California 2022 Employment and Labor Law Update

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Arden Hills Presentation

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- Founding Partner of Palmer Kazanjian Wohl Hodson.
- 25+ years' experience advising executive management, in-house corporate legal counsel, labor relations administrators, and human resource professionals
- Member of the Labor and Employment Law Sections of the State and County Bar Associations
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7 Supreme Court Wage And Hour Cases To Watch In 2022

California Trucking Association v. Bonta

- The California Legislature passed Assembly Bill 5 (“AB 5”) in 2019, which established by statute the ABC test as the method used in determining whether a worker is an employee or independent contractor.
- The 3-part ABC test presumes an individual is an employee unless the hiring entity can demonstrate that the test’s three prongs apply.
- Now, California’s ABC test is under the radar once again and will be reviewed on the California Trucking Association’s pending petition.

California Trucking Association v. Bonta continued

- The CTA, a trade group for motor carriers, and two drivers who make deliveries using their own vehicles, argued that the court should find federal deregulation of the trucking industry preempts state law.
- The issue is whether the Federal Aviation Administration Authorization Act (“FAAAA”), a federal law that preempts state laws relating “to a price, route, or service, of any motor carrier, preempts the application to motor carriers of a state worker-classification law that precludes motor carriers from using independent owner-operators to provide trucking services.
- The Ninth Circuit upheld California’s worker-classification statute as it applies to motor carriers:
  - The FAAAA does not preempt the “ABC test” for determining whether a worker was an employee or independent contractor because it is a “generally applicable labor law that affects a motor carrier’s relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers.

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California Trucking Association v. Bonta continued

- According to the Ninth Circuit, the state law must be closely related to a price, route, or service to trigger preemption–a very specific interpretation.
- But how “closely related” must the state law be, and what does “related to” mean?

What are the Supreme Court’s Considerations in *California Trucking Association v. Bonta* petition?

- Circuit Split: the Ninth Circuit expressly refused to follow the First Circuit’s holding, which found that the FAAAA “partially preempts” Massachusetts’s similar ABC Test.
- Can the California Law upheld by the Ninth Circuit be reconciled with the FAAAA’s statutory language and purpose? How does this uniform standard fit into an analysis like this?
- According to the petition before the Supreme Court, this issue “has tremendous practical significance;” California's worker-classification statute will defeat the trucking industry’s well-established business model, “destroy the uniformity necessary for the free flow of interstate commerce and the operation of nationwide businesses,” create corrosive uncertainty for the nation’s owner-operators, and have destructive effects on the prices, routes, and services for carriers.

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Virgin America Inc. v. Bernstein

- The Ninth Circuit held that:
  - California's meal and rest break laws are not preempted by the Federal Aviation Act or Airline Deregulation Act, ("ADA") and the federal law does not block California's rest and meal break requirements from being applied to flight attendants.
  - Labor Code sections 201 and 202 apply to California-based workers whose work is not performed predominantly in any one state, provided that California is the state that has the most significant relationship to the work.
- The ADA preempts state laws that relate "to a price, route, or service of an air carrier."
- To be subject to preemption, a state law would have to distort market forces by dictating a company's prices, routes, or services.

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What are the Supreme Court's Considerations in the *Virgin America Inc. v. Bernstein* petition?

- The Ninth Circuit's holding splits with the First, Fifth, Seventh, and Eleventh Circuits' approach – the other circuits use a less strict interpretation that says the ADA preempts state laws that have a "significant impact" on air carriers' prices, routes and services.
- The Court will consider whether the Ninth Circuit's holding contradicts "the broad reach that Congress intended for the ADA."

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5 Cases, One Major Concern by Employers: PAGA Undermines the Federal Arbitration Act ("FAA")

- In 2014, the California Supreme Court decision *Iskanian v. CLS Transportation Los Angeles, LLC* condoned businesses requiring workers to resolve disputes in arbitration rather than litigation, holding that workers may pursue claims in court even when they have an arbitration agreement if they filed under PAGA.
  - The Court reasoned that it would be contrary to public policy to require employees to waive the right to bring an action for civil penalties under Lab. Code, § 2699, 2699.3, and that PAGA claims did not interfere with the FAA because they were qui tam actions outside the scope of the FAA.
- A few years later, relying on the FAA which requires courts to honor arbitration agreements, the Supreme Court in *Epic Systems Corporation v. Lewis* held arbitration agreements as permissible because they do not infringe on worker's rights to pursue actions under the NLRA and the FLSA.

Cases:	
1.	***Coverall North America Inc. v. Rivas***
2.	***Uber Technologies Inc. v. Gregg***
3.	***Lyft Inc. v. Seifu***
4.	***Postmates LLC v. Rimler***
5.	***Postmates LLC v. Santana***

Employers: concerned that PAGA suits are being carved out from the FAA

- The high court rulings on these 5 cases allowed a PAGA suit to proceed in litigation despite a valid arbitration agreement.
- Businesses have been hit with countless PAGA suits in recent years because litigating representative actions has become easy and accessible.
- As a result, the 5 petitions before the Supreme Court are brought by employers arguing that:
  1. By refusing to honor arbitration agreements, PAGA suits are being severed or separated from the FAA.
  2. There is a need for clarity on the issue of courts not declining to send PAGA suits to arbitration – employees should be required to arbitrate claims rather than pursue them in court.

"That's your best advice? Play nice!"

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Coverall North America Inc. v. Rivas

- Coverall North America argued that the district court improperly decided issues that the parties' arbitration agreement reserved for an arbitrator, contending that the court had "no business" deciding whether an employee could arbitrate claims on behalf of other allegedly aggrieved employees.
- The Ninth Circuit had held that PAGA claims are inherently representative and therefore not bound by individual arbitration agreements.
- Issue before the Supreme Court: Whether the Federal Arbitration Act preempts a state-law rule precluding the enforcement of an agreement to arbitrate claims on an individual basis when a state declares that a private litigant has an unwaivable right to pursue certain claims on a representative basis (such as PAGA claims).

Uber Technologies Inc. v. Gregg

- Defendant Uber Technologies, Inc. sought to compel arbitration in a wage and hour action brought by a former driver.
- The Appellate Court had held that a PAGA action is fundamentally different than an employee's own suit for damages, reasoning that a PAGA claim is not a dispute between an employer and an employee arising out of their contractual relationship, but rather a dispute "between an employer and the state."
- Issue before the Supreme Court: Whether agreements calling for individual arbitration are enforceable under the FAA with respect to PAGA claims asserted under the California Labor Code.

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Lyft Inc. v. Seifu

- Defendant Lyft argued that the clause in the arbitration provision waiving Seifu's right to bring a representative PAGA claim was enforceable.
- Court of Appeals held that PAGA waivers are unenforceable.
- Issue before the Supreme Court: Whether the FAA requires the enforcement of a bilateral arbitration agreement providing that a worker cannot raise representative claims under PAGA, which preempts the contrary holding in *Iskanian v. CLS Transportation Los Angeles LLC*.

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Postmates LLC v. Rimler and *Postmates LLC v. Santana*

- Plaintiffs sued Postmates, seeking PAGA penalties for alleged Labor Code violations. Postmates filed a petition to compel arbitration based on an arbitration agreement compelling arbitration and waiving class and representative actions, which the trial court denied and the Court of Appeals affirmed.
- Court of Appeals reasoned that a PAGA claim involved a dispute not governed by the FAA and the waiver would have precluded the PAGA action in any forum; held that its PAGA-waiver unenforceability determination was not preempted.
- Issue before the Supreme Court: Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under PAGA.

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COVID-19:
Cal/OSHA's Emergency Temporary Standards; Centers for Medicare and Medicaid Services' Vaccine Mandate

Cal/OSHA has released emergency COVID-19 workplace safety measures, revised COVID-19 rules for 2022

" Wait--how many seasons is this ?"

- Cal/OSHA has released revised workplace safety rules that treat vaccinated and unvaccinated people similarly.
- Cal/OSHA has warned that the new rules will require testing of vaccinated workers with no symptoms, which can strain the availability of rapid tests and boost employers' costs.
- These revised rules apply to almost every workplace—including offices, factories, and retail locations.
- Effective as of 1/14/2022 for three months.

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Emergency Temporary Standards ("ETS"), consistent with current the California Department of Public Health ("CDPH")'s recommendations:

- Employers are now required to make COVID-19 testing available at no cost and during paid time to employees who were fully vaccinated before the "close contact" with a COVID-19 case occurred, even if they are asymptomatic.

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Emergency Temporary Standards ("ETS"), consistent with current the California Department of Public Health ("CDPH")'s recommendations:

- During outbreaks and major outbreaks, employers must now make weekly testing (outbreaks) or twice-weekly testing (major outbreaks) available to asymptomatic fully vaccinated employees in the exposed group.

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Emergency Temporary Standards (“ETS”), consistent with current the California Department of Public Health (“CDPH”)’s recommendations:

- Employees who have recently recovered from COVID-19 and those who are fully vaccinated are not required to be excluded from the workplace after “close contact” but must wear a face covering and maintain six feet of physical distancing for 14 calendar days following the last date of contact.

Cal/OSHA’s ETS, COVID-19 workplace safety measures do not replace public health orders

- In addition to these requirements, employers must follow public health orders on COVID-19.
- The latest order from the California Department of Public Health on January 5, 2022, requires the use of face coverings by all employees when indoors.
- More information on the COVID-19 Prevention Emergency Temporary Standards is available in Cal/OSHA's Frequently Asked Questions.

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“Can’t tell one from another with those protective face masks.”

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CMS Will Enforce Health Care Vaccine Mandate in California

- On December 28, 2021, the Centers for Medicare and Medicaid Services (“CMS”) announced that it will begin enforcement of the COVID-19 vaccine mandate, as set forth in the Interim Final Rule published on November 5, 2021, in 25 states and the District of Columbia (including California).
- CMS has revised the infection control requirements to include a vaccinate mandate that most Medicare and Medicaid-certified providers and suppliers must meet to participate in the Medicare and Medicaid programs.
- The COVID-19 vaccination requirements and policies and procedures must comply with applicable federal non-discrimination and civil rights laws and protections, including providing reasonable accommodations to individuals who are legally entitled to them because they have a disability or sincerely held religious beliefs, practices, or observations that conflict with the vaccination requirement.
- This mandate is being currently enforced in California and will remain active unless it becomes enjoined in the future.

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CMS's Timeline for Compliance

- **By January 27, 2022**, covered facilities will be considered compliant if:
  - Policies and procedures are developed and implemented for ensuring all staff are vaccinated for COVID-19; and
  - (a) 100% of staff have received at least one dose of COVID-19 vaccine, or (b) have a pending request for or have been granted a qualifying exemption, or (c) have been identified as having a temporary delay as recommended the CDC.
  - Covered facilities that do not meet the requirements of No. 2 will receive a notice of non-compliance under the rule. A facility that is above 80% and has a plan to achieve a 100% compliance rate within the following 60 days will not be subject to further enforcement action.
- **By February 26, 2022**, covered facilities will be compliant under the rule if:
  - (1) the facility has developed and implemented policies and procedures for ensuring a 100% vaccination rate and (2) either (a) 100% of the staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single dose vaccine or all doses of a multiple dose vaccine) or (b) have been granted a qualifying exemption or (c) identified as having a temporary delay as recommended by the CDC. At the 60-day mark, non-compliant facilities will receive a notice of non-compliance but can avoid further enforcement action if the facility can demonstrate that it is above 90% and has a plan to achieve a 100% compliance rate within 30 days.
- **By March 28, 2022**, covered facilities must be 100% compliant otherwise the facility may be subject to further enforcement action.

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- Partner with Palmer Kazanjian since 2002
- 20+ years' experience advising executive management, in-house corporate legal counsel, labor relations administrators, and human resource professionals
- Member of the Labor and Employment Law Sections of the State and County Bar Associations
- Recently published articles on Assembly Bill 5 and other Labor and Employment Laws
- J. Reuben Clark Law School (Brigham Young University)

California Updates: Topic 1

PAGA, Meal & Rest Break, Wage & Hour, Wage Statements, Rate of Pay, Equal Pay Act, Record Keeping

Employment Law Cases

- *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration*, 986 F.3d 841 (9th Cir. Jan. 15, 2021)
  - The Ninth Circuit reviewed Federal Motor Carrier Safety Administration ("FMCSA")'s analysis of California's meal and rest break rules and determined that they were preempted by the agency's own break requirements.
  - Held Federal law preempts California's meal and rest break rules as applied to drivers of property-carrying commercial motor vehicles who are subject to Federal Motor Carrier Safety Administration rest break regulations.
- A Similar Preemption Case Will Be Before the Supreme Court in 2022:
  - In *California Trucking Association v. Bonta*, the Ninth Circuit ruled that there is no federal preemption of California's new independent contractor law, AB-5., and upheld California's worker-classification statute as it applies to motor carriers: the Federal Aviation Administration Authorization Act ("FAAAA") does not preempt the "ABC test" for determining whether a worker was an employee or independent contractor because it is a "generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers.
  - The Supreme Court will consider whether the California Law upheld by the Ninth Circuit be reconciled with the FAAAA's statutory language and purpose—the First Circuit held that the FAAAA "partially preempts" Massachusetts's similar ABC Test.
  - According to the petition before the Supreme Court, this issue "has tremendous practical significance;" California's worker-classification statute will defeat the trucking industry's well-established business model, "destroy the uniformity necessary for the free flow of interstate commerce and the operation of nationwide businesses," create corrosive uncertainty for the nation's owner-operators, and have destructive effects on the prices, routes, and services for carriers.

Employment Law Cases

- *Bernstein v. Virgin America., Inc.*, No. 19-15382, 2021 WL 686281 (9th Cir. Feb. 23, 2021)
  - A plaintiff class of California-based flight attendants who were employed by Virgin America, Inc. brought a putative class action alleging that Virgin violated California labor laws.
  - Held an employer is not subject to heightened penalties for "subsequent" violations under PAGA until notified by the California Labor Commission or any court that it is violating the Labor Code.
  - Labor Code sections 201 and 202 apply to California-based workers whose work is not performed predominantly in any one state, provided that California is the state that has the most significant relationship to the work.
  - California's meal and rest break laws are not preempted by the Federal Aviation Act or Airline Deregulation Act.

Employment Law Cases

- *Magadia v. Wal-Mart Associates, Inc.,* No. 19-16184, 2021 WL 2176584 (9th Cir., May 28, 2021)
  - Former Walmart employee filed a class action alleging violations of the California Labor Code's wage statement and meal period requirements and sought civil penalties for these claims under PAGA. The district court ruled against Walmart on all claims and Walmart appealed.
  - Held an "employee lacks Article III standing to bring a PAGA claim in federal court for Labor Code violations that the employee did not personally suffer."
  - Case creates incentives for employers to remove cases to federal court as a way of limiting their liability.

Employment Law Cases

- *Johnson v. Maxim Healthcare Services, Inc., No. D077599, 2021 WL 3075433 (Cal. Ct. App. Jul. 21, 2021)*
  - Plaintiff alleged that employer violated the California Labor Code by requiring her and other employees to sign unenforceable noncompetition agreements.
  - Employer demurred on the grounds that Johnson was not an aggrieved employee because she signed the agreement more than three years before filing the complaint, and therefore her claim was time-barred.
  - Held employee whose individual Labor Code claim against employer is time-barred may still pursue a representative PAGA claim.

Employment Law Cases

- *Freyd v. University of Oregon*, 990 F.3d 1211 (9th Cir. 2021)
  - Freyd filed a lawsuit in 2017 under the Equal Pay Act, Title VII of the Civil Rights Act, other U.S. laws after learning that men with the same rank and seniority in the department were making thousands of dollars more.
  - The district court held that Freyd could not prove her work was equal to or better than her male co-workers because they conducted different types of research and sat on different committees. Freyd appealed.
  - Nine Circuit held that evidence showing comparable jobs were substantially similar to plaintiff's and statistical evidence of pay disparities raised triable issues to defeat summary judgment of plaintiff's Equal Pay Act claim and disparate impact claim under Title VII.

"I couldn't have said it better myself, Sarah, so I'll just repeat it a little bit louder."

Employment Law Cases

- *Ferra v. Loews Hollywood Hotel, LLC, No. S259172, 2021 WL 2965438 (Cal. Jul. 15, 2021)*
  - Employee alleged that Loews improperly calculated her meal and rest period premium payments when it excluded her non-discretionary quarterly incentive bonuses from premium pay calculations. Loews argued that Ferra's "regular rate of compensation" for meal and rest period premium pay is her base hourly rate of pay and is distinguishable from her overtime "regular rate of pay."
  - California Supreme Court held that the term "regular rate of compensation" under California Labor Code section 226.7 is synonymous with the term "regular rate of pay" used for calculating overtime premium payments.
  - Holding applies retroactively.

Scenario #1

- The employees at XYZ Company receive a bonus as an end-of-the-year gift. The bonus is provided on a completely discretionary basis (as opposed to non-discretionary). Does the discretionary bonus affect how overtime is calculated? If so, how?
- Alternatively, assume the employees receive a bonus at the end of the year that is based on a quota or performance goal that the employer put in place for the month of December. Does the end of the year, performance-based bonus affect how overtime is calculated?

Employment Law Cases

- *Donohue v. AMN Services., LLC*, No. S253677, 2021 WL 728871 (Cal. Feb. 25, 2021)
  - Under AMN's imprecise calculations based on their rounding policy, AMN considered the rounded meal period compliant. As a result, the employee was not receiving a meal period premium because the rounding policy did not always trigger premium pay when premium pay was owed.
  - Held employers cannot engage in the practice of rounding time punches in the meal period context, as the California Labor Code "requires premium pay for any violation" of the timing requirements, "no matter how minor." Time records that show noncompliant meal periods create a rebuttable presumption of liability at the summary judgment stage.

Employment Law Cases

- *Levanoff v. Dragas, Nos. G058480, G058709, 2021 WL 2621360 (Cal. Ct. App. June 25, 2021)*
  - Employee brought PAGA and class action claims based on employer's use of the rate-in-effect method instead of the weighted average method because it was the method that most benefited the dual rate employees. Employee argued that the employer must always use the weighted average method because it is the one endorsed by the California Division of Labor Standards Enforcement ("DLSE").
  - Held that an employer does not violate California law by selecting a method of calculating the regular rate of pay that most benefitted its employees, even when that method is contrary to the method endorsed by the DLSE.

Employment Law Cases

- *General Atomics v. Superior Court*, No. D078211, 2021 WL 2176921 (Cal. Ct. App., May 28, 2021)
  - Employee sued her employer under PAGA alleging that General Atomics violated section 226 by providing wage statements that did not identify the correct rate of pay for overtime wages, when section 226 of the California Labor Code requires showing "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."
  - Held wage statement reflects standard hourly rate, hours, and pay for all hours worked including overtime, and then reflects overtime hours at a rate of 0.5 times the regular rate complied with California Labor Code section 226(a)(9).

Employment Law Legislation/Statutes

"The good news is you have a case for wage theft. The bad news is that based on your wages, it's petty theft."

- Wage Theft - AB 1003
  - Makes the intentional theft of wages, including gratuities, benefits, and other compensation, in an amount greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees, by an employer in any consecutive 12-month period, punishable as grand theft.
  - Applies to both employees and independent contractors.

Employment Law Legislation/Statutes

- Tips of food delivery and facility personnel - AB 286
  - Makes it unlawful for a food delivery platform to retain any portion of amounts designated as a tip or gratuity.
  - Food delivery platforms are required to pay any tip or gratuity for a delivery order to the person delivering the order.
  - Any tip or gratuity for a pickup order must be paid, in its entirety, to the food facility.

"Here's the meat pizza you ordered. You don't have to tip me, because I ate the meat."

Employment Law Legislation/Statutes

- Electronic Records for Contractors and Subcontractors on Public Works Projects - AB 1023
  - Requires contractors and subcontractors of public works projects submit monthly records required under Labor Code Section 1771.4, at least once every 30 days while work is being performed on the project, and within 30 days after the final day of work performed on the project.
  - Contractors and subcontractors must furnish the records electronically, as specified by the Labor Commissioner's website.
  - Failure to submit records related to employees will subject employers to a fine of $100 a day for a maximum total of $5,000 per project.
  - The bill provides a 14-day grace period.

Employment Law Legislation/Statutes

- Employment: Electronic Documents- SB 657
  - Adds Section 1207 to the Labor Code.
  - Whenever an employer is required to physically post information meant to apprise employees of their rights under applicable statutes, the employer may also distribute that information to employees by email.

Employment Law Legislation/Statutes

- Regulation of Production Quotas in Warehouse Distribution Centers - AB 701
  - Regulates production quotas in warehouse distribution centers.
  - Applies to employers who directly, indirectly, or through an agent (including the services of a third-party employer, temporary service or staffing agency), employ or exercise control over the wages, hours or working conditions of 100 or more employees at a single warehouse distribution center; or 1,000 or more employees at one or more warehouse distribution centers in California.
  - Employers must provide each employee upon hire or within 30-days of 1/1/2022 a written description of each quota that the employee is required to meet.
  - The written description must include (1) the quantified number of tasks to be performed or materials to be produced or handled, (2) the defined period to complete the quota, and (3) any potential adverse action that could result from failure to meet that quota.
  - An employee is not required to meet the quota if doing so would prevent compliance with legally required meal or rest breaks, occupational health and safety laws, or if not previously disclosed to them. Employers may not take adverse action against an employee who fails to meet a quota under these circumstances. "

California's Minimum Wage Increase in 2022

- CA minimum wage will increase to
  - $15/hour for employers with 26 or more employees; or
  - $14/hour for employers with 25 or less employees"
  - Effective 1/01/2022.

California Updates: Topic 2

Employee Classification

Employment Law Cases

- *Vazquez v. Jan-Pro Franchising International, Inc., No. S258191, 2021 WL 127201 (Cal. Jan. 14, 2021)*
  - Vasquez filed his lawsuit and the Northern District of California granted summary judgment for Jan-Pro before the California Supreme Court decided *Dynamex*. Because the Dynamex decision had not yet been issued, the parties disputed which standards should apply to an independent contractor in the franchise context.
  - The three-part "ABC test" to determine independent contractor status announc *Dynamex Operations West, Inc. v. Superior Court* applies retroactively.
  - "Reliance" on the former legal standard does not warrant an exception to Retroactivity. Companies who classified their workers as independent contract pre-Dynamex, are now vulnerable to misclassification lawsuits.

Employment Law Cases

- *California Trucking Association v. Bonta, No. 20-55106, 2021 WL 1656283 (9th Cir. Apr. 28, 2021)*
  - California uses the ABC test to classify workers as employees or independent contractors. The Federal Aviation Administration Authorization Act ("FAAAA") preempts any state law affecting trucking prices, routes, or service.
  - A trucking industry group moved for review by the U.S. Supreme Court of a decision tossing out its challenge to California's strict worker classification law, saying it is preempted by federal regulations governing trucking companies.
  - The Federal Aviation Administration Authorization Act does not preempt the "ABC test" for determining whether a worker was an employee or independent contractor.

California Updates: Topic 3

Leave

Scenario #2

- Employee Heather asks her employer if she can take a two-week leave for an unavoidable knee surgery. However, the company is extremely busy during the month of Heather's surgery, and the employer really needs her at work.
- What are the employer's options? What are important considerations that the employer should keep in mind in responding to Heather's request?

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Employment Law Cases

- *Scalia v. Department of Transportation & Public Facilities, No. 19-35824, 2021 WL 139738 (9th Cir. Jan. 15, 2021)*
  - The Family and Medical Leave Act of 1993 ("FMLA") grants eligible employees a total of 12 "workweeks" of leave during any 12-month period for qualifying family or medical needs.
  - Plaintiff, the United States Secretary of Labor, brought suit against Defendant, the State of Alaska's Department of Transportation and Public Facilities, contending that Defendant was miscalculating amount of FMLA leave rotational employees of the Alaska Marine Highway System who took continuous leave were entitled to take.
  - Defendant argued that a rotational employee working a "one week on, one week off" schedule who takes 12 workweeks of continuous leave must return to work 12 weeks later because both the "on" and the "off" weeks count against the employee's FMLA leave entitlement.
  - Held that Congress intended to adopt the Fair Labor Standards Act's definition of "workweek" (defined as a fixed period of seven consecutive days) when it granted employees "a total of 12 workweeks of leave" under the Family and Medical Leave Act. Thus, Defendant's method of calculating rotational employees' continuous leave did not violate the statute.

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Employment Law Legislation/Statutes

- CFRA Expansion - AB 1033
  - Amends CFRA to include parents-in-law to the list of family members for which an employee can take leave under CFRA.
  - Requires DFEH to provide written notice to an employee who requests a right to sue of the requirement for mediation under the DFEH's small employer mediation program prior to the employee filing a civil action, if mediation is requested by the employer or employee.
  - The small employer mediation program covers employers with 5 to 19 employees.

"A word of fatherly business advice, Marty: keep your friends close and your enemies even closer. That way there's no room for useless in-laws to squeeze in."

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California Updates: Topic 4

Equal Employment Opportunity

Scenario #3

- In 2010, the U.S. Department of Justice passed the ADA Standards for Accessible Design, mandating all electronic and information technology, like websites, be accessible to those with disabilities, like vision impairment and hearing loss. Maintaining an ADA-compliant website helps protect businesses against lawsuits and fines in addition to providing needed accommodations for potential customers.
- An employer's website, while generally accessible to the public, is not fully accessible to blind or deaf members of the public because of the website's design. What should be the employer's next steps in providing an ADA-compliant website?

Employment Law Cases

- *Guzman v. NBA Auto., Inc., 68 Cal. App. 5th 1109 (2021)*
  - Plaintiff filed complaint with the California Department of Fair Employment and Housing ("DFEH"), identifying employer as "Hooman Enterprises, Inc." in the caption. In the "Additional Complaint Details" section, she identified her employer as "Defendant Hooman Enterprises Inc. DBA Hooman Chevrolet." Plaintiff then filed a lawsuit, naming "Hooman Enterprises Inc. DBA Hooman Chevrolet and DOES 1 to 10" as defendants. Defendant NBA Automotive, Inc., using name "Hooman Chevrolet of Culver City" filed an answer. Plaintiff later amended the name on her complaint and filed an amended complaint with the DFEH. The DFEH accepted, using the same filing date as the original complaint.
  - Defendant argued that Plaintiff did not timely file her administrative complaint. The trial court denied both motions and Defendant appealed.
  - Held former employee exhausted her administrative remedies despite incorrectly identifying the employer in her administrative complaint with the DFEH. The administrative complaint unmistakably identified NBA Automotive as the respondent, as any reasonable investigation would have revealed that NBA Automotive was Plaintiff's employer. Additionally, if an employee incorrectly names his or her employer in an administrative complaint, an employer should proceed with caution in arguing insufficient notice.

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Employment Law Cases

- *Smith v. BP Lubricants USA Inc., No. E073174, 2021 WL 1905229 (Cal. Ct. App., May 12, 2021)*
  - Smith's employer, Jiffy Lube, held a presentation for its employees to learn about a new Castrol product. Castrol employee Gus Pumarol made several comments during the presentation that Smith considered to be racist and offensive.
  - Smith sued Castrol (a dba of BP) and Pumarol for racial harassment under the Fair Employment and Housing Act and discrimination under the Unruh Act; Smith also sued Pumarol for intentional infliction of emotional distress ("IIED").
  - Held African-American employee to have sufficiently alleged claims for intentional infliction of emotional distress and Unruh Act violations against non-employer company and its representative where representative allegedly made racially offensive comments to employee in front of colleagues during training.

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Employment Law Cases

- *Pollock v. Tri-Modal Distrib. Servs., Inc., No. S262699, 2021 WL 3137429 (Cal. Jul. 26, 2021)*
  - On April 18, 2018, Pollock filed an administrative complaint with California's Department of Fair Employment and Housing ("DFEH") alleging quid pro quo sexual harassment in violation of the Fair Employment and Housing Act ("FEHA"). Employer Tri-Modal offered Gonzalez a promotion in March 2017. There was no evidence that Pollock knew or had reason to know that Gonzalez was offered the promotion and accepted it in March 2017.
  - At the time Pollock filed her DFEH complaint, the FEHA required employees seeking relief to file an administrative complaint with the DFEH within one year "from the date upon which the alleged unlawful practice . . . occurred."
  - Held that the statute of limitations in a failure to promote case brought under the harassment provision of FEHA begins to run when the employee knows or reasonably should know of the employer's allegedly unlawful refusal to promote the employee.

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Scenario #4

- The federal Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA") do not protect individuals who currently use drugs or abuse alcohol. However, these laws do protect persons who are former abusers of alcohol or illegal drugs and who have been successfully rehabilitated either through a supervised rehabilitation program or through their own program, and who no longer use illegal drugs or abuse alcohol.
- Paul's coworkers and supervisors have noticed that Paul has presented the odor of marijuana when walking into the workplace multiple times. Should the employer ask Paul to take a drug test? What does the employer need to know about Paul's history, if anything, before asking Paul to take a drug test? What are some considerations the employer should keep in mind?

Employment Law Legislation/Statutes

Implicit Bias Course Requirement for Nurses - AB 1407

- Requires nursing programs and schools to include one hour of direct participation in implicit bias training as a requirement for graduation.
- Registered nurses will also be required to complete one hour of implicit bias continuing education within the first two years of licensure.
- Hospitals must also implement an evidence-based implicit bias program as part of any new graduate RN training program.

Employment Law Legislation/Statutes

- Enforcement of Civil Rights under FEHA; Department of Fair Employment and Housing; Extending Retention of Personnel Records - SB 807
  - Extends the current requirement for retaining employee personnel records from two to four years.
  - If litigation has been filed, employers must retain such records until the applicable statute of limitations has run, or until the conclusion of the litigation, whichever occurs later.
  - Provides for tolling of the statute of limitations while the Department of Fair Employment and Housing investigates complaints of unlawful actions.

California Updates: Topic 5

Employment Agreements

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Employment Law Cases

- *Bannister v. Marinidence Opco, LLC, No. A159815, 2021 WL 2036529 (Cal. Ct. App., Apr. 30, 2021)*
  - Bannister worked in the administrative offices at a nursing facility for approximately three decades before Marinidence purchased the facility. A year later, Marinidence terminated Bannister. She sued, alleging discrimination, retaliation, and defamation.
  - Marinidence moved to compel arbitration, alleging that, when it took over the facility, Bannister electronically signed an arbitration agreement while completing the paperwork for new Marinidence employees. Bannister presented evidence that she never saw the agreement during the onboarding process.
  - Held that employer failed to authenticate employee's electronic signature on arbitration agreement where parties presented conflicting evidence as to execution and where no employee-specific usernames or passwords were required.

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Employment Law Cases

- *Chamber of Commerce v. Bonta, No. 20-15291, 2021 WL 4187860* (9th Cir. Sep. 15, 2021)
  - California's AB 51 prohibits employers from conditioning employment on an applicant's waiver of various rights, including the right to litigate. AB 51 applies to agreements to arbitrate. Penalties for employers who violate the provision are a fine of up to $1,000 and up to six months' imprisonment, as well as the potential for civil litigation brought by the California Department of Justice or by an individual in a private suit.
  - A group of business associations sued before AB 51 took effect, arguing that AB 51 both conflicted with and undermined the objectives of the Federal Arbitration Act ("FAA"). They filed a motion for a preliminary injunction.
  - Held that the FAA does not preempt Labor Code section 432.6's prohibition of mandatory employment arbitration agreements but does preempt the civil and criminal sanctions imposed for a violation of that provision.

"Hell, I was hoping we could avoid binding arbitration."

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Employment Law Cases

- *Crestwood Behavioral Health Inc. v. Lacy No. A158830, 2021 Cal. App. LEXIS 864 (Ct. App. Oct. 19, 2021)*
  - Lacy, an employee, filed a complaint with the state Department of Labor claiming her employer, Crestwood, had retaliated against her in violation of Labor Code section 98.7 for complaining about having been assaulted at work. Crestwood filed a petition to compel arbitration under the arbitration clause in Lacy's employment contract. The trial court compelled arbitration but also issued a stay of the DLSE proceedings.
  - Held that except when it issues a citation, the DLSE acts as an advocate in proceedings under Labor Code section 98.7 and thus should not have been stayed for proceeding while Lacy arbitrated her individual claim. If the Commissioner is acting as a prosecutor on behalf of the state, then the Federal Arbitration Act is inapplicable and does not prevent the Commissioner from investigating and acting on a retaliation complaint.

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Employment Law Legislation/Statutes

- Timing of Fees and Costs Due in Arbitration - SB 762
  - Arbitration fees in employment and consumer arbitrations, must be paid upon receipt of invoice unless the arbitration agreement expressly establishes a payment schedule.
  - Prevents employers from causing delay in arbitration proceedings by failing to timely pay fees or asking for extensions, unless all parties agree.
  - Requires the time specified in a contract of adhesion for the performance of an act performed to be reasonable.

Employment Law Legislation/Statutes

- Restrictions on Confidentiality and Non-Disparagement Provisions in Settlement and Severance Agreements - SB 331
  - Non-Disclosure provisions in Settlement Agreements:
    - Prohibits language within a settlement agreement that bars disclosure of factual information relating to any claim for workplace harassment, retaliation, or discrimination based on characteristics protected under the Fair Employment and Housing Act.
    - Employers may include language prohibiting disclosure of the settlement amount.
  - Non-Disparagement Agreements for current and separating employees
    - Prohibits employers from requiring an employee to sign a release of claims or non-disparagement agreement "denying the employee the right to disclose information about unlawful acts in the workplace" in exchange for a raise, bonus, as a condition of employment or continued employment, or upon separation.
    - Non-disparagement provisions are permitted only if they contain this disclaimer or substantially similar language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."
    - Requires employer offering employee a separation agreement to notify employee that they have the right to consult with an attorney and must provide the employee at least five business days for consultation. Employee may sign this agreement prior to the expiration of the consultation period, so long as the decision is informed and voluntary.

California Updates: Topic 6

Workplace Safety, COVID-19

Employment Law Legislation/Statutes

- COVID-19 Exposure Notification – AB 654
  - Amends Labor Code section 6409.6 to require employers to give notice to the local public health agency of a COVID-19 outbreak within 48 hours or one business day, whichever is later.
  - Employers must also provide notice to employees and certain entities (e.g., employers of subcontracted workers that were at the worksite).
  - Expands the list of employers that are exempt from the public health agency reporting requirements to include various licensed entities, including, community clinics, adult day health centers, community care facilities, and child day care facilities.

Employment Law Legislation/Statutes

- Expansion of Employee Recall Rights – SB 93
  - Provides recall rights to "qualified" employees who were employed by covered employers for six months or longer during the 12 months before January 1, 2020, worked at least two hours per week, and were laid off due to a reason related to COVID-19.
  - Covered employers include hotels, private clubs, event centers, airport hospitality operations, airport service providers, or building service providers (i.e., janitorial service).
  - Covered employers must follow specific requirements to provide notice of job openings to "qualified" employees.

Employment Law Legislation/Statutes

- Enterprise-Wide and Egregious Health and Safety Violations - SB 606
  - Creates two new Cal/OSHA violation categories: (1) enterprise-wide violations, and (2) egregious violations.
  - Enterprise-wide violations
    - Creates a rebuttable presumption that a violation committed by an employer with multiple worksites is "enterprise-wide" if Cal/OSHA determines that the employer has a written policy or procedure that violates certain safety rules or Cal/OSHA has evidence of a pattern or practice of the same violation involving two or more of the employer's worksites.
  - Egregious violations
    - Gives Cal/OSHA authority to issue a citation for an "egregious violation" if it believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order or regulation based on at least one of seven factors outlined in the statute (see Lab. Code sec. 6317(b)(1)-(7)).
    - The conduct underlying the violation must have occurred within 5 years of the citation.
    - Each instance of an employee exposed to that violation is to be considered a separate violation for the issuance of fines and penalties.

Scenario #5

- A company has multiple employees who work in-person on the employers' property. An outbreak occurs on the property, according to the definition provided by Cal/OSHA. Some of the employees that have tested positive are asymptomatic, fully-vaccinated employees.
- Generally, what are the employer's next steps? Does the employer need to inform any specific people or agencies about the outbreak? How soon must the employer inform those other parties? What additional information, if any, do you need in order to provide these next steps?

California Updates: Topic 7

Labor Law

Employment Law Cases

- *Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)*
  - A California state regulation allowed labor organizers onto private agricultural property during non-work time to talk with employees and solicit their support. Labor organizers' access to this property was strictly limited, and the California regulation stipulated when, for how long, and where labor organizers could access the property to speak with agricultural employees, specifically forbidding "conduct disruptive of the employer's property or agricultural operations." The owners of private agricultural properties challenged the California regulation, arguing that it violated the Takings Clause of the Fifth Amendment.
  - Held a California labor regulation that allows union representatives a "right to take access" to an agricultural employer's property constitutes a physical taking and thus a per se violation of the Takings Clause of the Fifth Amendment.

Scenario #6

- An employer has a private agricultural business that requires its employees to harvest cashews on the employer's property. While the employees were taking a break in the middle of the day, labor organizers arrived on the employer's property without the employer's permission to talk to employees.
- The purpose of the labor organizers' visit was to provide information on their cause and to solicit the employees' support. Was the labor organizers' conduct permissible? If not, what should the employer do, and what violations possibly occurred?

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Employment Law Cases

- *Wilson-Davis v. SSP America Inc., No. B306781, 2021 WL 1338078 (Cal. Ct. App. Mar. 11, 2021)*
  - Plaintiff, individually and on behalf of a putative class, filed suit against his employers, SSP, alleging violations of various provisions of California's wage and hour laws.
  - SSP moved to compel arbitration under the collective bargaining agreement (CBA) between it and the labor union representing plaintiff.
  - Held a collective bargaining agreement will not be interpreted as requiring arbitration of statutory wage-and-hour claims unless it contains a clear and unmistakable agreement to arbitrate such claims.

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NLRB Decisions

- *Castro Valley Animal Hospital, Inc.*, 370 NLRB No. 80 (2021)
  - Held employer violated Section 8(a)(1) by threatening employee with termination if she did not waive her complaints about overtime and breaks; reporting that employee to the police; and terminating that employee and another employee.
- *Sameh H. Aknouk Dental Services, P.C.*, 370 NLRB No. 78 (2021)
  - Held employer violated Section 8(a)(5), (3), and (1) by threatening employees with discharge if they continued to protest changes to their terms and conditions of employment; threatening employees with unspecified reprisals if they continued to support the Union and engage in other protected activities; promising improved working conditions if employees abandoned their support for the Union; reducing employees' work hours because they supported and assisted the Union; bypassing the Union and dealing directly with employees by consulting them about changing their pension plan and health insurance; bargaining directly with employees to change their wages and pension benefits; and failing to make contributions to employees' health insurance plan.

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NLRB Decisions

- *Medic Ambulance Service, Inc.,* 370 NLRB No. 65 (2021)
  - Held employer to have violated Section 8(a)(1) by maintaining rules prohibiting conducting personal business on company time or property and soliciting or distributing literature during working hours.
  - Also held the employer did not violate Section 8(a)(1) by maintaining provisions in its Social Media Policy prohibiting inappropriate communications, disclosure of confidential information, use of the company's name to denigrate or disparage causes or people, and the posting of photos of coworkers, finding that those rules are not unlawful when read in the context of the specific guidelines that followed.

NLRB Decisions

- *AT&T Mobility, LLC*, 370 NLRB No. 121 (2021)
  - Overruled the "applied to restrict" prong of the Lutheran Heritage-Livonia analysis which finds that work rules that have been enforced to interfere with employees' Section 7 rights are also unlawful to maintain.
  - Held the "applied to restrict" standard ignores legitimate and often compelling interests of employers in maintaining lawful work rules by invalidating otherwise lawful work rules based on a single instance of unlawful application.
  - Also held the remedy for "applied to restrict" violations, i.e., rescission and republication of rules, is unnecessary and ineffective, given that the rules themselves are lawful under the Act. Instead, employers who apply lawful work rules to interfere with protected rights to address the violation directly through a posted notice informing employees that it will no longer apply that rule to interfere with Section 7 rights.

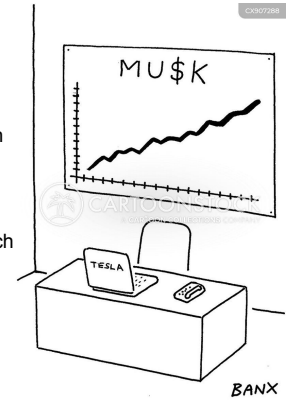
NLRB Decisions

"Your Christmas bonus was that I didn't fire you!"

- *Asociacion de Empleados del Estado Libre Asociado de Puerto* Rico, 370 NLRB No. 71 (2021)
  - Held that employer may unilaterally decrease employees' Christmas bonuses in 2017 following expiration of the 2013-2017 collective-bargaining agreement. The status quo under the expired agreement was for the employer to pay employees only the minimum bonus required under a local statute because "modifications" (higher bonuses) were limited to the years 2013-2016.
- *Dish Network, LLC*, 370 NLRB No. 97 (2021)
  - Held employer violated Section 8(a)(1) by maintaining a mandatory arbitration agreement that restricts employees' right to file charges with the Board and by maintaining a requirement in the Agreement that settlements be kept confidential.

NLRB Decisions

- *Tesla, Inc.*, 370 NLRB No. 101 (2021)
  - Held that employer violated Section 8(a)(1) by coercively interrogating employees, promulgating a rule restricting employees' use of a software program in response to protected activity, and threatening employees with the loss of their stock options if they selected the Union as their representative.
  - Also held that employer violated Section 8(a)(1) by maintaining the broad and unclear media-contact provision in its Confidentiality Agreement, which prohibited employees from communicating with the media regardless of whether the communications concern confidential information or the employees purport to speak on the employer's behalf.



NLRB Decisions

- *Temple University Hospital, Inc.*, 370 NLRB No. 106 (2021)
  - Held that the doctrine of judicial estoppel is not available to defeat NLRB's jurisdiction.
- *Alcoa Corporation,* 370 NLRB No. 107 (2021)
  - Held employer to have violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with the names of employees who provided witness statements during the disciplinary investigation and by delaying in providing the Union with the dates the witnesses were interviewed.
  - Also held that employers may instruct witnesses to keep their investigative interviews confidential, reasoning that confidentiality instructions that are limited to the duration of an investigation are categorically lawful. The NLRB will look at the surrounding circumstances to determine what employees would have reasonably understood concerning the duration of required confidentiality.

NLRB Decisions

- *Rush University Medical Center and Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees Union Local 743 affiliated with The International Brotherhood of Teamsters,* 370 NLRB No. 115 (2021)
  - Held that in determining whether the COVID-19 cases at the facility would reasonably be expected to affect the conduct of a manual election, the Centers for Disease Control's determination that new variants of COVID-19 exist does not constitute a "compelling circumstance" within the meaning of Aspirus factor 6 to change the mail ballot election into a remote one.
  - To change the manual ballot method, there must be a covid outbreak, or a "similarly compelling circumstance."

"Last year I gave my husband Covid for Christmas, so I'll probably give him a variation of that."

NLRB Decisions

- *Confidence Management Systems*, 370 NLRB No. 123 (2021)
  - Held employer violated Section 8(a)(5) and (1) by bypassing the Union and discontinuing a wage increase implemented during the COVID-19 pandemic, without first notifying the Union or providing the Union an opportunity to bargain.
- *Brinker International Payroll Company L.P*, 370 NLRB No. 137 (2021)
  - Held that employer violated Section 8(a)(1) by maintaining a mandatory arbitration agreement that, when reasonably interpreted, interferes with employees' access to the NLRB and its processes.
  - Also held that the agreement's broad reference to "an employee's ability to complete any external administrative remedy (such as with the EEOC)" did not serve as a sufficient savings clause.

NLRB Decisions

- *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16 (2021)
  - Held that employee engaged in protected conduct concerning employer's overtime procedures when he wrote "whore board" on employer's overtime signup sheets and that his conduct was not so egregious as to cause him to lose the protection of the Act.
  - Also held that employer may not argue of potential conflict between an employer's duties under the NLRA and under antidiscrimination laws if employer fails to show that it would have suspended and discharged the employee for misconduct under antidiscrimination laws even absent his protected Section 7 activity.

Practical Tips for 2022

Hiring Guidelines

"In five years, I see myself with the same job title, about the same salary, and significantly more responsibilities."

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Employer Policies and Employee Handbooks

"How much clearer can it be, Fred? On page forty-one of the employee handbook, in black and white, it says: 'Never run with scissors!'"

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Employer Policies and Employee Handbooks

"Now hold on, Mike. You're talking about embezzlement! And unless I'm very mistaken, that's strictly prohibited in the company's employee handbook!"

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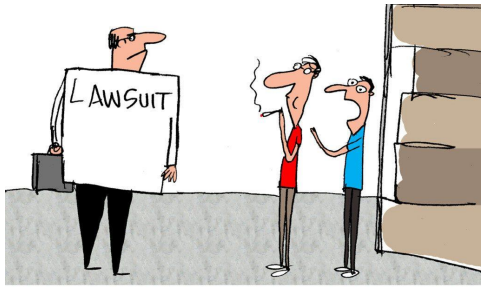

"Is it my imagination, or has that guy been hanging around once we were allowed to start smoking pot here at work?"

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THANK YOU!

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