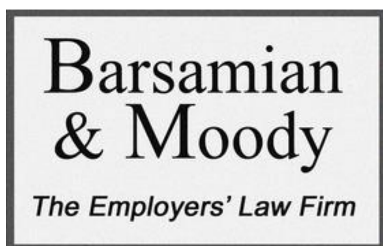
2023
LABOR & EMPLOYMENT LAW UPDATE

Presented by:



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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with **Barsamian & Moody at (559) 248-2360** for individual responses to questions or concerns regarding any given situation.

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WAGE & HOUR UPDATES

California Minimum Wage Increase for 2023

In 2016, then Governor Jerry Brown signed Senate Bill 3, which provided a six-step statewide annual increase to California's minimum wage. The law also established a two-tiered minimum wage system requiring "Large Employers" (those with 26 or more employees) to pay a higher minimum wage rate than "Small Employers" (those with 25 or fewer employees) until 2023.

According to the six-step increases, the minimum wage rate for both Large and Small Employers should have been $15.00 per hour on January 1, 2023. However, Senate Bill 3 also required the California Director of Finance to adjust the minimum wage rate for inflation by August 1, 2022, to be **effective January 1, 2023,** and then annually thereafter. In accordance with this provision, and effective January 1, 2023, all California employers, *regardless of size*, will be required to meet the new minimum wage rate requirement of $15.50 per hour.

Moving forward, the minimum wage rate will be adjusted annually at the rate of inflation based on the national consumer price index for urban wage earners and clerical workers (CPI-W). The adjustment is capped at 3.5% per year and cannot be lowered if the inflation rate is negative. The California Director of Finance will continue to adjust the minimum wage rate based on inflation no later than August 1 of each year to be effective the following year on January 1.

California Minimum Wage Rate Chart		
Date	*Small Employers (25 or fewer)*	*Large Employers (26 or more)*
Jan. 1, 2020	$12.00/hour	$13.00/hour
Jan. 1, 2021	$13.00/hour	$14.00/hour
Jan. 1, 2022	$14.00/hour	$15.00/hour
Jan. 1, 2023	**$15.50** ~~$15.00~~/hour	**$15.50** ~~$15.00~~/hour

Salary Basis Test for Exempt Employees

Additionally, employers must remember that the increase to $15.50 per hour for non-exempt employees also increases the minimum annual salary requirements for exempt (salaried) employees. Effective January 1, 2023, the new salary requirement for exempt status is $64,480 per year in gross wages ($5,373.34 per month in gross wages).

What This Means for Employers:

Employers must adjust the pay rates for all employees earning less than $15.50 per hour. These adjustments should have been made before the first payroll run of the year which covers workdays in 2023. If pay periods include 2022 and 2023, the hourly rate should be pro-rated accordingly. Employers should also check to see if their employees are covered by any local

minimum wage ordinances as there are now numerous localities that have adopted minimum wage requirement that exceed the state minimum wage rate.

California Agriculture Overtime Phase-In for 2023

Date	Large Employers	Small Employers
Jan. 1, 2020	9 hours/day; 50 hours/week	10 hours/days
Jan. 1, 2021	8.5 hours/day; 45 hours/week	10 hours/days
Jan. 1, 2022	8 hours/day; 40 hours/week	9.5 hours/day; 55 hours/week
Jan. 1, 2023	8 hours/day; 40 hours/week	9 hours/day; 50 hours/week
Jan. 1, 2024	8 hours/day; 40 hours/week	8.5 hours/day; 45 hours/week
Jan. 1, 2025	8 hours/day; 40 hours/week	8 hours/day; 40 hours/week

Mileage Reimbursement Rate Increases to 65.5 Cents Per Mile

Effective January 1, 2023, the Internal Revenue Service's ("IRS") standard mileage rate increased to 65.5 cents per mile. Generally, it is best practice for employers to use this rate when calculating expense reimbursement for employees who use their personal vehicles for business-related purposes.

"Pay Scale Disclosure" (SB 1162)

Pay Transparency for All Employers:

Effective January 1, 2023, all employers, regardless of size and upon reasonable request, must provide the pay scale for a position to an applicant for that position. Additionally, all employers, regardless of size and upon reasonable request, must provide the pay scale for a position to a current employee in such position.

Pay Transparency for Employers with 15 or More Employees:

Additionally, and **effective January 1, 2023**, employers with 15 or more employees must disclose the pay scale for a position in any job posting for that position. In terms of counting employees, the Labor Commissioner has indicated that employers with at least one employee

located in California should otherwise count all of their other employees regardless of where they are located. This includes employees obtained through an FLC or a leasing agency. If such an employer engages a third party such as Indeed, ZipRecruiter, etc., to announce, post, publish, or otherwise make known a job posting, then the employer is required to provide the pay scale to the third party and the third party is required to include the pay scale in its postings. In this context, the actual pay scale must be posted "within" the job posting. In other words, it is *not* sufficient for a job posting to include a link or QR code that will take the applicant to the pay scale.

The Labor Code defines "pay scale" as the salary or hourly wage range that the employer "reasonably expects" to pay for the position. If the position's hourly or salary wage is based on a piece rate or commission, then the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting. Any compensation or tangible benefits provided in addition to a salary or hourly wage, such as tips or bonuses are not required to be posted. [*Although bonuses are not considered wages, employers should pay attention to how they structure their bonuses as non-discretionary bonuses may be considered wages.*] However, in determining the amount of these other forms of compensation, employers should still take care to ensure that the amounts are not tied to protected classifications (such as gender, race, and ethnicity) because the Labor Commissioner can use these other forms of compensation in equal pay determinations.

Employers are required to retain records of job title and wage history for each employee throughout the duration of employment and up to three years *after termination of employment* (as opposed to after the creation of the record). The Labor Commissioner has authority to inspect employment records. Failure to maintain records will create a rebuttable presumption in favor of an employee's claims of wage discrimination or pay scale disclosure violation. An employer found in violation may be subject to civil penalties up to $10,000 **per violation**. A person may also bring a civil action for injunctive relief and any other relief that the court deems appropriate.

Pay Data Reporting for Employers with 100 or More Employees:

Most large employers (defined as employers with 100 or more direct hire employees) are already subject to annual pay data disclosures which require the data to be broken down by gender/race/ethnicity and job categories. **Beginning January 1, 2023**, employers with 100 or more employees, including those hired through a labor contractor or temp agency must also comply with the reporting requirements regardless of whether they are exempt from federal EEO-1 reporting requirements. The new requirements state that the report must contain the median and mean hourly rates for each combination of race, ethnicity and gender within each job category.

Under the "old" law, California employers with 100 or more employees who filed annual federal EEO-1 reports were considered to be in compliance with state pay data reporting mandates if they submit an EEO-1 containing the same or substantially similar pay data information. Under the new law (SB 1162), employers are required to submit a pay data report directly to the California Civil Rights Department (formerly known as the Department of Fair and Employment Housing or "DFEH"). Another significant change is that multi-establishment

employers are no longer required to submit consolidated reports. Instead, under the new law, multi-establishment employers may submit a report for each establishment.

The newly enacted statute also revises current submission timeframes for pay data reports. Reports will now be due on the second Wednesday of May. Specifically, the first report will be due on May 10, 2023, for 2022 pay data.

What This Means for Employers:

All employers, regardless of size, need to train their management personnel on how to respond to pay transparency requests/inquiries from applicants and employees. Employers with 15 or more employees need to immediately review (and potentially revise/update) their job postings and pay data retention record keeping practices. Employers who qualify as "large employers" under the revised pay transparency laws must also review their pay data reporting practices and begin recording additional elements (race, ethnicity, and gender) within each category of the job titles.

Finally, employers need to be aware of the potential penalties authorized by this new law. An employee who believes there is a violation of the pay transparency requirements may file a written complaint with the Labor Commissioner within one year of discovery. The Labor Commissioner is authorized to levy a civil penalty of up to $10,000 per violation.

Employers with 100 or more employees need to be aware that the penalties for failure to file pay data reports is equal to $100 **per employee** for any initial failure to file and $200 per employee for any additional violations. Further, it is worth noting that where a grower fails to submit a pay data report on behalf of its FLC workers because the FLC fails to provide the grower with the appropriate data, the penalties may be apportioned to the FLC.

Legal Procedures / Enforcement

AB 2183 – The ALRB Card Check Law

On September 28, 2022, Governor Gavin Newsom signed AB 2183, also known as the "Card Check Bill" into law. **Beginning January 1, 2023**, this law revamps the labor union election process, authorizes the ALRB to levy penalties on employers (*including liability for individual officers and directors*) for unfair labor practices, and requires employers to post a bond for the full amount of any ALRB award as a condition of appealing the Board's decision to an appellate court.

Labor Peace Compact (LPC):

LPC is an ***optional*** agreement whereby the employer agrees to the following terms:

1. Make no statements for or against union representation in any form;
2. Allow union access to employer property pursuant to the ALRB's former access regulations; and
3. Do not engage in any captive audience meetings with their employees.

Employers should NOT agree to an LPC because it provides no benefit to employers and instead requires employers to give up their free speech and property rights. In 2021, the United States Supreme Court made it clear that property owners DO NOT have to allow union organizers on their property.[1] These property rights, which have been so heavily fought for, should not be given up by the signing of an LPC. If a grower has entered into an LPC, their FLCs will also be bound by the LPC. LPCs will also *renew automatically*, unless revoked 30 days before renewal (*first day of the following year*).

The certification process in an LPC is as follows:

1. Labor unions who have filed LM-2 forms for the preceding two years may request voting kits from the ALRB. These voting kits include mail-in ballots, which if signed by employees, are good for 180 days.
2. Once a labor union obtains signatures of 50% of the employees and submits a petition to the ALRB, the employer, along with its response, must also submit a complete list of employees from the immediately preceding payroll period to the ALRB. Upon comparing the number of signatures with the list of employees and confirming a majority, the ALRB mails voting kits to all employees, except for employees who had themselves requested voting kits prior to the labor union's petition.
3. Once the ALRB receives the mail-in ballots and confirms majority, the ALRB certifies the labor union as the exclusive bargaining unit.

[1] *Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063.

Non-Labor Peace Compact (Card Check):

For employers who do not agree to an LPC, the election process is a little simpler. Labor unions may obtain signatures of the majority of workers through authorization cards or other proof of majority support and file a certification petition with the ALRB. Attached to its response, the employer must also submit a complete employee list. If the ALRB finds a majority support in the petition, the ALRB certifies the labor union as the exclusive bargaining unit. If the union does not obtain majority support, they are allowed an additional 30 days to obtain more support.

Penalties:

One of the most significant changes brought about by this law is that the ALRB is now authorized to levy civil penalties of **$10,000 for each ULP**. In discrimination cases, the penalty may be **up to $25,000**. In determining the penalty, the ALRB will consider the gravity of the ULP, the impact of the ULP on the employee(s), and the financial circumstances of the employer, among other things. The ALRB may also impose direct penalties on individual directors/officers of the employer depending on the particular facts or circumstances of the case showing their personal involvement in the ULP.

Appealing ALRB Decisions:

Going forward, an employer will now have to post a bond in the amount of the entire economic value of the order as determined by the Board. This will make it financially burdensome for employers to appeal any Board order.

What This Means for Employers:

The new election procedures make it virtually impossible to stop a unionization campaign as the unions will be able to present a petition showing majority support without employers ever becoming aware of the union's efforts to get support. Therefore, **it is more important than ever to create a workplace where employees do not feel the need to seek outside representation**. This will require streamlining procedures for employees to report any dissatisfaction in the workplace. In addition, this will require substantial training for supervisors who are the face of the company as employee dissatisfaction with their supervisor is the leading cause of unionization.

Employers should also consider offering employee benefits such as retirement plans and paid time off accruals that meet or exceed industry standards. Employers should communicate to employees what the company is doing for them and let them know that they are doing so because they value their contributions to the company.

AB 2766 – Unfair Competition Law Enforcement Powers

Effective January 1, 2023, AB 2766 grants enforcement and investigatory powers to the city attorney of any city with a population of over 750,000; to the county counsel of any county containing a city with a population over 750,000; or the city attorney of a city and county (collectively "Investigators"), when the Investigators reasonably believe there may have been a violation of the Unfair Competition Law, including any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising. Prior to this law, the

California Attorney General was the only office with this investigative and enforcement authority.

What This Means for Employers:

In the employment context, Unfair Competition Law issues arise when employees allege they have been purposefully underpaid by their employer in order for the employer to gain a competitive advantage over employers who pay their employees the lawful minimum wage rate. This new law gives certain local governments investigative authority, including the power to subpoena records and information, which can be used to find other potential violations. While this law does not involve the same degree of risk as a wage and hour class and PAGA representative action, it is another reminder of the importance of ensuring compliance with California's rigorous wage and hour laws.

AB 2068 – Employee Notification Requirements After Cal/OSHA Citations

Effective January 1, 2023, this law requires that any time a Cal/OSHA citation, special order or action is required to be posted, the employer must also post an employee notification, prepared by Cal/OSHA, in multiple languages. AB 2068 requires Cal/OSHA to prepare these notifications in English and the top seven non-English languages used by limited-English-proficient adults in California, as determined by the US Census Bureau's American Community Census, as well as Punjabi (if not already included). AB 2068 allows Cal/OSHA to enforce this posting requirement by citations and civil penalties of up to $12,471 for each violation.

The employer must post the following information in the employee notification prepared by Cal/OSHA:

1. Notice that Cal/OSHA investigated the workplace and found one or more workplace safety or health violations.
2. Notice that the investigation resulted in one or more citations or orders, which the employer is required to post at or near the place of the violation for three working days, or until the unsafe condition is corrected, whichever is longer.
3. Notice that the employer is required to communicate any hazards at the workplace to employees in a language and manner they understand.
4. Contact information for Cal/OSHA and the internet website where employees can search for citations against their employer.

What This Means for Employers:

According to AB 2068, Cal/OSHA will prepare employee notifications for employers, but employers should still ensure all the information required for the notification is present. Employers should also ensure the employee notifications are also prepared in all non-English languages as required.

DISCRIMINATION, HARASSMENT, AND RETALIATION

AB 2188 Expands Employees' Right to Off-duty Cannabis Use

Effective **January 1, 2024**, AB 2188 prohibits employment-related decisions based on a drug screen test that finds the person has *nonpsychoactive cannabis metabolites* (NCM) in their blood, hair, urine, or other bodily fluids. In other words, employers cannot hire, fire, or discipline applicants or employees based on drug tests that shows **metabolized** *tetrahydrocannabinol* (THC) in the body. THC is the chemical compound in cannabis that can indicate impairment and cause psychoactive effects. Once metabolized and stored in the body as NCM, THC no longer is an indicator of current impairment but merely an indicator of past consumption.

Specifically, this law expands the protected categories of the California Fair Employment and Housing Act ("FEHA"), to cover individuals that use (or are perceived to use) cannabis off the job and away from the workplace or who return a positive employer-required drug screening test showing nonpsychoactive cannabis metabolites (as metabolites show cannabis use and not impairment).

Employers can still maintain policies for a drug-free workplace and issue disciplinary actions against employees possessing, using, or being under the influence of cannabis while on the clock or on company property.

It may also be worth noting that this law does not apply to: an employee in the building and construction trade; or applicants or employees hired for position that require a federal government background investigation or security clearance in accordance with specific regulations issued by the U.S. Department of Defense or equivalent regulations applicable to other agencies. Nor does the statute preempt any state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

What This Means for Employers:

While AB 2188 will not go into effect until January 1, 2024, employers should begin gearing up for compliance by reviewing their drug testing policies, finding trusted testing sites that test for THC levels rather than metabolites, and training supervisory employees on the signs of cannabis impairment and the specifics of the "reasonable suspicion" testing process. Given that this law will become part of the FEHA fabric, employees will be able to sue for the full range of damages that are available under FEHA, which include compensatory damages and attorney's fees. As such, responding to and addressing cannabis issues in the workplace will carry similar risk as responding to harassment and discrimination complaints.

HR 4445 - Arbitration of Sexual Assault and Sexual Harassment Act of 2021

On **March 3, 2022**, President Biden signed HR 4445 into law limiting the use of arbitration agreements and class action waivers for allegations of sexual harassment and/or assault. HR 4445, which is known as the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"), allows an individual to invalidate a pre-dispute arbitration agreement that would otherwise prevent them from filing a lawsuit in civil court alleging sexual assault or sexual harassment. Specifically, the Act amends the Federal Arbitration Act or "FAA" by exempting sexual harassment and assault claims from arbitration agreements and "joint-action" waivers.

It is worth noting that HR 4555 applies to a "case" that "relates to" a sexual assault dispute or sexual harassment dispute. It is not clear whether this means that an entire lawsuit is shielded from arbitration, or whether the court must keep the sexual harassment or sexual assault causes of action in court and send the rest to arbitration. Due to this uncertainty, Plaintiffs' attorneys may latch on sexual harassment or sexual assault causes of actions to employment lawsuits to shield from arbitration.

What This Means for Employers:

Employers must review and, if necessary, revise and update their harassment prevention policies, procedures, and practices to be compliant with this new law. In particular, employers should also review their pre-dispute arbitration agreements to ensure that they do not prevent individuals from filing sexual assault and sexual harassment claims in federal or state court.

S. 4524 – Speak Out Act

Effective December 7, 2022, the federal Speak Out Act or "SOA" invalidates pre-dispute non-disclosure and non-disparagement clauses relating to sexual assault and sexual harassment claims. SOA bars employers from enforcing such agreements with former or current employees, independent contractors, providers of goods and services, and consumers that contain a non-disclosure and non-disparagement provision prohibiting any discussion related to sexual assault or harassment. SOA makes agreements in which individuals agree to keep confidential any unraised past or future sexual assault or harassment claims unenforceable. It also makes non-disparagement clauses unenforceable to the extent they would limit an employee's ability to comment on a sexual harassment dispute or a sexual assault dispute. Notably, SOA does not apply to separation and settlement agreements involving claims that an employee has already raised.

This law is squarely aimed at preventing situations where alleged victims of sexual harassment or assault were limited in their ability to come forward publicly with their allegations and aligns with other federal and state legislative efforts to limit the use and enforcement of confidentiality and non-disparagement clauses in settlement agreements.

What This Means for Employers:

Employers should review their employment agreements, confidentiality agreements, arbitration agreements, and employee handbooks and policies to ensure they are in compliance

with the Speak Out Act, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, the Silenced No More Act (in California), as well as applicable state and local laws.

AB 2777 – Revives Sexual Assault Claims Previously Time-barred by Law

Prior to January 1, 2023, California law set the statute of limitations for filing sexual assault claims as the later of (A) 10 years from the date of the last act or attempted act, or (B) three years from the date the individual discovers that an injury or illness resulted from those acts. **Effective January 1, 2023**, the Sexual Abuse and Cover Up Accountability Act revives sexual assault claims based on conduct that occurred on or after January 1, 2009, that would otherwise be barred solely because of the expiration of the applicable statute of limitations and allows such claims to be filed until December 31, 2026.

Additionally, and important for employers to note, this law also revives sexual assault claims, including any related claims such as sexual harassment or wrongful termination arising out of a sexual assault, where one or more employers might be legally responsible for damages *and* the employer, or its agents are alleged to have engaged in a "cover up." In this context, a "cover up" means "a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, **the use of nondisclosure agreements or confidentiality agreements**." (Emphasis added.) This law allows such claims to be filed until December 31, 2023.

This law does not revive any claims that have been (A) litigated to finality in court before January 1, 2023, or (B) resolved by a written settlement agreement entered into before January 1, 2023.

What This Means for Employers:

This law sets the stage for an increase in sexual assault claims (including related sexual harassment and wrongful termination claims) against California employers until December 31, 2023. In particular, it is anticipated that the number of older claims—that were otherwise time-barred but for the passage of this new law—will increase. These older claims might be troublesome for employers because critical records and witnesses may no longer be available. As such, employers should review their records for any sexual assault or sexual harassment claims and make sure that all related records and essential witness testimony are preserved. Further, if an employer required an employee to sign a nondisclosure and/or confidentiality agreement, the employer should ensure that the agreement included language specifically stating that the employee was not prohibited from discussing the underlying facts of any sexual assault/harassment in the workplace.

SB 523 – Contraceptive Equity Act of 2022

As of **January 1, 2023,** SB 523, also known as Contraceptive Equity Act of 2022, amends FEHA and makes it an unlawful employment practice to discriminate against an applicant or an employee based on reproductive health decision-making. It also makes it unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of

employment, the disclosure of information relating to an applicant's or employee's reproductive health decision making. In this context, "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.

SB 523 also expands coverage of contraceptives and vasectomy services by a health care service plan contract or health insurance policy issued, amended, renewed, or delivered on and after January 1, 2024.

What This Means for Employers:

Employers are advised to incorporate this new protected class into their anti-discrimination training. Employers should also ensure that existing anti-harassment and anti-discrimination policies and employee handbooks are updated to include this new protected classification.

EMPLOYEE SAFETY, RIGHTS, AND PRIVACY

California Privacy Rights Act of 2020 (CPRA)

The California Privacy Rights Act ("CPRA") is an amendment to the California Consumer Privacy Act ("CCPA") that protects individual's data privacy rights. CPRA builds on CCPA, which was passed in 2018. CPRA expands consumer privacy rights, revises data retention requirements for businesses, and transfers enforcement authority from the Attorney General to California Privacy Protection Agency. CPRA went into **effect on January 1, 2023**, but its requirements for data retention are retroactively applicable to all employer collected information beginning January 1, 2022. CPRA's enforcement does not begin until July 1, 2023. The January deadline will trigger several privacy related CCPA obligations for employers, such as:

Providing notification to applicants, employees, and contractors as to the categories of personal information that is (or may be) collected by the employer. The notice must describe the employer's purpose(s) for collecting and disclosing such information and provide employees with information concerning the sharing and retention of personal information by the employer.

Inform employees of their rights when it comes to access or restrictions on the use or disclosure of certain categories of personal information.

Inform employees of their rights when it comes to correcting or deleting personal information (subject to specific exemptions as applicable).

Inform employees about their right to request the personal information collected by the employer during preceding 12 months.

The first step for employers to take regarding CCPA obligations is to determine whether or not their business falls subject to CCPA. CCRA applies to businesses in California who collect consumer personal information, and who satisfy one or more of the following:

- As of January 1st of a given year, the business had a gross annual revenue of over $25 million of the preceding calendar year; or
- The business buys, sells, or shares personal information of 100,000 or more consumers;
    - In the context of CPRA, "sells" means disclosing information for monetary or other valuable consideration, while "shares" means disclosing personal information for "cross-context behavioral advertising," whether or not for monetary or other valuable consideration.

- The business derives 50% or more of its annual revenue from selling California resident's personal information.

This law applies to personal information of California residents or "consumers" who are employees, job applicants, independent contractors, and board members, as well as employee's dependents who receive benefits through the employer. CPRA includes the following categories of Sensitive Personal Information (SPI):

Driver's license numbers;

Social Security Numbers (SSN);

State ID numbers;

Union membership;

Passport numbers;

User credentials such as usernames and passwords;

Biometric data and genetics;

Ethnic or racial origins;

Precise geolocations;

Religious or philosophical beliefs;

Information about a consumer's sexual orientation, sex life, or health;

Contents of a consumer's text, mail, and email.

Consumer Rights: CCPA already empowered consumers with the right to know the information being collected, to delete their personal information, and to opt-out of the sale of their personal information. CPRA will allow consumers and employees to correct any personal information a business collects, and give them the right to not be discriminated against for exercising their CPRA rights.

Employer obligations:

Notice: Employers will be required to <u>publish</u> notice of collection of personal information "at or before the point of collection." This notice must be published in a conspicuous area visible to all employees and must include the following information: i) categories of SPI collected; ii) purpose for collection and use; iii) whether such information is sold or shared; and iv) length of time each category of SPI will be retained.

Service Provider or Contractor: If any personal data is shared with a third-party service provider or a contractor, the employer must draft and sign a contract with those parties detailing the nature of personal information shared, and the purpose for which it is shared. The contract must oblige the third parties to abide by the collection and use requirements. The contract shall include the following information: i) what information is sold/shared and for what purpose; ii) obligate the contracting party to comply with CPRA; iii) require the contracting party to notify the business if it can no longer meet its obligations under the CPRA; and iv) grant the employer the right to take "reasonable and appropriate steps" to help ensure the contracting

party uses the personal information in a manner consistent with the CPRA. [*this includes employer's authority to monitor contractor's compliance through manual reviews, automated scans, or audits.]*

Response to employee/consumer requests: Employers must return receipt of a consumer request within 10 business days and respond to opt-out requests within 15 days. However, if an employer does any of the following, it does not have to respond to consumer requests under CPRA: i) employer does not maintain personal information in a searchable or reasonably accessible format; ii) information is maintained for legal or compliance purposes; iii) employer does not sell the information or use it for any commercial purposes; or iv) employer describes to the consumer the categories of records it collects.

What This Means For Employers:

If an employer's gross annual revenue for the calendar year is under $25 million, it is unlikely that CPRA's requirements of notice, 3rd party service provider/contractor, or employee requests apply, unless your business engages in the buying, selling, or sharing of personal information as defined above. If CPRA does apply to you, you must identify every type of SPI being collected from employees and consumers and comply with the employer obligations listed above. Additionally, you must also update your handbooks to provide appropriate disclaimers to employees regarding personal information being collected.

AB 2091 – Disclosure of Information: Reproductive Health and Foreign Penal Civil Actions

Effective September 27, 2022, AB 2091 prohibits employers and healthcare plans from releasing information that would identify or relate to a person seeking or obtaining an abortion except pursuant to a subpoena, unless the subpoena is based on another state's laws that would interfere with an individual's abortion rights.

What This Means for Employers:

Employers may want to consider updating existing benefits policies as a way of notifying employees that the company is complying with this new statutory privacy requirement.

SB 1044 – Employer Prohibitions Concerning Emergency Conditions in the Workplace

Effective January 1, 2023, SB 1044 prohibits employers from taking or threatening adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area during an emergency condition because the employee has a reasonable belief that the workplace or worksite is unsafe. In this context, an employee has a reasonable belief that the workplace/worksite is unsafe, if a reasonable person would conclude there is a real danger of death or serious injury if that person enters or remains on the premises. The reasonableness of the employee's belief will be evaluated based on "the circumstances known to the employee at the time" of making the decision to refuse to report to or leaving the workplace/worksite.

Employers are also prohibited from preventing employees from accessing their mobile devices to seek emergency assistance, assess the safety of the situation, or communicate with others to confirm their safety in the event of an "emergency condition."

Under this new law, "emergency condition" means the existence of conditions 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. Notably, "emergency condition" does ***not*** include a health pandemic. It also does not apply in a situation where the emergency conditions that pose(d) an imminent risk of harm to the workplace/worksite, the worker, or the worker's home have ceased.

Employees are required to notify their employer of the emergency condition requiring them to leave or refuse to report to the workplace or worksite (either prior to leaving or refusing to report, when feasible, or—when prior notice is not feasible—as soon as possible).

In the event a current or former employee brings an action that could be brought pursuant to the Private Attorneys General Act (PAGA) for violations of these prohibitions, the law gives employers the right to "cure" alleged violations as set forth in section 2699.3.

What This Means for Employers:

Employers should consider updated existing safety or emergency policies to reflect these new protections. Employers should also ensure that supervisors are trained on theses protections to avoid inadvertently disciplining or terminating an employee under these circumstances.

AB 2282 – Definition of "Hate Crime" Expanded to Include Hate Imagery At A Place of Employment

Effective January 1, 2023, AB 2282 expands the definition of a hate crime to include the display of hate imagery for the purpose of terrorizing a person, including actions performed in a place of employment, for the purpose of terrorizing a person who attends, works at, or is otherwise associated with the place of employment. Hate imagery includes symbols, marks, signs, emblems, and other physical impressions, including, but not limited to, a Nazi swastika, nooses, or burned or desecrated crosses or other religious symbols on private and nonprivate property, as specified, with the intent to terrorize a person.

What This Means for Employers:

Employers should update their existing employee conduct policies to include the expanded definition of a hate crime.

SB 1126 – Expands "CalSavers" to Employers with at Least One Eligible Employee

SB 1126 expands the existing CalSavers program, which originally went into effect in 2020, to cover employers with at least one eligible employee. CalSavers phases in the mandatory retirement program for California employers who do not offer employer-sponsored retirement

plans. As of June 30, 2022, employers with **five or more employees** have been required to register with CalSavers. SB 1126 expands the definition of "eligible employer" to include employers with one or more eligible employees. Sole proprietorships, self-employed individuals, and other business entities that do not employ any individuals other than the owners of the business are excluded from this change.

What This Means for Employers:

Eligible employers under the expanded definition are required to have a payroll deposit savings arrangement in place to allow employee participation in the CalSavers program by **December 31, 2025**. Employers can find more information regarding the CalSavers program through the CalSavers website at https://employer.calsavers.com.

SECURE 2.0 Act Creates a Retirement Savings "Lost and Found"

The SECURE Act (Setting Every Community Up for Retirement Act of 2019 (SECURE 1.0)) was signed into law on December 20, 2019. SECURE 1.0 made several adjustments to the nation's retirement system. On **December 29, 2022**, President Biden signed the SECURE 2.0 Act into law to address several issues that SECURE 1.0 failed to address. SECURE 2.0 contains more than 90 provisions providing incentives, such as tax credits, to employers that implement and promote retirement plans to and for employees. SECURE 2.0 also contains provisions to incentivize saving for retirement for low earning employees, employees that have fallen behind in their retirement saving, employees that are fearful of penalties, employees that need to pay back student loans, and many other types of employees that otherwise may have been reluctant to save.

What This Means for Employers:

Employers that do not currently offer a retirement plan to employees and instead opt for the CalSavers program should consider taking advantage of the tax incentives in SECURE 2.0. Employers should consult with their tax professionals and employee benefits coordinator to determine what is best.

SB 1002 – Workers' Compensation: Licensed Clinical Social Worker

Effective September 27, 2022, SB 1002 expanded the definition of health care provider for purposes of workers' compensation services to include a Licensed Clinical Social Worker ("LCSW"). This law allows an injured worker to use the services of an LCSW as treatment for workers' compensation purposes.

SB 1002 also authorizes Medical Provider Networks (MPNs) to add LCSWs to the physician providers listing; allows an LCSW to treat or evaluate an injured worker but only upon a physician's referral; and prohibits an LCSW from determining disability.

What This Means for Employers:

Employers should ensure their human resources and workers' compensation representatives are aware of this update in order to guide injured employees when discussing the list of services employees may use for addressing work related injuries.

AB 984 – Motor Vehicle Tracking

AB 984 required the Department of Motor Vehicles (DMV) to establish a program authorizing an entity/business to issue alternatives to stickers, tabs, license plates, and registration cards. **Beginning January 1, 2023**, subject to the DMV's approval, these "alternative devices" will be available to everyone. These alternative devices include electronic registration cards, license plate wraps, and digital license plates. AB 984 also prohibits alternative devices from being equipped with GPS or other vehicle location tracking capability, except on fleet and commercial vehicles. Employers will be prohibited from using such GPS or other vehicle location technology to monitor employees except during work hours, and only if strictly necessary for the performance of an employee's duties.

Employers must provide a notice to the employee of the following prior to any monitoring:

- A description of the specific activities that will be monitored.
- A description of the worker data that will be collected as part of the monitoring.
- A notification of whether the data gathered through monitoring will be used to make or inform any employment-related decisions, including, but not limited to, disciplinary and termination, and, if so, how, including any associated benchmarks.
- A description of the vendors or other third parties, if any, to which information collected through monitoring will be disclosed or transferred. The description shall include the name of the vendor or third party and the purpose for the data transfer.
- A description of the organizational positions that are authorized to access the data gathered through the alternative device.
- A description of the dates, times, and frequency that the monitoring will occur.
- A description of where the data will be stored and the length of time it will be retained.
- A notification of the employee's right to disable monitoring, including vehicle location technology, outside of work hours.

This law imposes civil penalties of $250 per employee for initial violations and up to $1,000 per employee for each subsequent violation for each day monitoring occurs without proper notice. This law also prohibits retaliation against employees for disabling monitoring outside of work hours.

What This Means for Employers:

If employers choose to obtain and use alternative devices for company vehicles, they must ensure that employees using those vehicles are provided advance and adequate notice. Employers should also consider updating their handbooks to ensure notice of monitoring is provided to all impacted employees.

AB 1601 – Employment Protections

Effective January 1, 2023, AB 1601 modifies the California Worker Adjustment and Retraining Act ("Cal/WARN Act") to among other things, authorize the Labor Commissioner to enforce the Cal/WARN Act's notice requirements concerning a mass layoff, relocation, or termination of employees, to investigate an alleged violation and to order appropriate temporary relief to mitigate the violation.

As a general background, Cal/WARN covers employers that employ, or have employed in the preceding 12 months, 75 or more full and part-time employees. Like the federal WARN Act, the 75 or more employees must have been employed for at least 6 months out of the 12 months preceding the date of required notice. Notice is required for a plant of any size if there is a layoff of 50 or more employees within a 30-day period. WARN requirements are very specific and legal counsel should be consulted during any multi-individual layoff or relocation to ensure compliance with state and federal WARN requirements.

What This Means for Employers:

The Labor Commissioner will be looking for and investigating potential Cal/WARN violations. Employers must make sure they provide proper notice to employees when required.

BENEFITS AND LEAVES OF ABSENCE

AB 1949 – Bereavement Leave

Effective January 1, 2023, AB 1949 requires employers with five or more employees to grant an "eligible employee" up to five days of unpaid bereavement leave upon the death of a "qualifying family member." A "qualifying family member" includes a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in CFRA.

An employee is eligible for bereavement leave once they have been employed for at least 30 days prior to the commencement of leave. An employee can use bereavement leave for each qualifying occurrence, meaning each death of a qualifying member. Note: while unclear at this time, there does not appear to be a limit for how many times an employee can be eligible for bereavement leave. In any event, until more guidance is available about the interpretation of this law, employers should consider **not** limiting employees to one qualifying occurrence per year to avoid being the test case in a claim by a very sympathetic plaintiff.

Employers may require an employee to provide documentation of the death of the family member such as a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency. The documentation, if requested by the employer, must be provided within 30 days of the first day of bereavement leave. Employers are required to maintain confidentiality of any requests and documentation.

The leave can be taken intermittently but must be completed within three months of the date of death. The leave is not required to be paid leave unless the employer's policy is to provide paid leave. This law is intended to blend with an employer's existing bereavement leave policy to provide "up to 5 days of unpaid" leave. For example, if an employer's existing policy already provides 3 paid days, it need only amend its policy to add an additional 2 days of unpaid leave. This bill allows an employee to use paid leave balances such as PTO or vacation pay that an employee has available, although they are not required to use that time. It is unlawful for an employer to engage in discrimination, interference, or retaliation upon an employee's exercise of rights under the bill. Disputes concerning allegations of discrimination, interference, or retaliation relating to an individual's exercise of any rights to bereavement leave will now be included in the California Civil Rights Department's small employer family leave mediation pilot program.

The leave provided under this law does not apply to employees covered by a valid collective bargaining agreement that provides for bereavement leave and other specified working conditions.

What This Means for Employers:

Employers should consider updating their handbooks to address this right to bereavement leave. Employers will want to ensure their supervisors and human resources departments are familiar with the leave availability and the documentation requirements.

SB 984 – Military Service Leave of Absence

Generally, employers must grant unpaid leave to employees that are members of reserve military or the National Guard when the employees are required to attend drills or perform other inactive duty reserve obligations. The law also authorizes these employees to elect to use vacation time or accumulated compensatory time off during their leave. SB 984 amended the Government Code to require employers to grant those employees a leave of absence when they are required to perform inactive duty obligations, "other than inactive and active duty training drill periods." The law does not specify what these other obligations may entail leaving it up to the employer to try to figure out. Employees may use vacation time or accumulated compensatory time off to attend or perform inactive duty obligations, other than inactive and active-duty training drill periods.

SB 984 became effective on January 1, 2023.

What This Means for Employers:

Employers should consider updating their leave sections in their employee handbooks to reflect the new change to the law. The law seemingly requires the granting of leave for all obligations related to an employee's inactive military duty, therefore employers should be hesitant to deny an employee's leave if they are stating the purpose is related to their duty. However, nothing in the law prohibits an employer from requiring documentation from the employee verifying the need for leave. Employers should therefore require documentation much like they would for any other leave requests.

SB 951 – Unemployment Insurance

SB 951 made changes to the Unemployment Insurance Code **effective January 1, 2025** which will increase wage replacement rates for low wage workers (individual making roughly $57,000 or less annually) up to 90 percent and up to 70 percent for everyone else. The previous maximum wage replacement rate was only 60 percent. To pay for this increase SB 951 has repealed part of the Unemployment Insurance Code which caps contributions to the State Disability Insurance (SDI) fund, thereby making all wages subject to the SDI contribution rate. The Director of Employment Development can make adjustments to the contribution rate up to a certain amount to reimburse the SDI fund for disability benefits paid or estimated to be paid or to prevent the accumulation of funds in excess of those needed to maintain an adequate fund balance. Although the increase to wage replacement rates is not effective until 2025, the removal of the ceiling is effective January 1, 2024.

What this Means for Employers:

Although California undoubtedly has the most employee friendly leave laws in the country, SB 951 was passed with the help of special interest groups that purport to represent the

interests of low wage earners who would generally not take advantage of Paid Family Leave or SDI benefits for fear of not making enough money to pay their bills. Employers should keep in mind that employees will have every reason to take full advantage of the leave laws as the pay they receive while on leave may be up to 90 percent of what they would be paid if they were to continue working. It is imperative that employers prepare for employees taking extended leaves by cross-training current employees so that employees' absences have less significant effects on operations. Employers should also take advantage of grants offered by California that may help offset the costs of cross training for this purpose.

AB 1041 – "Designated Person" Added to Covered Family Members for Purposes of CFRA Leave and California Paid Sick Leave Law

Under the California Family Rights Act (CFRA), an employer with five or more employees must provide eligible employees who meet specified requirements to take up to 12 workweeks in a 12-month period to care for their own serious health condition or the serious health condition of a covered family member (as defined by the CFRA).

Effective January 1, 2023, AB 1041 expands the definition of family member to include a "designated person" in addition to the child (biological, adopted, or foster child, a stepchild, a legal ward, a child of a domestic partner, or a person to whom the employee stands in loco parentis), parent (biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child), grandparent, grandchild, sibling (a person related to another person by blood, adoption, or affinity through a common legal or biological parent), spouse, or domestic partner.

"Designated person" is defined to mean any individual related by blood **or whose association with the employee is the equivalent of a family relationship**. Further, this bill provides that the employee must identify the designated person at the time the employee requests leave and that the employer may limit the employee to one designated person per 12-month period.

This law also expands the definition of family member under the Healthy Workplaces, Healthy Families Act of 2014 (also known as the Paid Sick Leave Law) to include a "designated person." Although the term "designated individual" is also added to the CRFA the definition of designated person is different under PSL. For purposes of PSL, a designated person may be **any individual identified by the employee at the time the employee requests paid sick days**. Similar to the provisions of the CFRA discussed above, for purposes of the Paid Sick Leave Law, the employee must identify the designated person at the time the employee requests paid sick days and the employer may limit an employee to one designated person per 12-month period for paid sick days.

What This Means for Employers:

Employers must update their handbooks to reflect these changes to family care and medical leave provisions. Employers will want to ensure their supervisors and human resources departments are familiar with these new definitions under CFRA and PSL and understand the limits on identifying a designated person.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) goes into **effect June 27, 2023,** and is similar to the ADA in that it requires employers to provide reasonable accommodations to pregnant employees as long as it does not impose an undue hardship. PWFA applies to employers with 15 or more employees. Covered employers are obligated to provide a reasonable accommodation to employees and applicants based on known limitations regarding their ability to perform essential job duties due to a physical or mental condition related to pregnancy, childbirth and related medical conditions. Employers cannot require an employee take paid or unpaid leave if a reasonable accommodation is available. Thus, employers must engage in the interactive process to determine if a reasonable accommodation is available. The terms "reasonable accommodation" and "undue hardship" have the same meaning as under the ADA.

What This Means for Employers:

PWFA requires almost identical protections as the California FEHA. Employers should ensure their handbooks are up to date with California pregnancy requirements. Employers should also ensure that supervisors are aware of the need to direct all accommodation requests to the human resources or other appropriate department immediately so that the interactive process may begin.

Providing Urgent Maternal Protections for Nursing Mothers Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) went into **effect on December 29, 2022**. The new law requires employers to provide employees with reasonable break time to express breast milk with some limitations. PUMP expands the Federal Labor Standards Act (FLSA) and its previous protections enacted through the Affordable Care Act such as privacy for pumping and break time for non-exempt employees only. PUMP applies to all employees, not just non-exempt employees. Employers with 50 or fewer employees may be able to rely on a small employer exemption under limited circumstances. Employers must provide employees with reasonable break time to express breast milk for the employee's nursing child for one year after the child's birth. The law requires an employee to provide their employer with notice of the alleged violation of this law and allow the employer 10-days to cure the violation before filing a lawsuit unless (1) the employee has been discharged for requesting lactation break time or space or for opposing employer conduct which violated this law, or (2) the employer has indicated that it has no intention of providing a lactation space. Also of note is the fact that the remedies available under the FLSA for violation of PUMP do not take effect until April 28, 2023.

What This Means for Employers:

PUMP requires almost identical protections as the protections under California's lactation accommodations which went into effect in 2020. Employers should ensure their handbooks are up to date with California pregnancy requirements. Employers should also ensure that supervisors are aware of the need to direct all accommodation requests to the human resources or other appropriate department immediately so that the interactive process may begin.

COVID-19

Cal/OSHA Non-Emergency COVID-19 Prevention Regulations

On December 15, 2022, California's Occupational Safety and Health Standards Board (Cal/OSHA) voted to adopt non-emergency COVID-19 prevention regulations. The regulations are anticipated to take effect in **January 2023** once approved by the Office of Administrative Law. The new regulations, once approved, will remain in effect for two years after their effective date, except for the recordkeeping subsections that will remain in effect for three years.

Current regulations remain in effect until the new regulations are approved. The regulations will apply to most workers in California who are not covered by the Aerosol Transmissible Diseases standard.

Continuing COVID-19 ETS regulations will include the following:

- Employers must provide face coverings and ensure they are worn by employees when California Department of Public Health (CDPH) requires their use.
    - Employers must review CDPH Guidance for the Use of Face Masks to learn when employees must wear face coverings.
    - **Note:** Employees still have the right to wear face coverings at work and to request respirators from the employer when working indoors and during outbreaks.
- Employers must report information about employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA, consistent with existing regulations.
- Employers must make COVID-19 testing available at no cost and during paid time to employees following a close contact.
- Employers must exclude COVID-19 cases from the workplace until they are no longer an infection risk and implement policies to prevent transmission after close contact.
- Employers must review CDPH and Cal/OSHA guidance regarding ventilation, including CDPH and Cal/OSHA Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments. **Note:** Employers must also develop, implement, and maintain effective methods to prevent COVID-19 transmission by improving ventilation.

Some of the most notable changes under the new regulations include the following:

- **Employers are no longer required to maintain a standalone COVID-19 Prevention Plan (CPP).** Instead, employers must now address COVID-19 as a workplace hazard under the requirements found in section 3203 (Injury and Illness Prevention Program (IIPP)) and include their CPP procedures to prevent this health hazard in their written IIPP or in a separate document.

- Employers must do the following:
    - Provide effective COVID-19 hazard prevention training to employees.
    - Provide face coverings when required by CDPH and provide respirators upon request.
    - Identify COVID-19 health hazards and develop methods to prevent transmission in the workplace.
    - Investigate and respond to COVID-19 cases and certain employees after close contact.
    - Make testing available at no cost to employees, including to all employees in the exposed group during an outbreak or a major outbreak.
    - Notify affected employees of COVID-19 cases in the workplace.
    - 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 no longer required to pay employees exclusion pay while they are excluded from work.** Instead, the regulations require employers to provide employees with 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.

Changes to existing definitions for "**close contact**" and "**exposed group**" are as follows:

- "Close contact" is now defined by looking at the size of the workplace in which the exposure takes place.
    - For indoor airspaces of 400,000 or fewer cubic feet, "close contact" is now defined as 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, "close contact" is defined as 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.
- "Exposed group" is clarified to include means all employees at a work location, working area, or a common area at work, within employer-provided transportation and employees residing within employer-provided housing where an employee COVID-19 case was present at any time during the infectious period.

What This Means for Employers:

Employers can begin preparing for the new Non-Emergency COVID-19 Regulations by visiting Cal/OSHA's new "COVID-19 Prevention Non-Emergency Regulation" webpage and

review its updated fact sheet on the DIR website. Additional resources, such as FAQs and a model written program for employers to use as an example are expected in the coming year.

AB 2693 – COVID 19-Exposure

Effective January 1, 2023, AB 2693 amends existing law and provides that employers no longer have to give notice to the local public health agency in the event of a COVID-19 outbreak. The California Department of Public Health will also no longer be required to post workplace information received from local public health departments about COVID-19 cases and outbreaks. The definition for “close contact” is also re-defined (as shown above).

AB 2693 revises the notification requirements and extends the notice provisions until January 1, 2024. In the event of potential COVID-19 exposure, employers may now comply with existing notice requirements by either (1) providing a written notification individually or (2) prominently displaying a notice in all places where notices to employees concerning workplace rules or regulations are customarily posted and keeping the notice posted for 15 days. The notice must include the dates on which an employee with a confirmed case of COVID-19 was at the worksite within the infectious period and the location of the exposure. AB 2693 requires an employer to keep a log of all the dates the notice was posted and requires the employer to allow the Labor Commissioner to access those records.

What This Means for Employers:

Employers must ensure they comply with all notice requirements and maintain the relevant records evidencing compliance with the posting requirements.

Note: The COVID-19 State of Emergency is scheduled to end **February 28, 2023**.

AB 1751 – Workers’ Compensation: COVID-19 Critical Workers

Implemented at the outset of the pandemic California Labor Code Section 3212.86 establishes a disputable presumption concerning illness or death resulting from COVID-19. The statute defines “injury” to include illness or death resulting from COVID-19; effective until January 1. 2023 unless extended. AB 1751 extends the previsions of Cal. Lab Code sec. 3212.86 until January 1, 2024.

Under the statute, an “injury” occurs when an employee tests positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed work at the employee’s place of employment at the employer’s direction and where that day was on or after March 19, 2020 and on or before July 5, 2020. For employers with 5+ employees, existing law also allows for a presumption of injury for all employees whose co-workers experience specified levels of positive testing at their place of employment.

What This Means for Employers:

Employers should continue to report COVID-19 cases to their workers’ compensation carrier and participate in all investigations to rebut the presumption of workplace infection.

MISCELLANEOUS UPDATES

Updated Workplace Postings

Employers should update the following workplace posters:

1. California Minimum Wage

Eng: https://www.dir.ca.gov/iwc/MW-2023.pdf

Spanish: https://www.dir.ca.gov/iwc/MW-2023-Spanish.pdf

2. Family Care and Medical Leave and Pregnancy Disability Leave

Eng: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/CFRA-and-Pregnancy-Leave_ENG.pdf

Spanish: Coming Soon!

3. Your Rights and Obligations as a Pregnant Employee

Eng: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/Your-Rights-and-Obligations-as-a-Pregnant-Employee_ENG.pdf

Spanish: Coming Soon!

4. California Law Prohibits Workplace Discrimination and Harassment

Eng: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/Workplace-Discrimination-Poster_ENG.pdf

Spanish: Coming Soon!

5. California Sexual Harassment Poster

Eng: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/12/Sexual-Harassment-Poster_ENG.pdf

Spanish: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/12/Sexual-Harassment-Poster_SP.pdf

6. Transgender Rights in the Workplace

Eng: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/The-Rights-of-Employees-who-are-Transgender-or-Gender-Nonconforming-Poster_ENG.pdf

Spanish: Coming Soon!

7. EEOC Know Your Rights: Workplace Discrimination is Illegal

Eng: https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/posters/pdf/22-088_EEOC_KnowYourRights.pdf

Spanish: 22-088_EEOC_KnowYourRightsSp_10_20.pdf

8. Your Rights Under USERRA

https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Poster.pdf

9. Safety and Health Protection on the Job (Cal/OSHA)

Eng: https://www.dir.ca.gov/dosh/dosh_publications/shpstreng012000.pdf

Spanish: https://www.dir.ca.gov/dosh/dosh_publications/Spanish/shpstrspanish012000.pdf

New Form I-9 and Verification Rules

Department of Homeland Security (DHS) has made several changes in relation to Form I-9.

Form I-9:

The most recent Form I-9 expired on October 31, 2022; however, United States Citizenship and Immigration Services (USCIS) has directed employers to continue to use that form until further notice as the updated I-9 form has not been published. Once the new I-9 Form becomes available, employers will need to reverify an existing employee's documentation when the employee's employment authorization document (EAD) or receipt has expired.

Remote Document Inspection:

Previously, when workplaces were temporarily shut down or new hires and employees who needed to update temporary work authorization were subject to quarantine, DHS issued "relaxed" temporary rules to allow employers to review employment documents remotely. These relaxed rules are extended until July 31, 2023. Most recently on August 2022, DHS published a proposed rule that would allow the government to consider possible "alternative options for document examination procedures" for employees, including the option to review employees' I-9 documents on a remote basis permanently. **Note that where employees are physically present at a work location, no exceptions to the in-person verification of identity and employment eligibility documentation for Form I-9 apply.**

Fines:

Noncompliance with I-9 requirements now has increased fines for first and additional offenses.

Advisory:

DHS has updated its I-9 Inspection Flow Chart, which provides details regarding Notices of Suspect Documents, Notices of Discrepancies, and for the first time, Notice of Technical Procedures/Failures, indicating that employers will have the opportunity to correct technical errors before they turn into "substantive errors" subject to fines.

What This Means for Employers:

Employers are advised to review the revised I-9 Inspection Flow Chart to ensure compliance with I-9 requirements and be on the look-out for the new I-9 form as timely compliance is critical and failing to use the updated Form I-9 can result in administrative penalties.

SB 189 – DFEH Renamed to CRD

Effective July 1, 2022, SB 189 changed the name of the Department of Fair Employment and Housing (DFEH) to the Civil Rights Department (CRD), and the Fair Employment and Housing Council (FEHC) to the Civil Rights Council. This change is intended to more accurately reflect the CRD's powers and duties, which include enforcement of laws prohibiting hate, violence, human trafficking, discrimination in business establishments and discrimination in government-funded programs and activities, among others.

AB 1643 – Labor and Workforce Development Agency: Advisory Committee Study

An advisory-related law, AB 1643, requires the Labor and Workforce Development Agency (LWDA) to establish an advisory committee to study and evaluate the effects of heat on California's workers, businesses and the economy. The committee is to be established on or before July 1, 2023.

The Bill requires the advisory committee to meet and subsequently recommend a study that addresses some or all of the following topics:

- How to improve data collection regarding worker injuries, illnesses, or deaths as well as losses to businesses and the economy to capture more accurately those traceable to heat.
- Time away from work and lost wages due to heat.
- The frequency at which different types of occupational injuries and illnesses occur at given temperatures and humidity levels, including injuries and illnesses not directly attributable to heat exposure.
- Underreporting of heat illnesses and injuries covered by workers' compensation, especially among low-income employees, including the underreporting of occupational heat exposure with effects on workers after their shifts.
- Evidence-based methods of minimizing the effect of heat on workers.

The committee is to be made up of representatives from various government entities as well as scholars with expertise in high heat-related exposure. The results of the study are to be reported to the Legislature no later than January 1, 2026.

AB 1632 – Restroom Access: Medical Conditions

Effective September 30, 2022, AB 1632 requires a business that is open to the general public for the sale of goods and that has a toilet facility for its employees, to allow any qualifying individual who is lawfully on the premises to use that toilet facility during normal business hours, even if the toilet facility is not available to the general public.

Qualifying individuals include those who have an eligible medical condition or use an ostomy device. Eligible medical conditions include Crohn's disease, ulcerative colitis, other

inflammatory bowel disease, irritable bowel syndrome, or another medical condition that requires immediate access to a toilet facility. Employers in violation may be penalties up to $100 per violation.

What This Means for Employers:

Although this requirement will generally pertain to convenience or retail store, employers operating such businesses should ensure their employees are trained on public access to bathrooms under specific conditions, unless these bathrooms are open to the general public.

CASE LAW

Naranjo v. Spectrum Security Services, Inc.

The *Naranjo*[2] case is a reminder to all employers to ensure best practices for meal, rest and recovery period compliance. The California Supreme Court held that meal or rest premiums are wages. As a result, violations in meal period and rest compliance can also result in waiting time penalties due to incorrect wages issued to employees.

"Although the extra [premium] pay is designed to compensate for the unlawful deprivation of a guaranteed break, it also compensates for the work the employee performed during the break period." Therefore, "[t]he extra pay thus constitutes wages subject to the same timing and reporting rules as other forms of compensation for work."

In light of Naranjo, if an employee is denied a statutory break period, it is important to ensure that the employee is paid the one-hour premium when the violation occurs. Considering the decision, employers will have to adjust their wage statements to ensure that premiums are properly reported and calculated into the regular rate of pay for purposes of calculating overtime, and for paying out final pay.

Cinagro Farms, Inc.

In this ALRB case,[3] the Board found that Cinagro Farms, Inc's employees were "willfully misclassified" as independent contractors rather than employees. This resulted in paychecks accounting only for the gross piece-rate wages with no deductions. The Board found that it was immaterial that the employees were never "treated" as independent contractors or advised that they were independent contractors.

For the first time, the Board levied penalties under Labor Code section 226.8 subdivision (b) for unlawful willful misclassification. This Labor Code section subjects a person or employer to a civil penalty of not less than $5,000 and not more than $15,000, per violation, for unlawful willful misclassification.

Additionally, this decision created an exception to the general rule that supervisors are not entitled to relief under the ALRA. Previously, supervisors were only entitled to collect in ALRA cases when i) they were discharged for refusing to engage in activities proscribed by the ALRA or for having engaged in conduct designed to protect employee rights; or ii) when their discharge is the means by which the employer unlawfully discriminates against its employees. This case created an additional exception – when supervisors are discharged in response to the supervisor serving as a conduit for reporting the employees' complaints about being misclassified as independent contractors.

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2 *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93.

3 *Cinagro Farms, Inc.* (2022) 48 ALRB No. 2.

Employers must ensure they are properly classifying employees and independent contractors. Furthermore, employers should periodically review wage statements to confirm all necessary information pursuant to Labor Code section 226 and 226.2 is contained within the four corners of the wage statements.

Viking River Cruises, Inc. v. Moriana

In this case,[4] an employee signed an arbitration agreement with her employer, in which she agreed to arbitrate any individual PAGA claim she might have and waived the right to bring "representative" PAGA claims. The employer moved to compel arbitration of the employee's individual claim and dismiss the "non-individual" claims. The trial court denied the motion and the appellate court affirmed.

The U.S. Supreme Court reversed, holding the FAA grants the parties the right to determine what issues they will agree to arbitrate. By requiring parties to litigate representative claims in order to address individual claims, PAGA violates this right and is therefore preempted by FAA. The employer was therefore entitled to compel arbitration of the employee's "individual" PAGA claim. With that, the employee no longer had "standing" under PAGA's own terms to litigate the representative claim, and the U.S. Supreme Court ordered those claims be dismissed.

This employer friendly holding greatly emphasizes the importance of arbitration agreements with employees. Since this holding, numerous state cases, with varying types of individual arbitration clauses have been remanded. Some of these notable cases are discussed below.

Johnson v. Lowe's Home Centers

The U.S. Supreme Court decision in *Viking River* found that the Federal Arbitration Act (FAA) preempts the long-standing rule of *Iskanian* such that it precludes division of a PAGA action into individual and non-individual claims through an agreement to arbitrate. The U.S. District Court for the Eastern District in California in *Johnson* provides employers with a clearer roadmap – and a bit of hope – for addressing PAGA claims.

Refusing to question the U.S. Supreme Court's interpretation of California state law regarding issues of standing, the *Johnson*[5] court followed what it believed was clear authority set forth in *Viking River*; that non-individual PAGA claims should be dismissed once the individual PAGA claim is compelled into arbitration.

While other federal courts may choose to interpret *Viking River's* holding more narrowly, the *Johnson* case does lend weight where a court is faced with similar, but not necessarily identical, facts.

Further guidance on the unanswered question of standing should be forthcoming as the California Supreme Court is set to rule on the issue in the pending case *Adolph v. Uber Technologies, Inc*.

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4 *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, *reh'g denied* (2022) 143 S.Ct. 60.

5 *Johnson v. Lowe's Home Ctrs., LLC* (E.D.Cal. Sep. 21, 2022, No. 2:21-cv-00087-TLN-JDP) 2022 U.S.Dist.LEXIS 171626.

Adolph v. Uber Technologies, Inc.

The California Supreme Court recently granted review to *Adolph v. Uber Technologies, Inc*[6]*.* The question before the court is whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are "premised on Labor Code violations actually sustained by" the aggrieved employee maintains standing to pursue "PAGA claims arising out of events involving other employees" in court or in any other forum the parties agree is suitable. **A decision is expected sometime in 2023.**

Gavriiloglou v. Prime Healthcare Management

The Fourth District, Court of Appeals in *Gavriiloglou*[7] contradicts *Viking River*'s use of the term "individual PAGA claim," and held that the U.S. Supreme Court should have used the term "individual labor code claim," as it argues that PAGA claims cannot be split because a PAGA action is asserting the state's rights, not the individual's right. Therefore, the plaintiff, despite being compelled to arbitrate the "individual labor code claims," is still an "aggrieved employee" under Labor Code section 2699(a). California Supreme Court has yet to decide whether to grant review of this decision and will do so by January 26, 2023.

California Supreme Court in *Adolph v. Uber Technologies, Inc.* will likely answer the question whether the aggrieved employee maintains standing to pursue "PAGA claims arising out of events involving other employees in court or in any other forum the parties agree is suitable."

Camp v. Home Depot U.S.A., Inc.

Yet another rounding case![8] This time, the Plaintiff, as part of a class action suit, alleged Home Depot failed to pay employees all wages earned. The unpaid wages claims were the result of Home Depot's electronic timekeeping system which rounded time to the nearest quarter hour. Home Depot moved for summary judgement arguing that although the Plaintiff went unpaid for 470 minutes of work for over approximately 4 and a half years due to the rounding policy, the policy was neutral on its face, neutral as applied, and otherwise lawful under *See's Candy Shops, Inc., Superior Court* (2012) 210 Cal. App.th 889. The trial court granted the summary judgement finding that Home Depot's rounding policy was "neutral on its face and is used in such a manner that it will not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked."

The Appellate Court for California's Sixth District reversed the trial court's findings and instead followed the California Supreme Court Opinions in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 and *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58. The Appellate court found that Home Depot, in relying on its quarter-hour rounding policy, did not meet its burden to show that there was no triable issue of material fact regarding Plaintiff's claims for unpaid wages, where Home Depot could and did track the exact time in minutes that an employee

6 *Adolph v. Uber Technologies, Inc.* (Aug. 1, 2022, No. S274671) ___Cal.5th___ [2022 Cal. LEXIS 5021, at *1].

7 *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83 Cal.App.5th 595, 605.

8 *Camp v. Home Depot U.S.A., Inc.* (2022) 84 Cal.App.5th 638.

worked each shift and those records showed that Plaintiff was not paid for all the time he worked.

Miller v. Roseville Lodge No. 1293

Miller[9] is an important case for property owners delegating control over to independent contractors and escaping liability from jobsite injuries of workers hired by the independent contractors. In *Miller*, the property owner hired an independent contractor for various jobs on the property. The independent contractor hired an employee to move an ATM machine. The property owner had no say on how this work was to be performed and retained no control over equipment being used. On the day of the incident, the independent contractor advised the employee to use a scaffold placed against one of the walls. The scaffold had an unlocked wheel, and while climbing down, the scaffold moved, and the employee fell sustaining injuries. He sued the independent contractor and the property owner for damages. The trial court granted the property owner's summary judgment motion and the Court of Appeal affirmed, ruling that the *Privette* doctrine holds that a hirer (property owner) generally delegates to an independent contractor all responsibility for workplace safety and hirer is not liable for injuries sustained by the contractor or its workers while on the job.

The trial court rejected plaintiff's arguments that the "retained control" or "concealed hazardous conditions" exceptions applied to the *Privette* doctrine. ~~The Court of Appeal opined that because the property owner delegated to the contractor the duty to identify the fact that the scaffold had wheels and was unsafe to use unless the wheels were locked or the scaffold was steadied in some manner, and to take reasonable steps to address the hazard.~~ The Court of Appeal opined that the property owner had delegated the responsibility of completing the job to the independent contractor, including responsibility to identify and address any safety concerns with the scaffold. This is specially the case since the scaffold was simply placed in the vicinity, and the property owner had not instructed nor required the independent contractor or the employee to use the scaffold.

Although this case's factual disputes were ruled in the property owner's favor, it is essential for proper owners to carefully and in writing, lay out delegation of authority to independent contractors.

Grande v. Eisenhower Medical Center

In *Grande*[10], a temporary staffing agency placed a nurse to work at Eisenhower Medical Center (the "Hospital"). The nurse later joined a class action lawsuit against the staffing agency alleging wage and hour violations. The parties in this case reached a settlement, which included release in favor of the staffing agency and any of its agents. The Hospital was not named as a released party, nor was it a party to the lawsuit or settlement agreement. The nurse later filed a class action against the Hospital claiming the same violations for the same time period.

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9 *Miller v. Roseville Lodge No. 1293* (2022) 83 Cal.App.5th 825.

10 Grande v. Eisenhowever Medical Center, (2022) 13 Cal.5th 313.

There were several arguments raised by the Hospital raising issues of claim preclusion, which prohibits lawsuits involving the same cause of action the same parties. The Hospital also brought up its indemnification agreement with the staffing agency. However, the trial court disagreed with the Hospital opining that the client Hospital is not necessarily an "agent" of the staffing agency for purposes of claim preclusion, but instead, is an entirely different defendant. The staffing agency did not include the Hospital in the settlement agreement and the Hospital would not have been bound by any adverse judgment against the staffing agency from the first lawsuit. The Court of Appeal and the California Supreme Court agreed.

Employers utilizing staffing agencies should review contracts to ensure indemnification and notice obligations are clearly stated and enforceable. Conversely, staffing agencies will want to reconsider how they settle future claims in situations where their clients are not named litigants. Clients of staffing companies who settle cases where the plaintiff(s) worked should ensure the release expressly names the client or specifies a group of clients of the staffing agency. This will be especially important should they have indemnification obligations to such clients.

Villareal v. LAD-T

Villareal[11] emphasizes the importance of staying current and accurate on Secretary of State filings. A car salesman (plaintiff) filed a suit against his employer (LAD-T, LLC, dba Toyota of Downtown Los Angeles or LAD-T") alleging discrimination, retaliation and various other causes of action due to being terminated while on medical leave. The employer moved to compel arbitration based on an arbitration agreement, but the trial court rejected the motion because the arbitration agreement was between "DT Los Angeles Toyota" and plaintiff, but DT Los Angeles Toyota was a "non-entity" as the employer never filed a fictitious business statement to register that name. The trial court opined that, Bus. & Prof. Code section 17910 requires that any person who regularly transacts business for profit in California under a fictitious name must file a fictitious business name.

Betancourt v. OS Restaurant Services, LLC

The labor code mandates an award of reasonable attorney fees to the prevailing party in any action brought for nonpayment of wages, but there is no such mandate in the labor code with regard to actions for rest and meal period violations and wage statement violations. Following the holding in *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 9, which required unpaid meal premiums to be treated as wages, the Appellate Court[12] held that attorney feels are permissible in favor of the prevailing party in claims for rest and meal period violations as well.

11 *Villareal v. LAD-T, LLC* (2022) 84 Cal.App.5th 446.

12 *Betancourt v. OS Restaurant Services, LLC (*2022) 83 Cal.App.5th 132.

Hamilton v. Wal-Mart Stores, Inc.

Hamilton[13] is a recent case which clarified that in a PAGA representative action, the plaintiff is not required to satisfy requirements for class certification included in Rule 23 of the Federal Rules of Civil Procedure since a PAGA action is an "enforcement action" brought on behalf of the state rather than an action aggregating the individual claims of a group of plaintiffs.

Johnson v. Winco Foods, LLC.

Johnson[14] held that the "control test" used to determine whether an individual is subject to an employer's control for purposes of time worked, does not apply to job applicants who are required to obtain a drug test as a condition of employment since they are not yet "hired." As such, job applicants are not employees when they take pre-employment drug tests and may not request reimbursement for the time and travel expenses required to take the tests.

Estrada v. Royalty Carpet Mills, Inc.

Employees at a manufacturing facility filed class claims and a PAGA action. The trial court decertified a class, holding that one of the classes was "unmanageable," but also dismissed the portion of the PAGA claim based on that same claim. The Court of Appeal for the Fourth District[15] reversed this decision finding that the trial court improperly dismissed the PAGA claim based on manageability. However, the Court was clear that a trial court may limit the amount of evidence PAGA plaintiffs may introduce at trial to prove alleged violations suffered.

The California Supreme Court has granted review of this ruling and may decide on this issue sometime in 2023.

LaFace v. Ralphs Grocery Co.

LaFace[16] involves a cashier at Ralphs grocery store who testified that about 90 percent of her workday was spent at the cash register. She claimed that under the applicable California industrial Welfare Commission Wage Order, she should have been provided a seat when she was not busy. The cashier brought a PAGA action and the court granted Ralphs's motion for a bench trial. The cashier appealed arguing that she had the right to a jury trial and that her suitable seating claim held merit.

The Court of Appeal for the Fifth District made clear that plaintiffs asserting a claim under PAGA are not entitled to a jury trial. The Court opined that a PAGA plaintiff is a proxy for the State of California and brings what would otherwise be an administrative regulatory enforcement action on the State's behalf. There is no right to jury in a regulatory enforcement action. Additionally, PAGA allows trial courts to evaluable equitable factors and award less than the maximum amount of penalties. This weighing is performed by judges, and not juries. Lastly,

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13 *Hamilton v. Wal-Mart Stores, Inc.,* 39 F.4th 575 (9th Cir. 2022).

14 *Johnson v. WinCo Foods, LLC*, 37 F.4th 604 (9th Cir. 2022).

15 *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685.

16 *LaFace v. Ralphs Grocery Co.* (2022) 75 Cal,App.5th 388.

suitable seating rights or wage statement requirements are issues which are novel or unknown at common law, and California Constitution has not historically provided a right to a jury trial for these types of claims. The Court of Appeal also affirmed the trial's court ruling which rejected the plaintiff's "suitable seating claim," and found that an employee cannot create a "lull in operation" to trigger the provision of a seat by remaining idle instead of performing other expected job duties.

NLRB AND ALRB CASES

Bexar County II (Dec. 16, 2022.) 372 NLRB No. 28

Bexar[17] reestablished the standard set by the Board in *New York New York Hotel & Casino,* 356 NLRB 907 (2011) by restricting employers' right to deny off-duty contract workers' access to the property for the purpose of engaging in protected concerted activity. The property owner may only exclude the employees of its contractors from engaging in protected activity on the worksite if such activity would significantly interfere with the use of the property, or where exclusion is justified by another legitimate business reasons. What activity may "significantly interfere" will be decided on a case-by-case basis.

American Steel Construction, Inc. (Dec. 14, 2022) 372 NLRB No. 23

The Board in *American Steel Construction, Inc.*[18] reinstated the Obama-era precedent in *Specialty Healthcare*[19] (overruling *PCC Structurals*[20]) for petitioned-for bargaining-unit determinations. Under this standard, as long as a union's petitioned-for unit consists of a clearly identifiable group of employees who share a community of interest, the Board will presume the unit is appropriate. The Board in *American Steel Construction, Inc.* held that employers seeking to enlarge the scope of a petitioner-for bargaining unit must demonstrate that excluded employees share an "overwhelming" community of interest with the group the union seeks to represent. The employer must prove there is no "legitimate basis upon which to exclude certain employees from the petitioned-for unit." The Board will consider whether the employees are: i) organized into a separate department; ii) have distinct skills and training; iii) have distinct job functions; iv) are functionally integrated with the employer's other employees; v) have frequent contact with other employees; vi) interchange with other employees; vii) have distinct terms and conditions of employment; and viii) are separately supervised. This standard is tough for meet for employers and will likely give rise to small, unionized subsets of employees within an employer's facility.

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17 *Bexar County II* (Dec. 16, 2022.) 372 NLRB No. 28.

18 *American Steel Construction, Inc.* (Dec. 14, 2022) 372 NLRB No. 23.

19 *Specialty Healthcare & Rehabilitation Center of Mobile* (2011) 357 NLRB 934.

20 PCC Structurals, Inc. (2017) 365 NLRB No. 160.

The facts of this case are as follow: the Ironworkers union filed a petition to represent all journeymen and apprentice field ironworkers, but the employer argued that painters, drivers, and inside fabricators must also be included. The regional director applied the unit determination test set forth in *PCC Structurals* and held that petitioned-for unit was not appropriate because the field ironworkers did not share a community of interest "sufficiently distinct" from the remaining employees. The regional director dismissed the action and the Union filed a request for review of the regional director's Order.

Thryv, Inc. (Dec. 13, 2022) 372 NLRB No. 22

The Board[21] held that to "best effectuate" the NLRB's purpose to provide adequate remedy to the affected employees, it may order the employer to compensate those affected employees for "all direct or foreseeable pecuniary harms that these employees suffer a result" of the employer's unfair labor practices. These remedies may include, but are not limited to "out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." Although the Board's decision does not discuss or issue remedies for "pain and suffering" or emotional distress, the Board still maintained that its decision did not "reflect the limits of the Board's statutory remedial authority."

Tesla, Inc. (Aug. 29, 2022) 371 NLRB No. 131

This decision[22] establishes that workplace dress code policies are unlawful if they can be read "in any way" to prohibit employees from wearing union insignia, unless the employer can prove that its policy is justified by special circumstances. Employers need to be prepared for increased organizing efforts in response to AB 2183. Part of preparing means revising your policies and procedures to be current with the law.

[21] *Thryv, Inc.* (Dec. 13, 2022) 372 NLRB No. 22.

[22] Tesla, Inc. (Aug. 29, 2022) 371 NLRB No. 131.