

Employment Law Webinar: Weathering the Post COVID Litigation Storm

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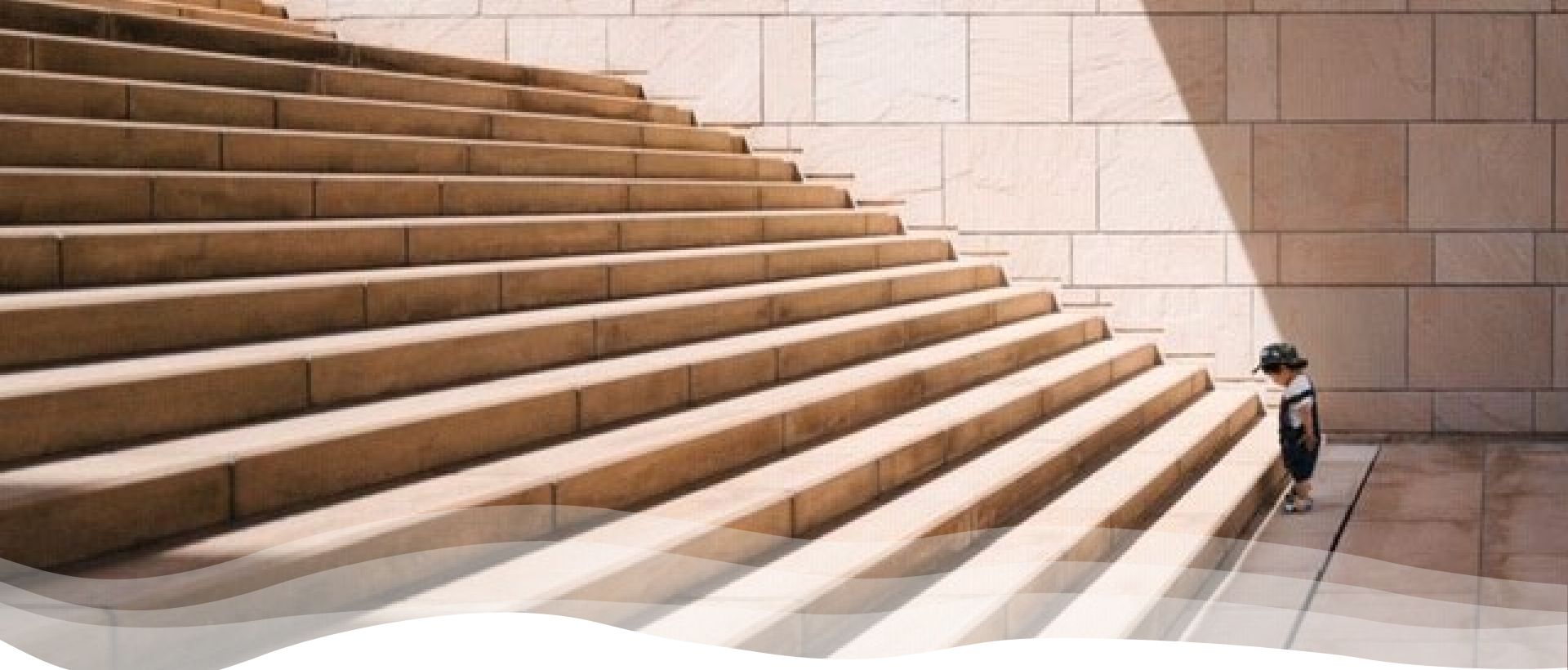
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Employers Dealing with Legal Compliance Pre-COVID



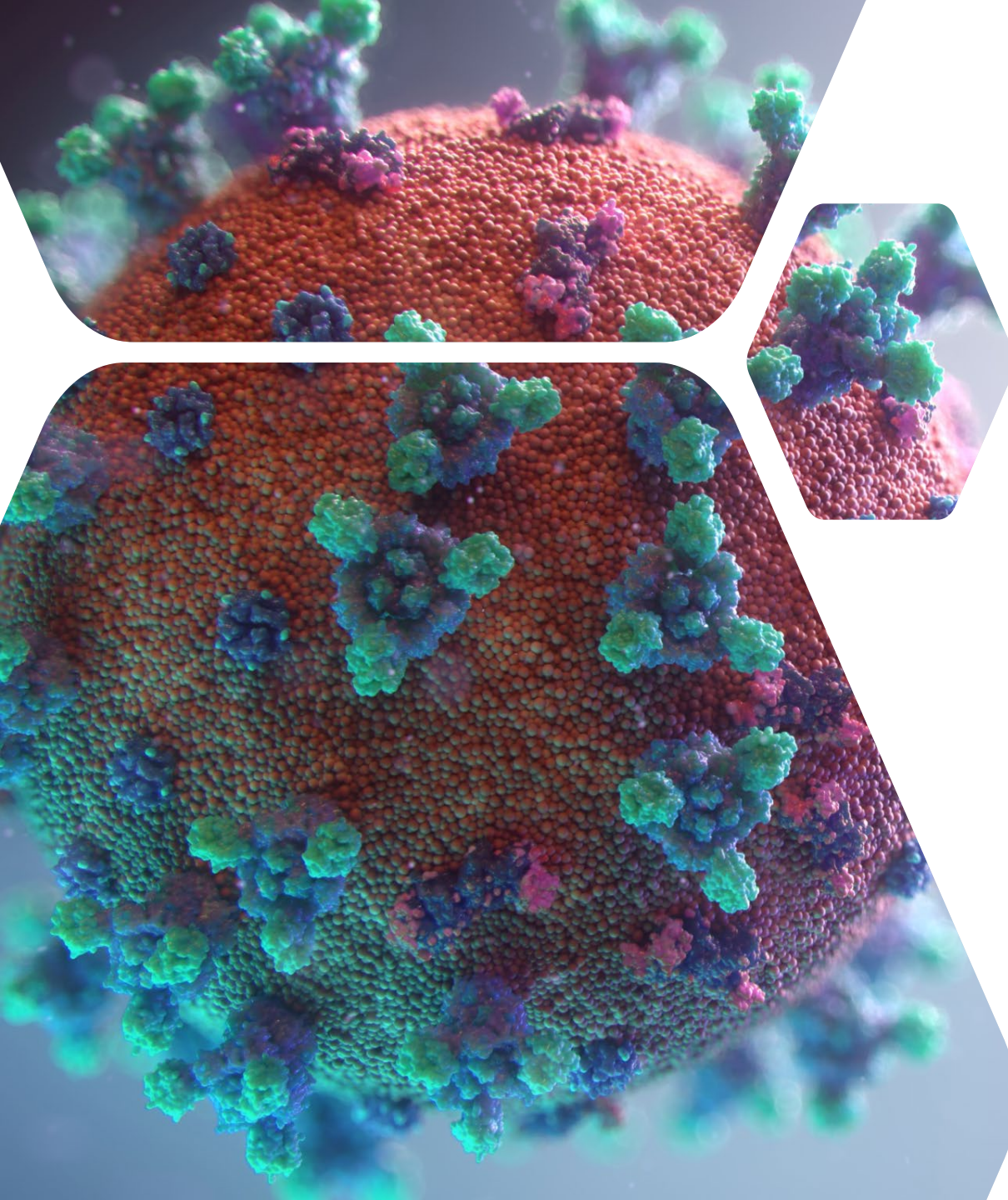
Employers Juggling All the New Laws and Safety Protocols DURING COVID

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So Now the
World is
Re-Opening,
What Can
Employers
Expect?



Bad News: Employers Have More Risks Now Than Ever

- New safety and leave laws which emerged during COVID
- Overlay of existing laws applied to new situations
- Challenges of businesses closing, re-opening, and rightsizing/re-adjusting
- Lurking discrimination, bias and harassment claims
- Claims from remote workers
- Increased wage and hour litigation due to recent case law



The Good News: We Are Here to Help





General Legal Obligations – Federal and State Statutes

- OSHA – protect employees' health & safety
- Protect privacy – California Constitution
- Protect against discrimination under Americans with Disabilities Act, Title VII, and California Fair Employment & Housing Act
- Provide leaves of absence under FMLA/CFRA/FFCRA
- California and local sick pay law
- Obligations to pay – California Labor Code and Wage Orders, FLSA
- WARN Act – 60 days advance notice of mass layoff or closing
- COBRA – continuation of benefits
- Worker's Compensation laws



Safety and Whistleblower Issues

- The presence of a worldwide pandemic has required employers to put workplace safety front and center
- Leaves the door open for whistleblower claims based on safety complaints or retaliation for refusal to work in unsafe conditions
- OSHA has made it clear that refusal to work due to “general fear of pandemic” is not grounds for wrongful termination or even unemployment insurance. Must articulate some specific safety complaint
- SB- 1159 - Rebuttable presumption that COVID is work related for certain first responder and health care employers, and for “outbreaks” of COVID in the workplace



Lay-offs, Closures, Re-Hires and Rightsizing



A worldwide pandemic is not a hall pass or an excuse to clean house!

- Employers must still justify all employment actions
- That includes who should stay and who should go
- If anything other than objective factors used, such as seniority, an employment action may well be questioned
- Be wary of precariously timed actions
- Also be mindful of other adverse actions based on claims of bias (women being disparately impacted when schools are closed – how will this impact their career trajectory in the long term?)

California's Fair Employment & Housing Act (FEHA) Prohibits Discrimination based on:

- Age (40 or older)
- Ancestry
- Color
- Marital status
- Medical condition
- Mental disability
- Military and veteran status
- National origin
- Physical disability
- Race
- Religious creed, including religious dress and grooming practices
- Genetic information
- Sex, including:
 - Pregnancy
 - childbirth
 - medical conditions related to pregnancy, childbirth, or breastfeeding
- Gender
- Gender identity
- Gender expression, or perception by a third party of any of the aforementioned
- Sexual orientation including,
 - heterosexuality
 - homosexuality; and
 - bisexuality





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Plus, Federal Law Prohibits Discrimination on:

- Gender (including pregnancy and sexual orientation and transgender), Race, Color, and Religion (Title VII)
- Age (Age Discrimination in Employment Act)
- Mental/physical disability (ADA)
- Citizenship (Immigration Act)
- Veteran status (Veteran's Act)
- Bankruptcy (Bankruptcy Act)

Claims for Paid Time Off and Leaves

- Existing Law:
 - Employees entitled to time off under state and local sick pay laws, FMLA/CFRA/ADA
 - Paid under sick pay, vacation (optional), state (SDI and PFL), employer private STD insurance
 - Health insurance per FMLA (12 weeks)





Claims for Paid Time Off and Leaves - New Law



- Families First Coronavirus Response Act (FFCRA)
- Affects employers of under 500 employees (possible exclusions for employers under 50 and healthcare related)
- Two different kinds of protected paid leave
- Emergency Paid Sick Time (EPST) and Amendments to FMLA – Public Health Emergency Leave (PHEL)
 - Ee under quarantine or isolation order; self isolated; has symptoms and is seeking diagnosis; is caring for someone (anyone!); is caring for child and school is closed;
 - Amount: 80 hours (10 days) for FT employees for EPST, additional ten (10) weeks for (PHEL)
 - Ee’s pay, capped at \$511 day (x 10 days) or \$200 day (x 10 days) depending on reason for use, or for PHEL
- Large Employer Sick Leave – for Employers OVER 500
- CFRA expanded to FIVE employees in 2021





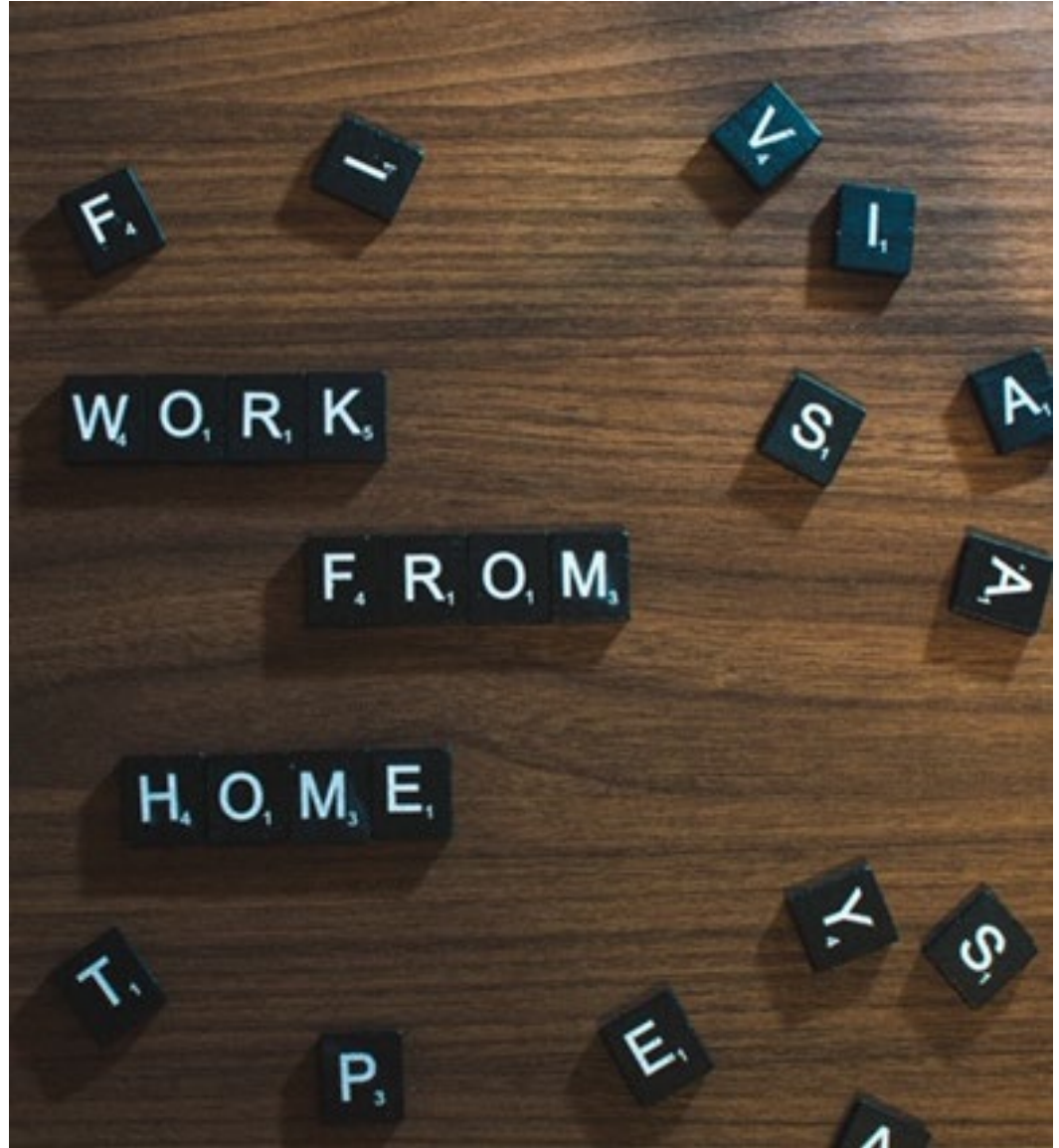
- An employee gets pregnant and her doctor doesn't want her working around COVID? Can she choose to work remotely? What if the rest of the workforce has returned to work?
- What about an employee who is over 65 but does not want to remain at home? Is it safe to have him return?
- What if an employee claims she is "too anxious" to work and her doctor has given her a leave of absence for stress "due to the pandemic"?

Nuances with Various Disability, Accommodation and Leave Issues

Issues Related to Remote Work

Remember wage and hour compliance:

- Track hours and breaks carefully, even when people are working from home
- Watch “off the clock” work
- Reimburse for out of pocket expenses (Labor Code Sec 2802) WiFi, cell phone, possible equipment costs
- Converting “salaried employees” to hourly
- If an employee “permanently” converted to remote status and then drives to office or anywhere else, drive time must be compensated





Other COVID related wage and hour issues

- Layoff v furlough v termination
- Labor Code requires final pay of all wages upon termination, including vacation pay. So, when does a furlough become a layoff or termination?
- Sick pay is NOT required to be paid upon termination. But see, Memo from City of LA – requiring payment of sick pay for furloughed employees, that was issued prior to FFRCA. Not sure if that has or will be enforced. All these issues are moving targets.



Most Recently, California Supreme Court Greatly Restricts Settlement of PAGA Claims

- March 16, 2020 – *Kim v Reins International*, the Cal Sup Ct held that even though the lead Plaintiff Kim had settled his claims and was no longer “aggrieved,” the PAGA case could continue.
- The *Kim case* essentially removes the individual settlement agreement from employers’ defense strategy in fighting PAGA cases. This had been a valuable weapon in defeating these expensive and prolific lawsuits.
- The state courts are now plagued with the difficult challenges of how to manage the settlement of these PAGA cases, since the Supreme Court has made it clear that these interests partially belong to the State.
- Just underscores why compliance and employee morale will be so much more important in the coming months and years.



What is a PAGA Lawsuit Again?

- PAGA stands for Private Attorney General Act, Labor Code Sec 2698, et seq
- Allows one employee to bring a “representative action” on behalf of “all other aggrieved employees” for violations of various Labor Code Sections that previously only the Labor Commissioner could enforce.
- Penalties are awarded on a “per payroll” basis for such conduct as inaccurate paystubs, break violations, record keeping violations, but calculated on a per employee basis. Penalties can be stacked and can add up to millions of dollars.
- Portion of award (75%) paid to the State, (25%) split amongst all “aggrieved” or harmed employees, even if they did not do same work as representative employee, and even if rep did not suffer same harm. And attorneys get their fees.



Don't worry . . .

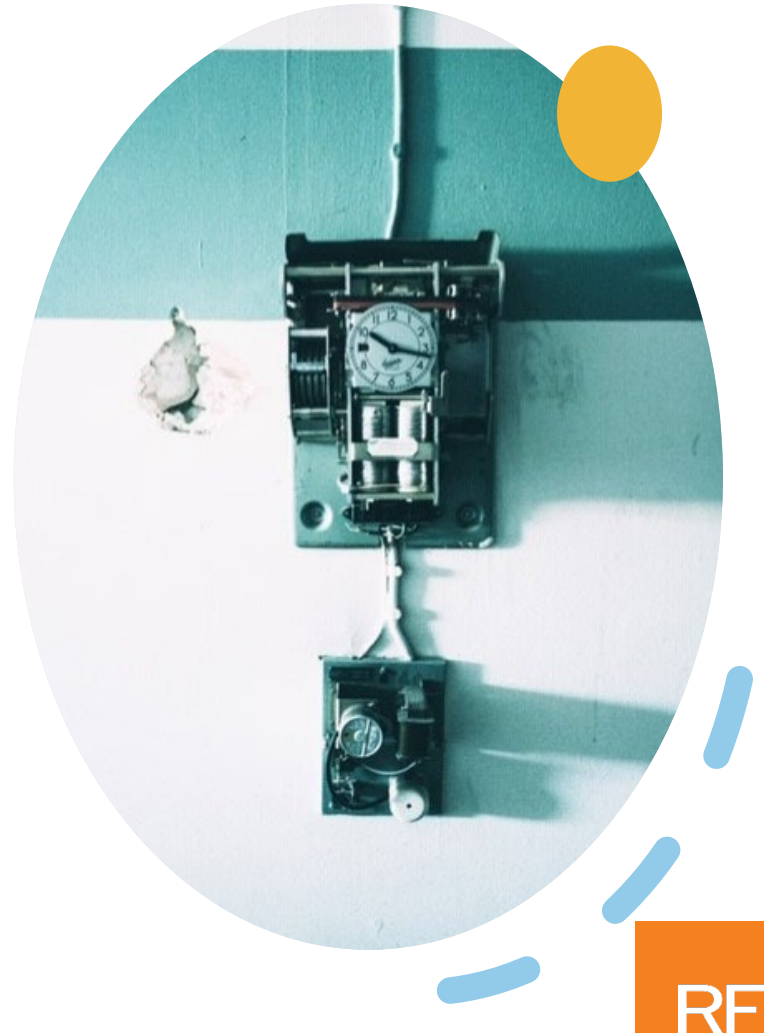
**GOOD
NEWS
IS COMING**

We Are Here to
Help



COMPLIANCE!

- Audit and update all written policies, handbooks, wage stubs, forms and agreements, and toss old ones!
- Go electronic. It's nearly 2021
- Audit your wage and hour practices, including classifications
- Specifically audit your break compliance procedures, including rest breaks
- Immediately implement an arbitration agreement with a class action waiver
- Management training. Nothing matters otherwise
- Consider anonymous reporting channels. www.kendr.com



But Nothing
Is More
Important
Than Just
Treating Your
Employees
Well



Employees who are not happy find reasons to seek out lawyers

Lawyers will find a reason to file a lawsuit, for any or none of the issues we have discussed above

Employer Risk & Human Capital Resources

Employment Practices Resources

- Understand The Exposures and Severity of an EPL Lawsuit
- Updated Protocols and Policies - Distribute!
- EPL Carrier Employer Hotline

Employee Benefits Resources

- Follow Your Plan Documents
- ThinkHR
 - Compliance Updates
 - Learning Modules
 - Update on State Requirements
 - Summaries
- Support Employees
 - Carrier Resources
 - Benefits Consultant

The collage features three overlapping documents from EPIC:

- Compliance Alert:** Titled "Cafeteria Plans Series: Health FSAs and Health Savings Account Interaction" dated April 1, 2018. It includes a "Quick Facts" section with bullet points about Health Flexible Spending Accounts (FSA) and Health Savings Accounts (HSA). The text explains that FSAs allow employees to increase their spendable income by allowing them to pay qualifying medical expenses with pre-tax dollars, while HSAs are tax-favored accounts for health care expenses. It also defines a Health FSA as a qualified benefit under a cafeteria plan.
- EPIC CLIENT:** A document titled "HIPAA Privacy & Security" dated June 30, 2018, identified as a "Compliance Resource Toolkit".
- EPIC Insurance Brokers and Consultants:** A document titled "WRAP PLAN DOCUMENT AND SUMMARY PLAN DESCRIPTION" for Plan Number 501, effective January 1, 2018, and marked as a draft.



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Upcoming Webinars

**Workers' Compensation Webinar Series
AB 685 – What you need to know to avoid
penalties in 2021**

December 3, 2020

Annual Employment Law & Benefit Update
December 8, 2020 & January 13, 2020