2020 Labor & Employment Law Update

AGRICULTURAL PERSONNEL MANAGEMENT ASSOCIATION

Barsamian & Moody
The Employers' Law Firm

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EMPLOYMENT LAW UPDATES

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HIRING, TRAINING, DICIPLINE AND DISCHARGE

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Employee or Independent Contractor

Implications of AB 5

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Dynamex v. Superior Court (Apr. 2018)

- Diverging from decades-old precedent, the California Supreme Court in *Dynamex* made it significantly harder to classify California workers as "independent contractors" instead of "employees" under the California Wage Orders affecting pay
- The new "ABC test" adopted in *Dynamex* is much more difficult to meet than previous multi-factor tests in California or under IRS rules

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The "ABC Test" for ICs in California

A: The worker is free from the hiring entity's control and direction in connection with the performance of the work, both under the contract for performance of the work and in fact.

B: The worker performs work that is outside the usual course of the hiring entity's business.

C: The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Worker is presumed to be an employee unless hiring company can satisfy all three prongs.

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AB 5 Codifies + Expands *Dynamex*

- AB 5 adopts and integrates the ABC test into California's Labor Code and Unemployment Insurance Code.
- Misclassified IC's and the government can now pursue businesses for unpaid payroll taxes, business expense reimbursement, paid family leave benefits, paid sick leave, workers' compensation coverage and unemployment benefits.
- Violating businesses may be subject to injunctive relief and direct prosecution

Steep Penalties for Misclassification

- If willful misclassification of ICs, the employer shall be subject to a civil penalty of not less than five thousand dollars **($5,000)** and not more than fifteen thousand dollars **($15,000)** for each violation.
- If a “pattern or practice” of these violations are found, the person or employer shall be subject to a civil penalty of not less than ten thousand dollars **($10,000)** and not more than twenty-five thousand dollars **($25,000)** for each violation, in addition to any other penalties or fines permitted by law.

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AB 5 Exemptions

- Exemptions cover, among others, those performing work under a contract for "professional services," (e.g., law, accounting, human resources administrators (if the work is "predominantly intellectual and varied in character"), graphic designers, and freelance writers.
- These exemptions must still pass the more flexible Economic Realities (aka "*Borello*" test)
- **<u>No exemption for AG</u>**

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Pending Litigation

- CTA brought suit to challenge AB 5's application to independent truckers, claiming:
  - AB 5 is preempted by federal law
  - Deprives independent truckers, owner-operators from contracting their services
- Court grants TRO which will remain in effect pending court's decision on preliminary injunction

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Salazar v. McDonald's Corp.

- Issue: Whether the fast food franchisor was a joint employer along with one of its franchisees.
- The workers claimed that they were denied OT premiums, meal and rest breaks, and other benefits in violation of the CA Labor Code.
- Workers also argued that the appellate court should use the ABC Test instead of the *Martinez* test to determine whether joint employer liability existed.
- Applying only the *Martinez* test, the Ninth Circuit declined to expand AB 5 to the joint employer analysis.
- Held: The franchisor was <u>not</u> a joint employer of the workers.
- Caution: Proponents that passed AB 5 are now seeking to judicially and legislatively replace the Martinez test with the ABC test!

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California Consumer Privacy Act Changes

- AB 25 Confirms that the California Consumer Privacy Act (CCPA), which takes effect January 1, 2020, protects individuals' personal information collected by a business, including personal information collected from a job applicant, employee, owner, and others, and therefore such personal information a business maintains that can identify these individuals is subject to CCPA.
- But **AB 25** also exempts such employee information from the definition of personal information for one year, until **January 1, 2021**.
- The 1-year exemption also does not apply to a business' obligation to provide notice to employees about its collection practices or employees' eligibility for the data breach provision's private right of action

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SB 778 – Extended Deadline for Training

- Amends the original compliance deadline associated with SB 1343 (passed in 2018), which requires all employers with five or more employees to provide two hours of sexual harassment training to supervisory staff and one hour of such training to nonsupervisory staff within 6 months of hire or promotion into a supervisory role, and every two years after that, from January 1, 2020 to January 1, 2021.
- In addition, the new law clarifies that an employer who provided sexual harassment training in 2019 need not provide such training again until 2021 (and then every two years thereafter).

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SB 530 – Harassment Prevention Training

- SB 530 extends the deadline for mandatory sexual harassment training to **January 1, 2021** for employers of seasonal, temporary, or other employees “hired to work for less than 6 months.”

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New W-4 Form

- The IRS has introduced a new Form W-4 for 2020.
- The Form W-4 is the form employees use to notify their employers how much federal income tax to withhold from their paychecks.
- The new form is supposed to make it easier for employees to use

Contract in Employment Context

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AB 51 – Prohibition of Arbitration Agreements

- AB 51 outlaws mandatory arbitration agreements
- Also prohibits arbitration agreements that require employees to opt out of a waiver “or take any affirmative action in order to preserve their rights.” Notably. the express language of AB51 provides that the law does not invalidate any agreement governed by the Federal Arbitration Act.

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AB 51 – Prohibition of Arbitration Agreements

- To the extent the agreement is not governed by the FAA, AB 51 says an employer may only enter into such an agreement an arbitration agreement or class action or jury trial waiver with a CA employee if employee voluntarily and affirmatively chooses to enter into such an agreement or waiver.
- A court has issued a TRO blocking the State from enforcing the law at least through 1/31/2020.

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AB 51 – Prohibition of Arbitration Agreements

- AB 51 says that any violation of this law will itself be an "unlawful employment practice" (i.e., violations will be subject to the private right of action under FEHA. Prohibits retaliation and discrimination against those who refuse to enter such agreements
- Does not apply to arbitration agreements entered into prior to January 1, 2020

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SB 707 – Arbitration Agreements

- Provides that an employer's failure to pay costs and fees associated with an arbitration within 30 days of the due date would result in breach of the arbitration agreement, thereby waiving the right to compel arbitration.
- The bill provides that the employee would, in turn, be able to withdraw the claim from arbitration and prosecute his or her claim in court.

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AB 1291 - Cannabis Labor Peace Agreements

- CA licensed cannabis companies with 20 or more employees have 60 days from 1/1/20 to certify that they have entered into a “labor peace” agreement with a “bona fide labor organization” or risk losing their license.
- Cannabis companies must attest that it has or will enter into a labor peace agreement, or do so within 60 days of employing its 20th employee.”
- Cannabis company can lose its license for failure to comply.

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AB 749 – Ban on No-Rehire Provisions

- Prohibits and invalidates any provisions in settlement agreements entered into on or after **January 1, 2020** that prevent workers from obtaining future employment with the settling employer or its affiliated companies.
- Applies to any employees who have filed a claim against their employer: (1) in court, (2) before an administrative agency, (3) in an alternative dispute resolution forum, or (4) through the employer's internal complaint process.

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Reimbursement Claims May be Covered By EPLI

- In *Southern California Pizza Co. v. Lloyd's* of *London* (2019), the CA Court of Appeal held that a "wage and hour" exclusion in EPLI policy "must be narrowly interpreted" to extend coverage for reimbursement claims brought under Labor Code § 2800 & 2802.
- Court held that reimbursement claims are not "wage and hour" claims for remuneration and should not be excluded from coverage.

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Leaves of Absence & Benefits

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AB 1223 - Organ Donor Leave

- Existing law requires employers are required to permit an employee donating an organ to take up to 30 days of ***paid*** leave of absence within a one-year period.
- AB 1223 requires employers to provide an additional ***unpaid*** leave of absence, up to 30 days per year, to an employee donating an organ.

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AB 17 – Voter Intimidation

- Existing law requires employers to allow employees to take up to 2 hours off-work to vote.
- Employers are now precluded from requiring or requesting that an employee bring their mail-in ballot to work or to vote by mail.
- Penalties of up to $10,000 per violation. Employers are <u>not</u> prohibited from encouraging employees to vote.

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SB 30 – Domestic Partnerships

- Under existing law, a domestic partnership could be entered into only by either two adults of the same sex, or two adults of the opposite sex who were over the age of 62.
- SB 30 will allow any two adults over the age of 18 to enter into a domestic partnership.

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AB 1554 - Flexible Spending Accounts

- AB 1554 requires an employer to notify employees who participate in FSA's of any deadline to withdraw funds before the plan year's end by ***two*** of the following methods: email, telephone, text message, postal mail and in-person notification.

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Equal Employment Opportunity

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SB 83- Expanded Family Leave

- Extends paid family leave from six weeks to eight weeks.
- Applies to workers who are:
  - new parents to children born or adopted within a year, or
  - taking care of a family member with a serious illness

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SB 41 – Bias in Damage Awards

- SB 41 applies to personal injury and wrongful death cases, and prohibits any reduction in damages resulting from an estimation, measure, or calculation of past, present, or future damages for lost or impaired earning capacity that is based on a person's race, ethnicity, or gender.

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AB 9 – FEHA Claims: Statue of Limitations

- The new law extends the statute of limitations for filing a complaint about a violation of the Fair Employment and Housing Act (FEHA) from one year from the date of the violation to *three years* for all employment related discrimination, harassment and retaliation claims filed with the Department of Fair Employment and Housing (DFEH).

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SB 142 – Lactation Accommodation

- The new law expands an employer's duties and responsibilities in providing lactation accommodation to those employees who need to express breast milk…

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SB 142 – Lactation Accommodation

- Employers must provide a lactation room or location, not a bathroom, that is:
  - In close proximity to the employee's work area, shielded from view and free from intrusion;
  - Safe, clean and free of hazardous materials;
  - Contains a surface to place a breast pump and personal items;
  - Contains a place to sit;
  - Has access to electricity
- Must also provide access to a working sink and a refrigerator suitable for storing breast milk close to the employee's workspace

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SB 142 – Lactation Accommodation

- Employers must develop and implement a **lactation policy**
- Denial of lactation break time or space is tantamount to a violation of a rest period; subjecting the employer to a $100 penalty per violation.
- Hardship exemption for employers with 50 or fewer employees

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SB 188 – Hairstyle Discrimination

- Known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair), SB 188 expands the FEHA definition of race to include traits historically associated with race, such as hair texture and protective hairstyles. The bill defines "protective hairstyles" as "braids, locks, and twits."
- The law prohibits workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists and locks.

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Jimenez v. U.S. Continental Marketing, Inc.

- **Facts**
  - Jimenez worked for Ameritemps, Inc., a temporary staffing agency that placed Jimenez with USCM. After USCM, and later Ameritemps, terminated Jimenez' services, she sued USCM for FEHA violations and related claims
  - The jury returned a verdict in favor of USCM, finding it was not Jimenez' special employer
- **Issue**
  - Whether the issue is which “employing entity” has more control **or** whether there can be two employing entities with sufficient level of control to be held liable under FEHA?

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Jimenez v. U.S. Continental Marketing, Inc.

- **More Facts**
  - USCM did not pay Jimenez , did not track Jimenez' time and did not ultimately terminate employment as that was through the staffing company
  - Jimenez oversaw 30 USCM direct employees, was supervised by a USCM employee, was entitled to attend professional development trainings and was subject to USCM's employee handbook
- **Result**
  - Court found under the circumstances, USCM exerted direction and control over Jimenez so as to constitute her employer for purposes of FEHA.

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Wage & Hour Issues

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State Minimum Wage Increase

- On Jan. 1, the state minimum wage increased to $13.00 per hour for employers with 26 or more employees. The rate is $12.00 for employers with 25 employees or fewer. The minimum salary under the white collar overtime exemption test is two times the state minimum wage or $54,080 for employers with 26 or more employees and $49,920 for employers with 25 or fewer employees.

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Changes to Wage Order 14 now in effect for "large" employers

Date	For Employers with 26 Employees or More	For Employers with 25 Employees or Fewer
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

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AB 673 – Unpaid Wage Claims

- Amends the Labor Code by giving employees who do not receive payment of their wages the ability to file a private action to:
  (1) recover statutory penalties against the employer in a hearing before the Labor Commissioner; or
  (2) seek to enforce civil penalties under PAGA.
- Aggrieved employees may not pursue both remedies for the same violation(s). These remedies are in addition to penalties an employee may recover through an action brought by the Labor Commissioner.

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SB 229 – Labor Commissioner Citations

- Expands the appeal and enforcement mechanisms available when the Labor Commissioner cites an employer for violating the Labor Code's anti-retaliation provisions.
- Once the citation is issued, if the employer does not request a hearing within 30 days, the citation becomes final, and 10 days after the citation becomes final the Labor Commissioner applies for entry of judgment.

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SB 688 – Labor Commissioner Citations

- Authorizes the Labor Commissioner to issue citations and recover amounts owed by an employer who has paid less than the wages earned by an employee under a contractual arrangement, even if the wages paid exceeded the minimum wage requirements.
- The law also permits an employer to contest such a citation, subject to a bond posting requirement and the forfeiture of the bond amount to the Labor Commissioner if the employer does not prevail.

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2020 Adverse Effect Wage Rate

- As of January 2, 2020, the adverse effective wage rate payable to H-2A workers and others in "corresponding employment" increased to $14.77 in California and $12.91 in Arizona.
  - 6.1% increase in California and 7.6% increase in Arizona.

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ZB, N.A. v Sup. Court of San Diego

- **Facts**
  - Plaintiff Lawson, hourly employee of CA Bank & Trust, filed complaint containing single PAGA cause of action seeking civil penalties and wages under Labor Code § § 558.
  - ZB moved to compel Lawson to individually arbitrate her claim for victim-specific relief under § 558 pursuant to binding arbitration agreement with her.

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ZB, N.A. v Sup. Court of San Diego

- **Issues**
  - Whether an employee may bring a PAGA action to collect *both* civil penalties *and* unpaid wages under § 558.
  - Whether an employer may compel arbitration of an employee's PAGA claim requesting wages under § 558.

ZB, N.A. v Sup. Court of San Diego

- **Result**
  - Court held the unpaid wages provided for by § 558 are compensatory damages, to civil penalties.
  - Because unpaid wages are not civil penalties and because § 558 does not contain a private right of action, Lawson could not recover her or any aggrieved employees' wages under § 558 and PAGA.
  - Because unpaid wages are not recoverable under PAGA, there was no cognizable claims to compel to arbitration.

Naranjo v. Spectrum Security Services

- **Facts**
  - Spectrum paid employees for their on-duty meal break but did not pay the one-hour premium for a noncompliant meal break policy which did not include a revocation clause.
- **Issue**
  - Whether employees who are entitled to a meal or rest break premium (after denial of a meal or rest period in violation of Labor Code § 226.7) may also recover derivative penalties under Labor Code § 203 (waiting time penalties) and § 226 (inaccurate wage statements)

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Ferra v. Loews Hollywood Hotels, LLC.

- California Court of Appeal decision that provided guidance on three key legal issues:
  - When calculating a meal or rest period premium pay for an hourly employee who receives bonuses, you only must include the base hourly rate of pay
  - Rounding time policies can be lawful so long as they were implemented with a neutral intent
  - Employees cannot recover waiting time penalties for mean and rest period violations
- **Review granted by California Supreme Court 1/22/20**
- **Issue:** Did the Legislature intend the term "regular rate of compensation" in Labor Code § 226.7 (requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break) to have the same meaning and require the same calculations as the term "regular rate of pay" under Labor Code § 510(a), which requires employers to pay a wage premium for each overtime hour?

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DOL Rolls Back Obama Joint Employer Rule

- On January 12, 2020, the DOL publish its Final Rule that that would roll back the expansive Obama-era "economic realities" joint employer test under FLSA.
- Under the new test, where a worker performs work for the employer that benefits another person/entity, the second person/entity may potentially be a joint employer if it:
  - Hires or fires the employee
  - Supervises and controls the employee's work schedule or conditions of employment to a substantial degree
  - Determines the employee's rate and method of payment
  - Maintains the employee's employment records
- No single factor is determinative.
- ***Actual* control is necessary to establish joint employment**

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Proposed Indoor Heat Illness Standard

- Cal/OSHA has a proposed an indoor heat illness standard that is similar to the outdoor heat illness standard codified in CCR Title 8, sec. 3395. The proposed rules would kick in when indoor temperatures equal or exceed 82˚F and would require:
  - Employers to maintain the temperature and heat index below 82 degrees where workers work in high radiant heat work areas or must wear clothing that restricts heat removal.
- Clothing items that restrict heat removal include those that cover the arms, legs, and torso that are:
  - Waterproof;
  - Designed to protect the wearer from a biological, chemical, fire, or radiological hazard; or
  - Designed to protect the wearer or work process from contamination.

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Proposed Indoor Heat Illness Standard

- Other requirements include:
  - Providing access to cool-down areas that are blocked from direct sunlight and radiant heat at all times
  - Allowing and encouraging employees to take cool down-breaks
  - Providing Drinking water
  - Implementing emergency response procedures for signs and symptoms of heat illness and contacting emergency medical services, if necessary
  - Close observation of employees under certain circumstances
  - Training on heat illness related topics
  - A written heat illness prevention plan
  - Using administrative controls or providing heat-protective equipment if engineering controls cannot reduce the temperature and heat index below the standard's limits

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Reporting Occupational Injuries and Illnesses

- AB 1804 requires employers to report serious workplace injuries, illnesses, or death **immediately** by telephone or through an online platform that will be developed by the Division of Occupational Safety and Health.
- Until the online platform is developed, employers should make these reports by telephone and/or email
- Employers may be fined up to $5,000 for each violation.

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AB 1805 - Expands Definition of Serious Injury or Illness

- AB 1805 revises the definition of "serious injury or illness" for purposes of reporting to Cal/OSHA, as follows:
  - Removal of the requirement that inpatient hospitalizations, except for medical observation and diagnostic testing hospitalizations, last for at least 24 hours before qualifying as "serious injury or illness";
  - Deletion of the "loss of any member of the body" and the addition of amputation and the loss of an eye to the definition;
  - Eliminates the previous exclusion jury or illness or death caused by the commission of a Penal Code violation; and
  - Clarifies that injuries, illness, or death caused by an accident on a public street or highway that occurred in a construction zone are included.
- Defines the definition of "serious exposure" to include exposure of an employee to a hazardous substance when the exposure is in a degree or amount sufficient to create a "realistic possibility" that death or serious physical harm in the future could result from the actual hazard created by the exposure.
- Changes are intended to conform Cal/OSHA's standards to the federal OSHA regulations on reportable injuries and illnesses.

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AB 61 - Workplace and School Gun Violence Restraining Orders

- Beginning September 1, 2020, AB 61 authorizes an employer, coworker who has substantial and regular interactions with the person and approval of their employer, to file a petition for an ex parte, one-year, or renewed gun violence restraining order.
- The restraining order will prohibit the subject of the petition from having in their custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition when it is shown that there is a substantial likelihood that the subject of the petition poses a significant danger of self-harm or harm to another in the near future, and that the order is necessary to prevent personal injury to the subject of the petition or another.

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Emergency Regulation to Protect Employees Wildfire Smoke Dangers

- On 7/29/19, the CA OSHSB's emergency regulation to protect outdoor workers from the harmful effects of wildfire smoke went into effect.
- The emergency regulation applies to workplaces where the current Air Quality Index (AQI) for airborne particulate matter (PM 2.5) is 151 or greater, and where employers should reasonably anticipate that employees could be exposed to wildfire smoke.
- Covered employers must take the following steps to protect workers who may be exposed to wildfire smoke:
  - Identify harmful exposure to airborne particulate matter from wildfire smoke at the start of each shift and periodically thereafter by checking the AQI for PM 2.5 in regions where workers are located.
  - Reduce harmful exposure to wildfire smoke if feasible by, for example, relocating work to an enclosed building with filtered air, or to an outdoor location where the AQI for PM 2.5 is 150 or lower.

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Emergency Regulation to Protect Employees Wildfire Smoke Dangers

- If employers cannot reduce workers' harmful exposure to wildfire smoke so that the AQI for PM 2.5 is 150 or lower, they must provide:
  - Respirators such as N95 masks to all employees for voluntary use, and
  - Training on the new regulation, the health effects of wildfire smoke, and the safe use and maintenance of respirators.
- The regulation will be effective through January 28, 2020, with two possible 90-day extensions.

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Questions?

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