LABOR AND EMPLOYMENT UPDATE 2023

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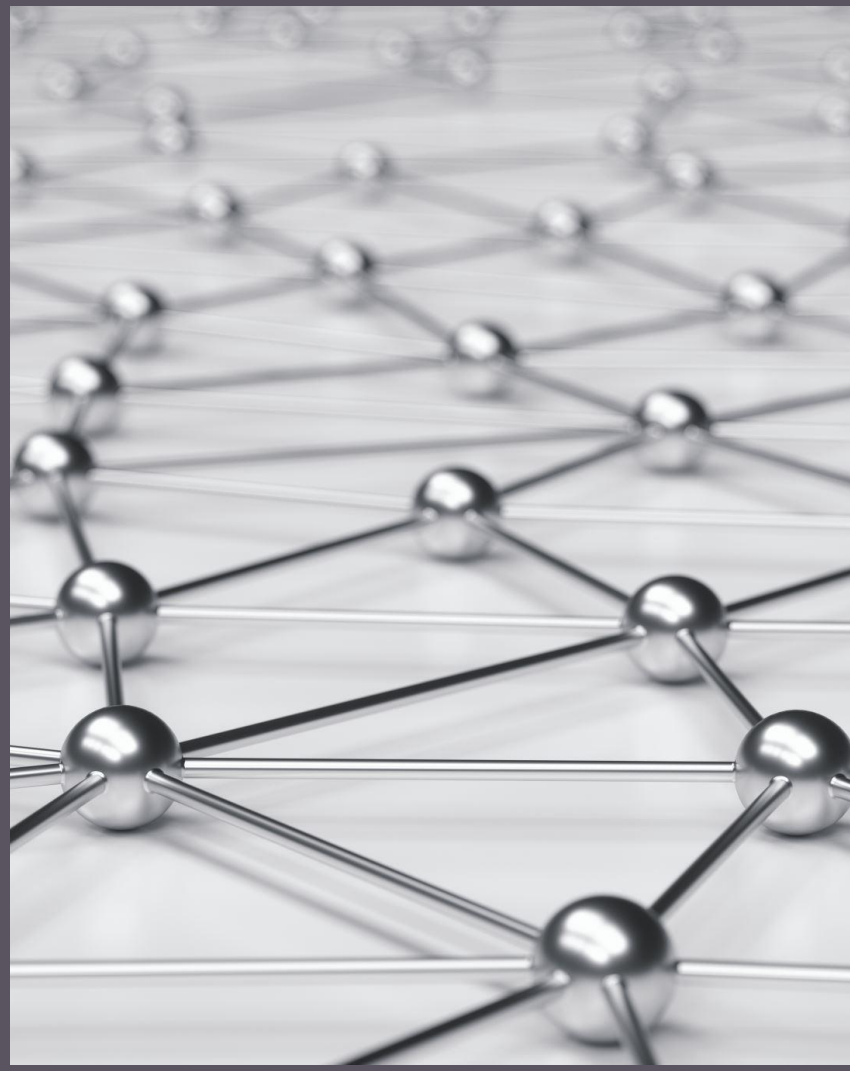
Agenda

- Wage & Hour
- Employment Status
- Arbitration
- Discrimination and Retaliation
- Privacy
- National Labor Relations Board
- Employment Litigation Decisions
- Employment Cases



WAGE & HOUR

AB 125: COVID-19 Supplemental Paid Sick Leave

- The COVID-19 Supplemental Paid Sick Leave ("SPSL") expired on December 31, 2022. Employers are no longer required to provide SPSL beginning on January 1, 2023.
- SPSL covers the period between January 1, 2022, to December 31, 2022. Employees that are taking SPSL when it expires on December 31, 2022, are allowed to finish the leave in 2023.
- Any claims filed with the Labor Commissioner, regarding a violation(s) of the SPSL law that occurred between January 1, 2022, to December 31, 2022, can be processed in 2023. Accordingly, an employee can request SPSL pay they were entitled in 2022, this 2023 year.

AB 1041: Employment Leave

- California Family Rights Act
  - This bill expands the class of people for whom an employee may take protected leave under the California Family Rights Act (CFRA) and include “designated person.” Under the CFRA, "designated person" means any individual related by blood, or whose association with the employee is the equivalent of a family relationship.
- Paid Sick Leave
  - The definition of the term “family member” under the Healthy Workplaces, Healthy Families Act of 2014, would expand to include a “designated person,” defined as a person identified by the employee at the time the employee requests paid sick days.
- This bill authorizes employers to limit an employee to one designated person per 12-month period.

- Under this bill, bereavement leave need not be taken in consecutive days, but must be completed within three months of the date of death of the family member. Further, within 30 days of the first day of the leave, the employer may request that the employee provide documentation of the death of the family member.

- "Documentation" includes, but is not limited to, a death certificate, a published obituary or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution or governmental agency.

AB 1949: Funeral or Bereavement Leave

- In addition, to the extent an employer has an existing bereavement policy, the bereavement leave must be taken pursuant to the employer's existing bereavement leave policy. If the employer does not have an existing bereavement leave policy, the bereavement leave may be unpaid; but the employee may use vacation, personal leave, accrued and available sick leave or compensatory time off that is otherwise available to the employee.

- If the employer's existing leave policy provides for less than five days of paid bereavement leave, the employee is entitled to no less than a total of five days of bereavement leave, consisting of the number of days of paid leave under the employer's existing policy, and the remainder of days of leave may be unpaid. However, the employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

AB 1949: Funeral or Bereavement Leave

SB 1162: The Pay Transparency for Pay Equity Act

- This bill requires employers with 100 or more employees to submit a pay data report to the Civil Rights Department on or before the second Wednesday of May 2023 and for each subsequent year on or before the second Wednesday of May. An employer can no longer submit the EEO-1 in lieu of the pay data report. Employers with 100 or more employees hired through labor contractors must also submit a separate pay data report. Because of this impending deadline, employers subject to this law should begin preparing their reports. This law deletes the provision requiring employers with multiple establishments to submit a consolidated report.

- The new law requires the pay data reports to include the median and mean hourly rate for each combination of race, ethnicity, and sex within each job category.

SB 1162: The Pay Transparency for Pay Equity Act

- Upon employee request, employers must provide a pay scale for the position in which an employee is currently employed.

- Employers with 15 or more employees are required to include the pay scale in any job posting and to maintain records of job title and wage rate history for each employee within a specific timeframe. Employers who have 15 or more employees and who engage a third-party to announce, post, publish, or otherwise make a job posting must provide pay scale to the third-party to include in the job posting. If an employer fails to keep record, a rebuttable presumption in favor of the employee's claim is established.

Seviour-Iloff v. LaPaille, 80 Cal. App. 5th 427 (Cal. Ct. App. 2022).

Statute of Limitations/Unpaid Wages

- Plaintiffs filed wage claims with the Division of Labor Standards Enforcement ("DLSE") against Defendants for violations of the Labor Code. On appeal, plaintiffs contend that the trial court miscalculated the statute of limitations when awarding unpaid wages. The court held that the statute of limitations ran from the filing of the Initial Report or Claim form filed with the DLSE.

Wage/Hour

- The Federal Motor Carrier Safety Administration's (FMCSA) determined that California's meal and rest break rules were preempted by federal hours of service regulations for short haul drivers, even though short haul drivers were exempted from one of the federal regulations. Additionally, the president of a trucking company, was held personally liable for "causing" the violations within Cal. Lab. Code § 558.1 for approving the policy regarding payment of truck drivers that violated various provisions of the labor code.

Espinoza v. Hepta Run, Inc., 74 Cal. App. 5th 44 (Cal. Ct. App. 2022).

Penalties for Meal & Rest Break Violations

- *Naranjo v. Spectrum Security Services, Inc. c*larified that meal and rest break violations trigger waiting time and wage statement penalties. This case highlights the importance of compliant break policies, as the derivative penalties under Labor Code sections 203 and 226 can increase penalties for the actual meal and rest break violations. The Court concluded that premium pay for missed meal and rest periods constitutes "wages" that must be reported on statutorily required wage statements during employment and paid within statutory deadlines when an employee leaves the job. The Court held that the extra pay is designed to compensate for the unlawful deprivation of a break and is also the compensation for the work the employee performed during the break period.

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

Pay Rates

- The Supreme Court held that the term "regular rate of compensation" for remedies for failure to provide meal, rest, and recovery periods is similar to "regular rate of pay" for overtime compensation. Therefore, "regular rate of compensation" encompasses all nondiscretionary payments, such that the calculation of premium pay for a noncompliant meal, rest, or recovery period must account for not only hourly wages but also for nondiscretionary payments for work performed by the employee.

Ferra v. Loews Hollywood Hotel, 11 Cal. 5th 858 (Cal. 2021).

Hutcheson v. Superior Court, 74 Cal. App. 5th 932 (Cal. Ct. App. 2022).

The original plaintiff substituted another employee as a representative plaintiff in a PAGA action. The substitute plaintiff filed a PAGA claim notice after the original plaintiff filed their PAGA complaint. The court found that the relation back doctrine applies. The court concluded that "if the trial court finds that the claims in the amended PAGA complaint...rest on the same general set of facts, involve the same injury, and refer to the same instrumentality as the claims in the original complaint filed" then the relation back doctrine applies, and the substitute plaintiff can assert claims on behalf of the LWDA violation that the original plaintiff began.

Rounding Time Entries

- *Delmer Camp v. Home Depot U.S.A. Inc*. (*Camp*) held that an employer must pay an employee for "all time worked," if an employer can and has captured the exact amount of time an employee worked in a shift.

- Regardless of the small discrepancies of time in regard to rounding, an employer must provide pay to an employee with pay for *all* of the time worked if the employer can and has captured the exact amount of time worked, and employee worked within a given shift. Although rounding is permitted via federal regulation, California protects employees against discrepancies within the rounding procedures and provides employees with greater protection. If the time is recorded and accounted for, an employer may still use "nearest-tenth" rounding policies that is fair and neutral on its face and does not result in a failure to properly compensate employees for the time worked overtime.

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

Employment Status

White v. Smule, Inc., 75 Cal. App. 5th 346 (Cal. Ct. App. 2022).

Employment Offer/At-will Status

Cal. Lab. Code § 970 prohibits employers from inducing employees to relocate and accept an employment offer through false representations such as the "kind, character, or existence of work, or the length of time that the work will last." In this case, the plaintiff was told he was hired as a lead project manager and with a long-term position. The court held that an at-will employment provision does not, as a matter of law show that an employee's reliance on an employer's promises regarding the kind, character, or existence of work the employee was hired to perform is unreasonable. However, the at-will status concerning the length of employment negated the justifiable reliance on the misrepresentations.

Bowerman et al v. Field Asset Services, Inc., 39 F. 4th 652 (9th Cir. 2022).

Joint Employment Claims/Employee vs. Independent Contractor Status Test

The Ninth Circuit held that for business expense and joint employment claims arising from conduct that occurred pre-California Assembly Bill 5 (AB 5), the employee status test discussed in *Borello*, rather than the test found in *Dynamex*, is applicable.

The Ninth Circuit concluded that the *Borello* test applied to claims for business expense reimbursement (Cal. Lab. Code § 2802) and joint employment claims because those claims were based on the California Labor Code, not California wage orders.

ARBITRATION

PAGA/Arbitration

- *Viking River Cruises, Inc. v. Moriana* held that individual claims under the Private Attorneys General Act may be compelled to arbitration.

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

Gallo v. Wood Ranch USA, Inc., 81 Cal. App. 5th 621 (Cal. Ct. App. 2022)

Payment of Arbitration Fees

- Recent developments highlight the requirement to pay arbitration fees in a timely manner. SB 762, which amended Code of Civil Procedure sections 1281.97 and 1281.98 and added section 1657.1 to the Civil Code, became law in 2022 and required payment of arbitration fees "upon receipt," with failure to pay resulting in a waiver of the right to compel arbitration. In *Gallo v. Wood Ranch USA, Inc.*, the court held that this requirement is not pre-empted by the FAA. Further, these sections in this case do not interfere with the FAA's first goal of honoring the parties' intent. Moreover, applying these sections, in this case, does not interfere with the FAA's second goal of safeguarding arbitration as an expedited and cost-efficient vehicle for resolving disputes.

Mendoza v. Trans Valley Transport, 75 Cal. App. 5th 748 (Cal. Ct. App. 2022).

Arbitration

- *Mendoza v. Trans Valley Transport* underscores the importance of having a standalone arbitration agreement signed by both the employer and employee. In this wage and hour class action, the issue was whether an arbitration provision in an employee handbook, coupled with acknowledgement forms the class representative signed, created a legally binding agreement to arbitrate the claims presented. In *Mendoza*, the court refused to find an enforceable agreement to arbitrate where the agreement merely appeared in a handbook and was not prominently distinguished, even though the employee had signed a handbook acknowledgement. The signed acknowledgment of the handbook was insufficient to constitute a waiver of the former's employee right to a judicial forum.

Adolph v. Uber Technologies, Inc., Cal. Ct. App. Case No. G059860.

PAGA/ Arbitration

- The *Adolph* decision primarily concerns whether, in a PAGA action, the threshold issue of whether the plaintiff is an employee or an independent contractor is arbitrable.

- On July 20, 2022, the California Supreme Court granted review in Adolph v. Uber Technologies, Inc., Cal. Ct. App. Case No. G059860, which indicates that it may intend to address the questions of state law addressed by the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

- The California Supreme Court's decision could come as soon as 2023. Until then, trial courts compelling arbitration of individual PAGA claims must decide for themselves whether to follow the U.S. Supreme Court's holding regarding the plaintiff's standing to pursue the nonrepresentative claims, or whether to chart a different path.

Arbitration/Unconscionability

- A former employee brought an action against the former employer with claims under the Fair Employment and Housing Act (FEHA) and wrongful discharge.

- The arbitration agreement provision cut the period that would apply to file a FEHA action in court by two years, allowing the employee to be compelled to arbitration before the Civil Rights Department completes its investigation and issues a "right to sue" letter. Thus, reducing the period within which a FEHA claim is brought from three years to one is substantially unconscionable. The court further found that the provision granting an award of attorney's fees for a prevailing party in a motion to compel arbitration, lack of mutuality, and the limitation on discovery are substantively unconscionable. The court affirmed the trial court's decision to deny the motion to compel arbitration.

Ramirez v. Charter Communications, Inc., 75 Cal. App. 5th 365 (Cal. Ct. App. 2022)

DISCRIMINATION AND RETALIATION

AB 2188: Discrimination in Employment: Use of Cannabis

- This bill makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or penalty, if the discrimination is based upon the person's use of cannabis off the job and away from the workplace. Existing law under the California Fair Employment and Housing Act (FEHA) protects and safeguards certain rights and opportunity of all persons to seek, obtain, and hold employment without discrimination, except as for pre-employment drug screening, as specified, or upon an employer-required drug screening test that has found a person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

- This bill would specify that the bill does not pre-empt state or federal laws requiring applicants or employees to be tested for controlled substances as condition for employment, receiving federal funding or federal licensing-related benefits, or entering a federal contract.

Mandatory Drug Testing Compensation

- Employee brought a putative class action against employer for compensation as an employee for time spent and travel expenses for undergoing mandatory drug testing that the employer required from successful job applicants. The court held concluded that the drug test is a condition precedent to employment, thus class the class members were not considered as employees until they satisfied the condition of passing the preemployment drug test. As such, compensation was not required.

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

Whistleblower Retaliation

- Cal. Lab. Code § 1102.5 provides whistleblower protections to employees that discloses wrongful conduct to authorities. Here, the employee disclosed information to his supervisor. The court held there was independent ground for asserting a whistleblower retaliation claim because the supervisor exercised authority over the employee, therefore it is a protected disclosure under Section 1102.5.

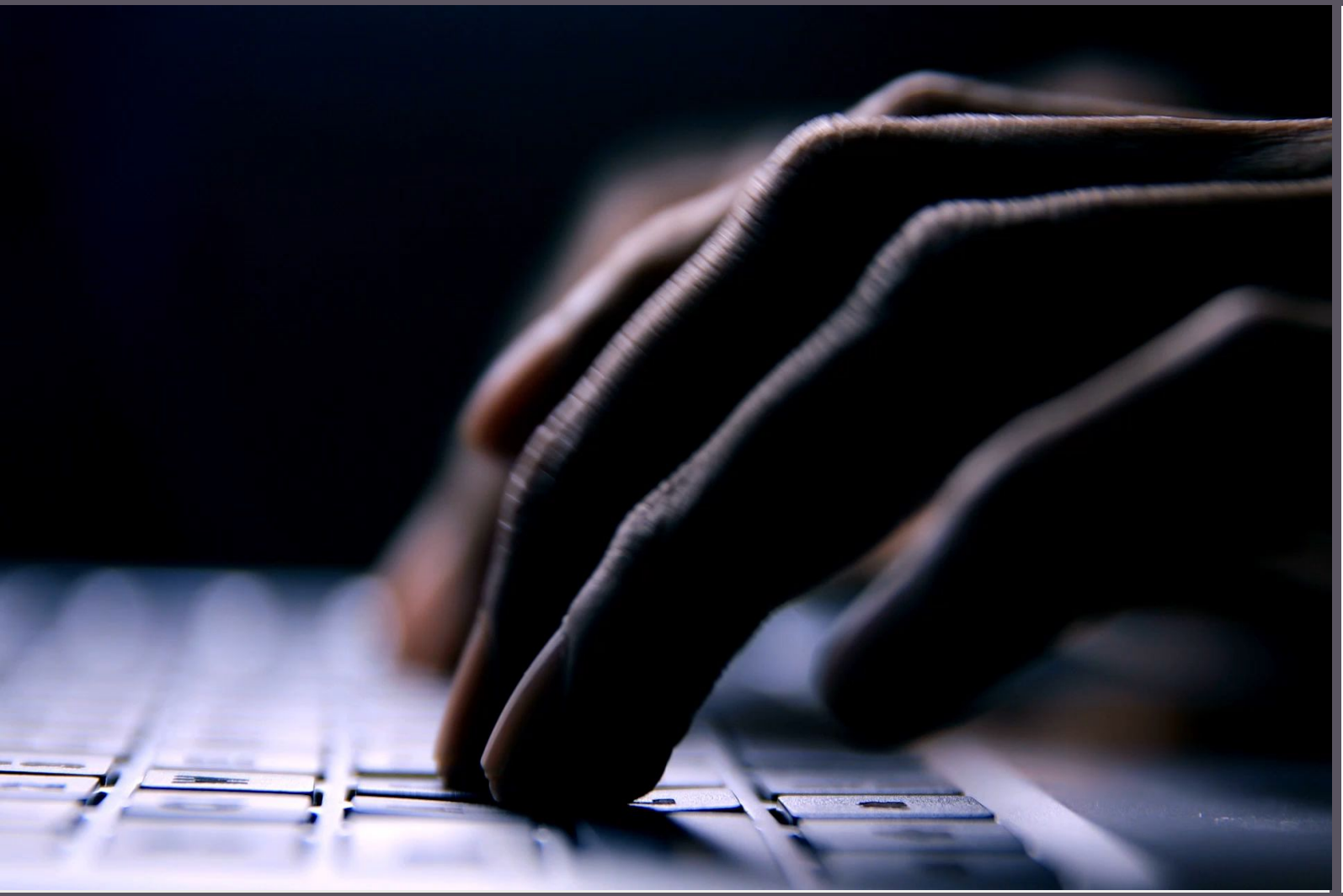
***Killgore v. SpecPro Professional Services*, LLC, 51 F. 4th 973 (9th Cir. 2022).**

Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455 (2022).

USERRA

- The US Supreme Court held that US states are subject to civil lawsuit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

- The Court found that nonconsenting states may not use sovereign immunity to avoid liability under USERRA because the states, by joining the US, implicitly agreed to yield their sovereignty to the federal policy of building and keeping a national military.



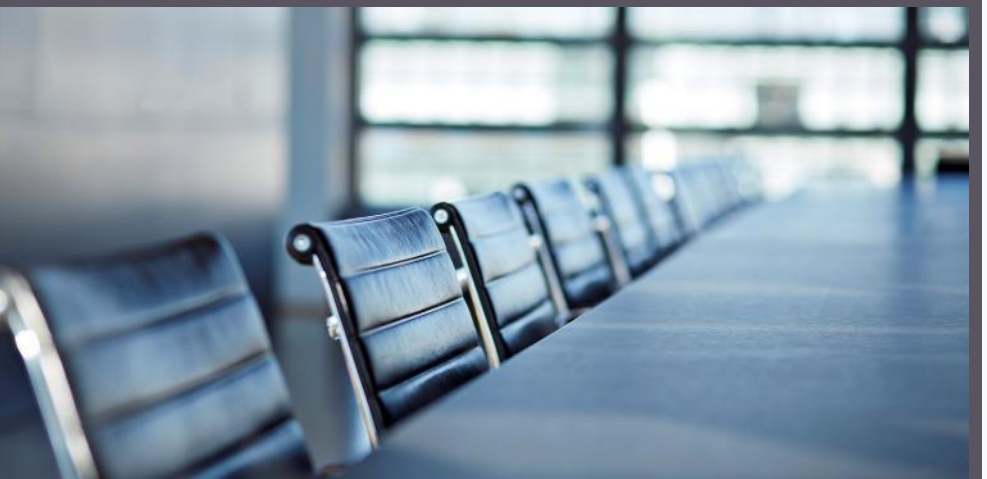
PRIVACY

- There are two primary laws that protect employees during the employment screening process: (1) the Investigative Consumer Reporting Agency Act (ICRAA) codified as California Civil Code sections 1786.10 to 1786.40 and (2) the Fair Credit and Reporting Act (FCRA) codified as 15 U.S.C. § 1681. ICRAA is a more restrictive law and supersedes the FCRA in any provision that conflicts.

- Finally, there are specific provisions regarding fair hiring practices to provide a second chance to those with a criminal arrest or conviction records (also known as the Fair Chance Act or "Ban the Box" Law). This is codified in Government Code section 12952 and California Labor Code section 432.7, both of which restrict employers from asking about conviction history prior to making a job offer and employment decisions.

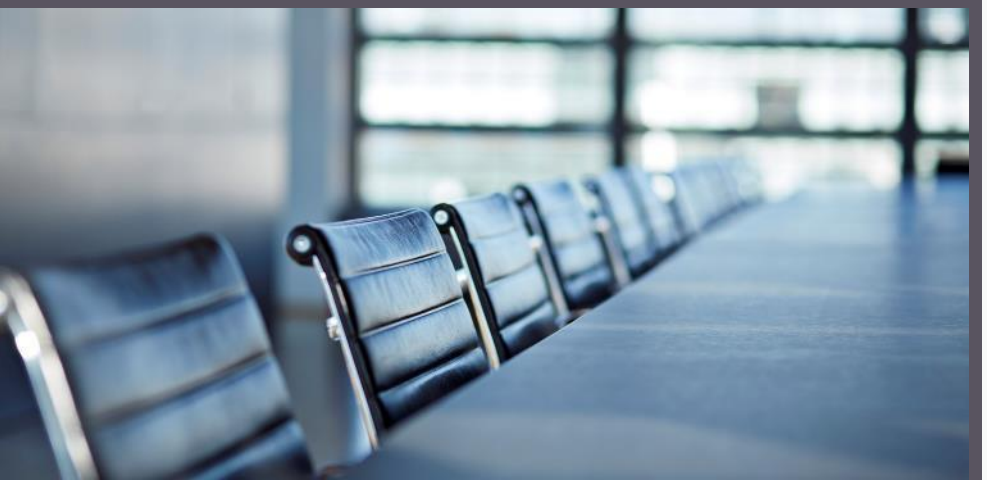
- Under ICRAA applicants and employees have the rights under the FCRA, plus additional rights and protections.

Fair Credit and Reporting Act & Investigative Consumer Reporting Agency Act



CALIFORNIA PRIVACY ACT

- The California Privacy Rights and Enforcement Act (CPRA), which amends the prior California Consumer Privacy Act (CCPA), takes effect on January 1, 2023. The CPRA eliminates employer exemptions in the CCPA applicable to employee and applicant data and expands on several areas of the CCPA.



CALIFORNIA PRIVACY ACT

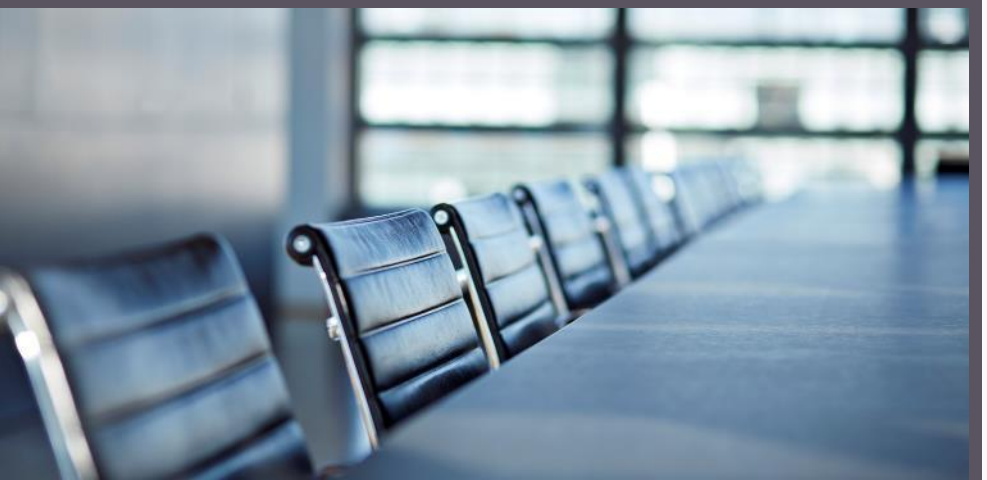
The CPRA creates several privacy-related obligations for employers, including:

- (1) notifying applicants, employees, and contractors about the categories of personal information that is or may be collected by the employer, and describing the purpose(s) for the collection and disclosure, and providing information regarding the sharing and retention of personal information;

- (2) employees' rights to access or restrict the use or disclosure of certain categories of personal information;

- (3) employees' rights to correct or delete personal information (subject to statutory exemptions that may apply); and

- (4) employees' rights to request the personal information that has been collected about them during the preceding 12 months.



CALIFORNIA PRIVACY ACT

- The CPRA also establishes a new agency, the California Privacy Protection Agency, which is responsible for implementing and enforcing the law, including issuing potential fines of $2,500 per violation and $7,500 per intentional violation. Although the CPRA takes effect January 1, 2023, any personal information about employees collected by employers dating back to January 1, 2022, will be subject to compliance with the CPRA.

NATIONAL LABOR RELATIONS BOARD

Tesla, Inc., 370 NLRB (2022).

- On August 29, 2022, the panel (Board) heading the NLRB's judicial functions considered the proper standard for evaluating the lawfulness of workplace rules or policies that restrict employees' right under Section 7 of the NLRA to display union insignia, including facially neutral, nondiscriminatory uniform rules or other dress code requirements that implicitly prohibit certain types of union attire.

- Tesla makes clear that the Board will analyze any prospective employer interference with employees' Section 7 right to display clothing with union messages or buttons, stickers, and insignia under the Republic Aviation balancing test and require employers to demonstrate special circumstances for even content-neutral limits. The Board presumes these kinds of restrictions violates Section 8(a)(1) of the NLRA and requires employers to justify their restrictions by showing special circumstances on a case-by-case basis.

NLRB Office of the General Counsel Memorandum GC23-02

- The General Counsel ("GC") urges the Board to adopt "a new framework for protecting employees from intrusive or abusive forms of electronic monitoring and automated management that interfere with section 7 activity." The GC further contends that the employer's interests must be balanced against the employee's rights.

- The GC requests a presumptive violation of Section 8(a)(1) in cases where an employer's surveillance or management practices tend to interfere with Section 7 rights. This requires an employer to show that the practice at issue is narrowly tailored to address a legitimate business need.

- If an employer's needs outweigh an employee's Section 7 rights, the GC urges the Board to require an employer to disclose to employees the technologies it uses to monitor and manage the system, its reasons, and the information it obtains, unless there is a special circumstance.

Bexar County Performing Arts Center Foundation, NLRB case no. 16-CA-193636.

- In Bexar County Performing Arts Center Foundation, 16-CA-193636 ("*Bexar County II*"), the Board restricted a business owner's ability to prohibit off-duty contract workers from conducting labor protests on its property.
- The *Bexar County II* decision overturns a previous standard. In the first *Bexar County* decision, the Board found that the Bexar County Performing Arts Center Foundation was within its rights to prohibit contract musicians from distributing leaflets outside of the music venue. Under the *Bexar County I* standard, property owners could prohibit off-duty contract workers from being on the property unless they work "regularly and exclusively" on that property and the owner shows that the workers have a reasonable, non-trespassory alternative to communicate their message.
- Moving forward, property owners should tread carefully when attempting to limit contractors from protesting labor conditions on their property.

University of California Los Angeles (UCLA), Pac-12 Conference, and The NCAA

NLRB 31-CA-290328.

Student Athletes as Employees

- The NLRB has directed its Los Angeles regional office to pursue charges of unfair labor practices against USC, the Pac-12 and the NCAA. If they are successful, athletes who play men's basketball, women's basketball or football at any private college in the NCAA will be granted the rights of employees, including the freedom to create unions.

THRYV, INC., Plaintiff, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL, NLRB 20-CA-250250.

NLRB Expanse of the Scope of Remedies

Having found that Respondent, Thryv, Inc., engaged in certain unfair labor practices, the NLRB "Upon careful consideration [] remedial authority and [] history of addressing the effects of unfair labor
practices, [the NLRB] find that standardizing [] make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees is necessary to more fully effectuate the make-whole purposes of the Act." The Board found that standardizing a remedy like this would satisfy the Board's statutory obligation to provide "meaningful, make-whole relief" for losses incurred by the respondent's unlawful conduct by calculating all direct or foreseeable pecuniary harm although not specifically requested.

NLRB v. Ampersand Publishing, LLC, 43 F. 4th 1233 (9th Cir. 2022).

- In *NLRB v. Ampersand Publishing*, LLC, the Ninth Circuit held that the NLRB may issue a remedial order requiring an employer to reimburse a union for legal fees incurred during the collective bargaining process.

- The Ninth Circuit identified circumstances under which it will enforce NLRB orders requiring an employer to reimburse a union for legal fees. It is unclear whether the DC Circuit or other circuit courts of appeals would similarly analyze NLRB orders to reimburse union legal fees. However, the decision underscores the potential breadth of the NLRB's Section 10(c) remedial powers, particularly where an employer has engaged in aggravated misconduct.

NLRB v. Ampersand Publishing, LLC, 43 F. 4th 1233 (9th Cir. 2022).

- The court reasoned that an award of bargaining expenses, including the union's associated legal fees, is primarily a compensatory remedy aimed at restoring the economic status quo that would have existed but for the employer's bad-faith bargaining and other unfair labor practices, and therefore is precisely the type of remedy that courts have upheld as within the NLRB's broad remedial authority under Section 10(c) of the NLRA.

EMPLOYMENT LITIGATION DECISIONS

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

Res Judicata

- The first suit involved a settlement agreement with the staffing agency. Contingent on the payment of the amounts due, the court barred and enjoined all class members from pursuing claims against "Released Parties." The term "Released Parties involved the staffing agency and its agents, but not the hospital. A hospital stands in privity with a staffing agency if circumstances permit binding the hospital to an unfavorable judgment. However, there is no privity when the staffing agency did not adequately represent the hospital's interest in the first action. The Court held that two litigants may be privies in some circumstances, but not in others, therefore a staffing agency and a hospital's divergent interests prevented a finding of privity.

Depuy Synthes Sales v. Howmedica Osteonics, 28 F. 4th 956 (9th Cir. 2022).

Forum-selection clauses

- Cal. Lab. Code § 925 prohibits agreements that require out-of-state forums for employees primarily residing and working in California. The court held that a forum-selection clause in an employment agreement violated California law and was found as void and unenforceable. The clause required a California resident who worked within the state to litigate in New Jersey courts all disputes with an employer concerning the agreement.


QUESTIONS?

THANK YOU

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