOC), which will publish regulations implementing it (but already takes complaints under the Act)

Federal Pregnancy Law

- Requirements include:
  - Reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions
  - Interactive process to determine the need for and availability of reasonable accommodations

Federal Pregnancy Law

- Prohibitions include:
  - Employers may not deny employment opportunities to a qualified employee due to failure to make reasonable accommodations
  - Employers may not require paid or unpaid leave if a reasonable accommodation would allow the employee to work
  - No adverse action based on requesting or using a reasonable accommodation

Federal Pregnancy Law

- Damages and remedies mirror those under Title VII (federal EEO law) – far less than unlimited damages required under state law
- Unlikely to make much of a *practical* difference, but the Act will support EEOC claims should an employee go to that agency
- Information: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

Non-Compete and Disclosure

Non-Disparagement

- California law recently limited the use of many non-disparagement clauses in severance and settlement agreements, prohibiting language that restricts comments about unlawful acts in the workplace

- This year the National Labor Relations Board went father -

Non-Disparagement

- Employer entered into a severance agreement that prohibited "statements … which could disparage or harm the image of [the] Employer"

- The Board found that this would restrict comments about the employer, policy and working conditions including lawful statements under the National Labor Relations Act (e.g., employer pay too low for all employees)

Non-Disparagement

- Board found the language too broad and held the employer had committed an unfair labor practice under federal law

- Some protection: employee could be prohibited from making statements that were so “disloyal, reckless, or maliciously untrue [as] to lose the Act's protection”

Non-Disparagement

- Confidentiality: the Board also found that the confidentiality language prohibiting disclosure of any part of the agreement *also* violated the Act as it kept employee from discussing parts he believed to be unlawful!

- Some protection: employee could be prohibited from making statements that were so "disloyal, reckless, or maliciously untrue [as] to lose the Act's protection"

Non-Disparagement

- Takeaway: there is very little value in non-disparagement language *or* in confidentiality of severance and settlement materials

- NLRB Case can be seen at:

https://apps.nlrb.gov/link/document.aspx/09031d45839af64d

Non-Compete Agreements

- Fair Trade Commission formally introduced a proposed rule banning non-compete agreements

- Proposed rule would prohibit non-compete agreements with employees, contractors, and volunteers - and require notice to employees that prior agreements are invalid

Non-Compete Agreements

- The rule would include any “non-compete clause: 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”

- It would also apply a “functional test” for whether *another* term qualifies as a “non=compete” clause under the rule If it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment:

Non-Compete Agreements

- Functional test:
  - non-disclosure agreement written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment
  - contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker

Non-Compete Agreements

- Rule can be viewed at:
  - https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking
- FAQ information published at:
  - https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf

Artificial Intelligence

AI Guidance

- EEOC released May 2023 guidance on AI effect under federal civil rights law
- Guidance is the culmination of a multi-year study on effects of AI in hiring and employee evaluation
- Guidance is at: https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used

AI Guidance

- Issues covered include:
  - use of an algorithmic decision-making tool as a "selection procedure"
  - Assessing potential adverse impact of an algorithmic decision-making tool
  - Application of a "four-fifths rule" if an algorithm has different result rates among different groups

AI Guidance

- The guidance accompanies *disability* related guidance under the Americans with Disabilities Act
  - ADA guidance is at:

https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence

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AI Guidance

- Issues identified in ADA guidance include:
  - employer does not provide "**reasonable accommodation**" necessary to be rated fairly and accurately by algorithm
  - algorithmic decision-making tool "**screens out**" an individual with a disability, even though that individual is able to do the job with a reasonable accommodation
  - Ai tool violates the ADA's restrictions on **disability-related inquiries and medical examinations**

AI Guidance

- Upshot: AI guidance applies common principles in EEO analysis
- The non-ADA guidance is focused on *adverse impact*, which only affects large groups of employees
- But the ADA guidance is relevant to *all* employee and will affect (for state purposes) employers with 5 or more workers

National Labor Relations Board

National Labor Relations Board

- NRLB also addressed employee discipline for both unionized and non-unionized workplaces in May 2023
- The Board considered situations where an employee protests employer policies or working environment in a heated exchange
- Outbursts can be profane or even have harassing language - how does an employer deal with such conduct under *other* EEO laws?

National Labor Relations Board

- In *Lion Elastomers*, the Board reinstated its prior "setting-specific" tests used to determine when an employee's outburst is protected by the NLRA.

- If directed at management about the workplace, the Board will now consider:

  - The place of the discussion;
  - The subject matter of the discussion;
  - The nature of the outburst; and
  - Whether the outburst was, in any way, provoked by an employer's unfair labor practice.

National Labor Relations Board

- In conversations with other workers in person or online, conduct is evaluated under a "totality of the circumstances test"

- Employees must be allowed to make statements – even profane statements - "robustly without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes."

National Labor Relations Board

- Takeaway: employers should be *very* careful when an employee's language is among or on behalf of other employees, or directed at management in response to or criticism of working conditions.

- *Lion Elastomers* can be seen here:

https://apps.nlrb.gov/link/document.aspx/09031d4583a42c17

Agricultural Labor Relations

Labor Peace Agreements

- AB 2183 amended Labor Code section 1156.35 *et seq*. to permit various types of elections for agricultural workers including polling place votes, labor peace elections and non-labor-peace card-check certification.

- Few if any employer registered 'labor peace agreements' in the January 2023 window

Labor Peace Agreements

- *Amendments* are proposed that will clarify some aspects of the law (if they make it through the process)
- Agricultural employers should monitor developments closely as the 2022 law both *expedites* representation and creates *substantial penalties* for noncompliance!
- ALRA developments can be tracked at: https://www.alrb.ca.gov/ab-2183-guidance/

Arbitration Agreements

Impact of Arbitration

- This year: federal appeal court *reverses* prior decision on AB 51 – a state law prohibiting mandatory employment arbitration agreements
  - Dramatic reversal by a judge known for tendency to cover desired outcome with complex opinions
  - Left employers ability to require arbitration agreements

Impact of Arbitration

- Benefit: no class actions (!)
- New benefit: no group PAGA action
- Questions:
  - What happens when an employee signed an agreement but has PAGA claims based on other employees?
  - What happens when other employees signed arbitration agreements *before* or *after* PAGA litigation was filed?

Questions Facing Employers

- Mandatory or Voluntary?
  - Congress limited arbitration of sexual harassment and similar claims under the federal law – which employers rely on for enforcement. So use *voluntary* agreements?
- How to deal with others?
  - Ensure agreement addresses non-arbitration of PAGA claims based on *other* employees – but then what happens to *their* claims? (Discuss coming *Adolph v. Uber Technologies* case.)

COURT CASES

Whistleblowing

- Significant case under California Labor Code section 1102.5
- 1102.5 prohibits 'whistleblowing' – reporting an employer's allegedly unlawful conduct
- 1102.5 was revised in the last decade to include reports *within* a company as well as reports to government authorities

Whistleblowing

- New California Supreme Court case: employee complained to her employer about unpaid wages *after* the employer already knew about the issue
- Employer allegedly retaliated against the employee following her complaints
- The Court of Appeal held that the report was not "whistleblowing" because the employer already knew about it. How could one blow the whistle on something already known (!).
- Supreme Court reversed: complaints still protected even well after the issue reported is publicly and internally known.

Whistleblowing

- *People ex rel. Garcia-Brower v. Kolla's, Inc.*, 529 P.3d 49 (Cal. 2023).
- Comments:
  - (1) 1102.5 has a *terrible* burden of proof, and
  - (2) this no longer covers just whistleblowing – it covers all complaints of allegedly unlawful conditions even after they have been discovered and *addressed* by an employer

Hostile Work Environment

- Employees sued because management allowed employees to listen to offensive music
- Lower court dismissed because the music was not directed at anyone in particular (and was not made by a particular person)
- Employees appealed

Hostile Work Environment

- Federal appellate court held that "sexually derogatory" lyrics *could* create a hostile work environment
  - Need not be directed at a particular gender – can be offensive to *both*
  - Need not target a particular person or gender

Hostile Work Environment

- What does this mean for employers? Do you ban all hip-hop, funk, etc.?
- Potential for 'associational' discrimination?
- *Sharp v. S&S Activewear, LLC* can be viewed at:
  - https://cdn.ca9.uscourts.gov/datastore/opinions/2023/06/07/21-17138.pdf

Multiple Policies

- Employer provided both an arbitration agreement and a confidentiality agreement – with an addendum – at hire
- Employee noted that the arbitration agreement had some issues, but that the confidentiality agreement was worse because it allowed the employer to go to court at times (!)

Multiple Policies

- Court rejected the idea that each document could be read *separately* – where one contradicted the other, it made the entire arbitration agreement unlawfully unfair

- *Takeaway:* scour your policies and materials and ensure they are consistent!

- Blog discussion (P*layu Alberto v. Cambrian Homecare*) at: https://www.rybickiassociates.com/post/policies-and-agreements-sometimes-too-much-is-too-much

ON THE HORIZON

Proposed Laws and Regulations

- Follow proposed laws and regulations (such as potential indoor heat illness regulations from Cal-OSHA)

- Keep watch on industry publications or HR sites (SHRM, HR California, etc.) for new laws (such as CalChamber “Job Killer” and “Job Creators”)

Be Prepared

- WATCH for interpretations by agencies over the coming months (DFEH, Labor Commissioner, etc.)
- READ postings and newsletters from chambers and industry organizations
- REVIEW policies and materials to ensure compliance with these new laws

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LABOR AND EMPLOYMENT ATTORNEYS

QUESTIONS?

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THANK YOU!

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