2024
Labor & Employment Law Update

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Case Law Updates

Arbitration Cases - Court of Appeal Reiterates Unconscionability Test

- Two Cases
  - *Basith v. Lithia Motors, Inc.* and *Fuentes v. Empire Nissan, Inc*.
    - California Court of Appeal
  - Similar arbitration agreements reviewed.
  - Both agreements found to have procedural unconscionability.
  - **Key question:** Whether any substantive unconscionability existed.
  - Court held that despite arguments raised, the substance of the arbitration agreements was fair and no substantive unconscionability existed.

Requires Both Procedural & Substantive

- Unconscionability is one of the few contractual defenses that may be used to invalidate an arbitration agreement.
- It is important to confirm the dividing line between procedure and substantive unconscionability.

How Did We Get Here?

2019

Assembly Bill 51 Passed

2020

Federal District Court grants preliminary injunction against enforcement of AB 51

Sept. 2021

U.S. Court of Appeals for 9th Circuit holds Federal Arbitration Act (FAA) doesn't completely preempt AB 51

Oct. 2021

Chamber of Commerce petitions for review *en banc*

2022

9th Circuit withdraws its prior opinion and states it will have a panel rehearing

2023

9th Circuit issues new opinion.

Chamber of Commerce of the U.S., et al. v. Bonta, et al.

- U.S. Court of Appeals for the Ninth Circuit
- Affirmed the district court's grant of a preliminary injunction barring enforcement of California's Assembly Bill (AB) 51 with respect to arbitration agreements governed by the Federal Arbitration Act (FAA).
- Held AB 51 seeks to impose criminal and civil penalties on employers that require individuals to sign, as a condition of employment or employment-related benefits, arbitration agreements affecting rights under the California Fair Employment and Housing Act or Labor Code.
- A majority of the Ninth Circuit panel concluded the FAA preempts AB 51.

Arbitration Case: Hernandez v. Meridian Management Services, LLC

- California Court of Appeal
- The plaintiff was a customer service representative for Intelex. As part of her hiring process, she signed an arbitration agreement with Intelex. At the same time, she worked for several other entities related to Intelex. These other entities purportedly were jointly owned and operated, and allegedly shared payroll, human resources, legal, and risk management teams with Intelex. After her termination, the plaintiff brought employment claims against all the other entities but did not name Intelex as a defendant to the lawsuit in what was likely a strategic move by the plaintiff to avoid arbitration.
- The other entities attempted to compel arbitration pursuant to the arbitration agreement that the plaintiff signed with Intelex. The other entities argued that, among other things, they could enforce Intelex's arbitration agreement with the plaintiff as third-party beneficiaries. In doing so, the other entities highlighted the fact that the plaintiff alleged that all the companies, including Intelex, were commonly owned and essentially operated as a "single organism with no meaningful division between them except on paper."

- Notwithstanding all the companies purportedly being jointly owned and operated, the court concluded that the other entities were not identified in the arbitration agreement and there was no indication in the agreement that Intelex and the plaintiff sought to benefit the other entities.
- **The Takeaway**: Related companies – even those that are intimately intertwined – cannot simply assume that one company's arbitration agreements can cover others. To ensure coverage of a non-signatory, the agreement should clearly identify the non-signatory and express a clear intent to cover the non-signatory. It is a simple point, but one that is often overlooked.

Iyere v. Wise Auto Group

- California Court of Appeal
- The plaintiffs were two sales consultants and a sales manager. After the plaintiffs filed suit against their former employer, Wise Auto Group (Wise) filed a motion to compel arbitration that included copies of the arbitration agreement with handwritten signatures of each plaintiff.
- To oppose the motion, the plaintiffs submitted declarations stating that they received a large stack of documents on their first day of work, they were told to sign the documents quickly, and they signed the documents as instructed without ever receiving a copy of the signed documents back.
- The plaintiffs also specifically asserted in their declarations that they "do not recall ever reading or signing any document entitled Binding Arbitration Agreement or Employment Acknowledgment, [they] do not know how [their] signature was placed on [either document]," and they would not have signed either document had they understood that the documents waived their right to sue Wise in court.

Court Rules Against Do Not Recall Defense

- The Court of Appeal concluded that absent evidence that their signatures were forged or otherwise inauthentic, the plaintiffs failed to show that the arbitration agreements were not authentic and unenforceable.
- The Court of Appeal disagreed with the comparison of the instant case with two cases involving electronic signatures, stating that “[w]hile handwritten and electronic signatures once authenticated have the same legal effect, there is a considerable difference between the evidence needed to authenticate the two.”
- The Court of Appeal held that even if an employee’s assertion that they do not recall signing the arbitration agreement can shift the burden back to the employer to authenticate the agreement, Wise satisfied its burden by producing a declaration from its custodian of records identifying the agreement.

Labor Commissioner v. Alco Harvesting, LLC

- The *Alco Harvesting* decision held that H-2A employers must disclose the use of mandatory arbitration agreements.
- The appellate court found that a mandatory arbitration agreement was a "material term and condition" of employment which should have been disclosed in **job order** (which employees view when applying for a position).
- Because the employer failed to disclose the arbitration agreement in the job order, the arbitration agreement with the employee was unlawful and unenforceable.

Kuciemba v. Victory Woodworks, Inc.

- California Supreme Court
- Question Certified from U.S. Court of Appeals for 9th Circuit.
- Questions Presented:
  - If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (WCA) bar the spouse's negligence claim against the employer?
  - Does an employer owe **a duty of care** under California law to prevent the spread of COVID-19 to employees' household members?

No Employer Liability for COVID-19 Take-Home Exposure

- As to the first question the Court ruled, that the WCA **did not bar a spouse's negligence claim**.
- As to the question of duty, to prevent take-home exposure of COVID-19, the Court ruled there was **no duty**.

Adolph v. Uber Technologies

- California Supreme Court
- **Question Presented:** Whether an aggrieved employee who has been compelled to arbitrate their individual claims under the California Private Attorneys General Act (PAGA) maintains statutory standing to pursue PAGA claims arising out events involving other employees in court or in any other forum the parties agree is suitable.

Employee Retains Standing for Non-Individual PAGA Claims in Court

- The California Supreme Court held that when a court compels an employee to arbitrate their "individual" Labor Code Private Attorneys General Act (PAGA) claims, the employee retains statutory standing to pursue "non-individual" PAGA claims on behalf of other allegedly aggrieved employees in court.
- The California Supreme Court relied heavily on its prior decision in *Kim v. Reins International California, Inc.*, which it held that a plaintiff need only be an "aggrieved employee" to have standing under PAGA.
- **"Aggrieved employee,"** in turn, is defined under PAGA as simply (1) someone who was employed by the alleged violator and (2) against whom one or more of the alleged violations was committed. The California Supreme Court concluded that, so long as these requirements are met, a plaintiff has standing to pursue the non-individual PAGA claims in court.

Naranjo v. Spectrum Security Systems

- California Court of Appeal
- Issues before Court:
  - Whether the trial court erred in finding Spectrum Security had not acted “willfully” in failing to timely pay employees premium pay, which barred recovery of waiting time penalties.
  - Whether Spectrum Security’s failure to report missed-break premium pay on wage statements was “knowing and intentional” to allow recovery of penalties for failure to provide accurate wage statements.

When Penalties Should Be Granted

- Additional Penalties for Waiting Time Penalties
  - When Failure is Willful
  - The regulations interpreting the California statute for waiting time penalties do not conflict with the statute but act to define terms not defined in the statute. The regulations specifically state that a “good faith dispute” that any wages are due occurs when an employer presents a defense, based on law or fact which if successful, would preclude any recovery on the part of the employee.
- Additional Penalties for Inaccurate Wage Statements
  - Knowing and Intentional = Willful

Estrada v. Royalty Carpet Mills, Inc.

- California Supreme Court resolves question as to whether trial courts have the inherent authority to dismiss PAGA claims for **lack of manageability**.
- The Court determined that trial courts do not have the authority to strike PAGA claims nor should the trial courts enforce class action manageability requirements on PAGA claims.

Hartstein v. Hyatt Corporation

- This case dealt with employees who were subject to “furloughs” during the COVID-19 pandemic, and specifically, **whether furloughs (temporary layoffs) constitute a “discharge” which triggers an immediate obligation to pay final wages** (including any accrued vacation)?
- The Ninth Circuit Court of Appeals was persuaded by the Labor Commissioner’s position that **temporary layoffs without a specific return-to-work date** within the employees’ regular pay period are considered a “discharge” under California Labor Code section 201.

Labor Commissioner v. Kolla's, Inc.

- The California Supreme Court held that Labor Code section 1102.5 (the whistleblower statute), which protects employees from retaliation for disclosing unlawful activity, **applies even when the information that an employee discloses is already known to the person or agency receiving the information**.
- The Court held that whistleblower protections from retaliation extend to all reports of wrongdoing regardless of previous knowledge or previous disclosure.
- The Court made a point to reiterate that an employer can rebut a whistleblower retaliation claim by presenting clear and convincing evidence that a legitimate non-retaliatory interest supported the employer's decision.

Cal/OSHA Appeals Board clarifies “as close as practicable standard"

- In *Rios Farming Company*, the Appeals Board provided guidance regarding the requirement that drinking water at outdoor worksites be located “as close as practicable” to the areas where employees are working.
- Cal/OSHA cited the company for a serious violation for not having drinking water as close as practicable to their employees because employees were required to climb through grape vine trellises to access drinking water.
- The ALJ and the Appeals Board found that the trellises were **an obstacle that discouraged employees from frequently drinking water** and there were other reasonable options available to the employer, such as providing a jug of water in each row where the employees were working or providing individual water bottles that employees could carry with them and refill from the jugs.

Labor Update

Labor Board (Again) Returns to Broader Rule for Determining Joint-Employer Status

- The National Labor Relations Board once again issued a new Final Rule for determining joint-employer status under the National Labor Relations Act.
- The joint-employer analysis has significant implications for employers, as it determines when one entity can be held liable for the other's unfair labor practices.
- The Final Rule largely centers on the degree to which one employer must retain the right to control another company's employees' essential terms and conditions of employment to make them joint employers.
- The Final Rule provides that an **entity's "reserved" authority or "indirect" control over the employees of another** with respect to an essential term and condition, regardless of whether that control is actually exercised, can establish joint-employer status.

Increase in Protected Concerted Activity Cases

- **Protected concerted activity**: Typically, two or more employees acting together to attempt to improve their terms and conditions of employment (i.e. wages, hours, working conditions).
  - At least 2 or more employees
  - Or a single employee acting at the request of, or on behalf of, other coworkers
- Prohibits retaliation for concertedly discussing or complaining about terms and conditions of employment.
- Only covers *employees'* protected concerted activity.
- Applies to unionized and union-free workplaces
- Applies to online activity
- **NLRB Broaden standard !!!**

Old NLRB Playbook: Voluntary Recognition/Election Procedures

- For decades, if an employer refused to voluntarily recognize a union, unions were obligated to file a petition for an election with the Board
- As a result, employers could refuse recognition, force an election, and educate employees as to why a union may not be a good idea
- Additionally, if an employer committed a ULP after the union asserted majority support (but before the election), the Board would normally order a new election
- In *rare* cases of truly egregious unfair labor practices during the critical period before an election, the Board would mandate that the employer immediately recognize the union and force the employer to bargain
  - However, unless the employer's unlawful conduct was so egregious to undermine a future election, an employer would rarely lose its ability to run a new election

The New NLRB World: What Has Changed?

- On August 25, 2023, the Board announced a new framework for when employers must recognize a union without an election
  - If a union demands recognition based upon claimed support from a majority of employees (generally, using signed cards), an employer that refuses to recognize the union will violate the Act *unless* the employer "promptly" files a petition with the Board requesting an election "to test the union's majority status or the appropriateness of the unit"
  - However, if an ALJ determines the employer committed a ULP that warrants the election results to be set aside, the Board will disregard the results of the election and "order the employer to recognize and bargain with the union."
- The decision makes it easier for unions to circumvent the Board's election procedures through a demand for recognition

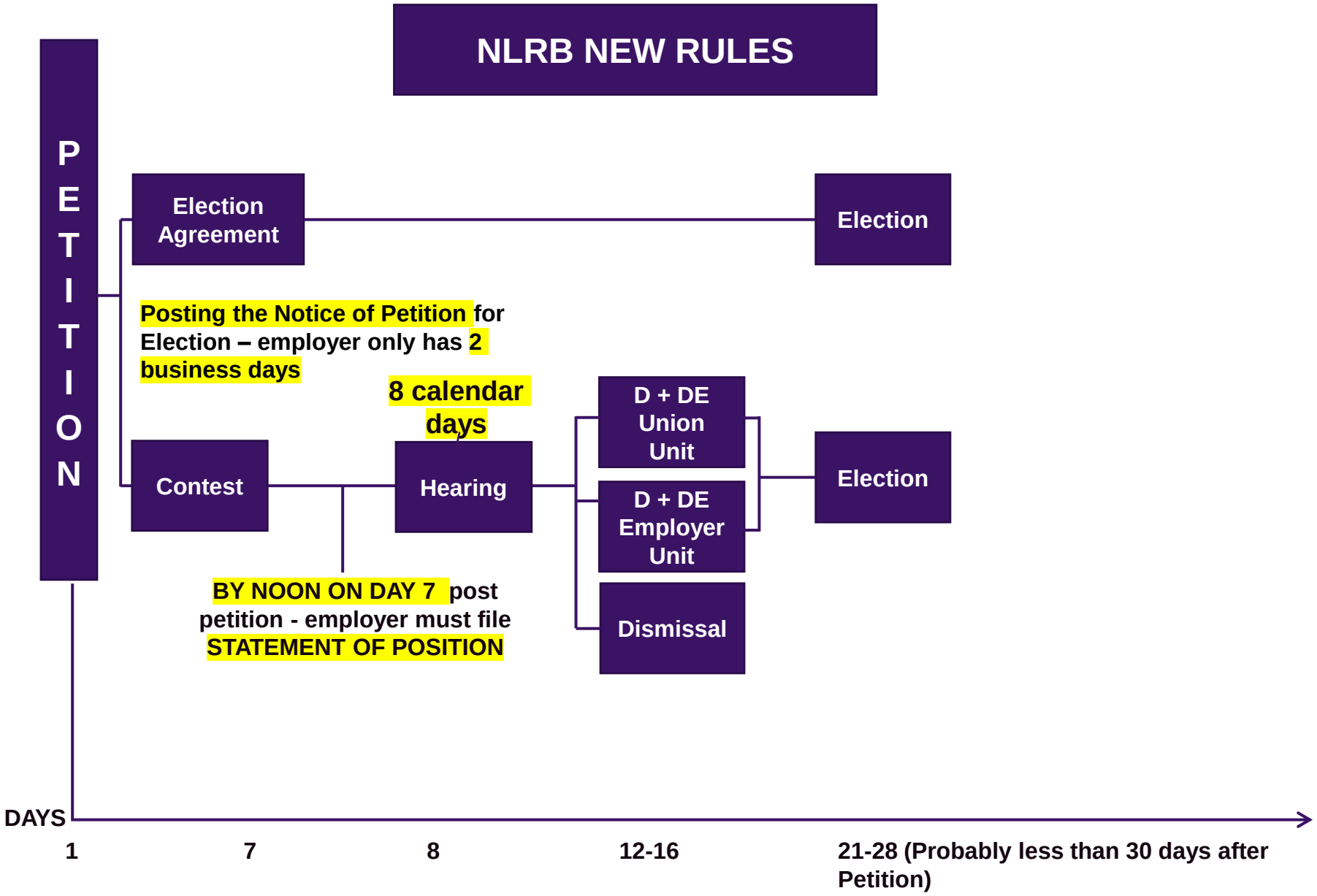
New NLRB Rules Amending Election Procedures

Effective December 26, 2023

Final Rule Returns to “Quickie Election” Rules

- On August 25, 2023, the NLRB amended its representation election procedures
  - Returns to rules first adopted in 2014 but were rescinded by 2019 Trump Board
- **Final Rule goes into effect December 26, 2023**
- “Quickie Election” rules – goal is to expedite elections
  - Reestablishes tight timelines on hearing dates and elections
  - Shortens amount of time employers have to respond to requests for recognition/election petitions/filing RM petition
- Pre-election litigation is limited to specific issues
  - If/when there is a hearing, it will happen more quickly, post-hearing briefing will be limited, a decision will be issued, and the election held as quickly as possible after petition is filed
- Encourages election speed over clarity of issues
  - Bargaining units
  - Eligibility of voters

NLRB NEW RULES

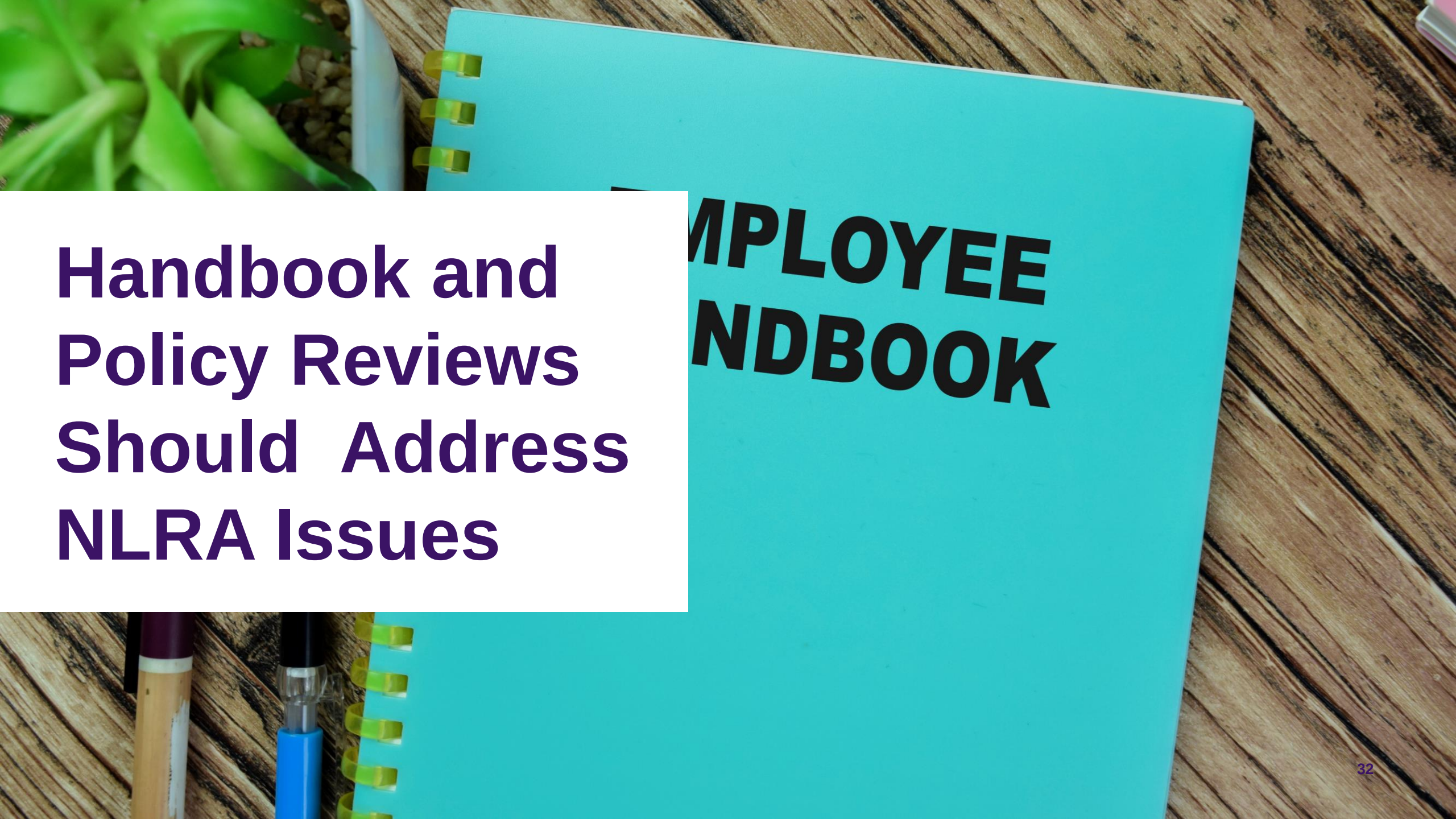


The New Amendments to Election Procedures

1. Date of the Pre-Election Hearing – shortened to 8 calendar days
2. Postponing a Pre-Election Hearing – limits requests for extensions of time
3. Statement of Position Response – shortens time to respond to election petition
4. Filing Statement of Position – restricts postponing due date
5. Petitioner's Response to Statement of Position – must be oral instead of written
6. Posting the Notice of Petition for Election – employer only has 2 business days
7. Pre-Election Hearing purpose is to determine whether a question of representation exists
8. Filing Post-Hearing Briefs – need RD or Hearing Officer's permission and on permitted subjects/time frame
9. Election Details (type, date, time, locations) specified in decision and direction of election
10. Scheduling Elections – "earliest date practicable"

Supervisory Status Concerns – Clarify Lead Positions-Why?

- The new rules will defer resolution on the issue of supervisory status, an already nuanced and fact-sensitive area of the law.
- Employers may not have formal determination on the issue before the election.
- How to respond to a petition without knowing which employees are supervisors?
- **It is now even more important to perform a supervisory analysis as early as possible, ideally before a recognition demand.**
  - Even more important clients are aware of need to be proactive.
- ***Cemex* means supervisors must be trained ASAP, ideally well before a recognition demand is received.**
  - Even isolated violations will have huge implications.
  - Potential loss of "captive audience" meetings = even more need to have effective communicators.



Handbook and Policy Reviews Should Address NLRA Issues

Top 10 Policies Commonly Found to be Unlawful by the NLRB – Need To Review Handbooks

1. Confidentiality
2. Social Media / Email
3. Solicitation and Distribution
4. Access to the Property (off-duty employees and third-parties)
5. Non-Disparagement of employer / supervisors / employees (gossip)
6. Discipline and Misconduct
7. Dress Code
8. Investigation of Misconduct
9. Photography / Recording in the workplace
10. Statements to the Media

Annual Reminders

State Minimum Wage Increase

- This year, California has decided that the minimum wage increase will include an inflation adjustment of 3.5 percent for all employees.
- This means effective January 1, 2024, California's minimum wage will increase to **$16.00 per hour** for all employers, regardless of size.

City Local Minimum Wage – January 2024 but Don't Forget About Potential Changes in July 2024 in Other Cities

Locale	Rate
Belmont	$17.35
Burlingame	$17.03
Cupertino	$17.75
Daly City	$16.62
East Palo Alto	$17.10
El Cerrito	$17.92
Foster City	$17.00
Half Moon Bay	$17.01
Hayward	$16.90
Los Altos	$17.20
Menlo Park	$16.70
Mountain View	$18.75
Novato	$16.86 – 100 or more employees $16.60 – 26-99 employees $16.04 – 1-24 employees
Oakland	$16.50
Palo Alto	$17.80
Petaluma	$17.45
Redwood City	$17.70
Richmond	
San Carlos	$16.87
San Diego	$16.85
San Jose	$17.55
San Mateo	$17.35
Santa Clara	$17.75
Santa Rosa	$17.45
Sonoma	$17.60 – 26 or more employees $16.56 – 26 or fewer employees
South San Francisco	$17.25
Sunnyvale	$18.55

In July 2024, the following cities may increase their city minimum wage laws:

1. City of Los Angeles
2. County of Los Angeles (unincorporated areas)
3. Malibu
4. Pasadena
5. West Hollywood
6. Santa Monica

And there could be more!!!

Minimum Salary Requirement – Overtime Exemptions – Administrative, Executive & Professional

California

Minimum Salary at least $1,280 per week = twice minimum wage ($16.00 effective **January 1, 2024**) $66,560.00 per year

FLSA

Minimum salary $684 per week

$35,568 per year

California Collective Bargaining Exemptions:

If the state minimum wage goes up, some wage and hour overtime exemptions and sick leave exemptions require an employer to pay **at least 30% more than State minimum wage** in the collective bargaining agreement:

$20.80 effective 1/1/24

Most common CBA exemptions relied upon are - overtime and sick leave

If the employer is not relying on any of the CBA exemptions, then it is not required.

AB 1066: Ag Overtime Phase-in

Date	Large ERs (26 or more EEs)	Small ERs (25 or fewer EEs)
01/01/2023	8 hours/day; 40 hours/week	9 hours/day; 50 hours/week
01/01/2024	8 hours/day; 40 hours/week	8.5 hours/day; 45 hours/week
01/01/2025	8 hours/day; 40 hours/week	8 hours/day; 40 hours/week

Harassment Prevention Training Compliance

- Employers with 5 or more employees must provide
- 1 hour of harassment prevention training to nonsupervisory employees
- 2 hours of training to supervisors
- Training must be provided every two years
- Within six months of hire or promotion for supervisors and managers.

Legislative Updates

Assembly Bill 1076: Non-Compete Agreements Unlawful

- Makes it unlawful to impose non-compete clauses on employees.
- Employers **must notify current employees and former employees** (employed after January 1, 2022), that any noncompete agreement or noncompete clause contained within an agreement the current or former employee signed is void unless the agreement or clause falls within one of the statutory exceptions.
- Effective **January 1, 2024**.

Senate Bill 699:
Support State's Prohibitions on Employee Restrictive Covenants

- Buttresses current state law that voids contracts that restrain an employee from engaging in a lawful profession, trade, or business of any kind.
- SB 699 both reiterates existing law and goes a few steps further.

Changes Made by SB 699

- Under SB 699, any contract that is void under section 16600 is unenforceable, regardless of where and when the contract was signed. In addition, an employer or former employer may not attempt to enforce a contract that restricts an employee's ability to engage in a lawful profession, trade, or business, even if the contract was signed outside of California and the employment was maintained outside of California.
- Moreover, SB 699 prohibits an employer from entering into a contract with an employee or prospective employee which includes noncompete clauses and other restrictive covenants that are void under section 16600. Employers who violate SB 699 could be liable for civil violations.
- **An important change to California law is that SB 699 adds explicit enforcement rights for employees regarding restrictive contracts.**
- This law takes effect on **January 1, 2024**, to the extent that new enforcement rights are created.

Senate Bill 616: Additional Paid Sick Leave

- Under the SB 616 employers must increase the amount of sick leave provided to California employees from 3 days/24 hours to **5 days/40 hours**.
- Employer must must increase accrual and carryover caps to **10 days/80 hours**.
- For employers not using the standard accrual of 1 hour for every 30 hours worked, employers must ensure that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period, and no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period.
- These requirements take effect **January 1, 2024**.

Senate Bill 848: Reproductive Loss Leave

- SB 848 requires employers with 5 or more employees to provide employees who have worked for at least 30 days with up to five days of reproductive loss leave.
- In the event an employee suffers more than one reproductive loss within a 12-month period, his/her employer is not obligated to grant a total amount of leave in excess of 20 days within 12 months.
- **Effective January 1, 2024**.

Reproductive Loss Defined

- “reproductive loss” includes:
  - a miscarriage
  - failed surrogacy
  - Stillbirth
  - unsuccessful “assisted reproduction” (such as artificial insemination or embryo transfer), or failed adoption.

Senate Bill 700: Inquiries About Applicant Cannabis Use

- Makes it unlawful under the Fair Employment and Housing Act (FEHA) for an employer to discriminate against a job applicant based on information regarding prior use of cannabis that is learned from a criminal history.
- Does not preempt state or federal laws requiring an applicant to be tested for controlled substances, nor is an employer prohibited from asking about an applicant's criminal history as long as in compliance with state law requirements.
- Effective **January 1, 2024**.

Senate Bill 553: Workplace Violence Prevention Plans for All Employers

- This bill requires all employers to establish, implement, and maintain an effective workplace violence prevention plan (WVPP).
- The WVPP will require the maintenance of a violent incident log, training on workplace violence hazards, and periodic reviews of the plan.

Exemptions

- The following types of entities are exempted from the WVPP requirement:
  - Healthcare facilities (already covered by Cal/OSHA's Violence Prevention in Health Care standard)
  - Facilities operated by the Department of Corrections and Rehabilitation
  - Employers that are law enforcement agencies, including being in compliance with the Commission on Peace Officer Standards and Training Programs
  - Employees who are teleworking
  - Places of employment where there are fewer than 10 employees working at the place at any given time, that are not accessible to the public and are in compliance with the requirement to develop and maintain an Injury Illness Prevention Plan (IIPP).

Deadlines for Legislation

- Many of the bill's requirements (including the development of the WVPP) take effect on **July 1, 2024**, and will be enforced by the Division of Occupational Safety and Health (Cal/OSHA).
- SB 553 also requires Cal/OSHA by **December 1, 2025**, to propose standards for the WVPP, and by **December 31, 2026**, for the Standards Board to adopt such standards.

Assembly Bill 102: Revives Industrial Wage Commission

- Signed **July 10, 2023**, takes effect immediately as a budget bill.
- Appropriates $3,000,000 to the Industrial Welfare Commission (IWC)
- The IWC is the administrative entity that was established to regulate wages, hours, and working conditions in California. The IWC developed the wage orders, which set forth many requirements that employers must comply with in addition to the California Labor Code. The IWC was previously defunded by the California Legislature effective July 1, 2004, but its 18 wage orders remain in effect. As a result of the defunding of the IWC, the wage orders have not been updated since 2001.
- Under AB 102, the IWC shall convene by **January 1, 2024**, with any final recommendations for wages, hours, and working conditions in new wage orders adopted by **October 31, 2024**.

Senate Bill 476: Compensation for Food Handler Certification

- Requires food facility employers to pay an employee for any cost associated with the employee obtaining a food handler card, considering the time it takes for the employee to complete the training and certification program to be compensable as “hours worked.”
- Moreover, employers must reimburse for necessary expenditures.
- Requires that employees are relieved of all other work duties while taking the training course and examination.
- an employer is prohibited from conditioning employment on the applicant or employee having an existing food handler card.
- These changes take effect **January 1, 2024.**

Basics of Food Handler Certification

- Under the Health and Safety Code, a food handler is required to obtain a food handler card within **30 day**s of their date of hire and maintain a valid card for the duration of their employment.
- A food handler is defined as an individual who is involved in the preparation, storage, or service of food in a food facility, other than an individual holding a valid food safety certificate or an individual involved in the preparation, storage, or service of food in a temporary food facility.
- “Food facility” means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level.

Assembly Bill 113:
Amendments to Collective Bargaining for Agriculture

- Signed **May 15, 2023**, took effect immediately as a Budget Bill.
- The bill enacts changes to the collecting bargaining process for agricultural workers.
- Bill makes changes to a bill signed in 2022, Assembly Bill 2183, which established new ways for farmworkers to vote in a union election under the Agricultural Labor Relations Act (ALRA), including mail-in ballots.

AB 113 – Card Check Elections

Labor Code section 1156.37 states:

(b) A labor organization that wishes to represent a particular bargaining unit . . . may be certified as that unit's bargaining representative by submitting to the board a Majority Support Petition. The petition **shall allege** all of the following:

(1) That the number of agricultural employees currently employed by the employer . . . is not less than **50 percent of the employer's peak** agricultural employment for the current calendar year.

(2) That no valid election has been conducted among the agricultural employees of the employer named in the Majority Support Petition within the 12 months immediately preceding the filing of the petition.

(3) That the Majority Support Petition is not barred by an existing collective bargaining agreement.

AB 113 – Card Check Elections

(c) The Majority Support Petition described in subdivision (b) shall be supported by a proof of majority support, through **authorization cards, petitions, or other appropriate proof** of majority support of the currently employed employees, as determined from the employer's payroll immediately preceding the filing of the Majority Support Petition. The showing of support shall be submitted together with the Majority Support Petition.

AB 113 – Card Check Elections

(d) A labor organization submitting a Majority Support Petition shall personally serve the petition on the employer on the same day that the petition is filed with the board. **Within 48 hours after the petition is served**, the employer shall file with the board, and personally serve upon the labor organization that filed the petition, its response to the petition.

As part of the response, the employer shall provide a complete and accurate list of the **full names, current street addresses, telephone numbers, job classifications, and crew or department of all currently employed employees in the bargaining unit** employed as of the payroll period immediately preceding the filing of the petition.

AB 113 – Card Check Elections

- The Board has **five days from the receipt of the MSP** to investigate and determine whether the union submitted proof of majority support.
  - In other words, after the employer responds with its eligibility list, the Board has just 72 hours to make its initial determination.
- The Board is required to compare the names on the union's proof of support documents to the names on the employer's eligibility list.
- In comparing names, the Board "**shall ignore discrepancies** between the employee's name listed on the proof of support and the employee's name on the [eligibility list] if the **preponderance of the evidence**, such as the employee's address, the name of the employee's foreman or forewoman, or evidence submitted by the [union] or employee shows that the employee who signed the proof of support is the same person as the employee on the [eligibility list].
  - But the Board's review is conducted in secret...

AB 113 – Card Check Elections

If the Board finds proof of support lacking, then the Board is required to:

- Return the proof of support to the union “with an explanation as to why each proof of support was found to be invalid. **To protect the confidentiality** of the employees whose names are on authorization cards or a petition, the board’s determination of whether a particular proof of support is valid **shall be final and not subject to appeal or review**.”
- Give the union **30 days** to submit additional proof of majority support.

AB 113 – Card Check Elections

If the Board determines the union has submitted proof of majority support, then:

- The Board is required to “immediately certify the labor organization as the exclusive bargaining representative of the employees in the bargaining unit”; and
- The employer’s duty to bargain with the union begins immediately after certification.
- Employer has five days to file objections to the certification on limited grounds:
  - (A) Allegations in the Majority Support Petition were false.
  - (B) The Board improperly determined the geographical scope of the bargaining unit.
  - (C) The majority support election was conducted improperly.
  - (D) Improper conduct affected the results of the majority support election.

AB 113 – Card Check Elections

If the union is certified, then the employer has **five days** to file objections to the certification. The objections are limited to the following grounds:

- (A) Allegations in the Majority Support Petition were false.
- (B) The Board improperly determined the geographical scope of the bargaining unit.
- (C) The majority support election was conducted improperly.
- (D) Improper conduct affected the results of the majority support election.

AB 113 – Card Check Elections

- If the Board decides to conduct a hearing on the objections, the objections hearing is required by law to be conducted "**within 14 days** of the filing of an objection, **unless an extension is agreed to by the [union]**."
- Filing objections do **not** diminish the duty to bargain with the union.
- Filing objections do **not** delay the running of the 90-day period for Mandatory Mediation and Conciliation (MMC).

AB 113 – Card Check Elections

- If an employer commits a ULP or other misconduct, including vote suppression, during a card check campaign, the Board can declare the union to be certified.
  - Is providing outdated contact information “vote suppression”?
- If an employer disciplines, suspends, demotes, lays off, terminates, or otherwise takes **adverse action against a worker** during a card check campaign, then there is mandatory “presumption that the adverse action was retaliatory.”
  - Clear and convincing evidence is required to rebut the presumption of retaliation.

Labor Code § 1160.10 (effective Jan 1, 2023)

- An employer who commits an unfair labor practice (ULP) shall be subject to a civil penalty up to **$10,000 for each violation**.
- If the ULP involves **discrimination or retaliation** against an employee, or if the ULP results in "serious economic harm" to an employee, then the civil penalty is doubled up to **$25,000 for each violation**.
- The Board has authority to impose **personal liability on directors/officers**, if directors/officers had actual or constructive knowledge of the ULP and failed to prevent it.

Modified Regulations for Fair Chance Act

- Modifications Effective: October 1, 2023
- Under the **Fair Chance Act**, employers with **five or more employees** are prohibited from asking an applicant about conviction history before making a job offer and setting forth other requirements pertaining to an applicant's criminal history.

Notice of Preliminary Decision and Opportunity for Applicant Response

- The modification clarifies that if an employer makes a preliminary decision after an “initial” individualized assessment that the applicant’s conviction history disqualifies the applicant, the employer shall notify the applicant in writing.
- The notice must include all of the following:
  - Notice of disqualifying conviction that is the basis for the preliminary decision.
  - A copy of the conviction history report relied upon.
  - Notice of the applicant’s right to respond to the notice before the preliminary decision becomes final.
  - Explanation of the type of evidence an applicant can submit to challenge the conviction history or as evidence of rehabilitation or mitigation.
  - Notice of the deadline for the applicant to respond.

Individualized Assessment

- The modified regulations clarify that an individualized assessment must be a “reasoned, evidence-based determination,” and provide detail on what may be taken into consideration in assessing the three factors to determine whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.

Reassessment

- The modification provides examples of the factors the employer may consider when making a final decision regarding whether to rescind a condition offer of employment.

  - The modified regulations provide more detail on the types of evidence an employer may consider including:
  - When the conviction led to incarceration, the applicant's conduct during incarceration, including participation in work and educational or rehabilitative programming and other prosocial conduct;
  - The applicant's employment history since the conviction or completion of the sentence;
  - The applicant's community service and engagement since the conviction or completion of sentence, including but not limited to volunteer work for a community organization, engagement with a religious group or organization, participation in a support or recovery group, and other types of civic participation; and/or
  - The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors.

Thank you!

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