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Labor & Employment Law Year in Review

January 10, 2024

Welcome, Logistics, Overview, Trends & Insights

Mitchell Silberberg & Knupp LLP.

New Laws and Regulations: Part I

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Minimum Wage Increases

- **As of January 1, 2024 the minimum wage in CA is now $16/hr.**
  - This means the minimum “salary basis” threshold for exempt employees in CA is now $66,560.
- **Don’t forget!**
  - 40 California cities and counties require employers to pay wages above the $16 an hour required by the state.
  - 28 of those municipalities raised their minimums on 1/1/24.
  - West Hollywood currently has the *nation's* highest minimum wage, at $19.08 an hour.
  - LA County minimum wage will increase to $17.27 (as of July 1, 2024).
  - LA City minimum wage is currently $16.78.

Expanded Workplace Defamation Privilege

- AB Bill 933 (adding Civil Code § 47.1): expands privileged speech to expressly include communications regarding factual information pertaining to incidents of:
  - **sexual assault**
  - **harassment or**
  - **discrimination.**
- Under the new law, if the person making a statement about such incidents had a "*reasonable basis* to file a complaint" and makes the statement *without* "*malice*", the statement cannot form the basis of a defamation claim.
  - Doesn't even matter if a complaint was filed.
- Furthermore, if the *defendant* (i.e. the employee), prevails, they are entitled to recover attorneys fees & costs, treble damages, and punitive damages.

Updated CA "Wage Theft" Notice

- **AB 636**
  - Adds additional required information on the *Wage Theft Notice*.
  - As of January 1, 2024, employers are required to note on the existence of a *federal or state emergency or disaster declaration* applicable to the count(ies) where the employee will work, and that was issued within 30 days before the employee's start date, which may affect their health & safety during their employment.
    - **Template available at: https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf**
    - **"Thank me later" links!**
      - https://www.fema.gov/locations/california#declared-disasters
      - https://www.caloes.ca.gov/office-of-the-director/policy-administration/legal-affairs/emergency-proclamations/

Cal-OSHA Non-ETS Regulations

- **The "NETS" went into effect as of *2/3/23***
- While the requirements have been relaxed, employers still need to:
  - Adopt COVID Model Prevention Procedures (fillable Word doc for employers, updated 6/29/2023) are still required (available at: https://www.dir.ca.gov/dosh/dosh_publications/CPP.doc).
  - Make COVID-19 testing available at no cost and during paid time to employees following a "close contact" (as now defined under the NETS).
  - Exclude COVID-19 cases from the workplace until they are no longer an infection risk and implement policies to prevent transmission after close contact.
  - Provide and require masks for returning COVID-19 cases and close contacts.
  - Notify affected employees of COVID-19 cases in the workplace.
  - Report major outbreaks to Cal-OSHA.

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New Laws and Regulations: Part II

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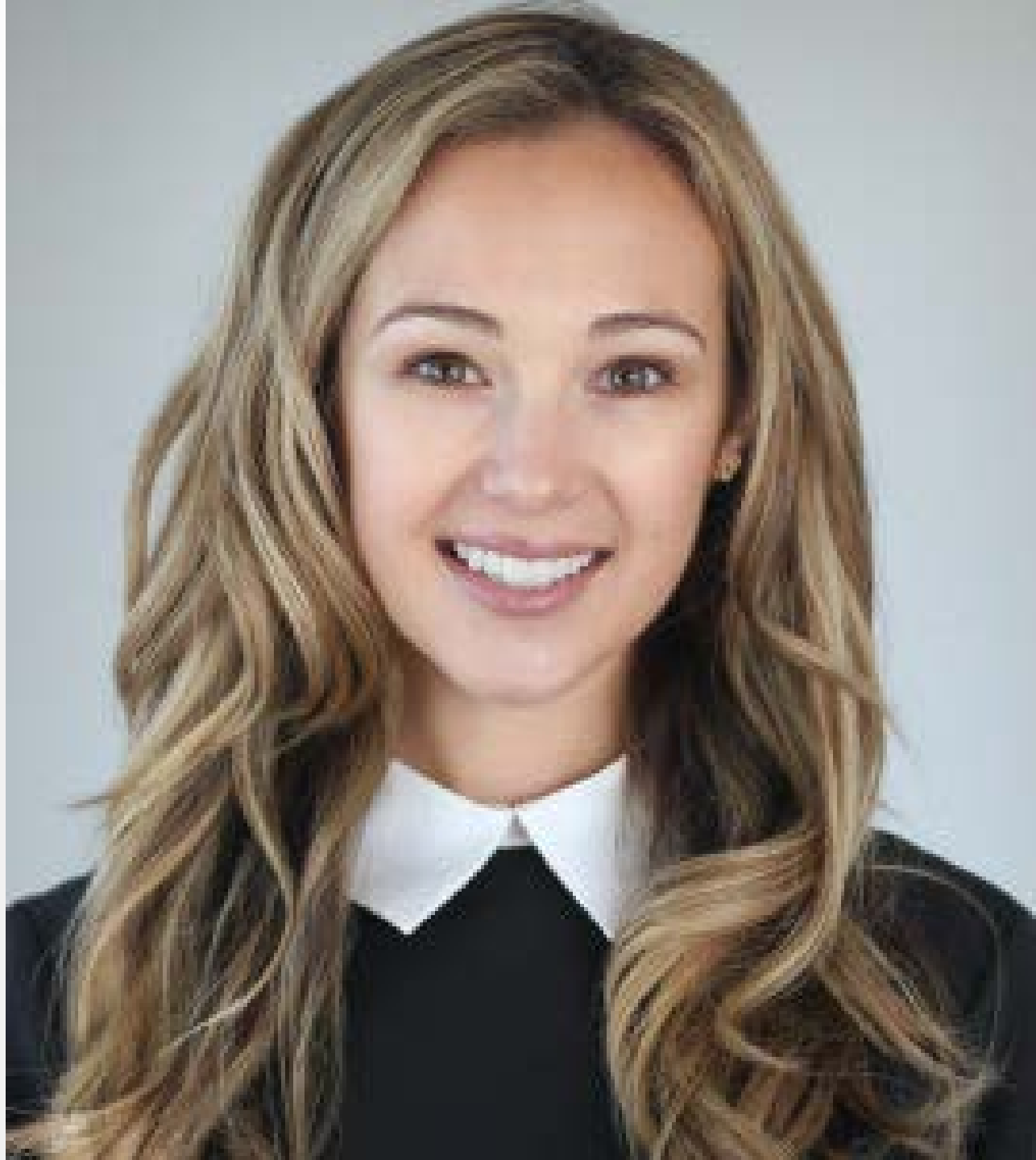

I. Paid Sick Leave Law Amendments

S.B. 616

- Amends the Healthy Workplaces, Healthy Families Act of 2014
- Effective January 1, 2024
- Labor Commissioner FAQs
  - Last updated December 21, 2023

What's Staying the Same?

1. Eligibility Requirements
2. Availability
3. Two Methods
4. Permissible Uses
5. Notice Requirements
6. Compensation

What's Changing?

1. Accrual Rate*
2. Accrual Cap
3. Carryover Cap
4. Annual Use Cap
5. Lump Sum Amount

State Law vs. Local Ordinance

- Almost always provide the provision or benefit most generous to employees

- Exceptions (i.e. state law preempts local ordinance):
  1. Lending
  2. Paystub Statements
  3. Calculating
  4. Providing Notice (sometimes)
  5. Payment Timing
  6. Payment at Separation

II. Reproductive Loss Leave

S.B. 848

1. Eligibility

2. Defining “Reproductive Loss Event”
   - “The day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction.”

3. Amount of leave per 12-month period

Reproductive Loss Leave (cont.)

4. Timing

5. Documentation?
   - The law is silent, so no express permission

6. No Retaliation

III. Workplace Violence Prevention Plan

S.B. 553

- Effective July 1, 2024
- Incorporate into existing Injury and Illness Prevention Program ("IIPP") plan, or standalone document
- Cal-OSHA model IIPP?

Workplace Violence Prevention Plan (cont.)

- Very few California employers exempt
  - Employees teleworking from a place of their choice
  - Workplaces where less than ten employees working at any given time and that are not accessible to the public
- Specifically tailored to employer
- In writing
- Procedures to obtain employee input

Workplace Violence Prevention Plan (cont.)

- Defining “Workplace Violence”
  - “Any act of violence or threat of violence that occurs in a place of employment.”
  - Includes “the threat or use of physical force against an employee,” or “[a]n incident involving a threat or use of a firearm or other dangerous weapon.”
  - No injury requirement
- Lawful acts of self-defense or defense of others not considered “workplace violence”

Workplace Violence Prevention Plan (cont.)

- What must be included (among other things):
  1. Names/job titles of individuals responsible for implementing the plan
  2. Procedures to identify, evaluate and correct workplace hazards
  3. Procedures to respond to reports of workplace violence
  4. Procedures to respond to actual or prospective workplace violence emergencies
  5. Post-incident response and investigation procedures, including “violent incident log” reporting

- Annual training requirement

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New Laws and Regulations: Part III

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Off-Duty Cannabis Use and Drug Results [AB 2188]

- Prohibits discrimination for either:
  - (1) the person's off-duty cannabis use away from the workplace; or
  - (2) the results of an employer-required drug screening test that has found the person to have *non-psychoactive cannabis metabolites*
- Employer can still refuse to hire an applicant based on a scientifically valid pre-employment drug screening, i.e. impairment tests.
- Exceptions:
  - Building/construction trades; or
  - Federal background investigation or security clearance

Off-Duty Cannabis Use and Drug Results [SB 700]

- Unlawful for an employer to request information from an applicant for employment relating to prior use of cannabis.
- Unlawful to consider information about prior cannabis use obtained from criminal history.
  - Exception: unless specifically permitted by the Fair Chance Act or other state or federal laws.

Retaliation Rebuttable Presumption [SB 497]

- Adverse action within 90 days of employee engaging in certain protected activity protected by the:
  - California Labor Code; and
  - California's Equal Pay Act.
- Allows employees who suffer from retaliation in violation of Labor Code Section 1102.5 to recover the $10,000 civil penalty directly.

NY Laws

- **NY state and local minimum wage increases:**
  - State: $15.00/hr; and
  - NYC/Long Island/Westchester: $16.00/hr
- **Prohibition of access to employee social media accounts (S2518A)**
  - Effective 3/12/2024
  - Prohibits employers from requesting or requiring employees or applicants for employment to provide access to social media accounts

NY Laws Cont.

- **NYC Prohibits Height and Weight Discrimination (Int. No. 209-A)**
  - Effective: 11/26/2023
- **Limitations on nondisclosure provisions in NY settlement agreements (S4516)**
  - Effective: 11/17/2023
  - Voids release of discrimination, harassment, and retaliation claims if:
    - A liquidated damages provision for the employee's violation of a nondisclosure clause or non-disparagement clause;
    - A forfeiture provision; or
    - An affirmative statement, assertion, or disclaimer by the employee that the employee was not subject to unlawful discrimination, harassment, or retaliation

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Restrictive Covenants: The Final Nail in the Coffin?

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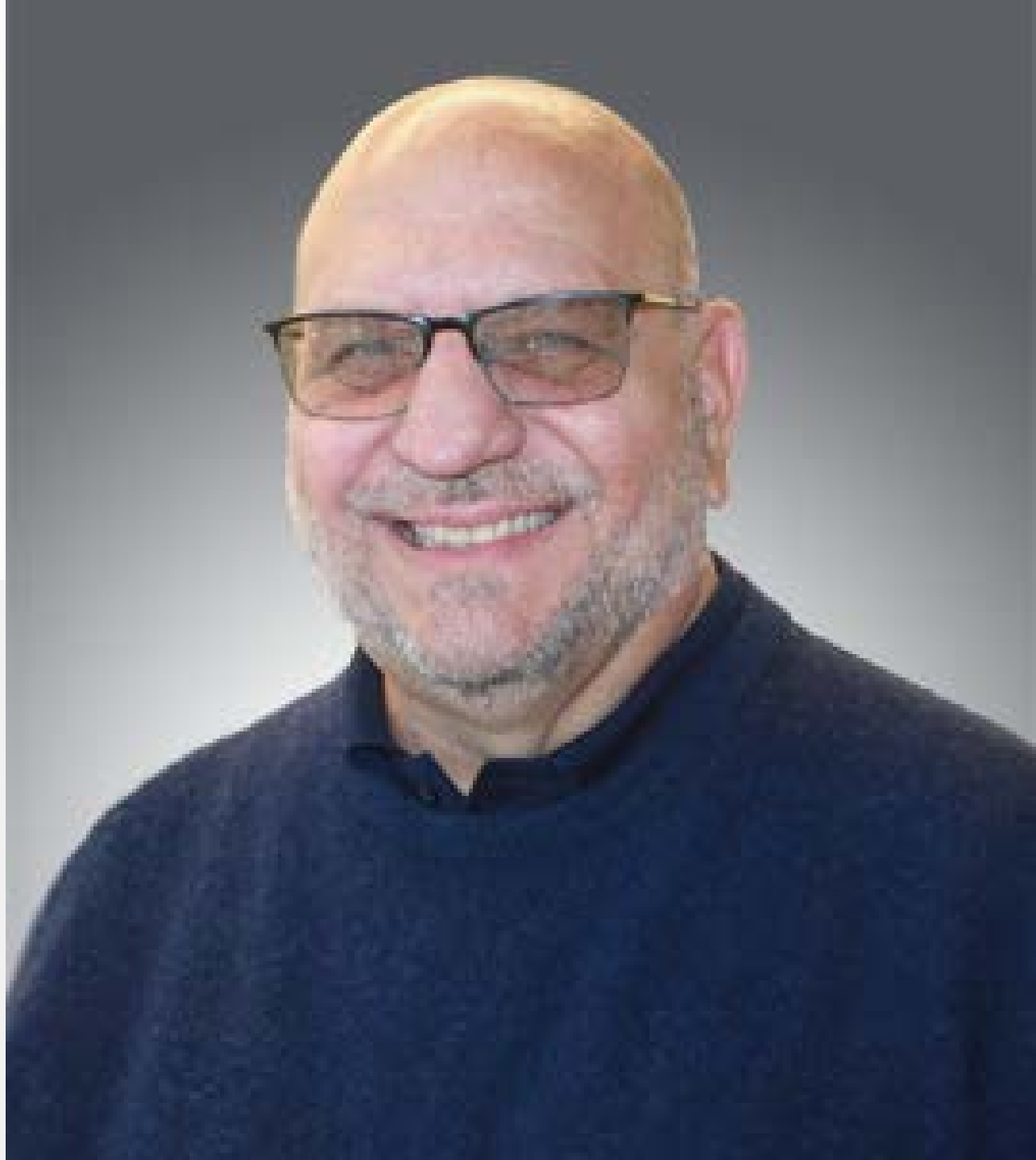

Longstanding Law

- Business and Professions Code §16600

  "Except as provided in this chapter, every contract by which anyone ***is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void***."

- Exceptions
  - Sale of business
  - Protection of trade secrets
- Remedies
  - Restrictive covenant or entire agreement is **VOID**

Effective January 1, 2024

- Three New Provisions added
- Enacted as part of 2 separate bills
- Bills do not use uniform language(!) and in some aspects are redundant

Change #1: Adds New §16600(b)

New Section 16600

(a) Except as provided in this chapter, every contract by which anyone is ***restrained from engaging in a lawful profession, trade, or business*** of any kind is to that extent void.

(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***.

Change #1: IMPACT

- Reiterates strong public policy against restrictive covenants
- Seems to use the terms “noncompete” agreements and agreements that restrain anyone “from engaging in a lawful profession, trade or business” synonymously
- Prohibition also applies to contracts with vendors and between employers that restrain others (e.g., employees) from engaging in lawful profession, trade or business

Change #2: Adds New §16600.1

New §16600.1.

(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).

Change #2: IMPACT

- Makes it unlawful to include a “noncompete” provision in a contract (i.e., not just void)
- For current employees, and for former employees who were employed after January 1, 2022, whose contracts include a “noncompete clause,” shall, by February 14, 2024, notify the employee in an individualized communication that the noncompete clause or noncompete agreement is void
- A violation of this section constitutes an act of unfair competition, which allows for injunctive relief, “restitution,” and attorneys’ fees.
  - Claims can be filed if employer includes/maintains a non-compete, AND/OR
  - Claims can be filed if employer fails to provide required notice
- **Query**: Should employer send notice if it only included non-solicitation or similar provisions (e.g., first refusal language) in its agreements?
- **Agreements to review**: Employment contracts, separation agreements, endorsement agreements, talent agreements

Change #3: Adds New §16600.5

New §16600.5.

(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.

Change #3: IMPACT

- Makes it a civil violation to include a provision that is a "that is void under this chapter" (i.e., not just void).
- Claims may be brought for damages, injunctive relief and attorneys fees.
- California court will not enforce an unlawful provision entered into, or enforceable, outside of California.
- **DOES NOT** apply to restrictions during employment.
- **Query**: Does 16600.5…
  - Extend to contracts a California employer enters into with its employees working outside of California?
  - Extend to contracts a California employer has with remote employees who report into a California office?

Homework

- Review existing and form employment agreements, including fixed term, confidentiality, invention, separation etc.
- Determine whether existing employment provisions should be voided by February 14th
  - Safest: Send void notices with respect to any provision that would appear to be void under §16600 (e.g., employee non-solicitation)
  - Riskier: Send void notices only with respect to "noncompete" provisions
- Consider removing CA choice of law provisions from contracts with employees working outside of California
- Review agreements with recruiters, other employers, vendors, etc.

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Arbitration Updates

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State of the Law

- Mandatory employment arbitration agreements still legal.
- Most typical employment claims are arbitrable, but employees can opt out of sexual harassment/assault cases arising after March 3, 2022.
- Arbitration agreements defeat class actions and make PAGA actions harder to pursue.
- California continues to pass laws to try make arbitration less attractive.
- Courts continue to strictly enforce rules meant to ensure agreements are “fair.”

One Benefit of Arbitration

- Imagine a 1,000 person workforce making $20 per hour given meal breaks late each day, with a 20% workforce turn-over rate per year :
  - Without arbitration: 4 Years of liability in class action + 1 year of PAGA penalties.
  - With arbitration: Plaintiff must individually arbitrate and only if they prevail they can proceed to pursue PAGA in court, where penalties are limited to one year, exclude wages, and can be reduced by the Court.

One Benefit of Arbitration

- 1,000 person meal penalty class action:
  - Meal Penalties (4 Years) = $20 million
    - $20 x 5 days x 50 weeks x 4 years x 1,000
  - Waiting time penalties (3 Years) = $2.88 million
    - $160 avg. daily wage x 30 days x 600 people
  - Paystub penalties (1 Year) = $4,000,000
    - $100 per week per person up to $4,000
- **Total:** $26.88 million (plus interest)

One Benefit of Arbitration

- Penalties in 1,000 person meal penalty PAGA action:
  - Failure to provide breaks (1 year): $2.5 million
    - $50 per week x 50 x 1,000
  - Failure to pay meal penalties: $5 million
    - $100 per week x 50 x 1,000
  - Inaccurate wage statements: $5 million
    - $100 per week x 50 x 1,000
- **Total:** $12.5 million (often reduced, even up to 90%)

One Benefit of Arbitration

- Potential Liability:
  - Without arbitration: Class + PAGA = $39.38 million
  - With arbitration: PAGA only = $12.5 million
    - = 68% reduction in liability
    - Plaintiff must arbitrate first (cheaper, more narrow)
    - Court may further reduce penalties

Lingering California Hostility

- California previously tried to ban mandatory arbitration but the ban was struck down under Federal Arbitration Act.

Lingering California Hostility

- The U.S. Supreme Court held that arbitration also defeats PAGA, but deferred to the California Supreme Court.
- The California Supreme Court disagreed. *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).
- Solution: Compel arbitration of "individual" PAGA claims and request stay of PAGA action.
  - Courts are approving requiring the employee to arbitrate their "individual" PAGA claims, and if the employer prevails it is binding in the PAGA court action. *Rocha v. U-Haul Co. of California*, 88 Cal. App. 5th 65 (2023).

Lingering California Hostility

- Requirement to pay arbitration fees within 30 days of receiving invoice or arbitration is waived and employer is liable for plaintiff's fees. Code Civ. Proc. § 1281.98(a)(1) (2019).
- Courts *strictly* construe this:
  - Payment *mailed* by due date was late because it was *received* by AAA 2 days after "due date". *Doe v. Superior Ct.*, 95 Cal. App. 5th 346, 362 (2023).
- Solution: Be prepared to pay immediately! Consider changing due date in your agreement.

Lingering California Hostility

- Arbitration agreements are usually evaluated in isolation.
- But a 2023 California decision held that a separate confidentiality agreement prohibiting discussion of wages helped invalid an arbitration agreement. *Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482 (2023).
- The two agreements were provided during onboarding process so they were part of “one transaction” and should be “read together.”
- Solution: Review all papers provided with arbitration agreement for potentially “unconscionable” provisions.

Lingering California Hostility

- The denial of a motion to compel arbitration is appealable and *used to* result in an automatic stay of the litigation.
- Starting January 1, there is no longer an *automatic* stay. Code Civ. Proc. § 1294 (a).
  - Note: This could be preempted by the FAA.
- Solution: Ensure the arbitration agreement is easily enforceable by avoiding common “unconscionable” provisions restricting remedies, lacking mutuality, prohibiting discovery, shifting fees, or otherwise disadvantaging employee.

Conclusion

- Arbitration is still a valuable tool for promptly and efficiently resolving many employment disputes.
- Dispute resolution programs and agreements must be supervised closely to comply with the many legal requirements that can undermine the program.
- The key is to ensure no advantage is sought other than a change from court to arbitration.

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2024 Update on Discrimination & Harassment Law

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Harvard Affirmative Action Ruling

- SCOTUS held that the goal of achieving a diverse student body cannot justify using race as a “plus factor” in college admissions violates the Equal Protection Clause of the 14th Amendment.
- SCOTUS ruling does not ***directly*** apply to private employers.
- Unlike in higher education, affirmative action that involves racial or gender preferences to achieve diversity has never been permissible in the employment context.
- Employers, however, should anticipate increased scrutiny and challenges to their workplace affirmative action plans and diversity initiatives.

Impact of Harvard Ruling on Employers

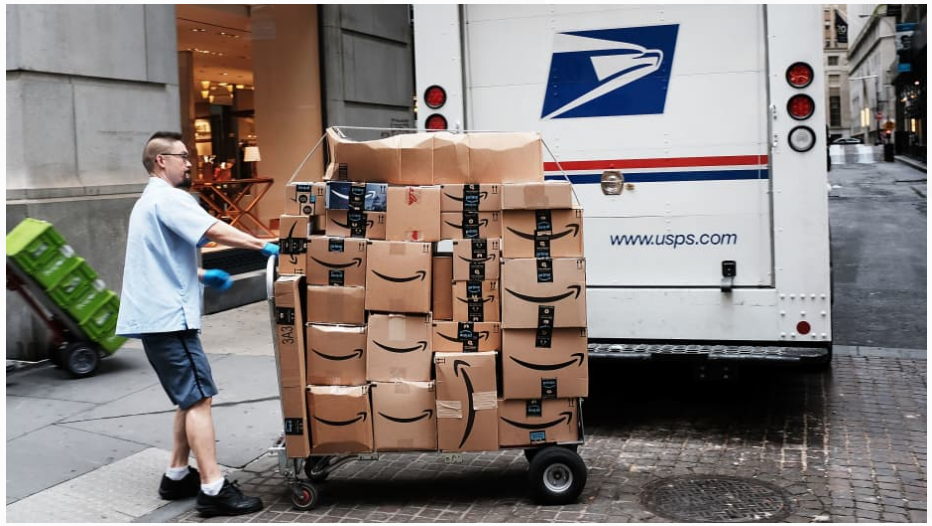
Employment Practice	Harvard Opinion's Impact
Individual employment decisions (e.g., hiring, promotions, terminations)	**Little, if any, impact**
Sponsorship and mentoring programs focused on diverse employees	**Targets for future litigation**
Affinity groups	**Consider opening membership or participation to all employees**
Diversity requirements for interview slates (e.g., Rooney Rule)	**Not impacted**
Statements setting diversity goals	**Not facially unlawful**

Impact of Harvard Ruling on Employers

- Race or gender should ***not*** be used as a “plus factor” to improve workplace diversity. It’s only appropriate when an employer has a written affirmative action plan that meets EEOC guidelines.
- Beyond sourcing and recruiting to ensure a diverse pool, race or sex should ***not*** be a factor when deciding who advances at any stage of the selection process.
- Diversity initiatives should ***not be a zero sum game***. They should be designed to expand opportunity for underrepresented groups without negative impacting opportunities for those in the majority.

Groff v. DeJoy, 600 U.S. 447 (2023)

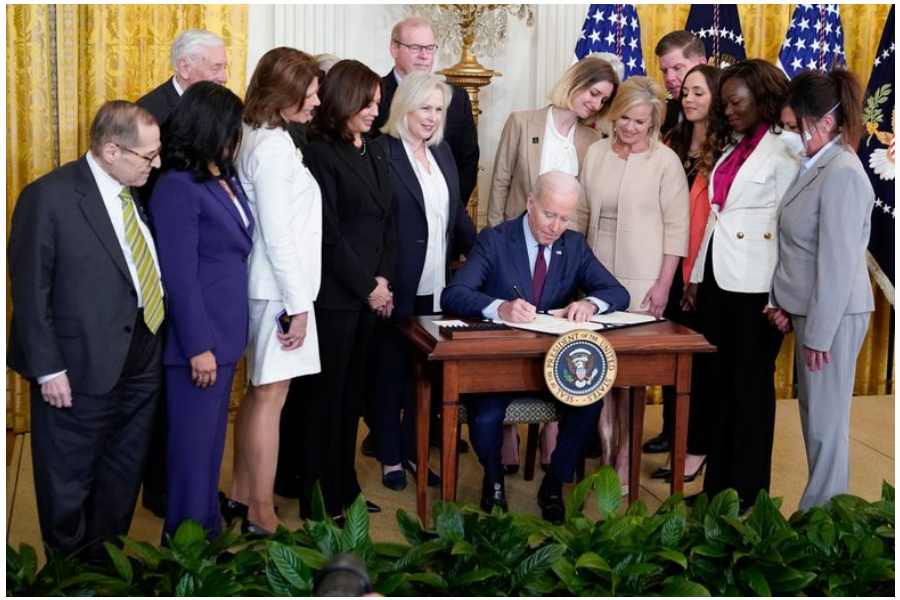
- Groff is a Christian and a U.S. Postal service worker. He refused to work on Sundays due to his religious beliefs.
- USPS offered to find employees to swap shifts with him, but on numerous occasions, no co-worker could swap, and Groff did not work. Groff then resigned.
- Groff sued USPS under Title VII of the Civil Rights Act, claiming USPS failed to reasonably accommodate his religion because the shift swaps did not fully eliminate the conflict.



***Groff v. DeJoy*, 600 U.S. 447 (2023)**

- Title VII requires an employer to provide a reasonable accommodation unless doing so would impose an "***undue hardship*** on the conduct of the employer's business."
- SCOTUS previously indicated that an accommodation creates an undue hardship when it imposes "**more than a *de minimis* cost.**"
- SCOTUS ***unanimously*** held that the standard is higher:
  - To deny a religious accommodation, an employer must show that the burden of accommodation would result in "***substantial increased costs***" in relation to the conduct of the particular business, not just "more than a *de minimis* cost."

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022



- Enacted March 2022
- "Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal or State law ***and relates to the sexual assault dispute or the sexual harassment dispute***." 9 U.S.C. § 402.
- "Sexual harassment dispute" is defined as a "dispute ***relating to*** conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4).

Impact of EFAA on Harassment Litigation

- **Does the EFAA render arbitration agreements unenforceable as to the entire case?**
  - "[T]he EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable ***with respect to the entire case*** relating to that dispute." *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173, at *19 (S.D.N.Y. Feb. 24, 2023).

Impact of EFAA on Harassment Litigation

- **Or, does the EFAA render arbitration agreements unenforceable *only* as to the claims relating to the "sexual harassment dispute"?**
  - "[U]nder the EFAA, an arbitration agreement executed by a sexual harassment dispute is unenforceable ***only to the extent that the case filed by such individual 'relates to' the sexual harassment dispute***, *see* 9 U.S.C. § 402(a); in other words, only with respect to the claims in the case that relate to the sexual harassment dispute." *Mera v. SA Hospitality Group*, 2023 WL 3791712, at *3 (S.D.N.Y. June 3, 2023).

Impact of EFAA on Harassment Litigation

The law remains unsettled.

But here's a framework to address these issues:

1. Has the plaintiff adequately alleged claims that raise a "sexual harassment dispute" within the EFAA's scope?
2. Is the arbitration agreement unenforceable as to such claims only, or as to the entire case?

Impact of EFAA on Harassment Litigation

- Plaintiffs' bar is increasingly using the low threshold to assert harassment claims (particularly in California) to avoid enforcement of arbitration agreements.
- Wage and hour issues seem to be severable, as it will be difficult for Plaintiffs to argue that they "relate" to a sexual harassment dispute.
- But if employer prevails in severing claims, then it is defending litigation in two separate proceedings, which will increase costs.

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Developments and Emerging Trends in Wage and Hour Law

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Time Rounding

- Historically, California courts have permitted time rounding if policy is facially fair and neutral and compensates for all hours worked on average over time (*See's Candy* line of case).
- ***Camp v. Home Depot*** (October 2022): Court of Appeal departed from *See's Candy*, and found that if employer can and has captured exact time an employee worked then must pay the employee for all actual time worked.
- ***Woodworth v. Loma Linda Med. Ctr.*** (July 2023): Court of Appeal followed *Camp,* where employer captured actual time worked and many employees not paid for all time worked under the rounding policy.
- California Supreme Court has granted review of *Camp* and *Woodworth.*

Remote Work Expenses

***Thai v. IBM* (Cal. Ct. App. Oct. 2023)**

- Employees required to work from home during COVID-19 pandemic pursuant to Governor's "stay at home" order.
- Court rejected IBM's argument that "stay at home" order was an "intervening cause" of the remote work expenses that absolved IBM of liability for reimbursement.
- Confirms that employer may be liable for remote work expenses necessarily incurred in "direct consequence" of performing work duties.
- However, the Court did *not* consider "what expenditures can be considered 'reasonable costs' of working from home … or to what extent an employer must reimburse an employee for expenses incurred for both personal and work purposes."
- Ultimate impact on remote work reimbursement going forward remains uncertain.

Compensable Time: Upcoming Decision

Huerta v. CSI Elec. Contractors, Inc.

- Employee argues that time spent driving between security gate and employee parking lot when entering, and waiting in vehicle to scan identification badge when exiting, is compensable.
- District court granted summary judgment for employer.
- Ninth Circuit certified questions to Cal. Supreme Court.
- Cal. Supreme Court arguments held on January 4, 2024; decision expected within 90 days.

Emerging Trend: "Boot Up" Time

- ***Cadena v. Customer Connexx LLC***, 51 F.4th 831 (9th Cir. 2022): Found that time spent booting up computers may be compensable under the FLSA as "integral and indispensable" to job duties.
  - On remand, Nevada district court granted summary judgment for employer, finding that time spent "booting up" and shutting down computers was *de minimis* (May 2023).
  - Employees have appealed to Ninth Circuit a second time.

- However, *de minimis* doctrine may not be a viable defense under California law.
  - *Troester v. Starbucks* (2018) severely eroded *de minimis* defense in California.
  - These types of cases may present greater risk in California.

Pending “Boot Up” Cases

- ***Velasquez v. Kind Lending, LLC*** (Cal. Superior Ct., filed 10/19/23): “Defendants failed to pay [] for ‘all hours’ worked … because some aggrieved employees would not clock in until only after booting up their computers on [sic] logging on.”
- ***Counts v. Wayfair LLC***, (D. Mass., filed 7/28/23): Employees “were required to perform a number of compensable work tasks including turning on and logging into their computers; connecting to Defendant’s virtual private network (VPN); and loading and logging into a number of essential work programs” before clocking in.
- ***Garcia v. Metlife Legal Plans, Inc.,*** (N.D. Ohio, filed 1/4/24): “Time Plaintiff and other customer service representatives spent booting up and logging into Defendant’s computer system, software applications, and phone system constitutes compensable work.”

Private Attorneys General Act (PAGA)

- *Happy 20th Birthday PAGA!*
- ***Estrada v. Royalty Carpet Mills***: Cal. Supreme Court will decide whether trial courts have authority to ensure PAGA claims are manageable at trial, and to strike/narrow if not.
  - Oral arguments held November 8, 2023
  - Decision by February 2024
- Ballot Initiative (Nov. 2024): “Repeal and replace” PAGA
  - Would eliminate PAGA and replace it with streamlined process for employee claims, with 100% of penalties going to employee.
  - Claims would be brought through Labor Commissioner (without lawsuit).

Industrial Welfare Commission (IWC)

- IWC promulgates Wage Orders; defunded and dormant since 2004.
- AB 102 (signed July 10, 2023) funds IWC for first time in almost twenty years.
- IWC to convene industry-specific wage boards.
- IWC to adopt any new/amended Wage Orders by October 31, 2024.
- ***But***, limits IWC authority to update Wage Orders so that they "shall not include any standards that are less protective than existing state law."

City of LA Predictive Scheduling Ordinance

- Applies to retail employers with 300 or more employees
- Covered retail employers required to:
  - Provide written, good faith estimates of schedules fourteen calendar days prior
  - Offer extra hours to current employees before hiring new workers
- Effective April 1, 2023.
- Los Angeles joins San Francisco, Berkeley, and Emeryville.

City of LA Independent Contractor Ordinance

- Requires a written contract for independent contractors and freelance workers, which must include:
  - Name, mailing address, phone number, and email address of hiring entity and worker;
  - Itemization of all services to be provided by worker, value of services, and rate/method of compensation; and
  - Date by which hiring entity must pay contracted compensation or manner by which such date will be determined.
- Penalties, damages, and attorney's fees available for violations.
- Effective July 1, 2023.

Helix Energy Solutions, Inc. v. Hewitt

- Offshore oil rig supervisor paid flat daily rate of $963 (later $1,341/day, and equaling ~$200k annually) argued he was misclassified as exempt and sued for overtime.
- Defendant argued plaintiff was exempt executive; Plaintiff admittedly met the duties test for exemption.
- Under FLSA, exempt employee must be paid on a “salary basis,” which FLSA regulations define to mean “the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”
- US Supreme Court held that salary basis test “is not met when an employer pays an employee by the day.”

FLSA Independent Contractor Rule

- DOL proposed new independent contractor rule in 2022.
- Final rule announced 1/9/2024; takes effect 3/11/2024.
- Establishes six-factor “economic realities” test for IC status:
  1. Opportunity for profit or loss depending on managerial skill
  2. Investments by worker and employer
  3. Degree of permanence of work relationship
  4. Nature and degree of control
  5. Extent to which work is integral part of employer’s business
  6. Skill and initiative
- ***Limited impact in California due to AB5 and “ABC” test.***

Proposed FLSA Exemption Rule

- New Proposed Rule would:
  - Increase minimum weekly salary for white collar exemptions to $1,059 per week ($55,068 annually).
  - Increase "highly compensated employee" minimum annual compensation to $143,988, with further increases thereafter (tied to 85th percentile of full-time salaried workers nationally).
  - Implement automatic updates to earnings thresholds every three years.

- DOL indicates it expects to finalize rule by April 2024.

- ***Limited impact in California, where minimum annual salary for white collar exemptions is $66,560/year.***

Mitchell Silberberg & Knupp LLP.

Assembly Bill 5: Effects and Consequences

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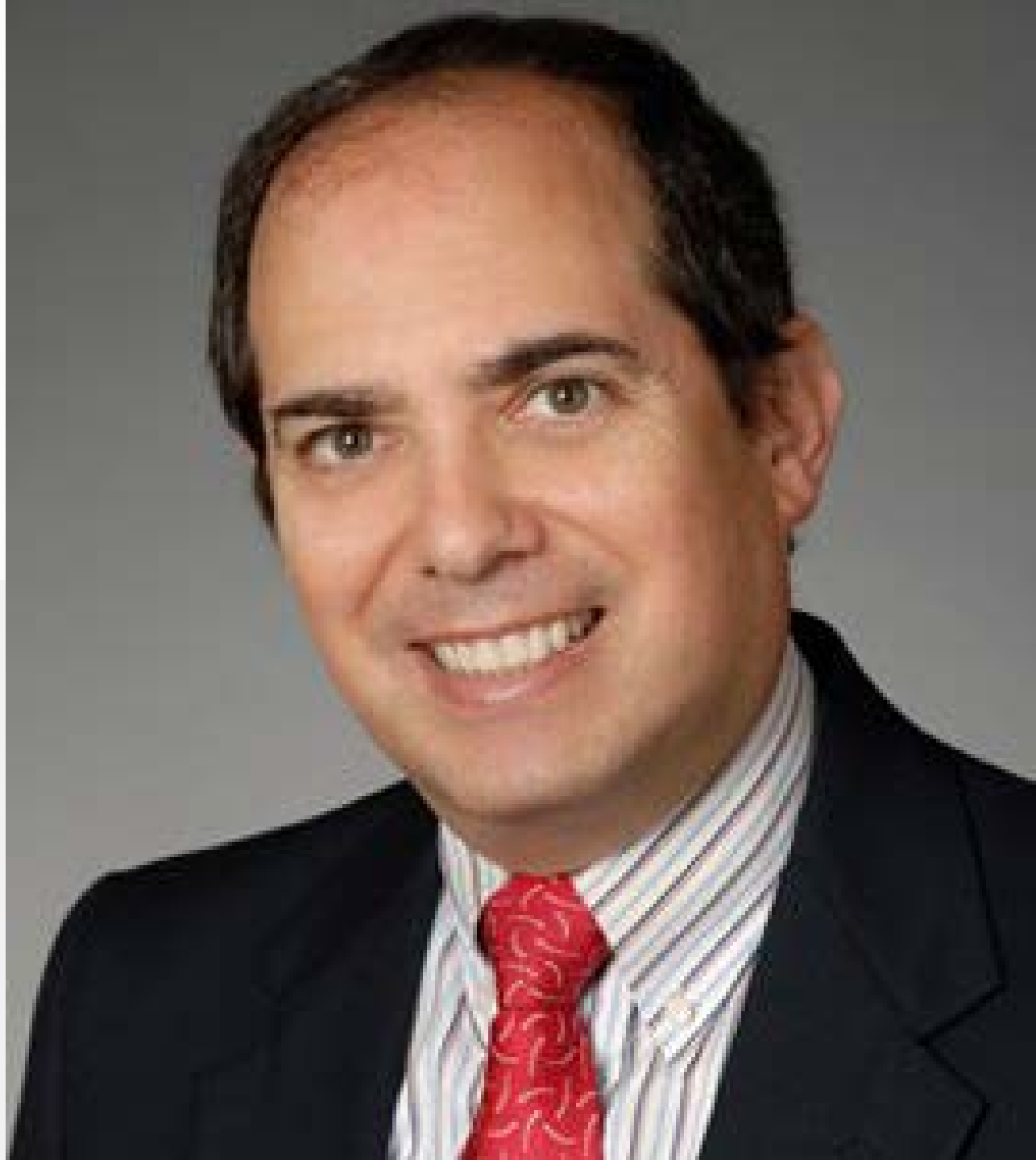

AB 5

- Effective as of 1-1-2020.
- Added Sections 2775 – 2787 to the CA Labor Code.
- Prior Law Applied the “Common Law” Test to Determine Worker Status
- Presumption Now is that ALL Workers in CA are Employees.

ABC Test – CA Labor Code Section 2775

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Common Exemptions

- Business to Business Exemption- Labor Code Section 2776

- Some Additional Exemptions-
  - Professional Services
  - Recording Artists, Songwriters, Composers, Managers, Record Producers
  - Subcontractors Providing Services to Contractors
  - Physicians, Dentists, Podiatrists, Psychologists, Veterinarians
  - Lawyers, Architects, Engineers, Private Investigators, Accountants

EDD Response to AB 5

- Strictly Interpreting AB 5 Provisions
- Adding Requirements Not in the Statute

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Immigration Updates

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H-1B Cap Lottery and FY 2024 Results

- The H-1B program allows companies in the United States to temporarily employ foreign workers in occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty, or its equivalent
  - **65,000** regular cap and **20,000** visas for the advanced degree exemption
- In 2020, USCIS introduced an electronic registration process for the H-1B cap
  - More streamlined
  - Reduced the possibility of misuse and fraud in connection to H-1B visas
- Last year, USCIS received a record number of registrations
  - FY 2023 - **483,927** registrations
  - FY 2024 - **780,884** registrations
- Registration for the FY 2025 is expected to open in March 2024
  - Do you employ F-1 students working to pursuant to OPT, L-1B, TN, and employees holding dependent status?

PERM Green Card Process Challenges

- PERM is a test of the local labor market by an employer to document a shortage of qualified and willing U.S. workers
  - Expansion of Equal Pay Transparency (EPT) laws
    - New York, California, Colorado, Massachusetts, and counting
  - Increased Department of Labor (DOL) processing times
    - In 2023, the DOL changed the form for PERM from the form it has been using since 2005 to the new FLAG-based form
    - As of now, no cases have been adjudicated using the new form
  - Changing labor market due to layoffs
    - Increased scrutiny related to employers with high profile layoffs

I-9 Compliance Updates

- COVID-19 flexibilities for completion of Form I-9 ended on July 31, 2023
- New rule authorized optional alternatives for employers to examine Form I-9 support documentation remotely if employer is participating in E-verify
- Benefits of enrolling in E-verify
  - Alternative remote document inspection option
  - Allowed to employ F-1 OPT students
- U.S. Citizenship and Immigration Services (USCIS) published a revised version of Form I-9 on August 1, 2023
  - As of November 1, 2023, all employers must use the new Form I-9
  - Among the improvements to the new Form I-9 is a checkbox employers enrolled in E-Verify can use to indicate they remotely examined identity and employment authorization documents under the alternative procedure

Takeaways

- As we look back at 2023 and forward to 2024, it is clear that the world of U.S. business immigration is continuously evolving.
- Our team can assist in a full range of employment visas, including intra-company transferees (executives, managers, and professionals), labor certifications, family green card petitions, citizenship petitions retention of U.S. resident status, and much more.

Planning for FY 2025 H-1B Cap

We are currently planning for FY 2025 H-1B Cap season. Please contact us if you are interested in registering any foreign national employees in the FY 2025 H-1B Cap.

Alternative Green Card Options

Our team is composed of experts in navigating the complexities of the PERM green card process. Additionally, we can strategize alternative pathways to permanent residency.

I-9 Compliance

All U.S. employers must properly complete Form I-9 for every individual they hire for employment in the U.S. We are happy to answer questions on how to complete in-person document review, E-Verify, and Form I-9 compliance.

Mitchell Silberberg & Knupp LLP.

Top 5 ERISA Developments to Watch for in 2024

Presented by:

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Mental health parity enforcement

- Federal mental health parity law enacted in 2008.
- Concept is simple to state but very complex to apply and enforce.
- Significant source of participant claims and benefits litigation.
- Greatest complexity relates to non-quantitative treatment limitations (NQTLs), such as pre-authorization requirements, medical necessity limitations and step therapy requirements.
- Federal law enacted in 2020 required health plans to perform and document comparative analyses of the design and application of their NQTLs.
- Many plan sponsors had difficulty complying with the requirement.
- DOL will now ask for this report when it audits a health plan.
- Participants may request this report.

Mental health parity enforcement

- Federal agencies' initial statement to Congress on these reports stated that **none** of the reports that the agencies had reviewed were sufficient.
- The statement to Congress also makes clear that the agencies have significantly expanded staffing (from 15 to 500 investigators, managers, benefits advisors, and attorneys from the Office of the Solicitor at the DOL), for enforcement of NQTL provisions.
- Agencies issued proposed regulations in 2023 to address these issues:
  - require plans to apply a new mathematical test to determine whether certain limits on behavioral health coverage are no more restrictive than limits on medical coverage;
  - document that the "processes, strategies, evidentiary standards and other factors" used to design and apply specific limits on behavioral health are comparable and not more stringent than those used to design and apply limits on medical benefits; and
  - require plans to take affirmative steps to collect, evaluate and analyze specific types of "outcome data."

Mental health parity enforcement

- Plan sponsors and their lobbying organizations have reacted negatively to the proposed regulations for imposing substantial and complex additional requirements.
- Although it is unclear currently if the regulations will be changed, health plans will almost certainly face increased obligations to demonstrate compliance with mental health parity rules.
- Increased agency enforcement actions in this area and participant claims litigation highly likely to continue.

Preventive health care

- The Affordable Care Act (ACA) required that health plans provide coverage of certain preventive services without cost sharing. However, the ACA did not specify the covered services. Instead, Congress delegated that task to three government entities: the U.S. Preventive Services Task Force (“USPSTF”), Advisory Committee on Immunization Practices (“ACIP”), and the Health Resources and Services Administration (“HRSA”). This structure allows USPSTF, ACIP, and HRSA to add new services without Congress having to pass a new law.
- This provision has allowed for many preventive procedures to be provided without cost sharing such as flu shots, mammograms, colonoscopies and numerous other procedures and services.

Preventive health care

- A federal district court found that the delegation of power to the USPSTF was unconstitutional and also found that the requirement to provide certain anti-HIV medication violated the religious rights of the plaintiff employer. Braidwood Mgmt. v. Becerra, (N.D. Tex. Mar. 30, 2023).
- The government appealed and sought to halt portions of the decision from taking effect until after the Fifth Circuit issues its ruling, which the court granted.
- At the present time, the preventive services remain available without cost sharing but this may change pending decisions by the Fifth Circuit and Supreme Court.

Abortion medication

- Supreme Court recently agreed to review 5th Circuit decision limiting access to mifepristone. Alliance for Hippocratic Medicine v. FDA, (CA5 8/16/2023).
- Federal district court in Texas had voided FDA original approval from 2000.
- Fifth Circuit Court of Appeals overturned that decision in 2023 with respect to the original approval but upheld the decision with respect to more recent changes in the rules regarding availability, including no longer requiring in person dispensing and allowing generic versions of the drug.
- No changes in availability have occurred because of a prior Supreme Court decision freezing any changes until the Supreme Court makes a final decision.
- Supreme Court will only be reviewing the more recent changes not the original FDA approval.

401(k) plan litigation

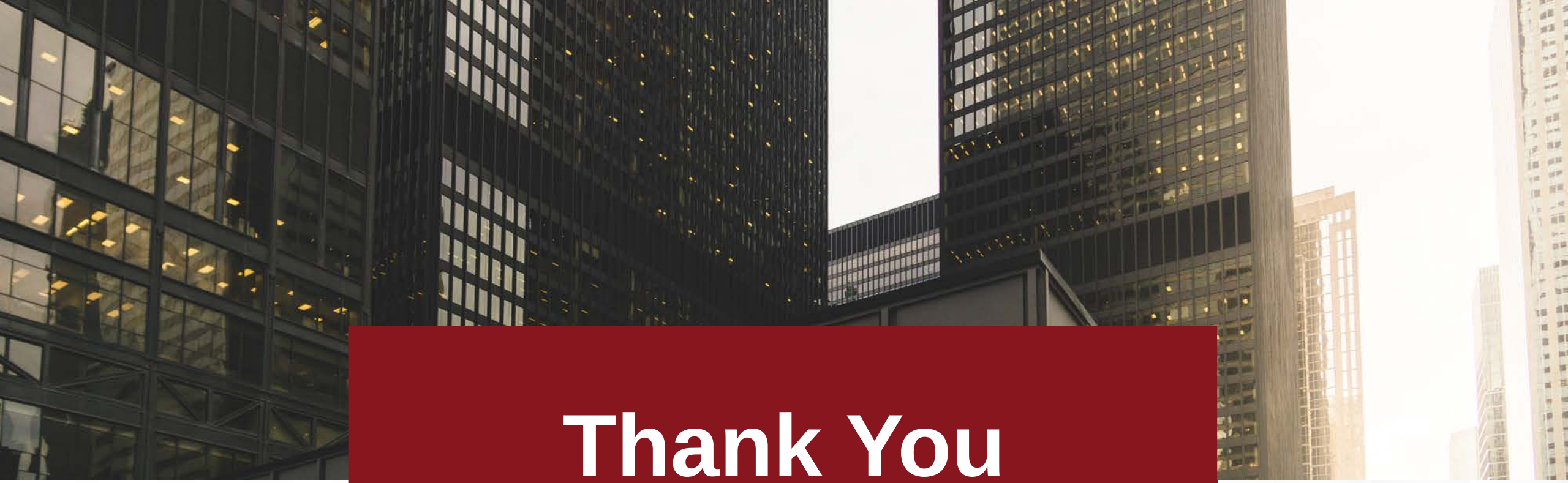
- 401(k) plans have been the target of plaintiffs' litigation generally related to high fees or poor investment performance.
- Regular review of plan performance and fees is considered the best defense although there is no guarantee against getting sued since many well performing plans have been sued by plaintiffs looking for a quick settlement.
- New issue raised by the recent Ninth Circuit decision in Bugielski v. AT&T Services, Inc. which found a potential prohibited transaction under ERISA for failure by the plan fiduciaries to review a compensation arrangement between the record keeper (Fidelity) and third parties (BrokerageLink and Financial Engines).
- Unless this decision is overturned, plan fiduciaries will have to determine what type of third party arrangements exist with plan service providers and review the compensation arrangements between the parties.

401(k) plan litigation

- Other courts have held the Plan fiduciaries are obligated only to review the arrangements with the parties with whom the plan directly contracts, not the service providers who are contracted by another service provider.
- Another theory that has been raised in some very recent cases is the practice of some plans that use forfeitures to offset future employer contributions.
- This is a longstanding practice that has been approved by the IRS and, so far, no court has found a violation of ERISA.
- A series of cases that were filed a year ago against plans holding Black Rock target date funds based on alleged underperformance have generally been dismissed.

Open issues from SECURE Act and SECURE Act 2.0

- Catch-up contributions to 401(k) plans for individuals earning in excess of $145,000 must be made on a Roth basis only.
  - Effective date was 1/1/2024 but IRS gave a two-year extension because employers and plan administrators were unable to implement.
  - Guidance from IRS will be necessary for employers to determine how to implement this change.
- Ten-year maximum payout for most beneficiaries other than surviving spouses for required minimum distributions (RMDs) from plans and IRAs.
  - Proposed IRS regulations required these payments to be made on an annual basis if the participant had already commenced RMDs prior to death.
  - IRS has received numerous negative comments on this approach and has repeatedly delayed implementation.



Thank You

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