I. New Laws and Regulations

A. CALIFORNIA FAMILY CARE AND MEDICAL LEAVE, AND PAID SICK LEAVE UPDATES.

1. On January 1, 2023, Assembly Bill ("AB") 1041, which expanded the definition of "family member" under the California Family Rights Act (California Government Code Section 12945.2, "CFRA") and the California Healthy Workplaces Healthy Families Act (Labor Code Section 245.5, "HWHFA"), went into effect.

2. The definition of "family member" for purposes of taking family care and medical leave pursuant to CFRA was expanded to include nonblood relatives, apart from spouses and domestic partners.

a) For family care and medical leave purposes, "family member" now includes a "designated person", which is defined as any individual related by blood or whose association with the employee is equivalent to a family member. The new law does not, however, define what "equivalent to a family member" means.

b) An employee must be permitted to name a "designated person" at the time they request to take family care and medical leave pursuant to the CFRA.

(1) An employer is permitted to limit an employee to identifying one designated person per 12-month period.

3. The definition of "family member" for purposes of taking paid sick leave pursuant to the HWHFA was also expanded to include nonblood relatives apart from spouses and domestic partners.

a) For paid sick leave purposes, "family member" now includes a designated person, which is defined in the HWHFA as a person identified by the employee at the time the employee requests paid sick days.

b) Notably, the definition of "designated person" for paid sick leave purposes is *broader* than the definition for family care and medical leave purposes.

c) An employee must be permitted to name a "designated person" at the time they request to take paid sick leave pursuant to the HWHFA.

(1) An employer is permitted to limit an employee to identifying one designated person per 12-month period.

B. SAN FRANCISCO FAMILY FRIENDLY WORKPLACE ORDINANCE UPDATE.

1. The San Francisco Family Friendly Workplace Ordinance (the "FFWO") was amended and expanded as of July 12, 2022.

2. The FFWO is applicable to employers with 20 or more employees.

a) For purposes of determining the total number of employees an employer employs, all employees are counted. As such, employees located both inside *and* outside San Francisco, temporary employees, part-time employees and full-time employees must all be counted.

b) If an employer has 20 or more employees with only *one* employee living or telecommuting into San Francisco, the FFWO will still apply to the employer with respect to the single San Francisco employee.

3. The FFWO amendments expanded the scope of what constitutes a "covered employee" for purposes of the FFWO.

a) Pursuant to the FFWO amendments, the FFWO no longer only covers employees employed within the geographic bounds of the City and County of San Francisco.

b) The FFWO now covers employees who *telework* outside San Francisco, as long as the employer maintains an office or worksite within San Francisco where employees may work or were permitted to work from before the COVID-19 pandemic.

c) Pursuant to the FFWO amendments, employees are still required to have worked for an employer for at least six months and work at least eight hours per week to be covered by the FFWO.

4. The FFWO now guarantees flexible work arrangements for covered employees with qualifying caregiver responsibilities who provide their employer with written notice of their preferred arrangement, unless the employer can demonstrate undue hardship.

5. An employee has "qualified caregiver responsibilities" if they have primary caregiver responsibilities, meaning they provide regular and substantial ongoing care, for:

a) A child or children for whom they have assumed parental responsibility;

b) A parent aged 65 or older of the employee; or

c) A person with a serious health condition "in a family relationship" with the employee.

(1) For purposes of the FFWO, a "family relationship" means a relationship in which a caregiver is related by blood, legal custody, marriage, or domestic partnership to another person such as a spouse, domestic partner, child, parent, sibling, grandchild or grandparent.

6. The bases for what constitutes an "undue hardship" for an employer under the FFWO were not changed by the FFWO amendments. They include, for example, detrimental effect on the ability of the employer to meet client or customer demands.

7. Pursuant to the FFWO amendments, a covered employee with qualified caregiver responsibilities is permitted to request the following changes to their work arrangements:

a) A change to the number of their required work hours;

b) A change to their work schedule;

c) A change to their work location, including a request to telework;

d) A change to their work assignment; or

e) Work duty modifications.

8. The FFWO amendments also revised the process and time frames for responding to a written request for work arrangement changes made by a covered employee with qualified caregiver responsibilities.

C. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT UPDATE.

1. Pursuant to California Senate Bill ("SB") 523, which is also known as the Contraceptive Equity Act of 2022, the Fair Employment and Housing Act (California Government Code Section 12900 *et seq*., "FEHA") now includes "reproductive health decision-making" as a characteristic protected from discrimination and harassment. SB 523 took effect on January 1, 2023.

2. Under the new law, the definition of "reproductive health decision-making" includes but is not limited to a decision to use or access a particular drug, device, product or medical service for reproductive health.

3. Pursuant to SB 523, FEHA-covered employers are now prohibited from discriminating against an employee or applicant based on reproductive health decision-making.

4. Pursuant to SB 523, FEHA-covered employers are now prohibited from requiring an employee to disclose information related to reproductive health decision-making as a condition of employment, continued employment or a benefit of employment.

D. CALIFORNIA LAWS REGARDING REPRODUCTIVE HEALTH DECISION-MAKING.

1. On September 27, 2022, California Governor Newsom signed AB 2091 and AB 1242 into effect.

2. AB 2091 prohibits California employers from releasing medical information relating to individuals seeking abortion care in response to a subpoena or request from an out-of-state individual or entity that seeks to interfere with an employee's rights under the California Reproductive Privacy Act (California Health and Safety Code Section 123460 *et seq.*).

a) Employers are still permitted to release medical information relating to individuals seeking abortion care—if this information is being requested to assist with medical treatment.

3. AB 1242 prohibits California employers from sharing information or assisting in an investigation related to a lawful abortion with out-of-state entities.

a) AB 1242 also prohibits entities from complying with out-of-state warrants or other legal processes seeking information or records for an investigation relating to a lawful California abortion.

E. CALIFORNIA EMPLOYEE OFF-DUTY CANNABIS USE PROTECTIONS.

1. On September 18, 2022, California Governor Newsom signed AB 2188, which amends the FEHA (California Government Code section 12900 *et seq*.) and is set to take effect on January 1, 2024.

2. Pursuant to AB 2188, California employers are prohibited from discriminating against a person in hiring, termination, or any term or condition of employment, if the discrimination is based upon the use of cannabis off the job and away from the workplace.

3. AB 2188 also protects employees who are required to take drug screening tests in appropriate circumstances and who test positive for "nonpsychoactive cannabis metabolites" in their hair, blood, urine, or other bodily fluids. "Nonpsychoactive cannabis metabolites" are defined in the new law as the metabolites left in the body after it metabolizes THC and which remain detectable for weeks after any psychoactive effect or impairment due to cannabis consumption ends.

a) California employers are prohibited under AB 3188 from discriminating against employees who test positive for "nonpsychoactive cannabis metabolites" during a drug test.

b) However, employees are still permitted under the new law to restrict employees from possession of, being impaired by, or using cannabis at work.

4. AB 3188 does not apply to an employee in the building and construction trades, or in circumstances where certain federal agency regulations are involved.

F. INCREASED CALIFORNIA PAID FAMILY LEAVE BENEFITS.

1. Pursuant to SB 951, which will take effect on January 1, 2025, there will be an increase in California Paid Family Leave ("PFL") benefits.

a) SB 951 will increase the PFL benefits that low-wage workers receive up to 90% of their weekly income.

b) SB 951 will also increase the PFL benefits that other workers receive up to 70% of their weekly income, up to a specified cap. The current PFL weekly benefits cap is currently set at $1,539, however this cap adjusts each year based on average statewide wages.

2. SB 951's increased PFL benefits will not require any additional business contributions; these benefit increases are funded entirely by increased payroll taxes.

G. CALIFORNIA BEREAVEMENT LEAVE LAW.

1. Effective January 1, 2023, unpaid bereavement leave requirements have been expanded by AB 1949, which adds section 12945.7 to the FEHA (California Government Code section 12900 *et seq*.).

2. Pursuant to AB 1949, employers covered by FEHA are now required to provide qualified employees with five days of *unpaid* bereavement leave for the death of a qualifying family member.

a) For purposes of this new law, a "qualified employee" is an employee who has been employed for at least 30 days prior to the commencement of their bereavement leave.

b) For purposes of this new law, a "qualifying family member" is a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law, meaning a parent of a spouse or domestic partner.

3. Bereavement leave days do not have to be consecutive under the terms of the new law; however, all bereavement days must be completed within three months of the death.

4. Qualified employees must be permitted to use any vacation, personal leave, accrued and available sick leave, or other available paid time off during their bereavement leave.

5. Employers may require a qualified employee taking bereavement leave to provide appropriate proof or documentation within 30 days of the first day of their leave.

a) Acceptable documentation may include a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency.

6. Qualified employees must be permitted to use bereavement leave for each qualifying occurrence, meaning each death of a qualifying family member.

a) AB 1949 does not limit how many times a qualified employee may be eligible for bereavement leave in a given year.

7. AB 1949 makes it unlawful for an employer to discharge, demote, fine, suspend, expel, or discriminate against a qualified employee who exercises their right to bereavement leave.

8. AB 1949 does not apply to employees who are covered by a valid collective bargaining agreement that provides for bereavement leave.

H. CALIFORNIA "EMERGENCY CONDITIONS" LAW.

1. In the event of a state of emergency or an emergency condition all employers are prohibited, as of January 1, 2023, from taking or threatening adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe. This new law was enacted by SB 1044, which added Section 1193 to the California Labor Code.

a) For purposes of SB 1044, an "emergency condition" is defined as a condition 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, or 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.

(1) Notably, an "emergency condition" under SB 1044 does not include a health pandemic, meaning the COVID-19 pandemic would not qualify as an emergency condition under the law.

b) For purposes of SB 1044, a "reasonable belief that the workplace or worksite is unsafe" is defined as a belief that a reasonable person, under the circumstances known to the employee at the

time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.

2. Employers may not prevent employees from accessing their mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety under the terms of this new law.

3. SB 1044 specifies that employees are required to notify the employer of the emergency condition prior to leaving or refusing to report to work when feasible. If this notification is not feasible, then employees must notify the employer of the emergency condition after leaving or refusing to report as soon as possible.

I. THE CALIFORNIA PAY TRANSPARENCY ACT.

1. The California Pay Transparency Act (the "Pay Transparency Act"), which was promulgated by amendments to the California Equal Pay Act and California Labor Code section 432.3, took effect on January 1, 2023. The Pay Transparency Act is applicable to employers nationwide with 15 or more employees, with at least one CA employee.

2. The Pay Transparency Act's pay scale disclosure requirements must be included within the job posting if the position may ever be filled in California, either in-person or remotely.

3. The Pay Transparency Act defines a "pay scale" as the salary or hourly wage range that the employer reasonably expects to pay for the position.

4. Current employees also now have the right to receive from their employer, upon request, the pay scale for the position in which they are employed.

5. The Pay Transparency Act also includes new reporting obligations for employers with 100 or more employees (required to report to the state the pay data of their employees and contractors by race, ethnicity and gender) – these are due May 10, 2023.

6. The Labor Commissioner's Office released Pay Transparency Act guidance on December 27, 2022. This guidance can be found at https://www.dir.ca.gov/dlse/california_equal_pay_act.htm (beginning with Question No. 22).

J. THE FEDERAL SPEAK OUT ACT.

1. On December 7, 2022, President Biden signed The Speak Out Act into law. This Act prevents the enforcement of nondisclosure agreements and non-disparagement clauses relating to sexual assault or harassment disputes between employers and employees or independent contractors that were in place before a sexual assault or harassment dispute arose.

2. The Speak Out Act applies to all sexual assault or harassment claims filed under federal or state law on or after December 7, 2022.

a) The Act does not, however, prevent employers from entering into standard confidentiality agreements with claimants upon settlement of sexual assault or harassment claims or demands.

3. There are no penalties under the Speak Out Act for including non-disparagement or non-disclosure provisions that prohibit the disclosure of future sexual harassment/assault claims or disputes that have not yet arisen in separation agreements and releases, but these provisions would be unenforceable.

4. Importantly, the Speak Out Act does not impact California employers, since California already restricts non-disclosure provisions in employment-related agreements, and these restrictions are *broader* than The Speak Out Act's restrictions.

K. THE CALIFORNIA CONSUMER PRIVACY ACT.

1. The California Consumer Privacy Act (the "CCPA"), was signed into law in 2018 and created an array of consumer privacy rights and business obligations with regard to the collection and sale of personal information.

2. The California Privacy Rights Act (the "CPRA"), which is also known as Proposition 24, was a ballot measure that was approved by California voters in 2020 that amended and significantly expanded the CCPA.

3. The CCPA, as amended by the CPRA, became operative on January 1, 2023.

a) The amended CCPA will not be enforced until July 1, 2023.

b) Although the amended CCPA's substantive provisions took effect on January 1, 2023, it contains a "lookback" provision to January

1, 2022. This means that covered businesses must be prepared for potential enforcement activity for information collected in 2022.

4. Prior to the enactment of the CPRA amendments, the CCPA had a "Human Resources exemption" under which California employees, independent contractors and job applicants were *not* considered "consumers" for purposes of the CPRA and thus had very limited privacy rights with respect to their employment or independent contractor data and information.

a) The CPRA amendments changed this by eliminating the CCPA's "Human Resources exemption."

b) Pursuant to the CPRA amendments, California employees, independent contractors and job applicants are afforded *all* the same consumer privacy rights under the CCPA as any other California-resident consumers.

c) The amended CCPA only provides consumer privacy rights to covered business workers who are California-residents.

5. A business is only covered by the amended CCPA and required to comply with its rules and regulations if it meets specific criteria. This criteria is as follows:

a) It collects the personal information, directly or on a business's behalf, of a consumer;

b) It determines, alone or jointly with others, the purposes and means of processing that personal information;

c) It does business in California; and

d) It meets one of the following thresholds:

(1) It has annual gross revenues over $25 million (adjusted for inflation);

(2) It annually processes the personal information of 100,000 or more California residents or household; or

(3) It derives 50% or more of its annual revenue from selling California residents' personal information.

6. The amended CCPA also applies to a business that is controlled by another business that meets the aforementioned criteria.

7. For purposes of the amended CCPA, "Personal Information" is defined as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or member of their household (in the employment context, this could be information about a worker's emergency contact).

a) "Sensitive Personal Information" is a particular subset of Personal Information and it includes categories such as a worker's social security number, driver's license, passport number, bank account log-in credentials, precise geolocation, race, religious beliefs and union membership. Sensitive Personal Information has certain data processing obligations.

b) "Selling" Personal Information is defined under the CCPA amendments as selling, disclosing, or disseminating a worker's personal information to another business or third party for money or other valuable consideration.

c) "Sharing" Personal Information is defined under the CCPA amendments as disclosing or disseminating a worker's personal information to a third party for cross-context behavioral advertising, whether or not money or other valuable consideration was exchanged.

8. California employees, independent contractors and job applicants have six specific rights under the CCPA. These rights are as follows:

a) The Right to Know: The right to know the personal information collected by the business about the worker, from whom it was collected, why it was collected, and, if sold, to whom;

b) The Right to Delete: The right to delete personal information collected from the worker, unless this proves impossible or involves disproportionate effort from the business;

c) The Right to Correct: The right to correct inaccurate personal information, and if a business receives this request, it is required to use commercially reasonable efforts to correct the inaccurate information;

d) The Right to Opt-out: The right to opt-out of the sale of personal information, if applicable;

e) The Right to Limit: The right to limit use and disclosure of sensitive personal information to certain business purposes and uses that are necessary to perform the services requested; and

f) The Right to Non-Discriminatory Treatment: The right non-discriminatory treatment, including the right to be free from retaliation for exercising any of these aforementioned rights.

9. From an employment perspective, it is important that covered businesses update and properly distribute their privacy notice in order to comply with the six worker privacy rights.

a) Covered businesses must provide a privacy notice to all California employees, independent contractors and job applicants at or before personal information is collected.

b) A proper privacy notice must include all of the following:

(1) The categories of personal information, including sensitive personal information, the business may collect from a worker;

(2) How the business may use the personal information it collects;

(3) Whether any categories of a worker's personal information are sold, shared, disclosed by the business, and why; and

(4) The length of time the business will retain the worker's personal information. If it is not possible to determine the timeframe, the business must state the criteria used to determine the retention period; however, it cannot be longer than necessary for the disclosure purpose.

10. Covered businesses must also update their privacy policy, which is not the same as a privacy notice.

a) A proper privacy policy must provide a list of all the business's online and offline practices regarding the collection, use, disclosure and sale of personal information. It must also inform

consumers of their six previously mentioned rights, and how they can exercise these rights via request.

b) Additionally, if a covered business sells or shares personal information, there must be a "Do Not Sell or Share My Personal Information" link on the business homepage.

c) Privacy policies must be updated at least every 12 months.

11. Covered businesses have several additional obligations that are related to the information included in a privacy notice and privacy policy.

a) A business must not collect personal information or sensitive personal information categories not disclosed in the privacy notice and privacy policy;

b) A business must not use the personal information or sensitive personal information collected for additional purposes that are incompatible with use purposes disclosed in the privacy notice and privacy policy;

c) A business must not retain personal information or sensitive personal information for time periods longer than reasonably necessary for each disclosed collection purpose; and

d) A business must implement and maintain reasonable security practices and procedures that are appropriate to the nature of the protected personal information.

12. Enforcement of the amended CCPA begins on July 1, 2023 and will apply to violations on or after that date.

a) Enforcement actions may be brought by either the California Attorney General or the California Privacy Protection Agency, which is a new agency created by the CPRA amendments.

b) Non-compliant businesses may face civil penalties of up to $7,500 per intentional violation or $2,500 per unintentional violation.

(1) The CCPA Amendments does not require that a cure period is provided; rather, it is discretionary.

c) California employees, independent contractors and job applicants do not have a private cause of action for violations of the amended

CCPA, however they have the right to initiate a private cause of action for data breaches individually or collectively.

(1) For data security breach violations, workers may recover statutory damages not less than $100 and not greater than $750 per consumer per incident or actual damages, whichever is greater.

(2) In actions for statutory damages, workers must first provide businesses with written notice and a 30-day opportunity to cure, although implementing and maintaining reasonable security procedures and practices following a breach does not constitute a cure under the amended CCPA.

(3) Workers may also seek non-monetary relief for data breach violations, such as injunctive or declaratory relief, as well as any other relief the court deems proper.

L. COVID-19 PREVENTION NON-EMERGENCY REGULATIONS.

1. On December 15, 2022, the Standards Board of the California Division of Occupational Safety and Health ("Cal-OSHA") voted to adopt non-emergency COVID-19 prevention regulations (the "Non-Emergency Standards").

a) The Non-Emergency Standards will take effect once they are approved by the Office of Administrative Law (the "OAL") in late January or early February 2023 and it will remain in effect for two years after the effective date, except for the recordkeeping requirements, which will remain in effect for three years.

b) The OAL has 30 days to complete its review and approve the Non-Emergency Standards. In the meantime, the current COVID-19 Prevention Emergency Temporary Standards will continue.

c) Once approved, the Non-Emergency Standards will apply to most workers not covered by the Aerosol Transmissible Disease standards, which includes but is not limited to health care facilities, services or operations including hospitals, clinics, medical offices, and other outpatient medical facilities, home health care and medical transport.

d) Non-Emergency Standard Guidance and Cal-OSHA's COVID-19 Model Written Program is forthcoming and will likely be released when the Non-Emergency Standard is approved by the OAL.

2. The Non-Emergency Standard includes some of the same requirements found in the current COVID-19 Prevention Emergency Temporary Standards, as well as new requirements that endeavor to make it easier for employers to comply and provide protections to workers.

3. The Non-Emergency Standards deviate from the current COVID-19 Prevention Emergency Temporary Standards in several notable ways. Accordingly, once the Non-Emergency Standards are approved, Cal-OSHA will enact the following changes:

a) Daily symptom screening and certain no-cost testing will not be required. Employers will no longer be required to screen employees for COVID-19 symptoms prior to entering their worksite. Additionally, employers will not be required to provide no-cost COVID-19 testing to symptomatic employees.

b) An outbreak (including a major outbreak) will be determined to have ended when there is one or no new COVID-19 cases in the exposed group for a 14-day period.

c) Employers will no longer have to provide their employees with COVID-19 exclusion pay.

d) Employers will no longer be required to maintain a standalone COVID-19 Prevention Plan. Instead, employers may address COVID-19 as a workplace hazard under their Injury and Illness Prevention Program requirements and include their COVID-19 procedures in a separate document. Employers will also be allowed to incorporate their COVID-19 hazard prevention training into the trainings required under the Injury and Illness Prevention Program standard.

e) The Non-Emergency Standards will remove the requirement for Employers to maintain records of the steps taken in order to implement their specific written COVID-19 Prevention Program.

f) Instead of having to provide individual written notices to all exposed employees after learning of a COVID-19 case at the worksite, employers will be permitted to post a notice for 15 calendar days informing exposed employees of a COVID-19 case

at the worksite, in lieu of providing employees with individual written exposure notices.

g) Employers will be required to improve worksite ventilation by maximizing the supply of outside air to the extent feasible, utilizing the highest level of filtration efficiency compatible with the existing mechanical ventilation system or filter circulated air through filters at least as protective as Minimum Efficiency Reporting Value or utilizing HEPA filtration units.

h) The definition of "close contact" will be revised to take the size of an employer's workplace into account. Additionally, the definition of "exposed group" will be revised to include employer-provided transportation and employees residing within employer-provided housing.

4. The Non-Emergency Standards will maintain several provisions included in the current COVID-19 Prevention Emergency Temporary Standards. The following requirements will remain:

a) Employers must continue to identify COVID-19 health hazards and develop methods to prevent transmission in the workplace.

b) Employers must continue to provide individual written notice to employees who have been identified as close contacts.

c) Employers must continue to promptly report major outbreaks and serious illnesses to Cal-OSHA, as well as local health departments, when required.

d) Employers must continue to keep a record of all COVID-19 cases for two years.

e) Positive COVID-19 cases must continue to be excluded from an employer's workplace until they are no longer an infection risk.

f) Employers must continue to make COVID-19 testing available at no cost and during paid time to employees following a close contact.

g) Face covering requirements remain unchanged. Additionally, employers must continue to provide face coverings and ensure they are worn by employees when the California Department of Public Health requires their use.

II. Arbitration Agreements: Current Status and Strategies

A. BENEFITS OF ARBITRATION – A BRIEF SUMMARY.

1. Arbitration is generally faster, less expensive and more streamlined than going through the court system.

a) There is often less discovery.

b) It is a less formal process.

2. There is no jury in arbitration; the arbitrator renders a final decision.

a) This may lead to more impartial decision-making, as arbitrators have greater experience and knowledge of the law.

b) For Los Angeles-based defendants, an outrageous award in the plaintiff's favor is less likely because there is less possibility of a "runaway jury."

3. Arbitration is a less public process.

4. Arbitration agreements can prevent class actions.

5. As of 2022, arbitration agreements may also be able to limit or even defeat PAGA representative actions (although this is before the California Supreme Court).

B. CALIFORNIA'S BAN ON ARBITRATION (AB-51): ENJOINED, AGAIN (FOR NOW).

1. On January 1, 2020, Governor Newsom signed into law California Assembly Bill 51 ("AB-51"), codified as California Labor Code section 432.6 and California Government Code section 12953.

a) Pursuant to AB-51, California employers are prohibited from requiring employees to sign arbitration agreements concerning disputes arising under the California Fair Employment and Housing Act (the "FEHA") or California Labor Code as a condition of employment or employment-related benefits.

2. In February 2020, a Federal District Court in California issued a preliminary injunction barring the enforcement of any part of AB-51. It reasoned that AB-51 was preempted by the Federal Arbitration Act

("FAA") because it impermissibly put arbitration agreements on unequal footing to other agreements.

3. On September 15, 2021, in a 2-1 decision, the Ninth Circuit of Appeals partially reversed the District Court's decision in *Chamber of Com. of United States v. Bonta*. This decision upheld the prohibition on mandatory pre-dispute arbitration agreements, but held that agreements entered into in violation of that law were still enforceable, and that AB-51's penalty provisions were preempted by the FAA.

4. In October 2021, in response to *Bonta*, the California and U.S. Chamber of Commerce petitioned for rehearing *en banc*, and the Ninth Circuit deferred to rehear the case pending U.S. Supreme Court decision in *Viking River Cruises, Inc. v. Moriana*.

5. On August 22, 2022, the original three-judge panel in *Bonta* voted *sua sponte* to grant panel rehearing and withdrew its September 2021 decision, rendering the petition for rehearing *en banc* moot.

6. As a result of these recent developments, the original injunction against enforcement of AB-51 remains in effect and employers may continue to require employees to sign arbitration agreements as a condition of employment.

a) The Ninth Circuit will eventually issue a decision, so it is possible the landscape could change yet again.

b) If the Ninth Circuit later holds that AB-51 is enforceable, enforcement of AB-51 may be retroactive.

C. *VIKING RIVER CRUISES*: A NEW, BUT UNSETTLED, OPPORTUNITY TO LIMIT EXPOSURE TO PRIVATE ATTORNEYS GENERAL ACT CLAIMS.

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

2. On June 15, 2022, in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___ (2022), the U.S. Supreme Court ruled that California authority prohibiting mandatory arbitration of PAGA claims was preempted by the FAA and as such, "individual" PAGA claims could be compelled to arbitration.

a) This overruled *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014), a 2014 California Supreme Court case that prohibited arbitration of PAGA claims, on the theory that the state of California was the real party in interest in PAGA actions and that it had never agreed to arbitration.

b) The U.S. Supreme Court reasoned that "individual" and "representative" claims could be split into two separate actions, such that the "individual" PAGA claim could be subject to a mandatory arbitration agreement.

3. The U.S. Supreme Court also ruled that once a plaintiff was required to arbitrate their individual PAGA claims, the plaintiff then lacked standing to pursue the representative claims in court, so the PAGA claim failed as a matter of law.

a) This decision potentially allows employers to avoid representative PAGA actions through the use of arbitration agreements.

4. The *Viking River Cruises* decision is particularly important in light of the September 2022 California Court of Appeal case, *Eleni Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 83 Cal. App. 5th 595 (2022).

a) In *Gavriiloglou*, the Court of Appeal held that an arbitrator's award denying an employee's non-PAGA, Labor Code violation claims did not preclude the employee from bringing her PAGA claims, which had been stayed by the trial court.

b) The Court of Appeal ruled that the arbitrator's findings regarding the employee's alleged Labor Code violations had no preclusive effect because the employee was acting in a different capacity. The employee was asserting her individual right to damages for alleged Labor Code violations in arbitration, and was acting in a representative capacity on behalf of the state in the PAGA action, the Court determined.

c) In order to avoid a *Gavriiloglou*-type decision, employers are encouraged to update their arbitration agreements to require arbitration of PAGA claims on an individual basis.

5. Employers should review their arbitration agreements with their employment counsel and consider updating them in light of the *Viking River Cruises* decision. California employers who do not currently use

arbitration agreements should consider implementing them in light of this ruling.

D. ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

1. On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA"). EFAA amended the FAA and took effect as soon as President Biden signed it into law.

2. EFAA effectively bans employers from enforcing pre-dispute agreements that require employees to arbitrate sexual assault or sexual harassment claims, whether the claims are brought individually, jointly, or on a class basis.

3. Although it does not outright ban arbitration of such claims, EFAA allows employees alleging sexual assault or harassment to elect, at their option, to invalidate any arbitration provision and/or joint or class action waiver with respect to such claims.

4. EFAA is not subject to any preemption defense.

5. EFAA is not entirely retroactive. It applies to all pre-dispute agreements, but only applies to claims that arose on or after March 3, 2022, when EFAA was enacted.

6. If a dispute arises as to whether a particular claim qualifies as a sexual assault or harassment dispute, EFAA requires that the dispute be decided in court, even if contractual terms delegate these decisions to an arbitrator.