Employment Law & Benefits Update

December 1, 2022

January 11, 2023

Christine Long

Partner
Berliner Cohen

Susan Bishop

Partner
Berliner Cohen

Liz Mann

Director of Compliance
EPIC Insurance Brokers & Consultants

Bob Carrington

Vice President, Employee Benefits
EPIC Insurance Brokers & Consultants

BERLINER COHEN LLP

2023 Employment Law Update

Presented By:

Christine H. Long, Department Chair

Susan E. Bishop, Partner

Updates to California Family Rights Act

- Amendments Expand the definition of a "family member" under the California Family Rights Act (CFRA) and California's Healthy Workplaces Healthy Families Act (HWHFA) to include a "designated person."
- A designated person is "any individual related by blood or whose association with the employee is the equivalent of a family relationship," and includes domestic partners.
  - An employer may limit an employee to one designated person per 12-month period.
  - Employees will be able to identify a designated person for whom they want to use leave when they request unpaid (CFRA) or paid (HWHFA) leave.
  - Certain cities require employee to designate at beginning of year and can not change for 12 months.

© 2021 Berliner Cohen, LLP

FEHA Amended – Reproductive Choices Protection

- Effective January 1, 2023, the Fair Employment and Housing Act is amended to prohibit employment discrimination on the basis of an individual's reproductive health decision-making.
- Expands required health plan coverage for contraceptives.
  - Certain exceptions for Religious Employers

© 2021 Berliner Cohen, LLP

Title III Accommodations

- Businesses open to the public that have restrooms for employees must allow individuals who have Crohn’s disease, ulcerative colitis, irritable bowel syndrome, or any other similar medical condition, to use the employee restrooms

Protected Time Off: Bereavement Leave

- AB1949 Amends the California Family Rights Act to require employers with five or more employees to provide up to five days of unpaid bereavement leave for an employee within three months of the death of a family member.
  - **Definition of family member is spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law**

© 2021 Berliner Cohen, LLP

California's Whistleblower Retaliation Burden of Proof Standard

- On January 27, 2022, the California Supreme Court ruled that Whistleblower Retaliation claims brought under Labor Code § 1102.5 will follow the framework described in Labor Code § 1102.6 at summary judgment and trial stages.
  (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703.)
- Now, when whistleblower retaliation claims are evaluated on summary judgment, or at trial, the Courts will follow the LC § 1102.6 standard, which is:

  (1) The employee has the burden to show, by *preponderance of the evidence*, that the employee's protected activity was a contributing factor to the employer's adverse employment action.

  (2) If the employee meets that burden, the burden shifts to the employer to show, by *clear and convincing evidence*, that it would have taken the same action for legitimate, independent reasons, even if the employee had not engaged in protected activity.

© 2021 Berliner Cohen, LLP

Whistleblower Retaliation Cases in CA

- *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703
  - Wallen Lawson was terminated after he reported that his supervisor asked him to participate in a fraudulent scheme to avoid PPG buying back excess unsold product. Lawson was asked to incorrectly tint customers' paint orders so Lowe's would be forced to sell the paint at a deep discount.
  - After reporting this scheme, Lawson's supervisor set very high performance goals that Lawson would not be able to meet. When Lawson failed to meet those goals, he was terminated.
  - Lawson sued PPG under LC § 1102.5 for retaliation, and the Cal. Supreme Court ruled that LC § 1102.6 is the appropriate framework when evaluating this case.
- *Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904
  - Arnold Scheer claimed he was terminated as Chief Administrative Officer of the Pathology and Laboratory Medicine Department after identifying and reporting issues involving patient safety. The employer claimed the termination was performance related. Scheer sued under LC § 1102.5 and Gov. Code § 8547.10, which are whistleblower retaliation statutes.
  - The Court ruled that the framework of LC §1102.6 applies to the GC § 8547.10 claim as well because the language used mirrors the Labor Code's language.

© 2021 Berliner Cohen, LLP

California's Whistleblower Retaliation Burden of Proof Standard

- The new employee-friendly standard means that under Labor Code § 1102.6, employees can prove that retaliation was a "contributing factor" by a *lower* evidentiary standard while the employer must prove it would have taken the same action for independent reasons by a *higher* evidentiary standard.
- Employees may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action.
- The Cal. Supreme Court disapproved of the previously used *McDonnel Douglas* standard because that standard only focuses on identifying the single, true reason for the adverse employment action.
- The previous standard created complications in "mixed motives" cases where an employer is alleged to have acted for multiple reasons, some legitimate and some not.

© 2021 Berliner Cohen, LLP

Discrimination on the Basis of Cannabis Use

- Effective January 1, 2024, AB 2188 will make it unlawful to discriminate against a person in hiring, termination, or other term or condition of employment based upon the person's use of cannabis off the job and away from the workplace or upon an employer-required drug screening test that has found the person to have "nonpsychoactive cannabis metabolites" in their hair, blood, urine, or other bodily fluids.

- Employers may still:
  - take action against a person for failing a pre-employment drug test that does not screen for nonpsychoactive cannabis metabolites;
  - prohibit the use of, possession of, or impairment by cannabis on the job;

© 2021 Berliner Cohen, LLP

Private Attorney General Act ("PAGA") Updates: Manageability

- *Wesson v. Staples the Office Superstore, LLC* 68 Cal.App.5th 685 (2021)
  - Court has the right to strike a PAGA claim if not manageable at trial
- *Estrada v. Royalty Carpet Mills, Inc.* 76 Cal.App.5th 388 (2022)
  - Court has no right to strike a PAGA even if unmanageable at trial

© 2021 Berliner Cohen, LLP

PAGA Updates: No Right to a Jury Trial

- La Face v. Ralph's Grocery Store, 75 Cal.App.5th 388 (2022)
  - Court held no right to a jury trial of PAGA claims

PAGA and Arbitration: *Viking River Cruises, Inc. v. Moriana*

- Employee's individual Labor Code claims must be submitted to arbitration under valid arbitration agreement, even if there are Private Attorneys General Act (PAGA) claims filed in civil court.
- Overturns a longstanding rule that PAGA claims must be litigated in civil court even if employee agreed to arbitration.
- As for the "non-individual" representative claim pending in court, "the correct course is to dismiss [it]."
- Employers should reevaluate the benefits of having an arbitration agreement because *Viking River* makes the enforcement of arbitration agreements much stronger even in the face of a PAGA claim.

© 2021 Berliner Cohen, LLP

Voluntary Signatures on Arbitration Agreements*: Chamber of Commerce of the United States of America v. Bonta*

- In 2021, Ninth Circuit Court of Appeals upholds California Labor Code Section 432.6, which prohibited employers from requiring California employees to agree to arbitrate their employment-related disputes.
- In 2022, Ninth Circuit withdrew that decision and will reconsider (hearing to be determined)
- Enjoined imposition of civil and criminal sanctions against employers that violate Section 432.6 on FAA grounds.
- While the panel reconsiders its ruling, California employers are free to require employees and applicants to sign arbitration agreements since a lower court previously struck down the anti-arbitration statute on the ground that it is preempted by the Federal Arbitration Act.
- Mandatory arbitration agreements that are otherwise enforceable under the FAA remain enforceable, notwithstanding Section 432.6.

© 2021 Berliner Cohen, LLP

Employer has burden to prove that an arbitration agreement is valid

- Under California law, the burden is on the employer to show that a valid arbitration agreement existed
- Reviewing practices for onboarding and execution of agreements

© 2021 Berliner Cohen, LLP

Federal Arbitration Act ("FAA") Amended

- Effective March 3, 2022, the FAA was amended to prohibit the enforcement of a pre-dispute arbitration agreement over claims of sexual harassment or sexual assault.
  - At the election of the person bringing the sexual harassment or assault claim
  - Includes federal, state or tribal sexual harassment or assault claims
  - Includes a waiver of joint, collective or class action

© 2021 Berliner Cohen, LLP

Limiting Economic Duress Theory

- A recent Ninth Circuit Court decision upheld an arbitration agreement and rejected the employee's argument that he suffered economic duress
  - Court held that it is not economic duress although the employee had moved from Mexico to the United States, was dependent upon the employer's housing and had already started harvesting lettuce.
  - Employee must show wrongful conduct on part of employer and no reasonable alternatives, but failed to do so

© 2021 Berliner Cohen, LLP

Background Checks – Updates

Record Cleaning

- The law will automatically seal conviction and arrest records in California once a former offender has "fully completed their sentence and successfully gone four years without further contact with the justice system."
  - This expansion of automatic relief does not apply to certain serious and violent felonies, and ones for which the person is required to register as a sex offender.
  - The law will take effect beginning July 1, 2023.
    - Seven other states already had similar legislation Pennsylvania, Utah, Michigan, Connecticut, Delaware, Oklahoma and Colorado.

No Pay for Waiting Time

- Court confirmed when employer extends conditional offer time while waiting for background check not compensable.

© 2021 Berliner Cohen, LLP

CalSavers – Now Applies to 1 or More Employees

- Law requires employers to establish a retirement program or participate in CalSavers.
- On August 26, 2022, the law expanded the definition of "eligible employer" to include businesses that do not participate in a retirement savings plan and have one or more eligible employees.
  - The law requires such employers to have a payroll deposit savings arrangement in place to allow employee participation in the program by December 31, 2025.
  - The new law excludes from the definition of "eligible employer" sole proprietorships, self-employed individuals, or other business entities that do not employ any individuals other than the owners of the business.

© 2021 Berliner Cohen, LLP

The "Restoring Workers' Rights Act" (H.R. 8755)

- Effectively bans both past and future non-compete agreements for non-exempt employees, nationwide.
  - Defines a "non-compete agreement" as any agreement that imposes restrictions on the performance of "Any work for another employer for a specified period of time" or "in a specified geographical area" or "that is similar to such employee's work for the employer that is a party to such agreement"
- Applicable to "non-exempt" employees as defined
- Similar legislation already exists in several states
- Agreements prohibiting the disclosure of trade secrets left unaffected

© 2021 Berliner Cohen, LLP

Wage Transparency

- Requires employers of 100 or more contracted employees to submit separate annual pay data reports regarding the contracted employees.
  - Extends to employees furnished by labor contractors
  - Ensure that contracts include right to pay data reporting
- Employers with 15 or more employees must include the pay scale in all job postings under California Labor Code 432.3.
  - "Pay scale" is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.
  - If a covered employer posts job postings using a third party, the employer must provide pay scale information to the third party for inclusion in the job posting.
  - Upon request, covered employers must provide the pay scale information to current employees and to applicants upon a reasonable request.
- Employers also must maintain employee records, including job titles and wage rate histories, through the term of each employee's employment and for at least **four** years after the employment has ended.

© 2021 Berliner Cohen, LLP

Wage Transparency Best Practices

- Group jobs by substantially similar skill effort and responsibility
- Document bona fide reasons for wage disparity, which can include: merit, seniority, quantity or quality of production, higher costs of living due to location, education, training, or experience or other lawful reason for disparity.
- Update handbooks to include reference to the CFPA.
- Maintain records for four years.
- Train managers who set pay or have input on the rules and how to lawful have disparate pay
- Review policies regarding submission of pay data submissions

© 2021 Berliner Cohen, LLP

DOL Proposes New Rule for Independent Contractor Classification

- On October 13, 2022, the DOL released a new proposed rule for classifying independent contractors under the Fair Labor Standards Act.

- This would replace the current generally employer-friendly test with a test decidedly more likely to result in findings that contractors have been misclassified under the FLSA and are entitled to overtime.

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.

© 2021 Berliner Cohen, LLP

Meal and Rest Break Premiums Are Wages

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

- California law requires employers to provide daily meal and rest breaks to most unsalaried employees. (Lab. Code, § 226.7[a])
- If an employer unlawfully makes an employee work during part of a meal or rest period, the employer must pay the employee an additional hour of pay. (Lab. Code, § 226.7[c])
- The primary issue in Naranjo *was* whether this extra pay for missed breaks constituted "wages" that must be reported on required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job. (Lab. Code § 203)
- With its decision in Naranjo, Supreme Court of California resolved confusion in Courts of Appeal and federal courts whether the wage statement and timely payment statutes apply to missed-break premium pay.
- Meal and rest period violations **can** subject employers to waiting time and wage statement penalties if the premium payments are not properly reported on wage statements and timely paid.

© 2021 Berliner Cohen, LLP

GPS Tracking and Privacy

- AB 984 allows employers to monitor in locating, tracking, watching, listening to or otherwise surveilling the employee during work hours through the digital license plate, so long as it is "strictly necessary for the performance of the employee's duties."
- Pursuant to AB 984, employers must first provide the employee with a notice that requires, at minimum:
  - A description of the specific activities that will be monitored.
  - A description of the worker data that will be collected as a part of the monitoring.
  - A notification of whether the data is used to inform any employment-related decisions, including disciplinary and termination decisions.
  - A description of vendors or third parties, if any, to which information will be disclosed or transferred.
  - A description of the organizational positions that are authorized to access the data.
  - A description of the dates, times, and frequency that the monitoring will occur.
  - A description of where the data will be stored and the length of time it will be retained.
  - A notification of the employee's right to disable monitoring, including vehicle location technology, outside of work hours.
- The digital plates shall display a visual indication that GPS is in active use.
- Employers are prohibited from retaliating against employees for disabling the monitoring outside of work hours.

© 2021 Berliner Cohen, LLP

The Fast Food Accountability and Standards Recovery Act (A.B. 257)

- On September 5, 2022, Governor Newsom signed AB 257 into law.
- AB 257 will significantly affect fast-food restaurants in the state, including franchise operations.
- AB 257 defines "fast food restaurant" as any establishment in the state that is "part of a fast-food chain."
  - Establishment must be part of a set of fast-food restaurants (consisting of 100 or more) nationally which share a common brand, or carry standardized options for decor, marketing, packaging, products, and services.
  - Exceptions may apply regarding bakeries and food-service operations within grocery stores
- AB 257 authorizes the California Department of Industrial Relations to create a Statewide Fast-Food Council if the Department receives a petition signed by at least 10,000 fast-food employees
- Council will regulate fast food restaurant employment practices until January 2029.
- Local city and county governments with 200,000+ residents may also form similar "local" councils

© 2021 Berliner Cohen, LLP

The Fast Food Accountability and Standards Recovery Act

Key Takeaways for Employers

- Increased Minimum Wage in Fast Food industry
  - $22.00 per hour, effective 1/1/2023.
  - On 1/1/2024, and annually thereafter, the Council can increase minimum wage. Increases limited to 3.5% or the percentage increase in the Consumer Price Index (whichever is lower).
- New Statewide Citation and Enforcement Powers
  - AB 257 empowers the California Labor Commissioner's office to enforce alleged violations of the new law.
  - Also creates a private right of action for any employee of a fast-food restaurant discharged, discriminated, or retaliated against for legally protected activity
  - Creates legal presumption of retaliation and/or discrimination if a fast-food restaurant operator discharges (or takes any other adverse action against) one of its employees within 90 days following the date when the operator had knowledge of that employee's protected activity.

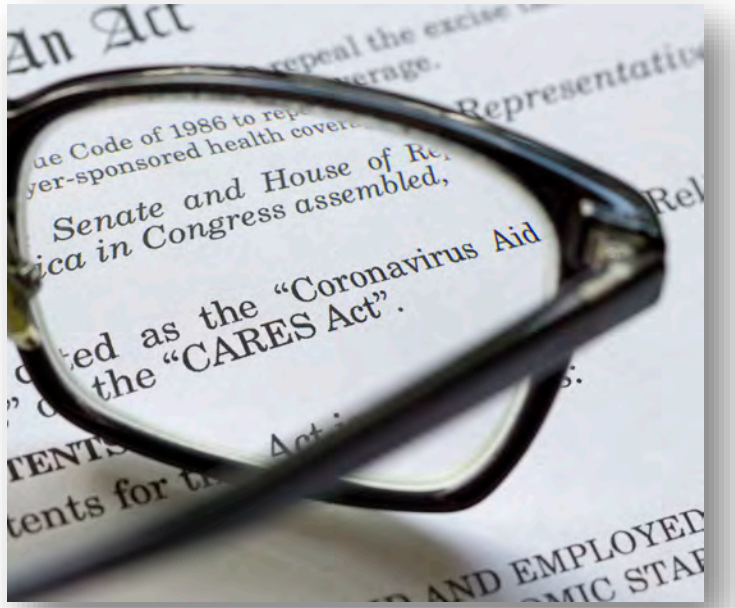
California Privacy Rights Act (CPRA)

Effective January 1, 2023, California employers subject to the California Consumer Privacy Act (CCPA)/California Privacy Rights Act (CPRA) must disclose data privacy practices and provide access rights to their employees.

Personal information collected in certain employee contexts will now be subject to the onerous compliance requirements under the CCPA/CPRA. Businesses will have to immediately pivot their data privacy compliance efforts and:

- Assess the personal information collected, used and disclosed from California employees and job applicants. This will require employers to map employee data and work with their human resource and information technology departments.
- Update employee, job applicant and other privacy notices and disclosures to incorporate personal information collected in an employment context.
- Businesses will be required to disclose a full text privacy notice to employees, as opposed to the previously abbreviated version permitted under the exemptions.
- Review and update any contracts with service providers and contracts that process employee personal information.
- Review and update policies and procedures to include the expanded rights under the CCPA/CPRA.

COVID-19: Where Are We Now?



- California supplemental paid sick leave (SPSL) law, which required certain employers to provide paid leave to employees for qualifying COVID-19-related reasons, **extended to December 31, 2022**.
- Local paid sick leave (COVID-related) provisions are still in effect in Los Angeles, and Alameda; check your local city/county.
- September 2022 Extension Provides Money for Small Business

© 2021 Berliner Cohen, LLP

COVID Sick Leave Updates Employers Need to Know

- If Employee exhausted 80 hours prior to September 30, 2022 extension no new right to COVID Paid Sick Leave IF the illness is not work related
  - If Work Related exposure and illness is reason for absence then duty to pay under CalOSHA
- Employer has right to deny pay if employee refuses to show proof of positive test, and/or submit to testing

© 2021 Berliner Cohen, LLP

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.

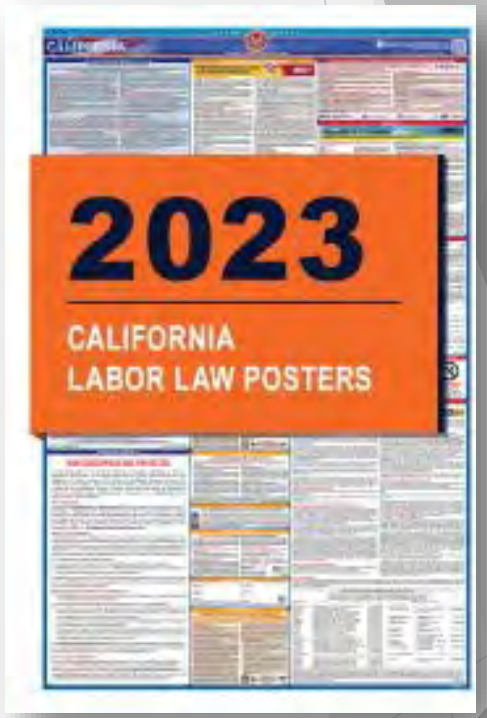
When a COVID-19-related serious illness or death occurs, the employer must report this immediately to the nearest Cal/OSHA enforcement district office.

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

© 2021 Berliner Cohen, LLP

COVID Posters – Multiple Languages

- AB 2068 Requires health and safety posters relating to COVID-19 to be posted in additional languages
  - Currently the required languages are Spanish, Cantonese, Mandarin, Vietnamese, Tagalog, Korean and Armenian.
    - The notices are also required to be posted in Punjabi where applicable.



© 2021 Berliner Cohen, LLP

Rebuttable Presumption Extended

- AB 1751 extends the current rebuttable presumption that an employee's illness resulting from COVID-19 was sustained in the course of employment for purposes of workers' compensation benefits to January 1, 2024

COVID Notification Changes

- California Labor Code section 6409.6 (Duties of employer when notified of potential exposure to COVID-19) is amended and extends its provisions until January 1, 2024.
  - The main modification gives employers the option to post a notice of potential COVID-19 exposure at the worksite and on existing employee portals instead of delivering providing written notice.

© 2021 Berliner Cohen, LLP

Cities with Specific Sick Leave Policies related to COVID 19

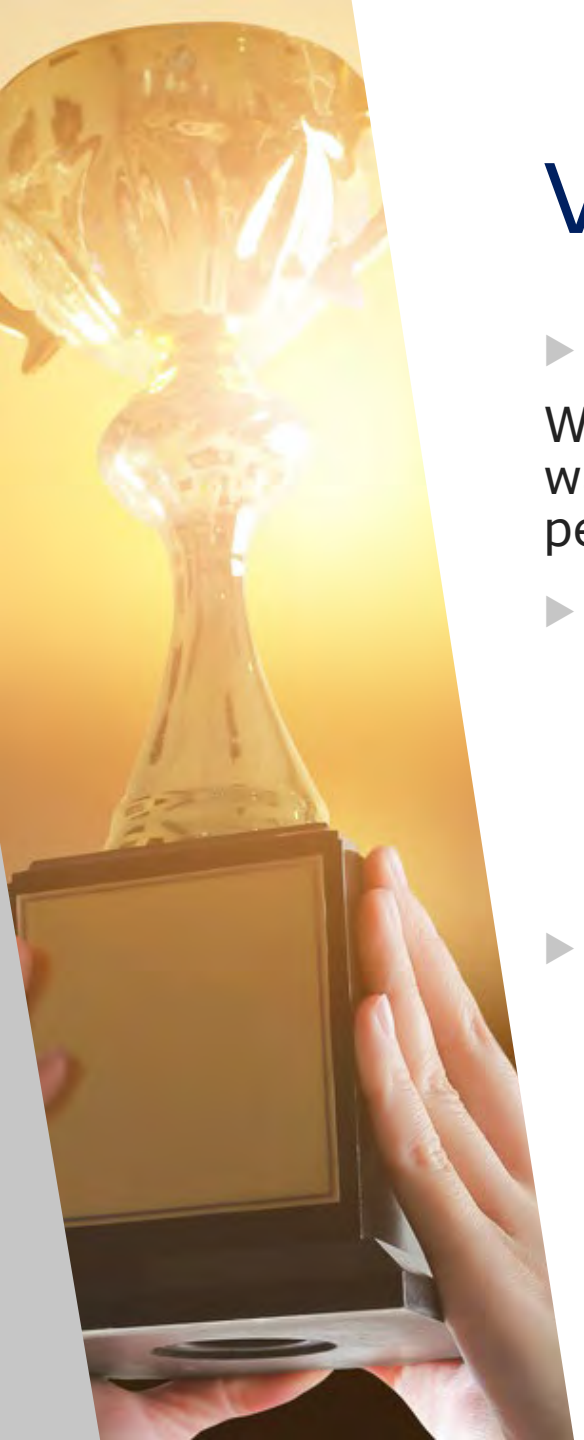
- Local Paid Sick Leave polices related to COVID-19 may or may not be have been modified or expired. When the need arises, check the appropriate locality to determine if the sick leave policy is still in effect.
  - Long Beach
  - Los Angeles City
  - Los Angeles County (unincorporated areas)
  - Oakland

© 2021 Berliner Cohen, LLP

Employees Excused from Work During "Emergency Conditions"

- SB 1044 allows employees to leave work or refuse to report to work during an "emergency condition," defined as disaster or extreme peril to the safety at the workplace caused by natural forces or a crime, or an evacuation order due to a natural disaster or crime at the workplace, an employee's home, or their child's school.
  - The law specifically excludes health pandemics from the definition of emergency condition.
  - The law also prohibits employers from taking adverse action against an employee for refusing to report to or leaving work during an emergency condition.
- The law does not apply to first responders; disaster or emergency service workers; health care workers who provide direct patient care or emergency support services; and employees who work on nuclear reactors, in the defense industry, or on a military base.

© 2021 Berliner Cohen, LLP



Victory! – Wage and Hour

- Wage Statement and Meal Break Violation Victories

Walmart was sued for two key claims (1) meal break violations and (2) wage statement violations as it related to adjusted overtime for performance bonuses.

- In regards to the meal break violation – the court found that the Plaintiff did not suffer a meal break violation because when Plaintiff missed a meal he was paid at his regular rate of pay, and even if class members did suffer, since they were not typical of Plaintiff's claims the court decertified the meal break class. However, it did remand this claim to State Court.
- In regards to the wage statement claims, the court did not find a violation of the wage statement based on lump sum payments.
  - Ninth Circuit found that not listing the rates and hours worked complied with the law because there was not an "hourly rate in effect during the pay period" for the bonus overtime adjustment. This would not work for a regular bonus and was specific to quarterly.

Victory – Discrimination Case

- *Dusel v. Factory Mutual Ins. Co.* (First Circuit)
  - In January/February 2018 there was a work place investigation in which the Plaintiff, who was CEO at the time, participated in and voiced opinions on.
  - In March 2018 there was a company wide reorganization which moved the entire corporate office. Plaintiff complained it was retaliatory.
  - In July 2018 as part of a company audit and investigation into another employee, the company began reviewing cell phone charges and food consumption.
    - As part of the process, Plaintiff was interviewed and stated that no one other than himself was on the company phone plan. What he left out is that as CEO he knew about the audit and as a result removed days earlier from the company plan his wife and daughter – who had been on it for years. The audit uncovered his actions.
    - There also was a report of him stealing company food. Video footage captured him at least 87 times going into the company cafeteria with empty bags and leaving with bags full of food.
  - Employee was terminated for theft.
  - Employee sued claiming it was retaliatory and age discrimination. The Court held on appeal that the company had a legitimate non-discriminatory reason for termination – the employee's theft and coverup. Thus the temporal relationship was irrelevant.

© 2021 Berliner Cohen, LLP

Minimum Wage for Exempt Employees (CA)

- Under California law, employers must pay employees overtime unless they fall under an exemption, such as certain administrative, executive, or professional jobs.
- In California, an "exempt" employee must generally be:
  - Paid a monthly salary equivalent to *not less than two times the California minimum wage* for full-time employment; and
  - Engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment.

- Effective January 1, 2023, California's minimum wage is $15.50 per hour. Thus, the minimum wage for exempt employees must be no less than $31.00 and a salary of $64,480.

© 2021 Berliner Cohen, LLP

Questions?

Christine H. Long
Email: Christine.Long@berliner.com
Phone: (408) 286.5800

Practices:
ADA Regulatory Compliance
Business Litigation Law
Labor & Employment Law
Hospitality Law
Real Estate Litigation

Ms. Long maintains a diverse litigation practice in employment, hospitality, business litigation and real estate. Ms. Long is the Chair of the Employment Law Practice Group and Hospitality Practice Group.

Ms. Long's employment and hospitality litigation practice includes handling wage and hour claims, claims of employment discrimination, wrongful termination, and breach of employment contract cases. She has experience with class action litigation, and FLSA and EEOC investigations. In addition to her litigation practice, Ms. Long counsels clients on all aspects of employment, including complaints made to and investigations initiated by the Department of Fair Employment and Housing, Labor Commissioner, and the EEOC on matters relating to employment including compensation issues, mandatory leaves of absence, reasonable accommodations, and reductions-in-force for individuals, companies and local government. Ms. Long regularly speaks on employment and hospitality issues of interest.

In the real estate and business litigation areas, Ms. Long has represented parties in a variety of matters, including commercial and residential sales disputes, partnership disagreements and dissolutions, partition actions, commercial landlord/tenant suits, easement and boundary claims, and CC&R.

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.

© 2021 Berliner Cohen, LLP

Labor & Employment Attorneys

Christine Long,
Partner

Susan Bishop,
Partner

Eileen Kennedy,
Partner

Kimberly Flores,
Partner

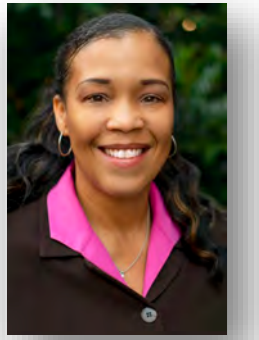
Iris Chiu,
Attorney

Kevin Landis,
Associate

Maysa Saeed,
Attorney

Richard Schramm,
Of Counsel

Lindsay Walczak,
Associate



Aleshia White,
Senior Attorney

Makayla Whitney,
Associate

© 2021 Berliner Cohen, LLP

BERLINER COHEN LLP

Berliner Cohen serves the business and regulatory needs of private businesses and public agencies. For over 50 years, the Firm has developed the special expertise required by a diverse client base consisting of some of Northern California's most influential and largest corporations, new ventures, leading real estate developers, cutting-edge technology companies, municipalities and public agencies, healthcare providers, and mortgage banking companies.

Berliner Cohen attorneys concentrate on providing experienced, knowledgeable and innovative solutions and services for our clients in numerous practice areas, including:

- Business Litigation
- Corporate and Tax
- Employment
- Hospitality
- Estate Planning
- Real Estate Litigation and Contract Negotiation
- Land Use Planning and Development

© 2021 Berliner Cohen, LLP

EPIC®
Insurance Brokers & Consultants

EPIC Berliner Employee Benefits Update

Compliance Series

January 11, 2023

EPICBROKERS.COM

© EDGEWOOD PARTNERS INSURANCE CENTER | CA LICENSE 0B29370

Presenters

Liz Mann, J.D. Director of Compliance - EPIC
Liz Mann is EPIC's internal compliance director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. As a client, you have the option of directly accessing Liz or accessing her traditionally through your account team. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 14 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.

1

Consolidated Appropriations Act of 2021

Mental Health Parity NQTL Analysis

RxDC Reporting

No Surprises Act

Mental Health Parity Analysis

Background

- Starting February 10, 2021, group health plans that provide coverage for mental health or substance use disorder benefits and are therefore subject to mental health parity rules are required to prepare a comparative analysis of the plan's non quantitative treatment limitations (NQTLs)
- The analysis must be provided upon request
- The Agencies only give about 2 weeks to provide the analysis
- Carriers will provide the completed analysis but self-funded TPAs will only provide the data required to complete the analysis, not the analysis itself

Information Included in the Analysis:

- A clear description of the specific NQTL plan terms and policies at issue
- Identification of the specific benefits to which the NQTL applies within each benefit classification
- Identification of any factors, evidentiary standards or sources, strategies or processes considered in the design or application of the NQTL along with their definitions
- Factors used for establishing variation between application of mental health benefits and medical/surgical benefits
- The nature of the decisions made during application of NQTLs
- Decisions made, and the qualifications of the decision maker(s)
- Whether the plan's or issuer's analyses rely upon any experts
- A reasoned discussion of the plan's or issuer's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources
- The date of the analysis and the name, title, and position of the person or persons who performed or participated in creating the comparative analysis

Prescription Drug Data Collection Reporting

RxDC

- Starting in 2022, plan sponsors must report certain prescription and healthcare spending data annually
- First report was due December 27, 2022, for calendar years 2020 and 2021 and then June 1 annually
- Reported data includes:
  - General information regarding the plan or coverage
  - Enrollment and premium information, including premiums paid by employees versus employers
  - Total health care spending, broken down by type of cost (hospital care; primary care; specialty care; prescription drugs and other medical costs), including Rx spending by enrollees versus employers and carriers
  - The 50 most frequently dispensed brand prescription drugs
  - The 50 costliest prescription drugs by total annual spending
  - The 50 prescription drugs with the greatest increase in plan expenditures from the previous year
  - Prescription drug rebates, fees, and other remuneration paid by drug manufacturers to the plan or carrier in each therapeutic class of drugs, as well as the 25 drugs that yielded the highest amount of rebates
  - The impact of prescription drug rebates, fees, and other remuneration on premiums and out-of-pocket costs
- The ultimate responsibility to report belongs with the plan sponsor, but carriers, TPAs, and PBMs will have most of the information necessary to complete the submission
- Plan sponsors need to coordinate what information is being reported by various entities and confirm the submission was completed by the deadline
  - Fully insured plans should obtain confirmation in writing that the carrier will submit
  - Self-funded plans may have more responsibility to submit depending on various vendor involvement

Prescription Drug Data Collection Reporting

Guidance Released December 23, 2022

- The Departments released a set of FAQ guidance a few days before the first filing deadline that included:
  - A grace submission grace period until January 31, 2023
  - Good faith relief for those entities who show a reasonable interpretation of the regulations and RxDC instructions when completing their submission
  - Clarification on:
    - Email submission allowed for employers submitting only a P2 file and a D1 file containing only premium and life years information and/or a narrative response
    - Multiple submissions by the same reporting entity now allowed
    - Data aggregation relief
    - Reporting on vaccines not required
    - Health care and prescription amounts not applied to deductibles or OOPMs no longer required

No Surprises Act

Prohibition on Balance Billing

- Effective January 1, 2022, participant cost sharing for out-of-network emergency services, out-of-network air ambulance services, and certain non-emergency services furnished by out-of-network provider at in-network facilities cannot be higher than in-network cost sharing for these services, and must be counted against in-network deductibles and out-of-pocket maximums
  - Providers cannot balance bill the participant for amounts in excess of cost sharing
- Amount the plan must pay the provider is determined by state law (if any), amount the plan and provider agree to, or independent dispute resolution process
  - "Qualified Payment Amount"
    - The median of the contracted rates recognized by the plan for similar services in the geographic region adjusted for inflation
- Participants can sign a consent waiver that gives the provider prior consent to issue them a balanced bill in certain situations
- Plans must provide notice of the new balance billing limitations on their public website (or Carrier/TPA website)
  - The DOL has provided a model notice for this purpose

No Surprises Act

New Identification Cards

- ID cards must state the plan deductible and out-of-pocket maximum limit and contact information such as a phone number and website address for further assistance.
- Plans should use a good faith, reasonable interpretation of the requirements to comply with this rule until additional rule making is provided

Provider Directories

- Plans must provide accurate provider directories online and by telephone, and updated directory information every 90 days
- Plans who provide inaccurate information that is relied on by an individual must pay in-network cost sharing for that individual
- Plans should use a good faith, reasonable interpretation of the requirements to comply with this rule until additional rule making is provided

Continuity of Care

- When a provider or facility is no longer in-network, plan participants must be permitted to elect continuing care for up to 90 days from that provider or facility under the same terms and conditions that were in place prior to the change in network or coverage
- Plans should use a good faith, reasonable interpretation of the requirements to comply with this rule until additional rule making is provided

2

Transparency in Coverage

Machine Readable Files

Pricing Transparency Tool

Transparency in Coverage

Machine Readable Files

- Effective July 1, 2022, plan sponsors were required to post "machine readable files" (MRFs) providing cost data for covered items and services on a publicly accessible website
- Guidance from HHS confirms that plan sponsors may rely on their carrier or TPA to post the MRF on their own public website

Pricing Transparency Tool

- Starting January 1, 2023, plan sponsors are required to make available an online price transparency tool providing cost for 500 items and services listed by CMS
- Starting in 2024 the price transparency tool must list all covered items and services
- Plan sponsors must lean on their carriers and TPAs for compliance assistance
    - Confirm in writing that your carrier or TPA is providing this tool

Dobbs v. Jackson Women's Health

Dobbs v. Jackson Women's Health

Background

- On June 24th, 2022, the Supreme Court released its final decision in *Dobbs v. Jackson Women's Health Organization (Dobbs),* overturning precedent case law from *Roe v. Wade* and *Planned Parenthood v. Casey*
    - Overturning *Roe* turns the legality of abortion to the states
    - Several states already have or are expected to ban or restrict abortion

Impact on Employer Health Plans

- The *Dobbs* decision does not have a direct affect on employer health plans
    - Fully insured health plans will need to follow state laws and may not cover abortions in locations where it is prohibited by state law.
    - Self-funded health plans, are not subject to state insurance laws due to ERISA preemption, but are subject to state criminal and similar laws
        - Generally speaking, ERISA will not preempt a criminal law

Dobbs v. Jackson Women's Health

Employer Considerations

- Options for providing coverage for abortion services
  - Cover under the plan in states where abortion is legal
  - Spending accounts (HSA, FSA, HRA)
  - EAPs
  - Travel benefit
  - Lifestyle account
- Mental health parity issues
- State aid and abet laws

Next Steps for Employers

- Determine level of risk and appetite for change if necessary
- Discuss decisions with legal counsel

IRS Updates

New Maximum Limits for Health Plans & Accounts

Changes to ACA Affordability

New IRS Limits for 2023

Benefits Plan Limits Comparison (2022-2023)				
Health Flexible Spending Accounts (Health FSA)	**2022**		**2023**	
Health FSA Maximum Contribution (per plan year)	$2,850		$3,050	
Health FSA Maximum Carryover (per plan year)	$570		$610	
Health Savings Accounts (HSA)	**2022**		**2023**	
	Self-Only	Family	Self-Only	Family
HSA Maximum Contribution	$3,650	$7,300	$3,850	$7,750
HSA Maximum "Catch-Up" Contribution (age 55 or older)	$1,000	$1,000	$1,000	$1,000
High-Deductible Health Plan (HDHP) Minimum Deductible	$1,400	$2,800	$1,500	$3,000
HDHP Maximum Out-of-Pocket	$7,050	$14,100	$7,500	$15,000
Qualified Transportation Benefits	**2022**		**2023**	
Parking	$280/month		$300/month	
Transit Pass/Commuter Vehicle	$280/month		$300/month	

Changes to Affordability and "The Family Glitch"

Current Rule

- Affordability for the employee and the entire family is based only on the cost for the employee to participate in single (employee only) coverage

New Rule

- Affordability for the family members will be based on the cost to elect family coverage
- Affordability for the employee will still be based on the cost for the employee to participate in single (employee only) coverage

Effect on Employers

- No change to penalties or risks for penalties under the affordability requirements of ACA's employer mandate (penalty B)
- Could affect enrollment of dependents on an employer sponsored health plan

Inflation Reduction Act

Inflation Reduction Act

Medicare Prescription Drug Costs

- 2024 – Eliminates 5% co-insurance on Medicare catastrophic drug coverage
- 2025 – Medicare $2,000 Rx out-of-pocket cap
- 2026 - Medicare to negotiate Rx price
  - Targeting 10 high-spending drugs that are older and not facing generic competition
    - More drugs added in later years
  - Minimum price reduction of 25% - up to 60% if drug has been on market for a long time
  - If drug companies don't agree to the negotiated price they may face financial penalties of 65% - 95% of drug sales to Medicare

Expanded Premium Tax Credits

- Allows individuals with household income under 150% federal poverty level (about $40,000 for a family of 4) to enroll in Marketplace coverage on a monthly basis through 2025

Consolidated Appropriations Act of 2023

Relief for HSAs and Telemedicine

HSAs and Telemedicine

Background IRS Rule

- Telemedicine fees less than fair market value (FMV) of the visit will cause a plan participant with an HDHP to be ineligible for an HSA

Previous Relief

- In 2020, the CARES Act granted relief from the FMV rule under the end of 2021.
- The relief was extended again in 2022

2023 Extended Relief

- The CAA 2023 extends relief from the FMV requirement starting January 1, 2023, for another two years
- Like previous relief the relief is permitted and not required

7

California Updates

San Francisco HCSO & HCAO
Dependent Parent Coverage
Timely Access to Care
Employer Associations
Large Group Specific Coverage Requirements
Public Employment Health Protection

California Specific Requirements

San Francisco Health Care Security Ordinance

- 2023 Expenditure Rate
  - $3.40 per hour for large employers (over 100 employees)
  - $2.27 per employee per hour for medium size employers (20-99 or 50-99 employees)
- Managerial, supervisory, and confidential employees who will earn at least $114,141 per year (or $54.88 per hour) are exempted

San Francisco Health Care Accountability Ordinance

- 2023 Minimum Standards
  - Employer must cover in-network out-of-pocket expenses up to 50% of the plan's annual out-of-pocket maximum on a first dollar basis
  - Maximum allowable coinsurance rate increases to 60%/40% for in-network services
  - Maximum allowable copayment for in-network primary care provider visits increases to $60
  - Plans are no longer required to fully cover the medical deductible

California Specific Requirements

Dependent Parent Coverage

- Starting January 1, 2023, CA Exchange plans that provide dependent coverage must make dependent coverage available to dependent parents/stepparents
  - This does not apply to employer-sponsored group plans

Timely Access to Care

- Beginning July 1, 2022, fully insured health plans must provide plan participants who are undergoing treatment for a mental health (MH) or substance use disorder (SUD) condition to get a follow-up appointment with a nonphysician MH or SUD provider within 10 business days of the prior appointment
- Requires the fully insured health plan to arrange coverage outside the plan's contracted network if a health plan is operating in a service area that has a shortage of providers and is not able to meet the geographic and timely access standards for providing MH or SUD services with an in-network provider

California Specific Requirements

Employer Associations

- Allows employers to offer a large group health plan to employers with a commonality of interest in the same line of business to offer a large group health plan under ERISA if:
  - The association is headquartered in CA
  - The association is a MEWA
  - The association was established before March 23, 2010, and has been in existence since that date
- Plans must have specific plan design as of January 1, 2019 and include coverage for employees and their dependents.
- Covered participants must be employed in specific job categories for a term no longer than six months and not covered by other group health coverage

Public Employment Health Protection

- Prohibits public employers from terminating, or threatening to terminate, the health care coverage and related benefits of employees and their families during an authorized strike

California Specific Requirements

Large Group Specific Coverage Requirements

- Effective plan years starting July 1, 2022 and after, large group health plans must cover medically necessary basic health care services including:
  - Hospital inpatient services and ambulatory care services
  - Diagnostic laboratory and diagnostic and therapeutic radiologic services
  - Home health services
  - Preventive health services
  - Emergency health care services, including ambulance and ambulance transport services and out-of-area coverage
  - Hospice care that is, at a minimum, equivalent to hospice care provided by the federal Medicare Program
  - Out-of-area coverage as coverage while an insured is anywhere outside the service area of the applicable network including urgent care services for an unforeseen illness or injury
- Prohibits discrimination in large group health insurance benefit designs and marketing practices.