Employment Law & Benefits Update

December 6, 2023

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EPIC by the Numbers

TOP 10

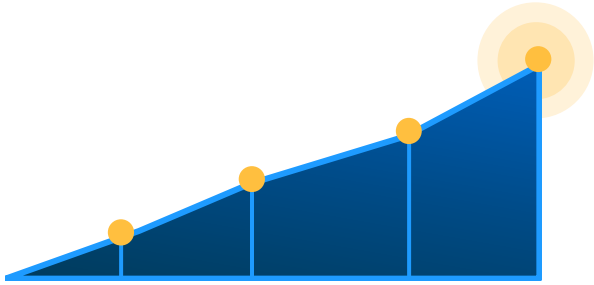
PRIVATELY HELD INSURANCE BROKERAGE
INSURANCE JOURNAL

TOP 20

LARGEST BROKERS OF U.S. BUSINESS
BUSINESS INSURANCE

TOP 20

BROKER WORLDWIDE
FINACCORD



REVENUE GROWTH

$992+ MILLION

RETAIL RUN RATE REVENUE

2,800+ EMPLOYEES

NATIONWIDE
OFFICES
WITH
REGIONAL PRESENCE

VOTED BEST PLACE TO WORK

IN THE INSURANCE INDUSTRY

CONSISTENTLY RECOGNIZED NATIONALLY SINCE 2009

Data Last Updated 7/5/2023.
Document will be updated quarterly and reflect any changes at this scheduled time.

BERLINER COHEN LLP

2024 Employment Law Update

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Updates to California Family Rights Act

Effective 2023- Designated Person

- Effective January 1, 2023, employees can take CFRA leave for a "designated person", defined as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."
- Employers may limit employees to one designated person per 12-month period.

Effective 2023- Bereavement Leave

- Effective January 1 2023, employers must grant employees up to 5 days of bereavement leave for work following a family member (spouse, domestic partner, child, parent, sibling, grandparent, grans-child, or parent-in-law)
- Need not be consecutive but all leave must be taken within 3 months of the death
- Employers can request documentation of the death, however documentation is not required before leave is taken so long as it is provided within 30 days of the leave

NEW: Reproductive Loss Leave

- Effective January 1, 2024, SB 848 requires employers grant employees 5 days of unpaid leave to recover from a reproductive loss event.
  - Don't need to be consecutive; must be taken within 3 months of event
  - Up to 20 days of leave within a 12-month period
  - Employees become eligible after working for 30 days
  - Applies to person experiencing the event, their current spouse or domestic partner, or any individual who would have been a parent had there not been reproductive loss
- Qualifying events:
  - Miscarriage
  - Stillbirth
  - Failed Adoption
  - Failed Surrogacy
  - Unsuccessful Assisted Reproduction

Updates to Healthy Families, Healthy Workplace

Expanded Paid Sick Leave

- **SB 616 amends the Healthy Workplaces, Healthy Families Act of 2014**
- Effective January 1, 2024, employers must provide employees with 5 days (or 40 hours) of paid sick leave
  - Increase from current requirement of 3 days (or 24 hours)
- Sick leave can either be made available up-front or can accrue each year
  - Sick leave can accrue at a minimum rate of 1 hour for every 30 hours worked OR
  - Employers can create an alternative accrual system so long as the accrual rate is regular and 24 hours have accumulated by the 120th day AND 40 hours have accrued by the 200th calendar day of employment

Expanded Paid Sick Leave cont.

- Employers must allow a minimum of 10 days or 80 hours to accrue and roll over to the following year
- If employers offer PTO that may be used for sick leave, the PTO policy must allow employees to accrue at least 5 days (or 40 hours) of PTO to use for sick leave within 6 months of employment
  - This is an alternative to paid sick leave, not in addition to
- Employers can mandate employees take paid sick leave in minimum increments of no more than two hours
  - However, employers may allow for paid sick leave in smaller increments at their own discretion

How to Prepare: Labor Code 2810.5

- Employers need to update their internal sick leave policies AND update their LC 2810.5 forms to include the new policy
- LC 2810.5(b) requires that employers notify employees of any changes to sick leave within seven calendar days of the change → **update your forms and distribute them to your employees by January 7, 2024**
- Form must be in the language the employer normally uses to communicate employment-related information to the employee
  - It is recommended employers have copies of forms on hand for the languages at least 10% of their employees speak

Additional Updates to Healthy Workplace, Healthy Families Act

- SB 616 also expands nonretaliation and procedural protections on the use of paid sick leave already available to non-union employees to employees covered by collective bargaining agreements
  - Prohibits retaliation for using paid sick days
  - Prohibits imposing certain conditions on the use of paid sick days
  - Requires the use of paid sick days for specified health care and situation
- Amends the schedule for in-home support service providers to increase their paid sick leave accrual to five days (or 40 hours) in each year of employment

Wage Issues

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, 2024, California's minimum wage is **$16 per hour**. Thus, the minimum wage for exempt employees must be no less than **$32 per hour** and a **salary of $66,560**.

Wage Transparency – Reporting Pay Data

- SB 1162 requires private employers with 100 or more employees to submit a pay data report to the Civil Rights Department
- Also requires employers with 100 or more employees hired through labor contractors to submit a separate pay data report for those employees
- Report must include the median and mean hourly rate for each combination of race, ethnicity, and sex within each job category
- Cannot submit a federal Employer Information Report (EEO-1) in lieu of a pay report
- There is a civil penalty not to exceed $100 per employee for failure to file the required report, and an additional penalty not to exceed $200 per employee for subsequent failure to file the report

Wage Transparency- Sharing Information with Employees

- Upon request, employers must provide employees the pay scale for the position in which the employee is currently employed
- All employers with 15 or more employees must include a pay scale for a position in any job postings
- Employers must maintain records of job title and wage history for each employee to be open for inspection by the Labor Commissioner
  - Records must be maintained for the duration of the employee's employment plus three years after the end of employment

Clarifications on California Pay Transparency Act

- Applies to all employers with a total of at least 15 employees → Labor Commissioner clarified that only 1 employee needs to currently be in California for the law to apply
- "The pay scale must be included within the job posting if the position may ever be filled in California, either in-person or remotely."
- Non-wage compensation including bonuses, tips, and other benefits are NOT required in the posting.
  - However, if a position's hourly or salary wage is based on the piece rate or commission, then the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting.
- A link to an external page containing the pay scale information is NOT acceptable and the pay scale information must be included in the post itself.

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
- Train managers who set pay or have input on the rules and how to lawful have disparate pay
- Maintain employee pay records for four years
- Update handbooks to include reference to the California Equal Pay Act
- Review policies regarding submission of pay data submissions

Fast Food Worker Minimum Wage Increase

- AB 1228 mandates that beginning April 1, 2024, the minimum wage for fast food restaurant employees shall increase to $20 per hour
- Also authorizes the Fast Food Council to set fast-food restaurant standards for minimum wage, and develop proposals for other working conditions, including health and safety standards and training, until January 1, 2029
  - Annual wage increase capped at the lesser of 3.5% of the annual increase in the US-CPI for Urban Wage Earners and Clerical Workers

Minimum Wage for Healthcare Workers

- Effective January 1, 2024, SB 525 establishes 5 separate minimum wage schedules for healthcare employees depending on the nature and size of the employer
- The new law also preempts local ordinances, regulations, and administrative actions related to wages, salary, or compensation for covered health care employees.
  - Any such local laws enacted after September 6, 2023, are void and cannot be enforced.

Reminder: Meal and Rest Period Premiums Are "Wages"

- ***Naranjo v. Spectrum Security Services, Inc.*** **(May 2022)-** Meal and rest period premiums are "wages" under California law and thus, employers could be liable for failure to properly report and timely pay those premiums.
- "Although the extra pay is designed to compensate for the unlawful deprivation of a guaranteed break, it also compensates for the work the employee performed during the break period."
- Guidance: Employers must be vigilant about compliance with California's meal period and rest break requirements, as well as ensure accurate wage statements include any meal period and rest break penalty information.

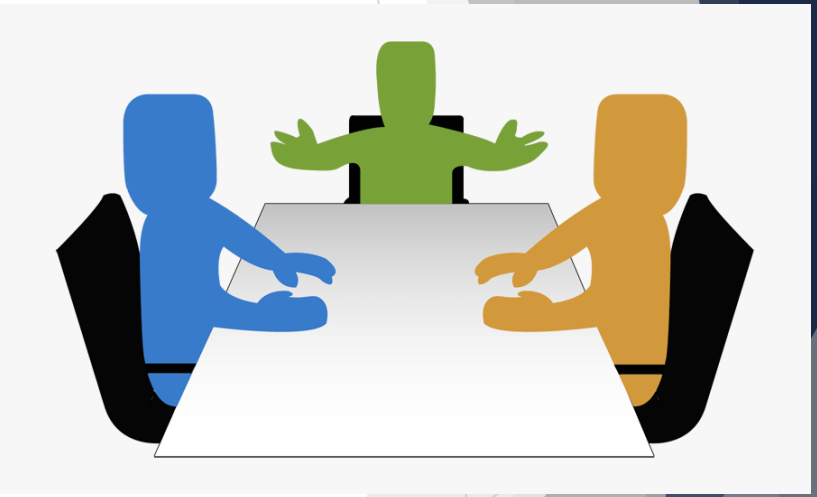
Employers Beware: End of Time Clock Rounding?

- California Supreme Court is currently reviewing time clock rounding for payroll purposes in *Camp v. Home Depot*
  - Sixth District of California ruled for Camp and held that rounding of employee's total time is impermissible when the employer records actual time and has the ability to pay by the minute
  - Home Depot appealed and the Court began reviewing in February 2023
- Recent California Supreme Court cases, like *Troester v. Starbucks*, emphasize that state law requires the payment of wages for all time worked
- **Advice: Start having employees track their arrival/departure time to the minute, and pay them accordingly**

Private Attorneys General Act (PAGA) Updates

PAGA and Arbitration: *Adolph v. Uber Technologies* (CA 2023)

- *Adolph v. Uber Technologies*: If a defendant believes arbitration is required, it is the party seeking arbitration that bears the burden of proving the existence of an arbitration agreement in court.
- Plaintiffs have standing to pursue non-individual, representative PAGA claims for violations alleged to have been suffered by other alleged aggrieved employees in court, even *after* arbitrating the individual PAGA claims.
- Party enforcing arbitration agreement (typically the employer) has burden of proving the agreement is valid
- **Best practice:** Give the employee time to review the agreement at work, and have the employee sign the agreement in person, on paper instead of a digital signature



Supreme Court Review: Manageability of PAGA Claims

- There is a split in California appellate districts on whether a PAGA class action claim can be dismissed for manageability concerns.
  - ***Wesson v. Staples*** (2nd Appellate District, 2021): PAGA class action claims **can** be dismissed for lack of manageability if the employee does not cooperate with the trial court's manageability inquiry.
  - ***Woodworth v. Loma Linda*** (4th Appellate District, 2023): PAGA class action claims **cannot be** dismissed for lack of manageability.
- ***Estrada v. Royalty Carpet Mills Inc***. California Supreme Court expected to decide whether a trial court may dismiss unmanageable PAGA claims in next six months.

Exorbitant Attorney's Fees Under PAGA

- Under PAGA, prevailing plaintiffs may recover their attorney's fees and costs. Settlements often allocate one third of the total settlement to attorneys' fees.
- In August 2023, a Fresno County Superior Court judge rejected that percentage approach in a $1.7 million settlement.
- "Applying the amount sought of $555,278 to the 303 attorney hours, the hourly rate would equate to $1,826… The court finds the rate sought as extraordinary, and therefore will not rely on the percentage approach."
- The Judge proposed attorney's fees of $162,645 based on a rate of $700 an hour.
- Does not reduce the overall settlement, just redistributes more of the compensation to class members.

2024 Election: The End of PAGA? Fair Pay and Employer Accountability Act

- In the November 2024 election, voters will decide whether to repeal PAGA and replace it with the Fair Pay and Employer Accountability Act
- Note: Repealing PAGA will not moot any pending PAGA claims against employers or reduce overall total claims possible against employers
- Changes:
  - Removes the private right of action for employees and places all Labor Code enforcement in the hands of Labor Commissioner
  - Statutory and civil penalties will double for willful violators
  - 100% of monetary penalties will go to harmed employees, rather than the current 25%
  - DLSE must be a party to all labor complaints filed with the Labor Commissioner
  - No more awarding of attorney's fees
  - Create a Consultation and Policy Publication unit for the purpose of providing information, advice, and assistance to employers, employees, and other members of the public about laws enforced by DLSE

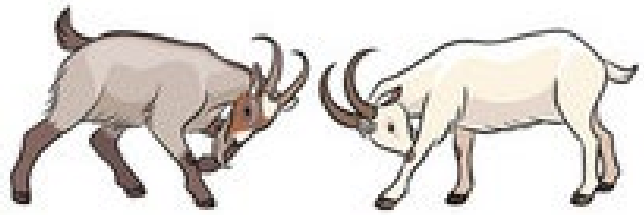
Litigation, Privileges, and Evidence Presumptions

Expanding Privilege for Sexual Harassment Victims in Defamation Lawsuits

- AB 933 privileges communications made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination.
- This is in addition to the already protected complaints of sexual harassment of an employee to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment.

Retaliation – Rebuttable Presumption

- Beginning January 1, 2024, when an employee or applicant is disciplined or discharged within 90 days of engaging in protected activity, ***there is a rebuttable presumption that the employer acted in retaliation in both civil actions and governmental enforcement***
- Presumption can be overcame if employer can show a legitimate, nonretaliatory reason for the disciplinary action → burden then shifts back to employee to show the disciplinary action was retaliatory
- Increased Civil Penalty: **Up to $10,000 per employee for each violation** awarded to the retaliated employee, in addition to other remedies
- Employers should:
  - Thoroughly document employee performance and disciplinary actions
  - Train supervisors to understand importance of adhering to company policies
  - Ensure policies are being applied fairly to ALL employees



Victory! – Retaliation

- *Vatalaro v. County of Sacramento* (2022)- After being terminated, Vatalaro sued for unlawful retaliation under Labor Code Section 1102.5 alleging that the County retaliated against her after she reported she was working below her service classification.
  - County moved for summary judgement saying Vatalaro could not show she had a reasonable belief that the information she disclosed evidenced a violation of any law.
  - Further, the County had a valid nonretaliatory reason for terminating her. Vatalero appealed.
  - Court of appeals affirmed stating**:" the relevant standard is not whether the County demonstrated it had such a [non-discriminatory] reason; it is instead whether the County 'demonstrate[d] by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.'"**

Additional Labor Code Enforcement

- AB 594, until January 1, 2029, authorizes public prosecutors to prosecute an action, either civil or criminal, for a violation of a specified provisions of the Labor Code or to enforce those provisions independently.
- Money damages recovered by public prosecutors will be first applied to payments due to affected works. All civil penalties recovered will be paid to the General Fund of the state, unless otherwise specified.
- Public prosecutor can only redress violations occurring in their geographical jurisdiction.
- Prosecutor can seek injunctive relief to prevent continued violations.
- Also permits Labor Commissioner or prosecutor to enforce willful misclassification of employees as independent contractors.

Public Prosecutor LC Enforcement and Arbitration Agreements

- AB 594 also allows the public prosecutor or the Labor Commissioner to enforce the Labor Code regardless of arbitration agreements between individual employees and employers.
- Any subsequent appeal of the denial of any motion or other court filing to impose arbitration agreements on a public prosecutor, Labor Commissioner, or Department of Justice shall not stay court proceedings, not withstanding specified law.

Employee Policy Updates

New I-9 Form

- New form must be used starting November 1, 2023
- Changes made to the form:
  - Condenses sections 1 and 2 to a single-sided sheet
  - Designed to be fillable on tablets and mobile devices
  - Moves Section 1 Preparer/Translator Certification and Section 3 Reverification and Rehire to separate, standalone supplements that employers can provide when necessary
  - Revises the Lists of Acceptable Documents
  - Reduces instructions from 15 pages to 8 pages
  - Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHA-authorized alternative procedure rather than via physical examination
- New form can be found on U.S. Citizenship and Immigration Services website: here

Updates to Employment Background Checks

Record Cleaning

- California Criminal Records Relief Act 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**.

No Pay for Waiting Time

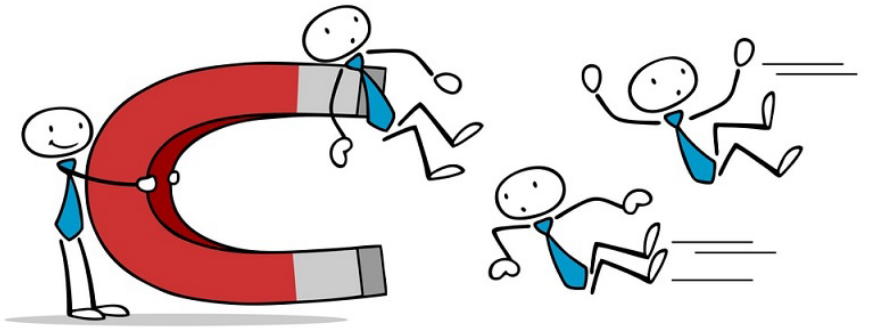
- **Court confirmed when employer extends conditional offer time while waiting for background check not compensable.**

CalSavers

- CalSavers now applies to employers with 1 or more employees
- Employers must register or notify the state they are exempt by December 31, 2025: application available here
  - If you have received a notice of violation letter, you have time to rectify the situation by registering at the link above by the deadline
- Employers may be exempt if they meet one of the following requirements
  - Sponsors a tax-qualified retirement plan
  - Does not employ any employees other than the owners
  - Closed in 2022
  - Is a religious organization, tribal organization, or government organization
  - Merged with another company

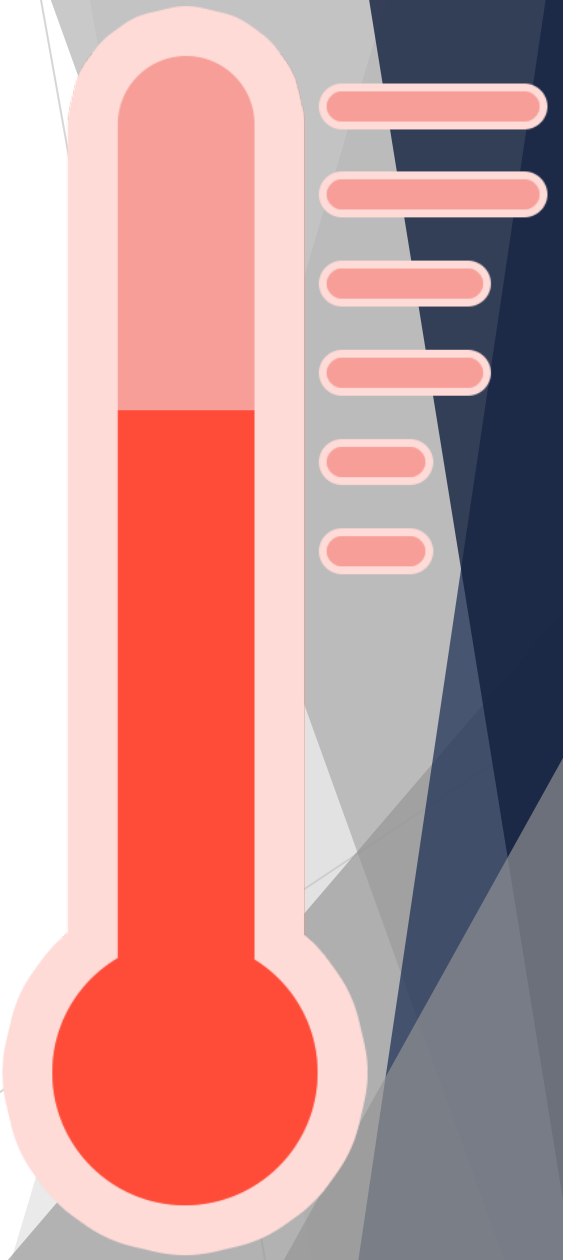
Employee Rehiring and Retention Displaced Workers

- SB 723 expands the right to recall due to COVID-19 layoff to a recall for practically any layoff or reduction in force by creating a rebuttable presumption that all economic, nondisciplinary reason for layoff is related to the COVID-19 pandemic
  - **This law is in effect until December 31, 2025**
- Covered businesses include hotels, private clubs, event centers, airport hospitality operations, airport service providers, and building services
- Covered employees must have been employed for at least 6 months and whose separation occurred on or after March 4, 2020
- Employers must retain records regarding what employees were laid off and why for at least 3 years



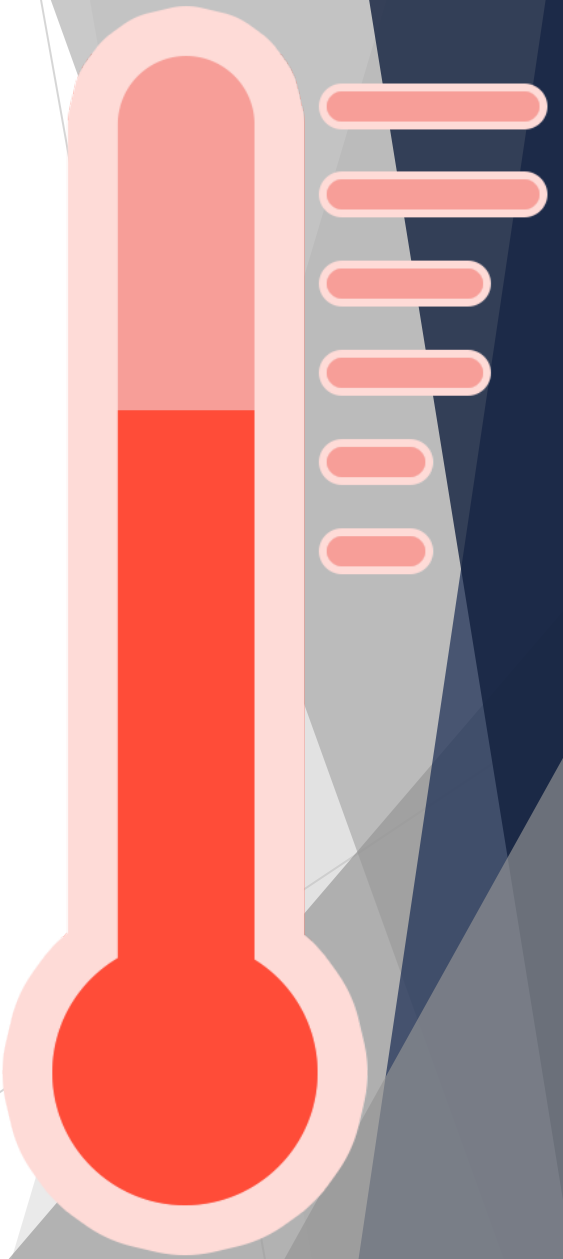
Update to IIPP: Indoor Workplace Temperature Regulations

- The following rules now apply to indoor work environments that reach or exceed a temperature of 82 degrees:
  - Employees must be provided and have access to at least one quart of potable water per hour
  - Employers must provide and encourage use of cool-down areas for employees
  - Employees experiencing symptoms of heat illness must be monitored
  - Employers must monitor temperature and hear index, keep accurate records of those recordings, and evaluate all factors for heat illness
  - Control measures must be used to reduce environmental risk factors for heat illness, including engineering controls, administrative controls, and personal-heat protective equipment



Update to IIPP: Indoor Workplace Temperature Regulations

- The following rules now apply to indoor work environments that reach or exceed a temperature of 82 degrees:
  - Employees must be observed while acclimating to higher heat levels, and effective emergency response procedures, including first aid, must be implemented for any employee displaying heat illness symptoms
  - Employees must be trained in topics related to heat illness including personal and environmental risk factors, heat load burden from exertion, clothing, and personal protective equipment
  - Employer must establish, implement, and maintain an effective Heat Illness Prevention Plan
    - If the majority of employees are not English speakers, the plan must be written in a language they can understand



California Privacy Rights Act (CPRA)

- Effective July 1, 2023, business privacy policies must include information on consumers' privacy rights and how to exercise them including the Right to Know, Right to Delete, Right to Opt-Out of Sale, and the Right to Non-Discrimination.
- This law applies if:
  - The company has an annual gross revenue in excess of $25 million
  - The company has annual purchases, receipt, or sales of the personal information of 50,000 California residents, households, or devices
  - The company derives 50 percent or more of annual revenue from selling consumers' personal information

Corporate Transparency Act

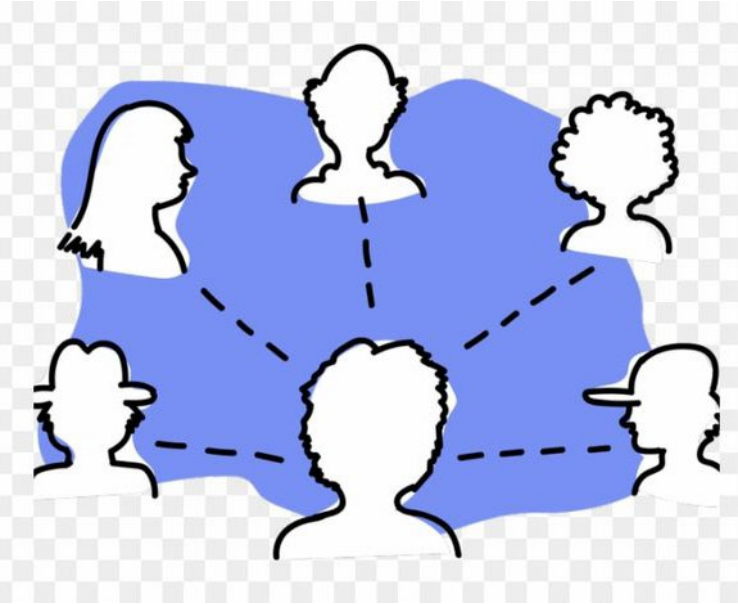
- Beginning January 1, 2024, corporations, limited liability companies, and limited partnerships and other similar entities formed or qualified to do business within the US must disclose **beneficial ownership information** to the Financial Crimes Enforcement Network (FinCEN) within the US Department of the Treasury.
- "Beneficial Owner" is any individual who directly or indirectly exercises "substantial control" over the reporting company OR who "owns" or "controls" 25% of the "ownership interests" in a reporting company.
- All entities formed after January 1, 2024 will need to file on formation, and entities forms before this date have until January 1, 2025 to file.
  - Banks, Large Operating Companies, Publicly Traded Companies, and Tax-Exempt Entities are exempt from filing.
- Failing to file or fraudulently filing results in a daily $500 fine up to $10,000.

NLRB and State Updates to Employment Agreement Provisions

Confidentiality Clauses- *McClaren Macomb*

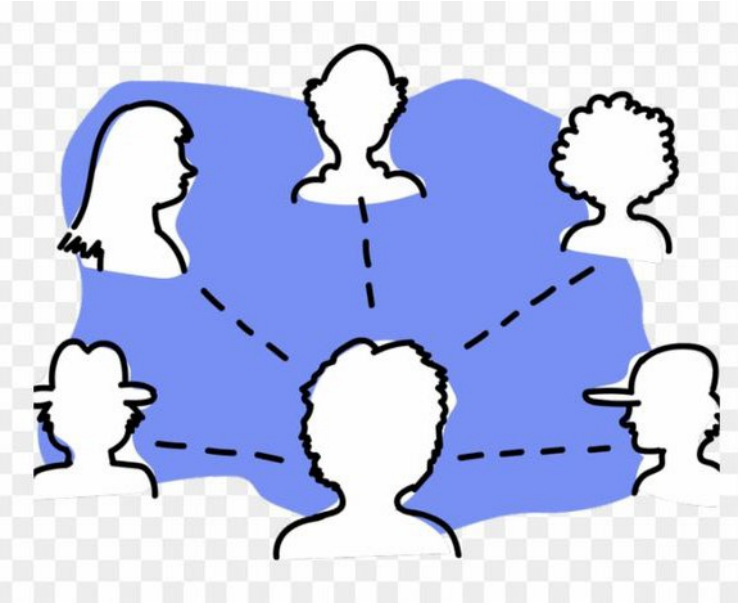
- Union employees were laid off and offered severance with a confidentiality clause:
  - *"The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."*
- Administrative Law Judge ruled the provision was lawful and did not prevent coercive activity.
- The ruling was appealed and reviewed by the NLRB.

The New Standard

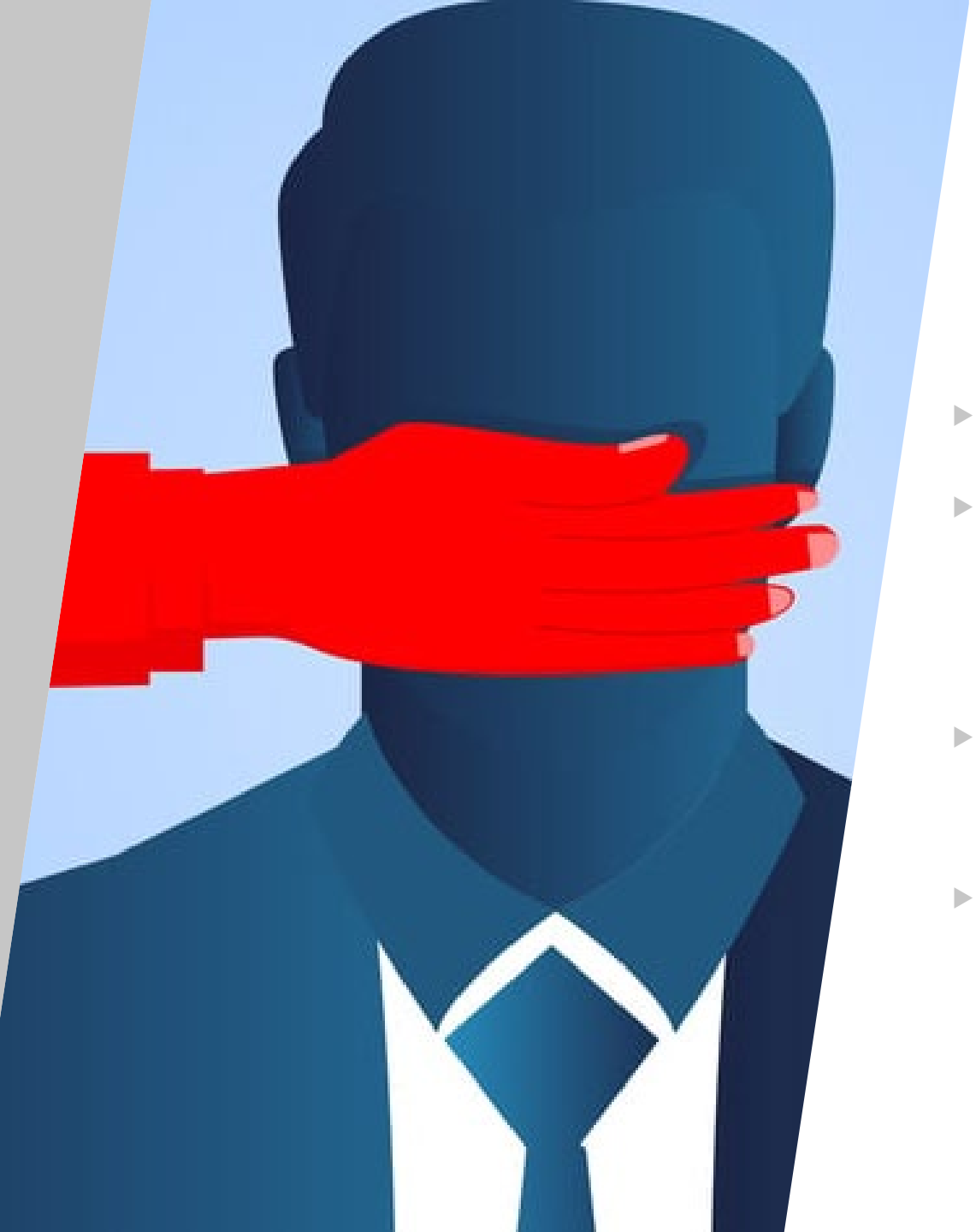


- Holding: The action of offering an agreement with broad confidentiality provision violates the Act.
- The Board majority held that precluding employees from disclosing terms of the severance agreement — including those that may be unlawful — violated employees' Section 7 rights to assist coworkers and the NLRB.
- The majority explained that by prohibiting any discussion of the agreement's terms, employees were in effect prevented from any future discussion of a possible "labor issue, dispute, or term and condition" found in or caused by the agreement.

The New Standard



- **This decision is retroactive, so agreements signed before this ruling may be challenged as well.**
  - However, it is unlikely an unlawful confidentiality/non-disparagement clause will invalidate the entire severance agreement.
- The General Counsel of the NLRB released guidance emphasizing that this decision applies to "all employer communications"
- Provisions that could interfere with employee speech rights include noncompete clauses, non-solicitation clauses, no-poaching clauses, broad liability releases, and cooperation agreements involving current or future investigations.



Non-Disparagement Clauses

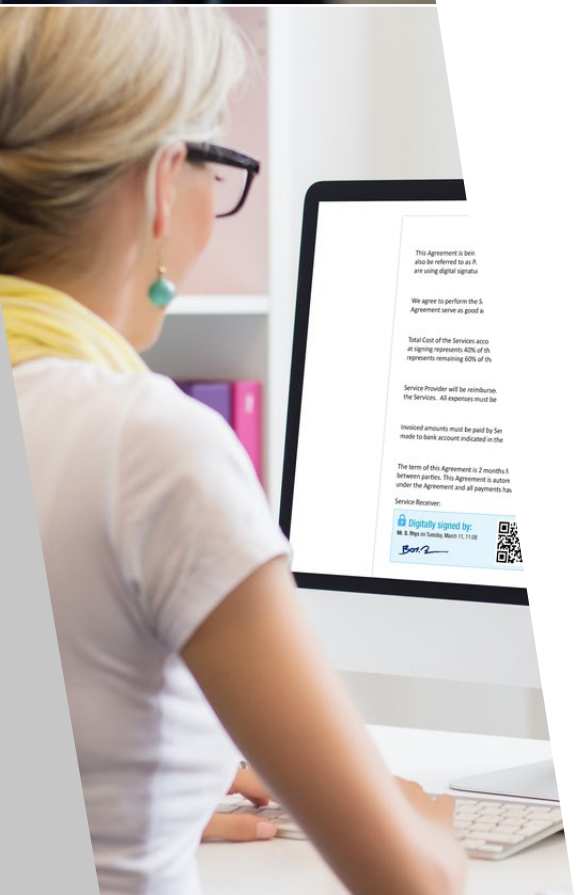
- Board is hyper focused on blanket terminology that is not commonly understood.
- Clauses such as: "At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives" are too vague.
- The Board ruled in *McClaren McComb* that the non-disparagement provision at issue did not include a definition of "disparagement" and contained no temporal limitation.
- Also absent from the severance agreement was any express statement making clear that nothing in the severance agreement limited employees' exercise of Section 7 rights.

Employer Guidance

- Board ruling against confidentiality clauses in severance agreements doesn't apply to management or supervisors (generally exempt employees)
- Narrowly tailor agreements to your business
- Confidentiality provisions should be used sparingly. Most likely not needed if
  - Company wide RIF
  - Employee had no access to confidential information (day laborers)
  - The amount of severance is so nominal no consideration
- Review standard severance agreements and determine whether confidentiality is needed or even allowed.
- Include an express statement in employee communications that any rules do not preclude employees from exercising Section 7 rights.
- Do not recycle severance agreements, provide specific provisions for the issues at hand.

New Rules on Non-Competes

- SB 699 prohibits California employers from entering into contracts with employees containing voidable non-compete agreements AND prohibits employers from enforcing in California courts a non-compete agreement *regardless of whether the contract was signed and the employment was maintained outside of California*
- AB 1076 requires that employers notify current and former employees in writing that any noncompete agreements they have signed are void **by February 14, 2024**



DOL Proposes New Rule for Independent Contractor Classification

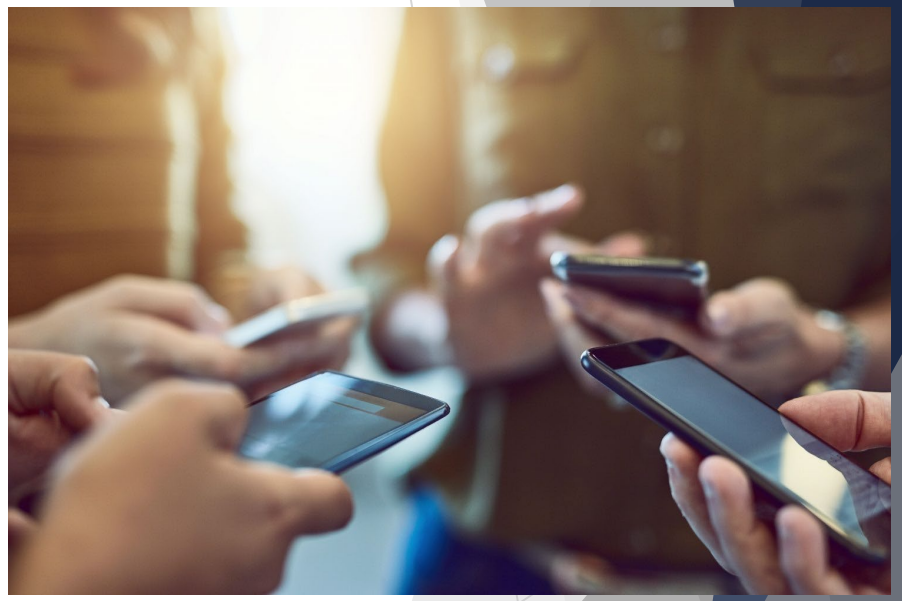
- On October 13, 2022, the DOL released a new proposed rule for classifying independent contractors under the Fair Labor Standards Act.
- **Comment period has ended and we are awaiting the final rule**
- This would replace the current generally employer-friendly test with a test decidedly more likely to result in findings that contractors have been misclassified under the FLSA and are entitled to overtime.

Personal Device Policies- *Stericycle*

- In February 2015, the employer Stericycle, Inc. distributed a revised employee handbook to its employees, which included a rule restricting the use of personal electronic devices to break times only.
  - Required personal phone and email usage to be infrequent, brief and limited to urgent communication with family members.
  - Banned from taking pictures, video or audio recordings at the worksite without a supervisor's permission.
  - Prohibited conduct that maliciously harms or intends to harm the business reputation of the company.
  - Prohibited activity that constitutes a conflict of interest or adversely reflects upon the integrity of the company or its management.
  - Prohibited employees from disclosing retaliation complaints and the terms of their resolution.
- The union filed unfair labor practice charges, and the General Counsel issued a complaint alleging the rule unlawfully infringed on employees' Section 7 rights.

Stericycle Creates Rigid Standard

- Stricter legal standards for workplace rules and policies stated within employee handbooks.
  - Employer policies will be reviewed liberally for Section 7 violations.
  - A facially neutral work rule is presumed to be *unlawful* where the General Counsel makes a showing that it has a reasonable tendency to chill employees' exercise of their Section 7 rights.
  - Whether the rule has a "tendency" to do so will be viewed from the perspective of an employee who is predisposed to engaging in protected concerted activity, not any other regular employee.
  - To the extent the rule is ambiguous, the rule will be interpreted against the drafter (i.e., employer).
  - The employer's intention in maintaining a rule is immaterial.
  - To rebut the General Counsel's presumption, the employer must prove that legitimate and substantial business interests support the rule, and those interests cannot be achieved through less restrictive means.
- Law no longer balances Employer's legitimate business interests against the effects workplace rules have on Employees.

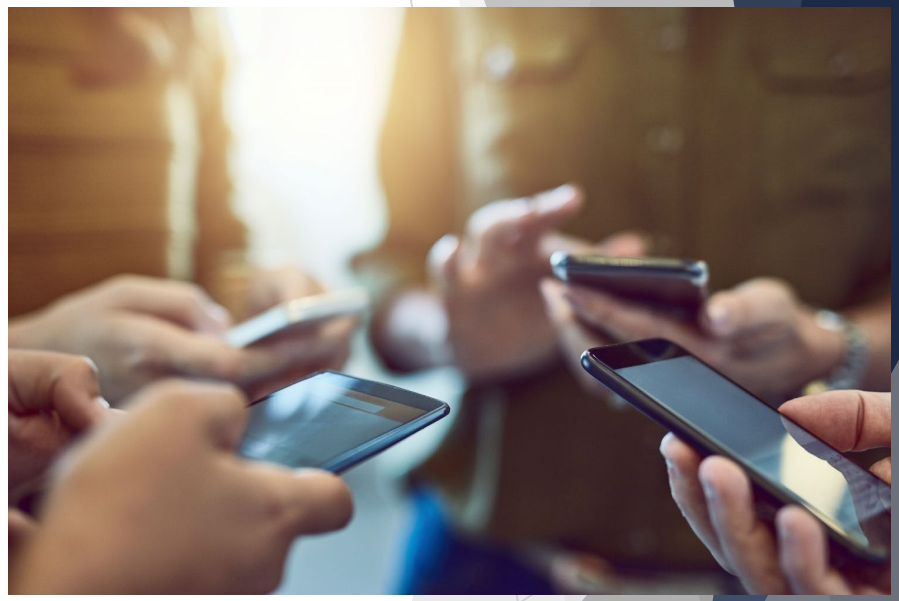


State and Federal Bans on Gag Clauses as to Sexual Assault

- **Stand Together Against Non-Disclosure Act & "Silenced No More" Act**
  - STAND Act prohibits confidentiality provisions in settlement agreements based on sex
  - "Silenced No More" Act expands ban to settlement agreements based on race, color, national origin, religion, age, sex, sexual orientation, physical or mental disability, and retaliation
  - Non-disparagement agreements denying an employee the right to disclose information about unlawful acts in the workplace as a condition of employment or continued employment are banned unless there is a specific carve-out for the employee to discuss conduct has "reason to believe is unlawful
- **Federal Speak Out Act**
  - Non-disclosure and non-disparagement clauses related to allegations of sexual assault/harassment that are entered into "before the dispute arises" are unenforceable
  - Dispute arises once an allegation is made

Best Practices to Update Handbooks

- Review and Scrutinize all workplace rules, policies, and procedures especially policies addressing social media, audio and video recordings at work, use of company devices, email or computer use, distribution and solicitation of materials, and bulletin boards or group chats.
- Does a rule have the potential to dissuade an employee from engaging a protected activity?
  - Could it be interpreted as preventing them from self-organizing?
  - Does it prevent them from joining or assisting labor organizations?
  - Does it restrict employee comment on a workplace condition, wages or policy?
- Review with an eye towards could this be interpreted to say it is restricting an employee in any manner.
- If restricting, is there a less intrusive means to achieve the same result?



Workplace Discrimination & Harassment Issues

Discrimination & Cannabis Use: Drug Screening

- 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;

Discrimination & Cannabis Use: Criminal History

- Effective January 1, 2024, SB 700 makes it unlawful for employers to discriminate against a job applicant based on information regarding cannabis use that is learned from a criminal history.
- Employers may still ask about an applicant's prior criminal history so long as in compliance with state law requirements.

What Can Employers Do?

- Employers can test employee impairment using an “impairment test”
  - “Impairment test” was not defined by the CA legislature. Testing similar to what is done for alcohol at traffic stops may be helpful.
- Cannabis breathalyzer test
  - Employers should be wary because while accurate, the cannabis use could have occurred prior to the start of work. Technology is still progressing.

State and Federal Protections for Pregnant Workers

- **Fair Employment and Housing Act**
  - Reasonable accommodations for medical needs related to pregnancy
  - Transfer to a less strenuous or hazardous position (if one is available) or duties if medically needed
  - Provide Pregnancy Disability Leave of up to 4 months and return to your same job when no longer disabled by pregnancy
  - Provide reasonable amount of break time and use of a room or other private location in close proximity to the employee's work area to express breast milk
  - Never discriminate, harass, or retaliate on the basis of pregnancy
- **Pregnant Workers Fairness Act**
  - Reasonable accommodations for medical needs related to pregnancy
  - Cannot require an employee to accept an accommodation without a discussion about the accommodation
  - Cannot require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
  - Never discriminate, harass, or retaliate on the basis of pregnancy
- **PUMP for Nursing Mothers Act**
  - Employers must provide break time and a private place to express breast milk

- Congress drafted a list of examples of reasonable accommodations:
  - Assigning light duty
  - Permitting more frequent bathroom breaks
  - Allowing pregnant workers to drink water at their workstations
  - Ability to sit at their workstation
  - Closer parking
  - Flexible hours
  - Appropriately sized uniforms and safety apparel
  - Additional break time to use the bathroom, eat, and/or rest
  - Reassignment from activities that are strenuous or dangerous to the health of the baby

NEW: Workplace Violence Prevention Plan

- SB 553 adds a new section to Labor Code 6401.9 requiring employers to create and implement an effective plan aimed at preventing workplace violence beginning July 1, 2024
  - Workplace Violence Prevention Plan can be included in the already mandated Injury and Illness Prevention Program
- "Workplace violence" means any act of violence or threat of violence that occurs in a place of employment
- Supervisors and employees must be trained on workplace violence matters and employers must keep records of all training for a minimum of 1 year
- Employers must create and maintain a violent incident log and record all violent workplace incidents that occur

Requirements for Workplace Violence Prevention Plan

- A sample policy is available on the California Department of Human Resources Website
- An employer's Workplace Violence Prevention Plan must include:
  - A system for identifying and evaluating workplace hazards
  - Methods and procedures to correct unsafe or unhealthy work conditions and practices
  - Procedures for accepting and responding to reports of workplace violence, including a prohibition on retaliating against the employee making the report
  - Procedures to communicate workplace violence matters with employees, including how to report an incident without fear of retaliation
  - Procedures to investigate employee concerns
  - Procedures for responding to an actual or potential workplace violence emergency, including the means to alert employees of the emergency and obtain help from staff designated to respond, and evacuation and shelter plans
  - Procedures for post-incident response and investigation

Requirements for Workplace Violence Prevention Training

- Training must be provided when the plan is first established and annually thereafter on all the following:
  - The employer's plan, how to obtain a copy of the plan at no cost, and how to participate in development and implementation of the employer's plan
  - The definitions and requirements laid out in Labor Code Section 6401.9
  - How to report workplace violence incidents or concerns to the employer or law enforcement without fear of reprisal
  - Workplace violence hazards specific to the employee's jobs, the corrective measures the employer has implemented, how to seek assistance to prevent or respond to violence, and strategies to avoid physical harm
  - The violent incident log and how to obtain copies of records
  - An opportunity for interactive questions and answers with a person knowledgeable about the employer's plan
- Additional training shall be provided when new or previously unrecognized workplace violence hazards have been identified or changes are made to the plan

Requirements for Violent Incident Log

- Log information for each incident shall be based on information solicited from the employees who experienced the workplace violence, witness statements, and investigation findings.
- **Employers shall omit any element of personal information sufficient, either alone or in combination with other public information, to identify any person involved in a violent incident**
- If an incident occurs at a multiemployer worksite, each employer shall log the incident and share their records with the controlling employer
- Violent incident logs shall be maintained for a minimum of five years

Requirements for Violent Incident Log

- Each violent incident log entry shall include:
  - Date, time and location of the incident
  - Type of incident as defined in the statute
  - Detailed description of the incident
  - Classification of the perpetrator (employee, customer, relative to employee, stranger etc)
  - Classification of the circumstances at the time of the incident including whethe the employee was completing usual job duties, working in a poorly lit area, wa rushed, working during a low staffing level, isolated or alone, unable to get help, working in a community setting, or working in an unfamiliar or new location
  - Whether the incident included any of the following: physical attack with or without a weapon, threat of physical force or use of a weapon, sexual assault or threat, or an animal attack
  - Consequences of the incident including whether security or law enforcement was involved and their response and actions taken to protect employees from a continuing threat or other hazards as a result of the incident
  - Name and job title of person completing the log and the date and time the log was completed

TROs, Protective Orders, and Employee Harassment

- Effective January 1, 2025, SB 428 authorizes any employer whose employee has suffered harassment to seek a temporary restraining order and an injunction on behalf of the employee and other employees upon showing clear and convincing evidence that an employee has suffered harassment, that great or irreparable harm would result to an employee, ad that the respondent's course of conduct served no legitimate purpose.
- An employer seeking a TRO must provide the employee whose protection is sought the opportunity to decline being named in the order before filing the petition.
- The court is expressly prohibited from issuing an order to the extend that the order would prohibit speech or activities protected by the NLRA or specified provisions of law governing the communications of exclusive representatives of public employees.

Groff v DeJoy: Religious Accommodations in the Workplace

- Groff was an Evangelical Christian working for USPS. Groff believes that Sunday should be devoted to worship and rest and requested to not work on Sundays. After "progressive discipline" for failing to work on Sundays, Groff sued under Title VII of the Civil Rights Act of 1964 asserting USPS could have accommodated his religious beliefs without undue hardship.
- **Holding:** To deny a religious accommodation, the employer has the burden of showing the burden of granting the accommodation would result in ***"substantial increased costs"*** in relation to conduct of its business.

Groff v DeJoy: Religious Accommodations in the Workplace

- This new "substantial increased costs" is a higher standard than the previous *de minimis* standard
- Court did not provide much guidance, but the new test should take into account all relevant factors including the particular accommodation at issue and their practicality in light of the size and operating cost of the employer
- Employers should apply more rigorous standards as they asses religious accommodation request with an emphasis on the "conduct of the business"

Discrimination Based on Caste

- Governor Newsom vetoed SB 403 which would have banned discrimination based on an individual's cast under the FEHA, Unruh Civil Rights Act, and California Education Code, stating:

"California already prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, gender identity, sexual orientation, and other characteristics, and state law specifies that these civil rights protections shall be liberally construed."

- Caste may already be protected under national origin and ancestry, and employers should be aware of this potential source of discrimination

LGBT Disparities Reduction Act

- AB 1163 adds *intersexuality* to the voluntary self-identification information to be collected under the Lesbian, Gay, Bisexual, and Transgender Disparities Act.
- State entities, including the Civil Rights Department, need to comply with this provision as soon as possible following January 1, 2025 but not later than July 1, 2026.

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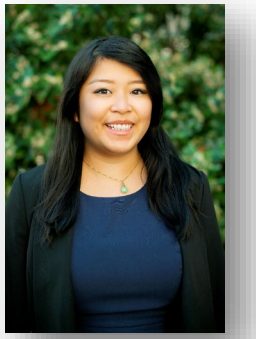

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Berliner Cohen serves the business and regulatory needs of private businesses and public agencies. For over 50 years, the Firm has developed the special expertise required by a diverse client base consisting of some of Northern California's most influential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

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Presenters

Liz Mann, 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

What's New?

New and Upcoming Compliance Matters

Gag Clause Prohibition Attestation

Effective December 27, 2020, group health plans and health insurance carriers are prohibited from entering into agreements with health care providers, or service providers that have access to healthcare providers or networks of providers containing gag clauses. Starting December 31, 2023, group health plans and insurance carriers must attest to compliance with this requirement.

Who does this apply to?

- Insurance carriers providing individual and group plans
- Group health plans covered by ERISA including grandfathered plans
- Non-federal government health plans
- Church plans

Who does this not apply to?

- Account based plans and short-term limited duration plans
- Excepted benefits and carriers that provide them
- Medicare and Medicaid

Gag Clause Prohibition Attestation

What is a Gag Clause?

A gag clause is a contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party.

Might exist in agreements between the plan and:

- A health care provider
- A network or association of providers
- A third-party administrator (TPA)
- Another service provider offering access to a network of providers (PBM)

Gag Clause Prohibition Attestation

Attestation Requirement

Plans must attest to compliance with the gag clause prohibition requirement by December 31, 2023, and then annually.

- The first attestation will be for plan language dating back to **December 27, 2020**
- Most fully insured carriers will attest on behalf of fully insured plans
  - Because fully insured carriers are obligated to submit an attestation on their own behalf, the Departments will consider both the plan and the issuer to have satisfied the attestation submission requirement under the issuer's submission
  - Fully insured plan sponsors are encouraged to reach out to carriers for confirmation
- Self-funded plan sponsors will likely need to complete their own attestation
  - Level of involvement is vendor specific
  - Self-funded plan sponsors are encouraged to reach out to their vendors for more information
- Employer plan sponsors who handle their own agreements will need to provide their own attestation

Reproductive Health Care

HIPAA

- Proposed changes to HIPAA to strengthen privacy for reproductive healthcare

Executive Orders

- Expand access to contraception
- Promote access to reproductive healthcare
- Address privacy concerns
- Promote compliance with non-discrimination and other federal laws

Preventive Care – FAQs Part 54

- Clarification on required contraception as preventive services under ACA

End of COVID-19 HDHP Relief

IRS Notice 2023-37

- June 2023, the IRS released guidance ending relief for COVID-19 testing and treatment for HDHPs and HSAs for plan years ending on or before December 31, 2024
- Intent is to provide a smooth transition period for plan sponsors and participants

2024 ACA Affordability

Changes to Affordability Percentage

- 2023 – 9.12%
- 2024 – 8.39%

Three IRS Safe Harbors

- Federal Poverty Level
- Rate-of-Pay
- W-2

New IRS Limits for 2024

Benefit Plan Limits Comparison (2023-2024)				
Health Flexible Spending Accounts	**2023**		**2024**	
Health FSA Maximum Contribution	$3,050		$3,200	
Health FSA Maximum Carryover	$610		$640	
Health Savings Accounts	**2023**		**2024**	
	Self-Only	**Family**	**Self-Only**	**Family**
HSA Maximum Contribution	$3,850	$7,750	$4,150	$8,300
HSA Maximum Catch-Up Contribution	$1,000	$1,000	$1,000	$1,000
HDHP Minimum Deductible	$1,500	$3,000	$1,600	$3,200
HDHP Out-of-Pocket Maximum Limit	$7,500	$15,000	$8,050	$16,100
Qualified Transportation Benefits	**2023**		**2024**	
Parking	$300/month		$315/month	
Transit/Commuter	$300/month		$315/month	

2

What's Coming?

Pending Compliance Matters

Proposed Rules for STLDI, and Fixed Indemnity

Short Term Limited Duration Insurance

- Removes Trump-Era changes to term length
- Coverage is limited to three months with a one-month extension allowed
- Effective after the publication of the final rules (expected later this year)

Hospital and Fixed Indemnity

- Plans must pay on a "fixed period" basis
- Cannot make indemnity coverage contingent on participation in medical coverage
- Benefits that are provided on a pre-tax basis paid for without regard to whether an actual medical expense was incurred are taxable income to the employee
- New notice requirement
- Effective for new plans after the publication of the final rules and plan years starting January 1, 2027 for existing plans
- Clarification on taxation of benefits effective later of publication of final rules or January 1, 2024

Mental Health Parity Background & 2021 NQTL Comparative Analysis

Background & Timeline

- 1996 – Mental Health Parity Act
- 2008 - Mental Health Parity and Addiction Equity Act (MHPAEA)
- 2013 – Final MHPAEA rules under Affordable Care Act (ACA)
- 2020 – Additional requirements under the Consolidated Appropriations Act (CAA)
- 2023 – Proposed rulemaking released

Original Intent

To ensure that individuals have access to mental health and substance use disorder (MH/SUD) treatment in the same capacity as individuals seeking treatment for medical/surgical (M/S) procedures.

Context for the New Proposed Rule

Biden Administration increased efforts to improve access to mental health care

Mental Health Parity Background & 2021 NQTL Comparative Analysis

Current Requirements

Starting February 10, 2021, as part of the Consolidated Appropriations Act (CAA) group health plans that provide coverage for MH/SUD benefits are required to prepare a **comparative analysis** of the plan's NQTLs.

- The analysis must be provided upon request
  - Plan sponsors are encouraged to get a comparative analysis in place **before** the Departments request it
  - The Agencies only give about two weeks to provide the analysis
- Plans must correct any violations within a specific time frame
- Most carriers will provide the completed analysis for fully insured plans, but self-funded TPAs and service providers will only provide information required to complete the analysis, not the analysis itself

Mental Health Parity NQTL Proposed Rules (2023)

Proposed Three Part Test for NQTLs

1. No more restrictive
2. Design and Application
3. Relevant Data Evaluation

Material differences in outcomes data is a strong indicator of an NQTL violation

New Proposed Definitions

- Mental health benefits
- Factors
- Processes
- Strategies
- Evidentiary standards

Mental Health Parity NQTL Proposed Rules (2023)

Network Standards

The proposed rules include a special provision for NQTLs related to network composition. A plan or issuer will fail to meet the parity requirements of MHPAEA if, in operation, the relevant data collected shows material differences in access to in-network MH/SUD benefits as compared to in-network M/S benefits in a classification.

The Departments will evaluate the impact of all NQTLs related to network composition based on four types of data:

- Out-of-network utilization
- Percentage of in-network providers actively submitting claims
- Time and distance standards
- Reimbursement rates

Material differences in network composition would prove an actual NQTL violation

Mental Health Parity NQTL Proposed Rules for Comparative Analysis (2023)

Comparative Analysis Elements

1. Description of the NQTLs
2. Identification and definition of the factors used to design or apply the NQTL
3. Use of the factors used to design or apply the NQTL
4. Determination of comparability as written
5. Determination of comparability in operation
6. Findings and conclusions

Additional Requirements

- Must be certified by one or more named plan fiduciaries
- Must be available upon request
- Not required to be prepared annually but should be updated for changes in plan design or usage

Mental Health Parity NQTL Comparative Analysis

Proposed Penalties & Consequences for Non-Compliance

- Analysis must be provided to participants/beneficiaries within 30 days of a written request, or an ERISA plan could face up to a $110 per day penalty
- May be prohibited from imposing certain requirements or limitations prospectively
- May be required to re-process claims retroactively
- May have to send notice to participants and be listed in an enforcement report to Congress

Mental Health Parity NQTL Comparative Analysis (2023)

Next Steps for Employers

- Work with your EPIC account team to make sure you have an NQTL comparative analysis in place
- Review service agreements for provisions that outline vendors' responsibility to provide analyses
- Once you have an analysis, review it with EPIC and your TPA/Carrier/Service Providers
- Fix any potential parity issues
- Document any variations in NQTLs and provide rationale for these items

PBM Transparency – State Legislation & ERISA Preemption

ERISA Preemption

- 2020 – *Rutledge v. PCMA*
  - Supreme Court holds that ERISA does not preempt Arkansas PBM law
- 2023 – *PCMA v. Mulready*
  - 10th Circuit holds that ERISA preempts Oklahoma PBM Law

Since *Rutledge* more than 100 bills have been introduced in state legislatures and Congress

- Federal legislation is likely to pass in Congress in 2024

Proposed Bill on Telehealth

Telehealth Expansion Act

- Current relief under the CARES Act has been extended through 2024
- Allows permanently for health plans to cover telehealth visits for individuals with high-deductible health plans coupled with a health savings account (HDHP-HSA) before satisfying their deductible
- Bipartisan support in the House and Senate
- No vote yet

Proposed Bills for ACA Reporting

Employer Reporting Improvement Act (S. 3204)

- Allows the use of name in lieu of TIN
- Allow electronic delivery of 1095 forms
- Allows 90 response for 226-J Letters
- Creates a 6-year statute of limitation for assessing ESR penalties

What's New?

New and Upcoming California Specific Compliance Matters

California Short Term Disability Insurance Changes

California SDI Wage Cap Removal

- Starting in 2024, CA is removing the wage cap on contributions to the state disability insurance fund
  - The current cap is $153,000 in annual wages
- Contribution rate will be 1.1% effective January 1, 2024

Increase to SDI Benefits

- Starting January 1, 2025, the average weekly wage replacement will increase to an amount between 63% and 90% (varying on an individual's average weekly wage)

California LTC Developments

LTC Taskforce

- Established in 2019 to:
  - Explore an LTC program design and options for financing
  - Evaluate coordination of benefits with private plans
  - Explore and make recommendations for both public and private LTC options

LTC Feasibility Study

- Provided by the Taskforce in December 2023
- Analysis must be completed by January 1, 2024

LTC Legislation

- As of the date of this presentation no legislation has been introduced

What do we expect to see in the potential legislation?

California Prohibition on Balance Billing

Ambulance Services

- Starting with plan years in 2020, fully insured group health plans in CA cannot balance bill for air ambulance services that exceed the in-network out-of-pocket maximum limit
- CA Fully insured plans beginning on or after January 1, 2024, must cover out-of-network ground ambulance services at a rate that does not exceed in-network ground ambulance services
- A ground ambulance provider shall not require an uninsured patient or self pay patient to pay an amount more than the established payment by Medi-Cal or Medicare fee-for service amount, whichever is greater
- The newly created Emergency Medical Services Authority must annually report the allowable maximum rates for ground ambulance transportation services in each county, including trending the rates by county

California Single Payer

S.B. 770

- S.B. 770 establishes a process for financing a single-payer system in California
- A California single-payer system is projected to cost the state over $500 billion a year, requiring large tax increases on individuals, employers, and small businesses
- S.B. 770 is the first step toward single-payer healthcare, which would not only eliminate Medicare and Medi-Cal but would eliminate all private health coverage
- S.B. 770 aims at financing a single-payer system, it does not eliminate private health coverage
- Until further notice, private health plans, Medicare and Medi-Cal remain in place

California Specific Requirements

San Francisco Health Care Security Ordinance

- 2024 Expenditure Rate
  - $3.51 per hour for large employers (over 100 employees)
  - $2.34 per employee per hour for medium size employers (20-99 or 50-99 employees)
- Managerial, supervisory, and confidential employees who will earn at least $121,372 per year (or $58.35 per hour) are exempted

San Francisco Health Care Accountability Ordinance Minimum Standards

- Effective January 1, 2024
  - Employer must pay 100% of premiums
  - 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 deductible for self-only $3,000
  - Maximum out-of-pocket for self-only $8,750
  - Maximum allowable copayment for in-network primary care provider visits increases to $60
  - Prescription Drug maximum deductible is $300

Questions?