Employment Law & Benefits Update

December 9, 2021

January 11, 2022

Susan Bishop

Partner

Berliner Cohen

Eileen Kennedy

Partner

Berliner Cohen

Liz Mann

Director of Compliance

EPIC Insurance Brokers & Consultants

Bob Carrington

Vice President, Employee Benefits

EPIC Insurance Brokers & Consultants

EPIC by the Numbers

TOP 10

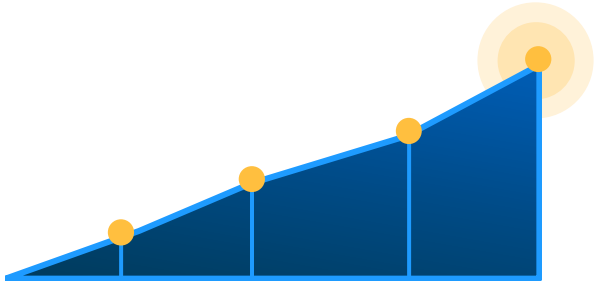
PRIVATELY HELD INSURANCE BROKERAGE
INSURANCE JOURNAL

TOP 15

LARGEST BROKERS OF U.S. BUSINESS
BUSINESS INSURANCE

TOP 20

BROKER WORLDWIDE
FINACCORD



REVENUE GROWTH

$744+ MILLION

RETAIL RUN RATE REVENUE

2,600+ EMPLOYEES

NATIONWIDE
OFFICES
WITH
REGIONAL PRESENCE

VOTED BEST PLACE TO WORK

IN THE INSURANCE INDUSTRY

CONSISTENTLY RECOGNIZED NATIONALLY SINCE 2009

2022 Employment Law Update

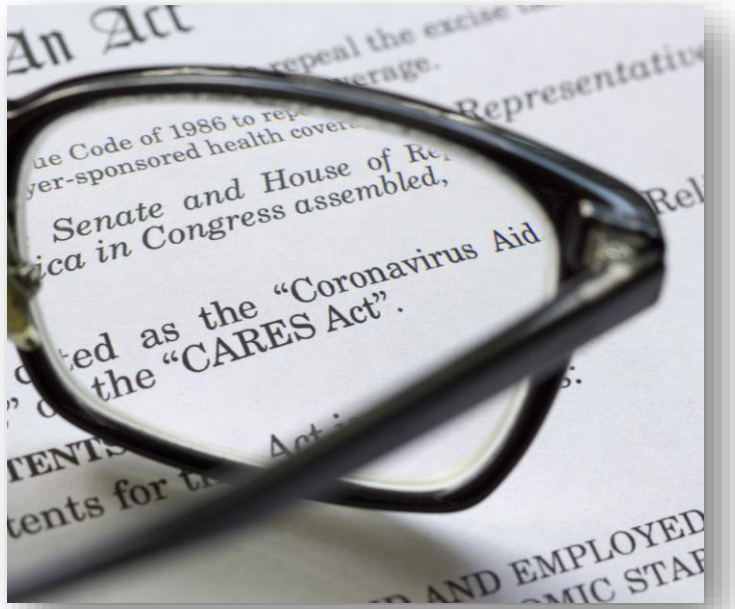
BERLINER COHEN LLP

Presented By:

Susan E. Bishop

Eileen P. Kennedy

COVID-19: Where Are We Now?



- Mandatory FFCRA expired December 31, 2020. All tax credits for FFCRA leave expired September 30, 2021.
- California supplemental paid sick leave (SPSL) law, which required certain employers to provide paid leave to employees for qualifying COVID-19-related reasons, **expired** on September 30, 2021.
- The Occupational Safety and Health Administration's vaccine-or-test rule currently requires private employers with 100 or more employees to require unvaccinated employees to get vaccinated or to test weekly and to wear masks. **The Supreme Court has not yet ruled on whether OSHA has the authority to implement the rule.**
- Some local paid sick leave (COVID-related) provisions expired; general local paid sick leave provisions remain; check your local city/county.

Federal OSHA Emergency Temporary Standard

- Applies to private employers with 100 employees or more
- Fully vaccinated means: two weeks after receiving second shot of Moderna or Pfizer or single shot of Johnson & Johnson (does not require booster shot).
- Implement policy requiring testing weekly or showing proof of full vaccination
- Must show copy of vaccination card to prove vaccination status (exceptions apply if the employee cannot prove vaccination status
- Reporting COVID-19 illness/death and record-keeping requirements
- Confidentiality of all medical records applies

Cities with Specific Sick Leave Policies related to COVID 19

Local Paid Sick Leave polices related to COVID-19 may or may not be have been modified or expired. When the need arises, check the appropriate locality to determine if the sick leave policy is still in effect.

- San Jose
- Long Beach
- Los Angeles City
- Los Angeles County (unincorporated areas)
- Marin County (unincorporated areas)
- Oakland
- San Mateo County (unincorporated areas)
- Santa Rosa
- Sonoma County (unincorporated areas)

What’s Left for COVID Regulations?

California’s COVID-19 Prevention Emergency Temporary Standards (“ETS”) are still in effect. The workplace standards were updated again on December 28, 2021 and January 6 & 7, 2022 to include requirements for vaccinated and unvaccinated workers.

In addition to these requirements, employers must follow public health orders on COVID-19.

Emergency Temporary Standard Requirements (Cal OSHA ETS)

Employers must establish, implement, and maintain an effective written COVID-19 Prevention Program that includes:

- Identifying and evaluating employee exposures to COVID-19 health hazards.
- Policies and procedures to correct unsafe and unhealthy conditions.
- Allowing adequate time for handwashing and cleaning frequently touched surfaces and objects.
- Make testing available at no cost to employees who have had a “close contact” (as defined in the ETS) with a person with COVID-19, and in the case of multiple infections or a major outbreak, make testing available at no cost on a regular basis for employees in the exposed work areas. This requirement does not apply to exposed employees who are fully vaccinated and have no symptoms, except during major outbreaks.
- Exclude COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk. Exposed employees who are fully vaccinated (including booster) and have no symptoms do not need to be excluded.
- Employers must evaluate ventilation systems to maximize outdoor air and increase filtration efficiency and evaluate the use of additional air cleaning systems.
- Employers must provide effective training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related benefits that affected employees may be entitled to under applicable federal, state, or local laws.
- Cal/OSHA has posted a Model COVID-19 Prevention Program on its website for employers to use.

ETS Requirements – Mandatory Exclusions

Mandatory Exclusion from the worksite for Employees who have COVID-19 symptoms, a positive test, or Close Contacts if they have not been fully vaccinated.

STATUS	EXCLUSION?	TIME PERIOD OF EXCLUSION	WAGES?
Employee positive for COVID-19	Must be excluded from work regardless of vaccination status	Employees who test positive for COVID-19 must be excluded from the workplace for at least 5 days. Isolation can end and employees may return to the workplace after day 5 if symptoms are not present or are resolving, and a diagnostic specimen* collected on day 5 or later tests negative. * Antigen test preferred. If an employee is unable or chooses not to test[i] and their symptoms are not present or are resolving, isolation can end and the employee may return to the workplace after day 10. If an employee has a fever, isolation must continue and the employee may not return to work until the fever resolves. If an employee's symptoms other than fever are not resolving, they may not return to work until their symptoms are resolving or until after day 10 from the positive test. Employees must wear face coverings around others for a total of 10 days after the positive test, especially in indoor settings.	An employee would typically receive pay for the period the employee is excluded, which could be 10 or more days. If an employee is out of work for more than a standard exclusion period based on a single exposure or positive test, but still does not meet the regulation's requirements to return to work, the employee may be entitled to other benefits, such as Temporary Disability, Disability, or Workers' Compensation.
Employee has symptoms of COVID-19	Must be excluded from work	The Quarantine/Isolation Period is at least 5 days. Employees with symptoms should test immediately and again on the 5th day. If the second test is negative, symptoms do not exist or subsided and no fever, person may return to work. If positive test, or fever still present or symptoms have not subsided, isolate for 10 days.	

ETS Requirements – Mandatory Exclusions (cont.)

Mandatory Exclusion from the worksite for Employees who have COVID-19 symptoms, a positive test, or Close Contacts if they have not been fully vaccinated.

STATUS	EXCLUSION?	TIME PERIOD OF EXCLUSION	WAGES?
Non-Fully vaccinated Employee has Close Contact	Must be excluded from work if they are NOT fully vaccinated (including a booster)	The Quarantine/Isolation Period is at least 5 days (except as described below). Employees with close contact who are NOT fully vaccinated should test immediately and again on the 5th day. If the second test is negative, symptoms do not exist or subsided and no fever, employee may return to work. If positive test, or fever still present or symptoms have not subsided, isolate for 10 days. Employees must wear face coverings around others for a total of 10 days after exposure, especially in indoor settings. Employers are not required to exclude asymptomatic employees in this category if: A negative diagnostic test is obtained within 3-5 days after last exposure to a case; Employee wears a face covering around others for a total of 10 days; and Employee continues to have no symptoms. If employees covered cannot be tested as required, quarantine must continue for at least 10 days	If exposure was work-related, the employee must continue to receive wages during the exclusion period. Employers may not use sick time in accordance with California's mandatory sick leave law.
Fully vaccinated Employee has Close Contact	If they are vaccinated (plus received a booster) and no symptoms, they do not need to be excluded from work, but need to wear a mask indoors and outdoors for 10 days	No. Employees do not need to quarantine if they: Test on day 5 with a negative result & wear face coverings around others for 10 days after exposure. If employees test positive, they must follow isolation recommendations above. If employees develop symptoms, they must be excluded pending the results of a test. **If employees cannot be tested on day 5, employers should follow the ETS. For vaccinated close contacts, as of January 14, 2022, that means wearing a face covering and maintaining six feet of distance for 14 days following the close contact.	N/A.

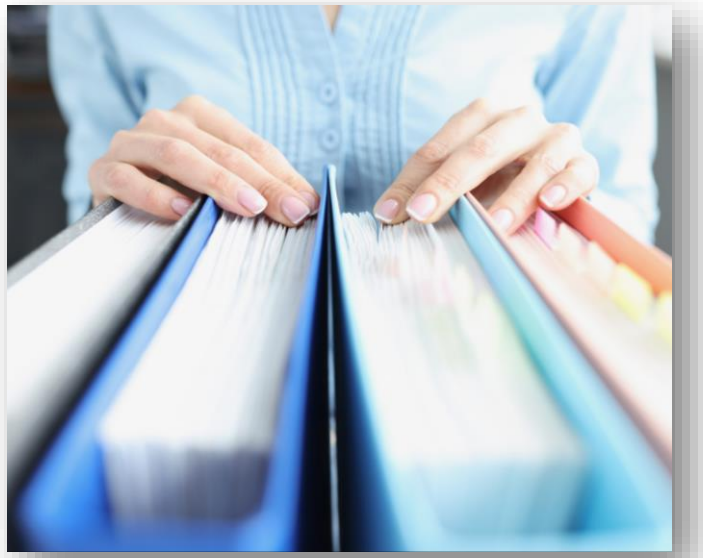
When There are Multiple COVID-19 Infections and COVID-19 Outbreaks

During any outbreak:

1. Contact the local health department within 48 hours after learning of three or more cases
2. Offering Testing Free of Charge
3. Testing must be allowed during work hours and be paid time off to test
4. Review COVID-19 Policies and Procedures
5. Require face coverings regardless of employee vaccination status: 1) indoors and 2) outdoors when employees are less than six feet from another person.

During major outbreaks, six-feet physical distancing is required where feasible, both indoors and outdoors.

Recordkeeping and Reporting COVID-19



Employers must maintain accurate records and track all COVID-19 cases.

Ensure medical information remains confidential.

Records must be made available to employees, authorized employee representatives, with personal identifying information removed.

When a COVID-19-related serious illness or death occurs, the employer must report this immediately to the nearest Cal/OSHA enforcement district office.

Biden OSHA Penalty: $13,653 per violation/$136,532 for repeated

California/Local Public Health Orders

Check the local public health officer for additional requirements! Also note:

- Effective January 5, 2022, California Public Health Dept. requires all employees regardless of vaccination status to wear face coverings indoors until February 15, 2022.
- Effective June 2021 (and still in effect) (Cal-OSHA) Physical distancing requirements is eliminated except where there is a hazard or major outbreaks.
- Effective June 2021 (and still in effect) (Cal-OSHA) Employees who are not fully vaccinated may request respirators for voluntary use from their employers at no cost and without fear of retaliation from their employers.

California Family Rights Act (CFRA), updated 2022

- Number of Employers expanded from 50 or more to five or more employee
- Definition of “Child” to include all children regardless of age
- “Key Employee” exclusion eliminated
- Parents from the same Employer may take New Child Bonding Leave at same time.
- Family Members for Whom an Employee May Take Family Medical Leave Expanded to include grandparents, grandchildren, siblings and parents-in-law (2022)

Posting Requirements for Leave Laws

- Both California and federal family and medical leave laws and California pregnancy disability leave laws require employers to post specific notices for employees explaining their leave rights.
- Notices must be in a common place.
- Written policies MUST be updated to include changes to the law effective 2021/2022

Coordination of Benefits with Workers Compensation and COVID

- Use of accrued paid sick leave
- Use of PTO, vacation or other paid leave policies
- Use of workers' compensation benefits for work-related COVID-19

Meal and Rest Premium Rate of Pay Clarified

- An employer must pay the employee for each workday any meal or rest period is not properly provided (i.e., missed, delayed or shorten meal/rest period).
- ***Ferra v. Hollywood Hotel*:** Per Labor Code § 226.7, an employer who fails to provide meal or rest periods must provide the employee "premium pay," in the form of an additional hour of pay, at the employee's "regular rate of compensation" for each workday a meal period or rest period is not properly provided.

- "Regular rate of compensation" is the employee's base rate + incentive pay.
  - This means employers must account for an employee's base hourly rate, as well as other forms of nondiscretionary compensation (e.g., commissions, nondiscretionary bonuses) when calculating meal and rest break premiums.
- *The ruling in Ferra is retroactive, and employers may now face liability for previous practices of paying premiums at the base rate of pay.*
- Ideally, your payroll software is already calculating the regular rate of pay correctly for overtime purposes, and that rate now needs to be used when calculating premiums for each meal or rest period not provided. *Confirm with your payroll service.*

No Rounding of Meal Periods

***Donohue v. AMN Services*:** The Supreme Court decided two questions of law related to meal periods for employees. The Supreme Court held:

1. an employer cannot engage in the practice of rounding meal period time punches so as to adjust the hours that an employee has actually worked; and
2. time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the stage of summary judgment.

Takeaway:

- Employers cannot round ANY meal periods.
- 28 and 29 minute meal breaks are presumptively improper.
- This rule applies retroactively.
- Employer has the opportunity to overcome the presumption with evidence of bona fide relief from duty or payment of meal period premiums.
- “Duty to provide” but not “police” the taking of meal periods.

One NARROW exception on rest breaks. On-Duty Rest Breaks for Security Officers

- Under California Labor Code Section 226.7 security officers may now be allowed to take on-duty rest breaks if they are registered pursuant to the Private Security Services Act and covered by a valid collective bargaining agreement.
- On-duty rest breaks would require security officers to:
  - Remain on the premises during rest periods,
  - Remain on call, and
  - Carry and monitor a communication device during their minimum ten-minute rest break.

- These three requirements do not constitute an interruption in a security officer's break.
- However, if a security officer is not permitted to take an uninterrupted ten-minute on-duty rest break for every four hours worked, or major fraction thereof, then the employer must pay the security officer one additional hour of pay at their regular base rate.
- These changes don't apply to cases filed prior to January 1, 2021.

1. Cal. Bus. & Prof. Code Ch. 11.5

- **This exception is limited to security guards. On-duty rest breaks are not permitted in any other situation.**

Best Practices – Policies and Time Records

- Determine whether an employee is entitled to a meal or rest period premium, which is one hour of pay at their regular rate of compensation and pay that premium accordingly.
- Look back and see if you have properly paid your employees premiums for any delayed or shortened meal/rest period.
- *Do not round meal periods.* Accurately track that employees are provided with a minimum full and uninterrupted 30-minute meal period that starts prior to completing the fifth hour of work and the tenth hour for second meal periods and does not utilize rounding.
- Have policies and practices that notify employees of the availability of timely, uninterrupted and complete meal and rest periods.
- For best practices, provide legally compliant meal and rest breaks, discourage employees from working through their meal breaks and pay premiums if owed.

Methods of calculating overtime. One size does not fit all.

Levanoff v. Dragas. DLSE's adoption of the weighted average method is not binding and employers are not obligated to accept weighted average method for calculating overtime for dual rate employees.

- Rate in Effect method may be applied where:
  - Prior to performance of work, the employee agrees to be paid at an overtime rate equal to 1.5 times for the hourly rate applied for the type of work the employee is performing.
  - Overall, applying this calculation, is neutral on its face and in its application

Mandated Reporting of Child Abuse or Neglect (Cal. Penal Code § 11165.7)

- Effective January 1, 2021, for an employer of five or more employees that employs minors, mandated reporters under the Child Abuse and Neglect Reporting Act now include both:
  - a human resources employee; and
  - an adult whose duties require direct contact with, and supervision of, minors in the performance of the minors' duties in the workplace.

Diversity Requirement for Boards of Directors (Assembly Bill 979)

- Publicly held domestic and foreign corporations with their principal executive offices in California (as listed on the company's Form 10-K filed with the SEC) must have at least one director from an underrepresented community on their board by the end of 2021.
- By the end of 2022, these companies may need to have additional directors from underrepresented communities depending on the size of their board:
  - If the board has four or fewer directors, at least one director must be from an underrepresented community
  - If the board has more than four but fewer than nine directors, at least two directors must be from an underrepresented community.
  - If the board has nine or more directors, at least three directors must be from an underrepresented community.

Expansion of Successor Liability for Labor Code Judgments (Assembly Bill 3075)

- New Labor Code section 200.3 provides that
  - "[a] successor to a judgment debtor shall be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgement, after the time to appeal therefrom has expired and for which no appeal therefrom is pending."
- It also adds new obligations for a company when submitting its Statement of Information with the Secretary of State, to state whether
  - "any member or any manager has an outstanding final judgment issued by the Division of Labor Standards Enforcement or a court of law, for which no appeal therefrom is pending, for the violation of any wage order or provision of the Labor Code.“
  - *Although the Secretary of State had until January to implement the changes, the website shows that the form has already been updated.*

Special Considerations for Hiring Remote Workers

- Apply the laws of the state where the employee will work or is assigned, even if they work remotely.
- Determining whether a worker is an independent contractor may vary from state to state.
- Requirements for protecting confidential information and trade secrets may vary from state to state.

New Recording Keeping Requirements

Under SB 807, effective January 2022, employers must now preserve personnel records for employees and applicants for four years from the date they were created, after an employee is terminated and when an applicant is not hired. Employers also now have a statutory duty to preserve all relevant records if they receive notice of claim until the later of the resolution of the complaint or the expiration of the statute of limitations for the claims.

Additionally, the Department of Fair Employment and Housing's (DFEH) deadline to complete its investigation and issue a right-to-sue letter for employment discrimination complaints treated as class or representative actions is extended to two years, and the time in which an individual can file a civil action for statutory violations is extended by tolling that period while the DFEH investigates. This is extending the period of liability for employers throughout California.

As the year draws to an end, be sure to review your retention policies and make sure that records are not discarded prematurely under these new laws.

Changes to Background Check laws

Effective January 1, 2020, California employers (with specific exceptions) may not request an applicant or existing employee disclose the following information, and may not use the following information in determining any condition of employment:

1. Arrests or detentions that did not result in a conviction.
2. Concerning a referral to and participation in any pretrial or post-trial diversion program.
3. Concerning a conviction that has been judicially dismissed or ordered sealed.
4. Concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, pr court disposition that occurred while the persons was subject to the process and jurisdiction of the juvenile court.

Exception: An employer is not prevented from asking an employee or applicant about an arrest for which the individual is out on bail or on their own recognizance pending trial.

Term of Art: For purposes of this section the term “Conviction” means a plea, verdict, or finding of guilt, regardless of whether the court imposes a sentence.

(Cal. Lab. Code § 432.7(a)(1)-(3))

Cal. Labor Code §432.7 Penalties

In addition to any and all other remedies that may be available under any other laws, an employer that:

1. ***Negligently*** violates Cal. Lab. Code § 432.7 is liable for:
   - the greater of actual damages or $200;
   - costs; and
   - reasonable attorneys' fees.
2. ***Intentionally*** violates Cal. Lab. Code § 432.7 is liable for:
   - the greater of treble actual damages or $500;
   - costs;
   - reasonable attorneys' fees; and
   - a misdemeanor punishable by a fine up to $500.

(Cal. Lab. Code § 432.7(c)-(d))

Non-Disclosure and Confidentiality Separation Agreements

- **<u>Settlement agreements:</u>** Prohibition of non-disclosure provision in settlement agreements expanded to include *all* acts of workplace harassment or harassment, not just based on sex

- **<u>Non-disclosure provisions/agreements:</u>** Greater limits on non-disclosure agreements for current and departing employees to include limits on right to disclose all “unlawful acts in the workplace” including any harassment or discrimination.

Non-Disclosure and Confidentiality Separation Agreements

- **New required language**: “[n]othing 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.”

- **New notice requirements for separation agreements**: Separation agreements must notify the employee or former employee of the right to consult with an attorney and provide a period of at *least five business days* to consult with the attorney, *regardless of the employee’s age.*

No "Re-Hire" Provisions

A Waiver of Future Employment Clause provides that (1) the plaintiff cannot reapply for any positions with the employer, and (2) the employer does not have a duty to rehire the plaintiff.

These provisions are commonly included in an employment separation agreement when an employee's separation is contentious and the employer would not consider rehiring the individual, regardless of the employee's qualifications for an open position.

Effective January 1, 2020, however, any agreement to settle an employment dispute which restricts an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, shall be void as a matter of law and against public policy.

This change does NOT:

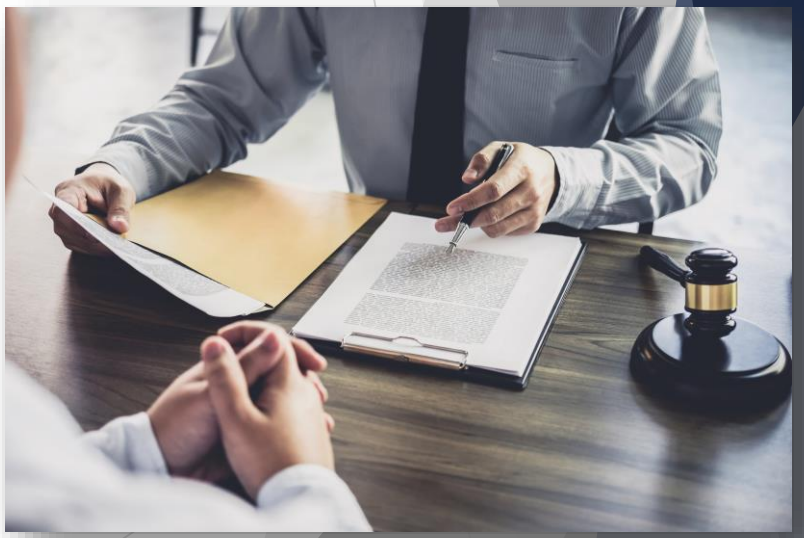
1. Preclude the employer and aggrieved person from making an agreement to either:
   - End a current employment relationship, or
   - Restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made and documented a good faith determination, before the aggrieved person filed the claim, that the aggrieved person engaged in sexual harassment, sexual assault, or any criminal conduct.

2. Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(Cal. Code of Civil Procedure §1002.5)

Reminders and Developments related to Private Attorney General Act ("PAGA")

- Upon receipt of a letter addressed to the Labor Workforce Development Agency (LWDA), do the following:
  - As lawsuit will likely follow, contact counsel as soon as possible
  - Determine whether the alleged violation may be cured (30 days upon receipt of the LWDA letter)
  - Assess the alleged violations and defenses
- *Wesson v. Staples*: A win for businesses
  - Wesson was a General Manager (GM) (claim brought on behalf of 348 GMs) and claimed he was misclassified as exempt from overtime requirements and was owed unpaid overtime and denied breaks
  - Court held that the claim was not manageable to try on a class/collective basis



EDD Audits and Independent Contractors

The uptick in independent contractors filing for unemployment has led to an increase in EDD Audits.

Following best practices will ensure the audit process results in a favorable outcome for you:

- Ensure that you are paying the proper payroll taxes for all employees.
- If you hire independent contractors, ensure that you are meeting the AB-5 requirements and filing 1099's. Collect records from the independent contractor including:
  - Their business EIN and/or SSN
  - Their business card and marketing materials
  - A copy of their business license
- Request an invoice from the independent contractor for the work they completed and/or keep a copy of any contract or document which memorialize any agreement between your business and the independent contractor.

Victory!

- **Santos v. UPS.** UPS won a victory on class certification. The Court held UPS's timekeeping system is not "inaccurate or inadequate" simply because it does not require that employees record their rest breaks since the wage order does not require recordation of rest breaks. Further the Court held there was no evidence of a uniform or even pervasive policy of requiring employees to work through rest breaks and not paying rest break premiums.
- **Magda v. Wal-Mart** An employer may make lump-sum payments as a retroactive adjustment to employees' overtime rate to factor in bonus payments without identifying a corresponding "hourly rate", and such lump sum payment does not violate the wage statement laws.

Mandatory Arbitration Agreements are Unlawful Again, for now.

In 2019, California enacted AB 51, making it unlawful for employers to require that its applicants or employees sign arbitration agreements. However, a federal district court preliminarily enjoined enforcement of AB 51 two days before the law was scheduled to go into effect.

Recently, the Ninth Circuit partially vacated that injunction. As of today, the portion of AB 51 that makes mandatory arbitration agreements unlawful has been determined to be valid and enforceable in California. (The case has been submitted for reconsideration, so there may be a change in the future.)

If your company requires employees to sign arbitration agreements, those agreements must be changed going forward to make them voluntary. Previously signed agreements are fine, but moving forward, only voluntarily signed agreements will be permitted, unless the law changes again.

Minimum Wage Increases Chart

Locality	Minimum Wage (25+ Employees)	Minimum Wage (Small Employers <25 Employees)	Effective Date
Alameda	$15.00/hour	$15.00/hour	July 1, 2020
Berkeley	$16.32/hour	$16.32/hour	July 1, 2021
Daly City	$15.53/hour	$15.53/hour	January 1, 2022
El Cerrito	$16.37/hour	$16.37/hour	January 1, 2022
Emeryville	$17.13/hour (CPI)	$17.13/hour (CPI)	July 1, 2021
Fremont	$15.25/hour	**$15.00/hour**	July 1, 2021
Hayward	$15.56/hour (CPI)	**$14.52/hour (CPI)**	January 1, 2022
Milpitas	$15.65/hour	$15.65/hour	July 1, 2021
Oakland	$15.06/hour	$15.06/hour	January 1, 2022
*Oakland (Hotel Workers w/Health Benefits)	$16.38/hour	$16.38/hour	January 1, 2022
*Oakland (Hotel Workers w/out Health Benefits)	$21.84/hour	$21.84/hour	January 1, 2022

Minimum Wage Increase Chart (cont.)

Locality	Minimum Wage	Minimum Wage (Small Employers <25 Employees)	Effective Date
Palo Alto	$16.45/hour	$16.45/hour	January 1, 2022
San Carlos	$15.77/hour	$15.77/hour	January 1, 2022
San Francisco	$16.32/hour	$16.32/hour	July 1, 2021
San Jose	$16/20/hour	$16/20/hour	January 1, 2022
San Leandro	$15.00/hour	$15.00/hour	July 1, 2021
Santa Clara	$16.40/hour	$16.40/hour	January 1, 2022
Santa Rosa	$15.85/hour	$15.85/hour	January 1, 2022
Sunnyvale	$17.10/hour	$17.10/hour	January 1, 2022

Minimum Wage Increase Chart (cont.)

Locality	Minimum Wage	Minimum Wage (Small Employers <25 Employees)	Effective Date
Long Beach (Hotel Workers)	$15.69/hour	$15.69/hour	July 1, 2021
Los Angeles (City & County)	$15.00/hour	$15.00/hour	July 1, 2020 & July 1, 2021, Respectively
Malibu	$15.00/hour	$15.00/hour	July 1, 2020 & July 1, 2021, Respectively
Pasadena	$15.00/hour	$15.00/hour	July 1, 2021
San Diego	$15.00/hour	$15.00/hour	January 1, 2022
Santa Monica	$15.00/hour	$15.00/hour	July 1, 2021
Santa Monica (Hotel Workers)	$17.64/hour	$17.64/hour	July 1, 2021

Questions?

Susan E. Bishop, Partner
Email: Susan.Bishop@berliner.com
Phone: (408) 286.5800

Practices:
Business Litigation Law
Labor & Employment Law

Ms. Bishop's litigation practice includes working with management of public and private corporations and nonprofit organizations on issues, including employee relations, personnel policies, wage and hour matters, discrimination, harassment, retaliation and wrongful termination. She represents clients before State and Federal Courts, the Department of Fair Employment and Housing, Equal Employment Opportunity Commission, California Labor Commissioner, Workers' Compensation Appeals Board, and California Unemployment Insurance Appeals Board. Much of her time currently is spent defending class actions alleging meal and rest break violations, off-the-desk claims, unpaid overtime, and inaccurate wage statements.

Ms. Bishop advises clients in a wide range of industries, including high tech, franchisees, general contractors and subcontractors, homeowner's associations, physicians and medical professionals, produce companies, restaurants, beauty salons, sanitation, senior living, and temporary help agencies.

During law school she was a Judicial Extern for Justice Jerome Smith.

Eileen Kennedy, Partner
Email: Eileen.Kennedy@berliner.com
Phone: (408) 286.5800

Practices:
Labor & Employment Law

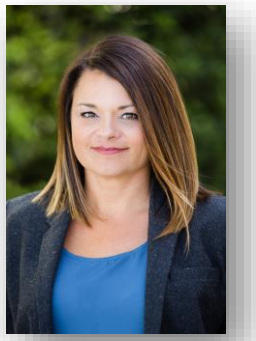
Ms. Kennedy has extensive experience counseling clients on federal and state employment laws and practices, including recruitment, hiring, employee/contractor classification, exempt/non-exempt status, compensation issues, leaves of absence, workplace accommodations, workplace privacy, discipline, and termination of employment.

Ms. Kennedy has over ten years of litigation experience defending companies and individual managers in employment-related and other business disputes. She has successfully defended employers in state courts, before the California Labor Commissioner, the Equal Employment Opportunity Commission, and the Department of Fair Employment and Housing. Ms. Kennedy represents a wide variety of companies, including semiconductor, real estate, hospitality, medical and professional services businesses on employment law issues, and in all stages of litigation.

Ms. Kennedy previously served as corporate counsel for a publicly-traded, global chip manufacturer and Integrated Device Technology, Inc., an analog/digital technology company, where she advised on federal and state employment laws while overseeing compliance with U.S. immigration and international employment laws. She previously practiced employment law with two firms in Buffalo, New York.

Labor & Employment Attorneys

Susan Bishop,
Partner



Kimberly Flores,
Partner

Christine Long,
Partner

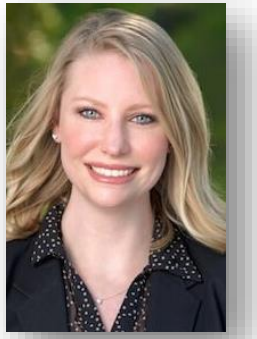
Eileen Kennedy,
Partner

Iris Chiu,
Associate

Aleshia White,
Senior Attorney

Lindsay Walczak,
Associate

Makayla Whitney,
Associate



Lea Nemeth,
Associate

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January 11, 2022

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Affordable Care Act

Affordable Care Act Overview & Updates

Overview

- The ACA went into effect in 2010 with many health care reform changes affecting employers becoming effective in 2014 and beyond
- There have been several challenges to the Affordable Care Act since its inception
  - In November 2020 SCOTUS heard oral arguments on the Constitutionality of ACA
  - In June 2021 SCOTUS upheld ACA for a third time in a 7-2 decision
- In November 2021, the IRS released proposed guidance delaying ACA reporting deadlines from January 31 to March 2 permanently
  - Employers may rely on this proposed guidance for reporting in 2022 for 2021 calendar years
- In general, ACA is business as usual with no major changes in 2021 or 2022

No Surprises Act

Prohibition on Balance Billing

No Surprises Act Prohibition on Balance Billing Background & Overview

Background & Overview

- The Consolidated Appropriations Act (CAA) COVID-19 relief bill was signed into law on December 27, 2020
- It included many healthcare related provisions including changes to:
  - Surprise Billing
  - Healthcare Transparency
- The No Surprises Act (NSA) prohibition against balance billing provides protections against balance billing in certain limited situations

No Surprises Act Prohibition on Balance Billing Applicable Services

Emergency Services

- Coverage for emergency services must be provided without regard to any other term or condition of coverage with a few exceptions such as coordination of benefits matters and waiting periods
- Coverage must be provided regardless of provider/facility network affiliation and without any prior authorization
- Coverage must be provided at a cost not greater than the in-network amount
- Post Stabilization services will generally be treated as emergency services unless certain conditions are met

Non-Emergency Services provided by an Out-of-Network Provider at an In-Network Facility

- Unless the provider has satisfied the notice and consent requirements the plan/issuers must not impose cost sharing that is greater than that of an in-network provider

Air Ambulance Services

- Plans/issuers must not impose cost sharing that is greater than that of an in-network provider

Note: The NSA does not require that certain services be covered by the plan rather that certain services covered out-of-network be covered at the in-network rate

No Surprises Act Prohibition on Balance Billing California Law

CA Prohibition on Surprise Billing

- Starting July 1, 2017, patients can no longer receive balance bills in these situations:
  - Plan participant goes to an in-network facility and services are provided by an out-of-network provider
  - Plan participant receives emergency services from a provider that is not contracted with the plan participant's health plan
- In these situations, plan participants are only responsible to pay the in-network cost sharing amount
  - Cost sharing amounts paid for these services will count toward the in-network deductible and OOPM
- Starting January 1, 2020, plan participants in CA can no longer receive balance bills for out-of-network air ambulance claims
  - These claims will be subject to in-network cost sharing amounts
- These rules apply to fully insured plans in CA or self-funded plans that opt into the state law

No Surprises Act Prohibition on Balance Billing Notice & Consent

Notice & Consent to be Balance Billed

- In limited situations a provider may receive notice and consent from a participant to be balance billed
  - Certain non-emergency services or post-stabilization services only
  - For notice and consent to be permitted for post-stabilization services certain conditions must apply:
    - Written notice to the individual
    - Notice must be provided no later than 72 hours prior to the date of service (with limited exceptions)
    - Voluntary consent given by the individual or the individual's authorized representative
    - Signed copy of the notice given to the individual for their records

Model Notice Requirement

- Plans and issuers must provide certain disclosures to plan participants
- The DOL provided a model notice for plans and issuers to use to satisfy notice requirements
  - Must be made publicly available on a website of the plan or issuer and provided in EOBs
  - Using the model notice provided is considered good faith compliance
- Disclosure requirements effective January 1, 2022

No Surprises Act Prohibition on Balance Billing Payment Calculation

Payment Calculation – Plan Participant

- Plan participants will be responsible for no more than the in-network cost-sharing amount which is based on the out-of-network "Recognized Amount."
- The recognized amount is determined in the following order:
  - An All-Payer Model Agreement (only in VT and MD)
  - An amount determined by the applicable state law (CA fully insured plans) or
  - The lesser of the billed charge and the "Qualified Payment Amount" (self-funded plans)
    - The Qualified Payment Amount is the median contracted rate for the same or similar items/services in the same insurance market by a provider in the same specialty and provided in the same geographic region, adjusted for inflation.
- Cost sharing is applied against the in-network deductible and out-of-pocket maximum limit
  - Note: an out-of-network total payment applied before a deductible is met will not cause a qualified HDHP to become HSA ineligible

No Surprises Act Prohibition on Balance Billing Background & Overview

Payment Calculation – Group Health Plan/Issuer

- The "initial payment amount" is the amount that the plan/issuer sends to the provider after receiving the bill
  - There is no required initial payment amount
  - Must be received no later than 30 days after receiving a "clean claim"
- The out-of-network rate is determined in the following order:
  - An All-Payer Model Agreement (VT and MD)
  - An amount determined by the applicable state law (CA fully insured plans)
  - An amount agreed upon by the parties or
  - An amount determined through independent dispute resolution (IDR)
- Group health plans and issuers will be responsible for making total payment equal to the out-of-network rate less the plan participant cost-sharing and "initial payment amount."
- Plans and Providers that do not reach an agreement on a payment amount may initiate the Independent Dispute Resolution Process of arbitration
  - Both parties will present payment amounts and a third-party arbiter will decide the claim payment amount

No Surprises Act Prohibition on Balance Billing Employer Responsibilities

Fully Insured Plan Responsibilities

- When a plan is fully insured, the law technically applies to the employer, but the responsibility falls on the issuer
- Plans that are in states with balance billing laws (like California) will follow the state laws and plans in states without balance billing laws will follow the federal guidance

Self-Funded Plan Responsibilities

- When a plan is self-funded, the obligation to comply falls on the employer, but practically speaking the TPA will have to assist with compliance
  - Employers should ask the TPA for an action plan for compliance
  - Review TPA agreements
    - TPAs may request fee increases due to new IDR obligations and added administrative burden
- Check with the TPA that they are prepared to provide all required notices
  - Model notice on the website and with EOBs
  - QPA disclosure with EOBs
- Provide the model notice or highlights of the notice in your legal notice packet/ open enrollment materials
- Review TPA agreements with your broker and check for increased fees or contract amendments
- Review updated provisions for the SPD/Plan Document

No Surprises Act & Healthcare Transparency

Additional Requirements & Next Steps

No Surprises Act & Healthcare Transparency Additional Requirements & Next Steps

Mental Health Parity Comparative Analysis

- Group health plans must formally analyze and make available, upon request, to the Departments' secretaries an analysis of the plan's compliance with the MHPAEA non quantitative treatment limitation (NQTL) requirements.
- NQTLs refers to any benefit limit that a GHP imposes on items and services that is not a specific monetary or visit limitation, examples of NQTLs include: preauthorization, fail-first/step therapy protocols, probability of improvement evidence, requirements of written treatment plans, residential treatment limits, geographical limitations, and licensure requirements
- This provision is already in place, effective February 10, 2021
- Plan sponsors are encouraged to get a comparative analysis in place BEFORE the Departments request it
    - Plan sponsors should reach out to TPAs to request assistance with creating the comparative analysis

No Surprises Act & Healthcare Transparency Additional Requirements & Next Steps

Broker/Consultant Compensation Disclosure

- Brokers must disclose to group health plans the amount of direct and indirect compensation paid for services when the broker reasonably expects to receive at least $1,000 for their services.
  - Note that this is a prospective disclosure not a retrospective disclosure like the Form 5500
- Applies to ERISA health plan benefits such as medical, dental, vision, stop loss, certain EAPs, HRAs, FSAs, certain voluntary benefits, wellness programs etc.
  - Does not apply to life insurance and disability policies
- Effective December 27, 2021
  - Contracts executed, extended, or renewed on or after December 27, 2021
  - Pending additional guidance use a good faith interpretation of whether a contract needs the disclosure
- Plan sponsors must review contracts, monitor consultants/vendors, and report violations of the rule to the DOL

No Surprises Act & Healthcare Transparency Additional Requirements & Next Steps

Transparency in Coverage (TiC) Machine-Readable Files

- Departments will defer enforcement of machine-readable files for prescription drug pricing pending further rule making
- Departments will defer enforcement of the requirement to publish machine-readable files until July 1, 2022

Price Comparison Tools

- Departments concede that these requirements under CAA are similar to those under the TiC
- Departments will defer enforcement of price comparison tools until January 1, 2023, to align with the deadline to comply with the TiC

Identification Cards

- Effective January 1, 2022, plans and issuers are expected to use a good faith reasonable effort to comply with these requirements
- Plans and issuers may use various reasonable methods to comply
- Plans should review cards created by TPAs/Carriers to ensure compliance

No Surprises Act & Healthcare Transparency Additional Requirements & Next Steps

Good Faith Estimate & Advanced EOBs

- Departments will defer enforcement of this rule until rulemaking is available
- Departments will defer enforcement of this rule until after a comment period has been completed, rulemaking available, and plans/issuers establish appropriate data transfer standards
- Plans must review contracts with TPAs/Carriers to ensure TPA/Carrier compliance

Prohibition on Gag Clauses

- Plans/issuers are expected to implement the attestation requirement effective January 1, 2022, using a good faith reasonable interpretation of the statute
- Additional rule making is expected in early 2022
- Plans must review TPA and network contracts

Provider Directories

- Plans and issuers are expected to comply with the requirements effective January 1, 2022, using a good faith reasonable interpretation of the rule
- Plans must review TPA/Carrier contracts to ensure compliance and make quarterly verification on accuracy of directories (updates must be made within 48 hours)

No Surprises Act & Healthcare Transparency Additional Requirements & Next Steps

Continuity of Care

- Additional rule making will include a prospective applicability date with a reasonable amount of time to comply
- Until additional rule making is provided, plans and issuers are expected to implement the requirements using a good faith reasonable interpretation of the rule
- Plans must review network contracts and update SPD language to include new requirements

Reporting on Pharmacy Benefits and Costs

- On November 17, 2021, HHS released interim final rules providing guidance on how to submit information, identify required information to report, and definitions/uniform standards
- Delayed until December 27, 2022 – plan sponsors may report on both 2020 and 2021 plans in 2022
- Plans must report on the items listed in the CAA and Nov. 17 guidance

No Surprises Act & Healthcare Transparency Employer Action Items

Action Plan

- Fully Insured Plans
  - Carriers will be responsible for compliance with most CAA and TiC requirements
  - Employers should reach out to carriers to determine that they will be ready to comply with requirements by the effective dates
- Self-Funded Plans
  - Employers will be responsible for compliance with the CAA and TiC requirements but will need to lean heavily on the TPA for assistance
  - Employers should reach out to TPAs to determine that they will be ready to comply with requirements and be able to assist with employer requirements by the effective dates
  - Employers should review carrier service agreements to determine what if any services need to be stipulated to in agreements and if additional/increased fees will be added
  - Review updated provisions for the SPD/Plan Document

Watch for EPIC Compliance Matters updates and Insights for more information on legislation updates

Questions?

Thank You