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Labor and Employment Law Update for 2022

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Trends in Employment Practices Liability Insurance

- **EPL Coverage**
  - Sexual harassment, discrimination, wrongful termination, and retaliation claims
  - Whistleblower, breach of privacy, negligent hiring, emotional distress, slander, Family and Medical Leave Act, Americans with Disabilities Act, punitive damages, wage and hour defense, third-party liability, violence, brand damage
  - Mismanagement claims can arise if a company fails to comply with employment-related rules and regulations, bleeding from EPL into D&O

- **Social, Legislative, Legal and Technological Trends**
  - Each social trend has affected claim levels, "each of these movements triggers the passage of new employee protections at the state, local, and even federal level."
  - #MeToo, Black Lives Matter, Stop Asian Hate

Trends in Employment Practices Liability Insurance

- **Coronavirus Pandemic**
  - Generate layoffs and claims - claims related to returning to work, not invited to return to work, required to take a vaccine and refuses
  - Claims expected: discrimination, wrongful termination, and breach of privacy claims
  - Discrimination is becoming a focus on two fronts: there is a very real expectation in the market that furloughs, terminations, and the subsequent re-hiring process, due to the COVID-19 pandemic, will create an onslaught of wrongful termination and re-hiring discrimination claims
  - D&O claims related to discrimination and a lack of diversity at the board level
  - Under FFCRA - private employers with less than 500 employees are required to provide Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFMLA) to their employees under certain circumstances relating to COVID-19. Employers who fail to acknowledge and comply with the new laws could easily find themselves embroiled in a costly EPL claim.
  - Inadequate health and safety precautions to prevent the spread of the virus, to failing to inform shareholders of, and even downplaying the significant impact of COVID-19

Trends in Employment Practices Liability Insurance

- **Coverage is Getting More Expensive**
  - Prices and retention levels are increasing anywhere from 5 percent to 30 percent

- **Denial of Coverage**
  - States like California, New Jersey, New York, and Illinois are hotbeds for legislative activity and claims. Some underwriters will not take on a company in California or the Los Angeles or San Francisco Bay area because of their litigious environments
  - Industries difficult to place coverage: hospitality, transportation, entertainment, or auto industries and due to COVID-19, the healthcare

- **Serious Questions on Application – Underwriters are looking at:**
  - Audits and company Financials required
  - When policies and procedures were last updated, **their employment law counsel**, what training is provided
  - Comments on sites such as Glassdoor and Indeed

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Trends in Employment Practices Liability Insurance

- **What to Do**
  - Review your current policies for any gaps in coverage
  - Make sure your choice of counsel is approved during the application process or as part of your policy review
  - Work with your broker to identify areas of risks
  - Look into what EPL & D&O policy and the cost to protect your organization

Question & Answer

- Please use the chat box or Q&A section to share questions you have for our presenters.

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Treaver Hodson, Esq.

- 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)

7 Supreme Court 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.

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.

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

US Supreme Court Cases

Coverall North America Inc. v. Rivas

Uber Technologies Inc. v. Gregg

Lyft Inc. v. Seifu

Postmates LLC v. Rimler

Postmates LLC v. Santana

- 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.

- A few years later, relying on the FAA, which requires courts to honor arbitration agreements, the US 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 FLSA.

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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California Updates

Wage and Hour

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.

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.

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 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.

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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

- 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.

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.

QUESTION 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? Yes or no?
- 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? Yes or no?

California Updates

Leave of Absence

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."

QUESTION 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. Should the employer terminate Heather's employment, but write her a very nice note inviting her to reapply once she is able to return to work? Yes or no?

California Updates

Equal Employment Opportunity

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.

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.

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.

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.

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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.

QUESTION 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?

QUESTION 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? Yes or No?

California Updates

Employment Agreements

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.

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.

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

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

- 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.
- 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.
- 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.

"Can't tell one from another with those protective face masks."

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.

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.

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.

QUESTION 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.
- Should the employer gather the employees together and require they sign a confidentiality agreement that they will not tell anyone about the outbreak and threaten to fire them if they do? Yes or no?

California Updates

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.

NLRB Decisions

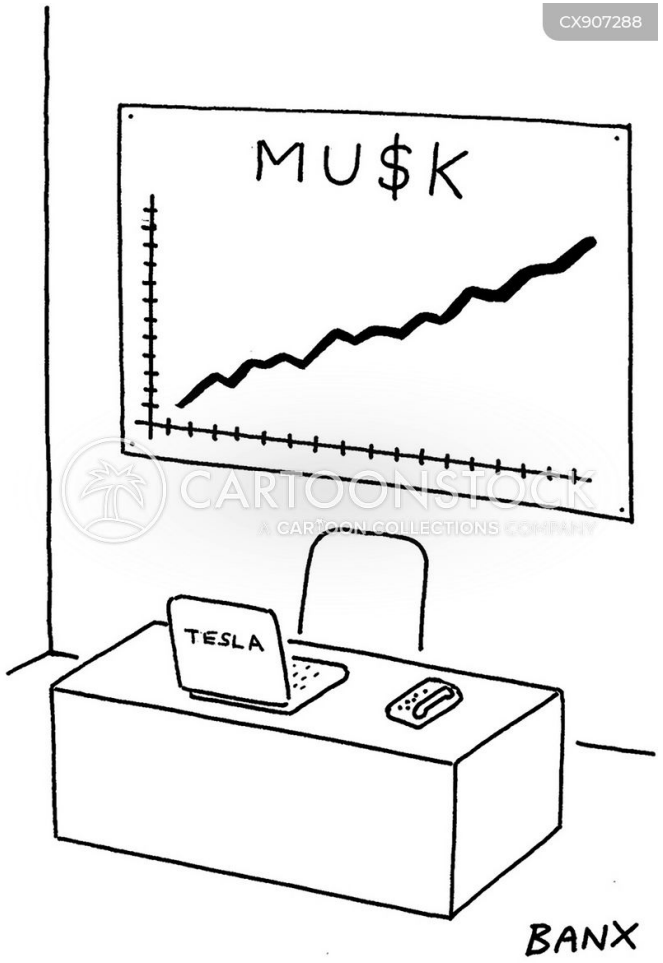
- *Castro Valley Animal Hospital, Inc.*, 370 NLRB No. 80 (2021)
  - Held employer violated Section 8(a)(1) by threatening employee with termination if she did not waive her complaints about overtime and breaks; reporting that employee to the police; and terminating that employee and another employee.
- *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.

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

- *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

- *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.

QUESTION 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. Should the employer call law enforcement for violation of trespass laws? Yes or no?

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Palmer Kazanjian Wohl Hodson LLP Attorneys

Thank you for joining in on another informational

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See you next time!