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What's New (Since January 2023) And In Effect Now

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City of Los Angeles' Fair Work Week Ordinance

- Effective April 1, 2023
- Covered Employers: Retail businesses with 300+ employees globally.
- Covered Employees: Employees who work at least 2 hours in a particular workweek for a covered employer within the City.
- Employee Rights:
  - Good Faith Estimate
  - Rest Between Shifts
  - Shift Coverage
  - Advance Notice of Work Schedule
  - Request Changes to Work Schedule
  - Additional Work Hours Offered to Current Employees Before Hiring New Workers

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City of Los Angeles' Fair Work Week Ordinance: Predictability Pay

Employer-Initiated Change	Predictability Pay
Increase of hours of more than 15 minutes	1 hour at the employee's regular rate of pay
Change to date, time, or location, but no change in hours	1 hour at the employee's regular rate of pay
Reduction of hours of at least 15 minutes	Hours not worked at ½ the employee's regular rate of pay
On-call shift, when the employer does not call the employee to perform the work	Hours not worked at ½ the employee's regular rate of pay

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City of Los Angeles' Fair Work Week Ordinance

- Other requirements:
  - Records Retention and Inspection
  - Notice and Posting of Employee Rights
  - Prohibition Against Retaliation

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Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- Public and private sector employers with at least 15 employees, among others, must offer reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless providing the accommodation will cause undue hardship to the employer.
- PWFA does not replace more protective federal, state, or local laws.
- Other laws that may apply to pregnant workers: ADA, Title VII, FMLA, CFRA, FEHA, The PUMP Act

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PUMP ACT: New Remedies

- Employers must provide nursing employees reasonable break time and a place, other than a bathroom, shielded from view, to express milk while at work.
- Changes to remedies effective April 28, 2023
- An employer who violates the PUMP Act will be liable for the following remedies, regardless of whether the employee has also experienced retaliation:
  - Employment reinstatement
  - Promotion
  - Lost wages
  - Liquidated damages
  - Compensatory damages
  - Make-whole relief

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Increases to Local Minimum Wages As of July 1, 2023

- Several localities implemented minimum wage increases on July 1
- Confirm localities where employees work
  - Remember your remote employees

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Locality/City	Jan. 1, 2023 minimum wage (per hour) (26 or more employees)	July 1, 2023 minimum wage (per hour) (26 or more employees)
Alameda	$15.75	$16.52
Berkeley	$16.99	$18.07
Emeryville	$17.68	$18.67
Fremont	$16.00	$16.80
Los Angeles City	$16.04	$16.78
Los Angeles County (UA)	$15.96	$16.90
Malibu	$15.96	$16.90
Milpitas	$16.40	$17.20
Pasadena	$16.11	$16.93
Sacramento (City and County)	$15.50 (state minimum wage)	same
San Francisco	$16.99	$18.07
Santa Monica	$15.96	$16.90
West Hollywood	$18.35	$19.08

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Pay Data Reporting: The "Need To Know"

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Gov. Code Section 12999: California Pay Data Reporting

- **Who must report?** Private employers of 100 or more employees and/or 100 or more workers hired through labor contractors
- **What must be reported?** The mean and median hourly rate of payroll employees and/or labor contractor employees, by establishment, pay band, job category, race/ethnicity, and sex
- **When must employers report by?** On or before the second Wednesday of May of each year
  - Employers may seek "enforcement deferral requests." Once granted, the Civil Rights Division (CRD) will defer – through July 10, 2023 – seeking an order of compliance for the employer to file its Labor Contractor Employee Report. Requests will only be considered by employers registered in pay data reporting portal, and CRD will only accept requests through the portal.
- **Penalties:** a Civil Penalty not to exceed $100 per employee for failure to file the required report
  - Not in excess of $200 per employee for subsequent failure to file the required report

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Pay Data Reporting: Tools & Resources

https://calcivilrights.ca.gov/paydatareporting/

The CRD's website provides useful guides, templates, and FAQs to address questions concerning employers' pay data reporting obligations

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CPRA Update – Now Being Enforced, as of 7/1/2023

- California Privacy Rights Act of 2020 (CPRA) – follows on and amends parts of the California Consumer Privacy Act of 2018 (CCPA)
- The CPRA "went live" on January 1, 2023
- The California Privacy Protection Agency (CPPA), the agency in charge of rulemaking for the CPRA, published regulations for the CPRA in early 2023 that will be enforced in 2024
- The CPPA will be enforcing the CPRA as of July 1, 2023, for violations occurring on or after that date

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CCPA/CPRA Thresholds

- The CCPA and CPRA apply to businesses that:
  - Have a gross annual revenue of over $25 million;
  - Buy, sell, or share the personal information of 100,000 or more California residents or households; or
  - Derive 50% or more of their annual revenue from selling or sharing California residents' personal information.
- "Joint ventures" and entities (even nonprofits) that share "common branding" and are controlled by a covered business can also fall under the CCPA/CPRA

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Highlights of the CPRA

- One of the most important changes the CPRA brought was that covered businesses are now required to comply with the CCPA and CPRA regarding their employees (and job applicants)
- This requirement went live on July 1, 2023
- Employees now have the full set of rights under the CCPA and CPRA with respect to information their employer collects about them
  - Right to request deletion
  - Right to request disclosure
  - Right to correct inaccurate information
  - Right to limit use of sensitive PI
  - There are multiple exceptions

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How Can Employers Comply with the CCPA/CPRA?

Map out the personal information you collect about your employees/job applicants:

- What categories of PI you collect, including "sensitive PI"
- The reason you collect each category
- The retention period for each category
- The reasoning behind each retention period

Draft and circulate a Notice at Collection to your employees and have it available to job applicants

- Must inform employees/job applicants of:
  - Their rights under the CCPA/CPRA and how they can exercise them
  - The information to the left

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How Can Employers Comply with the CCPA/CPRA?

Review the exceptions in the CCPA/CPRA to see what may apply to you:

- Exceptions are most often used in response to requests for deletion. Commonly used exceptions include:
  - Information is needed to comply with a legal obligation (e.g. the Labor Code's recordkeeping requirements for wage statements and personnel files)
  - Information is needed to maintain the employment relationship

Prepare to respond to employee/job applicant requests:

- Prepare template response letters
  - One to acknowledge the request within 10 days
  - Another to substantively respond to the request within 45 days (one 45-day extension is allowed, but the requestor must be notified)

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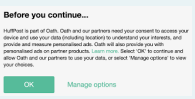
What else does my company need to do?

- Ensure that your collection of consumers' PI is reasonable and proportional to the purposes for which it was collected
- Update your general Privacy Policy to reflect the new CPRA consumer rights
- Ensure your website does not use "dark patterns" to manipulate users into not exercising their rights under the CCPA/CPRA
- Update agreements with any service providers or contractors with whom you share PI to reflect the new CCPA/CPRA obligations



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Laws Taking Effect On ....

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Reproductive Health: Contraceptive Equity Act of 2022 (SB 523)

- Expands required health plan coverage for contraceptive care.
- Effective January 1, 2024, health benefit service plans must provide coverage for contraceptives, vasectomies, and other related services consistent with the requirements of the California Health and Safety Code and California Insurance Code.
- Applies to health care service plan contracts and health insurance policies issued, amended, renewed, or delivered on and after January 1, 2024.

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SB 523: But Don't Forget ...

- Effective January 1, 2023:
  - SB 523 Amended California's FEHA to prohibit employment discrimination, retaliation or harassment based on an applicant's or employee's reproductive health decisions.
    - "Reproductive health decision-making" includes but is not limited to: "A decision to use or access a particular drug, device, product, or medical service for reproductive health." (Gov't Code §12926(y))
  - It is unlawful to require, as a condition of employment, continued employment, or a benefit of employment:
    - Disclosure of information relating to applicant's or employee's reproductive health decision-making or to engage in discriminatory practices based on reproductive health decision (Gov't Code §12940(p))

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SB 523: But Don't Forget …

- SB 523 makes clear that protected classification "sex" may also include reproductive health decision-making and the two classifications may overlap.
- "Sex" also includes things such as (1) pregnancy or medical conditions related to pregnancy; (2) childbirth or medical conditions related to childbirth; (3) breastfeeding or medical conditions related to breastfeeding; and (4) gender, gender identity, and gender expression.

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SB 523: Employer Takeaways

- Make sure to check health benefit plans and insurance policies prior to January 1, 2024.
- Revise discrimination, harassment, and retaliation policies
  - To incorporate reproductive health decision-making, including in the list of protected classifications
- Train/advise supervisors, managers, recruiters, interviewers
  - Incorporate into the mandatory non-supervisory and supervisory harassment training.

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AB 2188
Clearing The Haze

- Creates anti-discrimination protections for individuals that use cannabis while off duty and away from the workplace
- Adds Section 12954 to the California Government Code and serves as an amendment to the California Fair Employment and Housing Act ("FEHA")
- Effective January 1, 2024

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The Slow Burn – 2023

- Cannabis use remains illegal under federal law.
  - **38** states and D.C. have legalized medical use
  - **19** states and D.C. have legalized recreational use
- Only **6** states have employment protections addressing off-duty cannabis use
  - Nevada, New York, New Jersey, Connecticut, Montana, Rhode Island, and
  - California and Washington (effective January 1, 2024)

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What Does AB 2188 Require?

- It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:
  - (1) The person's use of cannabis ***off the job and away from the workplace***.
  - (2) 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.
- Does NOT prohibit an employer from discriminating based on scientifically valid ***pre-employment drug screening*** conducted through methods that do not screen for ***nonpsychoactive cannabis metabolites***.

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"off the job and away from the workplace…"

- Coming to work "high" is not protected.
- "Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace, as specified in Section 11362.45 of the Health and Safety Code, or any other rights or obligations of an employer specified by federal law or regulation."

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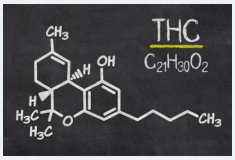
What are Nonpsychoactive Cannabis Metabolites?

- THC is the chemical compound found in cannabis that causes psychoactive effects—it's what makes people feel "high."
- After THC is metabolized, it is stored in the body as a ***nonpsychoactive*** cannabis metabolite—a metabolite that does not indicate impairment, only that an individual has recently consumed cannabis.
- The presence of nonpsychoactive cannabis metabolites can vary depending on the route of consumption (eating vs. inhaling), and among occasional or chronic users.



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Is Pre-Employment Drug Testing Still Legal?

- Yes. Employers may still require pre-employment drug testing as a condition of employment.
- Except the testing method used cannot screen for ***nonpsychoactive cannabis metabolites***.
- Translation = Say goodbye to urine drug tests.

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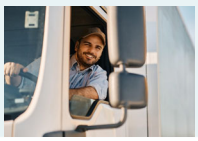
Are All Employees Protected By AB 2188?

Does **NOT** apply to

- Building and construction trades
- Positions that require a federal government background investigation or security clearance (Dept. of Defense)
- Employers receiving federal funding or federal licensing-related benefits or in a federal contract.
- Employers required to test applicants/employees for controlled substances under state or federal law
  - Safety-sensitive industries, such as transportation industry (aviation, trucking, railroads, mass transit, pipelines, etc.)



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In The Meantime, How Do We Prove Current Impairment?

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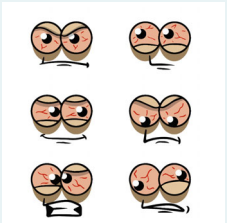
Documentation and Witness Statements

- It is more important than ever to clearly document evidence of impairment, such as:
  - Slurred speech,
  - Odor/smell,
  - Changes in motor function,
  - Bloodshot eyes



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How to Prepare for January 1, 2024?

- Revise practices/procedures regarding drug testing
  - Less than 6 months to move to new drug test
- Revise employee handbooks and drug and alcohol policies
  - Define "Off the job and away from the workplace"
- Revise employment applications
  - Including employment questionnaires and background check forms.
- Update and implement new training
  - Interviewers, supervisors, internal recruiters (3rd party recruiters)
  - New investigation practices and incident reports

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Types of Policies

- **Zero-Tolerance Policy**
  - Outright prohibition on cannabis use.
  - Not available to all employers.
- **"Don't Ask, Don't Tell"**
  - No pre-employment drug testing.
  - May involve drug testing based on reasonable suspicion.
- **The Alcohol Model**
  - Treats it like alcohol.
  - Beware of company-sponsored social events.

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SB 951: Increases Wage Replacement Benefits for Low-Wage Earners

- Increases wage replacement rates for lower wage earners under the state Paid Family Leave program (PFL) and State Disability Insurance (SDI) programs.
  - Currently, low-wage earners may be eligible for 70% of their regular wages
- Starting January 1, 2025, workers who earn 70% or less than the CA's average wage would be eligible for 90% of their regular wages under the PFL and SDI programs
  - Other workers will receive up to 70%

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SB 951: Other Notable Aspects

- Will increase benefits paid to certain categories of employees
  - Taking time off to recover from a serious illness
  - Taking time off to care for ill family members
  - Taking time off for parental leave following the birth of a child
  - Taking time off to participate in qualifying events due to family members being deployed for military duty
- Changes do not require any additional business contributions
  - SB 951 will pay for the increased benefits via increased contributions on payroll taxes for Californians earning above $145,600
  - The new withholding rules will start on January 1, 2024. However, the new paid leave benefits will not begin until January 1, 2025
- Small businesses in California (less than 100 employees) who have at least one employee utilizing PFL after June 1, 2022, may be eligible for CA's new PFL small business grant program
  - Helps offset the costs incurred when recruiting and training workers to cover the duties of the individual utilizing Paid Family Leave

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What's Coming?
Pending Bills to Watch

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SB 403: Caste Discrimination

- Would add caste as a legally-protected category under Unruh Civil Rights Act, Fair Employment and Housing Act, and anti-discrimination policy in public schools
- Would ban discrimination based on caste
  - Caste = an individual's perceived position in a system of social stratification on the basis of inherited status

AB 524: Family Caregiver Discrimination

- Would recognize family caregiver status as a civil right
- Would prohibit employment discrimination based on family caregiver status
  - Family caregiver = an employee who contributes to the care of family member or designated person
- Would create a de facto accommodation requirement

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SB 616: Increased Employee Paid Sick Days

- Would allow employees to carry over 56 hours/7 days to the following year
- Would increase threshold of employees' total accrual of paid sick leave
  - From 48 hours/6 days per year to 112 hours/14 days per year

AB 518: Paid Family Leave for Designated Persons

- Expands eligibility for benefits under the paid family leave program to include individuals who take time off work to care for a designated person who is seriously ill
  - Designated person = any individual whose association with the employee is the equivalent of a family relationship

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SB 525: Minimum Wage for Health Care Workers

- Would mandate minimum wage increase for health care workers
  - Starting June 1, 2024, $21/hour
  - Starting June 1, 2025, $25/hour
  - Includes all work performed on the premises of any covered health care facility
  - Includes all health care services work for an owner/operator of a covered health care facility

SB 399: Employer Communications: Intimidation

- Would prohibit an employer from adverse action or threat of adverse action because employee declines to attend employer-sponsored meeting to communicate employer's opinion about religious or political matters, including unionization
  - Potential issues: First Amendment and NLRA preemption

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SB 627: Retention and Transfer of Displaced Workers

- Would prohibit chain employers from closing a covered establishment without providing "displacement notice" 60 days before closure
- Would require chain employer to provide opportunity to covered workers to transfer to a location within 25 miles of closed establishment
  - Requirement would last one year
  - Offers would be provided in order of seniority as positions become available

SB 723: Rehiring and Retention of Displaced Workers

- Would change Labor Code 2810.8 from a temporary COVID-19 measure into a permanent right of recall for certain hospitality workers
  - Would require employers to make offers in order of seniority to those laid off for any reason

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Questions?

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WARN-ING Before Downsizing: Requirements for Employers & Trends in WARN Act Litigation

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Agenda

- Nuts and Bolts of Federal WARN and Cal WARN
  - Worker Adjustment and Retraining Notification Act (WARN Act)
- Legislative Updates
- Key Differences Between Federal WARN and Cal WARN
- Recent Trends for Employers

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Nuts & Bolts

Federal WARN:

- Covered Employers planning a "plant closing" or "mass layoff" must provide affected employees and government officials at least 60 days written notice. [29 U.S.C. § 2102(a)]

California WARN (Cal WARN):

- Covered Employers must provide 60 days notice of a "mass layoff, relocation or termination" of a covered establishment to affected employees and government officials. [Cal. Lab. Code § 1401(a)]
- "Termination" = "the cessation or substantial cessation of industrial or commercial operations in a covered establishment." [Cal. Lab. Code § 1400.5(f)]

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Covered Employers & Employees

Federal WARN:

- "Employer" defined as "any business enterprise with 100 or more full-time employees; or 100 or more employees, including part-time, who in the aggregate work at least 4,000 hours per week [20 C.F.R. § 639.3]
- Dep't of Labor considers there to be only one employer as to separate plants or sites of employment if under common ownership or control
- Includes employees on leave of absence
- Employees must have been employed for at least 6 months preceding the date of required notice
- Does not apply to Independent Contractors

Cal WARN:

- Any person or business that "directly or indirectly owns and operates a covered establishment." [Cal. Lab. Code § 1400.5(b)]
- "Covered establishment" = any industrial or commercial facility that employs or has employed in the preceding 12 months, 75 or more persons. [Cal. Lab. Code § 1400.5(a)]
- Part-time employees included
- Employees must have been employed for at least 6 months preceding the date of required notice
- Does not apply to Independent Contractors

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Legislative Updates – Cal WARN Act

- AB 1601 – Signed by Governor on Sept. 29, 2022, effective January 1, 2023.
- Codified at Cal. Lab. Code § § 1410, 1411
  - Requires Employment Development Department (EDD) to publish semi-annual list of call center employers that have provided notice that year
  - Call center employers who did not provide notice required under Cal WARN will be ineligible for
    - Any direct or indirect state grants or state-guaranteed loans to that call center employer for five years after the date that the list is published
    - Claiming a tax credit for five taxable years beginning on and after the date that the list is published

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Pending Legislation– Cal WARN Act

- **Proposed** expansion of Cal WARN – AB 1356 (Assembly Member Matt Haney)
  - To increase advance notice requirement from 60 to 90 days
  - To expand definition of "employee" to "a person employed by a labor contractor and performing labor with the client employer for at least 6 months of the 12 months preceding the date on which notice is required"
  - To expand Cal WARN to "labor contractor" defined as "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business"
  - To expand application of "covered establishment" from industrial or commercial facility to "any place of employment that employs, or has employed within the preceding 12 months, 75 or more persons"
  - To prohibit an employer from "utilizing compliance" with Cal WARN in connection with a severance agreement and waiver of an employee's right to claims. The bill would provide that any general release, waiver of claims, or nondisparagement or nondisclosure agreement that is made a condition of the payment of amounts for which the employer is liable is void.

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Key Differences Between Federal and California WARN

Resource: https://edd.ca.gov/en/jobs_and_training/layoff_services_warn

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Triggering Events: Plant Closing (Fed WARN) and "Termination" (Cal WARN)

Federal WARN:

- **Plant closing**: "the permanent or temporary shutdown of a single site of employment or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees **excluding any part-time employees**."

[29 U.S.C. § 2101(a)(2)]

Cal WARN:

- "Termination" means "the cessation or substantial cessation of industrial or commercial operations in a covered establishment." [Cal. Lab. Code § 1400.5(f)]
- **Note:** Termination of operations affecting **any number of employees, including part-time employees**

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Triggering Events: Mass Layoffs

Federal WARN:

- **Mass Layoff**: A reduction in workforce that is not the result of a plant closing and results in an "employment loss" at a single site during any 30-day period for:
  - At least 500 employees
  - At least 33% of total employees at the site who comprise at least 50 employees [29 USC §2101(a)(3)]
- **"Employment loss"** =

(1) termination of employment (other than 'for cause,' voluntary departure or retirement);

(2) layoff in excess of 6 months; or

(3) reduction in hours of work >50 percent during each month of any 6-month period

Cal WARN:

- **Mass layoff**: a layoff during any 30-day period of 50 or more employees at a covered establishment. [Cal. Lab. Code § 1400(c), (d)]
- **"Layoff"** = Separation from a position for lack of funds or lack of work
- Cal WARN does not require that a separation exceed any length of time and does not discuss reduction in hours

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Temporary Layoffs?

Federal WARN:

- WARN notice obligations are only triggered if the mass layoff exceeds six (6) months

Cal WARN:

- Cal WARN does not explicitly limit its applicability to layoffs exceeding 6 months
- The CA Court of Appeal holds that Cal WARN applies to temporary layoffs as short as three to five weeks

Int'l Bhd. of Boilermakers v. NASSCO Holdings Inc., 17 Cal. App. 5th 1105 (2017)

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"Unforeseen Business Circumstances" Exception?

Federal WARN:

- Employer need not give the full 60-day notice if a plant closing or mass layoff is caused by "business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

[29 U.S.C. § 2102(b)(2)(A)]

Cal WARN:

- Cal WARN does not adopt the federal statute's "unforeseen business circumstances" exception

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Notice Requirements

Federal WARN

- **Who:** employees or their collective bargaining representative, state dislocated worker unit (EDD, Workforce Services Division in CA), and the chief elected official of local government in which such closing or layoff is to occur. [29 U.S.C. § 2102; 20 C.F.R. § 639.5]

Cal WARN:

- **Who:** In addition to Federal WARN, notice must be given to Local Workforce Development Board and chief elected official of each county and city government in which the termination, relocation, or mass layoff occurs. [Cal. Lab. Code § 1401(a)]
- Does not expressly permit notice to collective bargaining representative in lieu of employee

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Notice Requirements (cont.)

Federal WARN:

- **When:** 60-days prior to a plant closing or mass layoff

Cal WARN:

- **When:** 60-days prior to a plant closing, layoff or relocation

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Triggering Events: Combined Employment Losses Within 90 Days

Federal WARN:

- Separate layoffs of fewer than 50 employees within 90 days *could* trigger WARN Act notice requirements
- Courts look for evidence of employer attempting to evade WARN application

Cal WARN:

- There is no 90-day aggregation rule in California
- Only layoffs during a 30-day period count in determining whether a "mass layoff" has occurred. [Cal. Lab. Code §1400(d)]

Note: CA courts will look to federal WARN for guidance

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Triggering Events: Relocation?

Federal WARN:

- No "employment loss" (WARN not triggered) if plant closing or mass layoff is the result of relocation or consolidation of part of employer's business if employer offers to transfer employee with no more than 6-month break in employment to:
  - (1) a different worksite within reasonable distance, or
  - (2) any worksite the employee accepts within 30 days of offer or plant closing/layoff, whichever is later. [29 U.S.C. §2101(b)(2)]

Cal WARN:

- Relocation of at least 100 miles affecting any number of employees will trigger Cal WARN. [Cal. Lab. Code §1400(e)]
- Relocation = removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away

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Other Exceptions to Federal WARN and Cal WARN Notice Requirements

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Pursuit of Capital or Business ("Faltering Company") Exception

Federal WARN:

- Applies to plant closings (not mass layoffs) – employer may provide less than 60 days notice if it:
  - (1) employer was actively seeking capital or business at the time notice was required;
  - (2) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the shutdown; and
  - (3) employer reasonably and in good faith believed that giving the required notice [60 days] would have precluded it from obtaining the needed capital or business.

[29 USC §2102(b)(1)]

Cal WARN:

- Applies to plant closings (not mass layoffs)
- Same standard as Fed WARN but requires employer to furnish records and Dep't of Industrial Relations (DIR) to make the determination that the three conditions exist.

[Cal. Lab. Code § 1402.5]

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Natural Disaster Exception

Federal WARN:

- 60-day notice not required where the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake or drought.

[29 U.S.C. § 2102(b)(2)(B)]

Cal WARN:

- 60-day notice not required where the layoff, relocation or termination is necessitated by a "physical calamity or act of war." [Cal. Lab. Code § 1401(c)]

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Potential Penalties & Civil Liability

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Civil Penalties – Agency Enforcement

Federal WARN:

- Failing to give notice to the state dislocated worker unit will subject employers to a civil penalty of not more than $500 for each day of violation. [29 U.S.C. § 2104(a)(3)]
- **Note:** Penalty may be avoided "if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff." [29 U.S.C. § 2104(a)(3)]

Cal WARN:

- Failing to give notice will subject employer to possible civil penalty of $500 for each day of violation. [Cal. Lab. Code § 1403]

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Potential Exposure to Private Right of Action, Class or Representative Action

Federal WARN:

- An employer who violates the WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days, but no more than half the number of days the employee was employed by the employer.

[29 U.S.C. § 2104 (a)]

Cal WARN:

- Where employer violates WARN provisions, employees may receive back pay to be paid at employee's final rate or 3-year average rate of compensation, whichever is higher.
- Employer liable for cost of any medical expenses incurred by employees that would have been covered under an employee benefit plan. The employer is liable for period of violation up to 60 days or one-half the number of days the employee was employed whichever period is smaller. [Cal. Lab. Code §1403]

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WARN Act in the Spotlight: Recent Trends & Developments

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Trends and High-Profile Examples

- High Profile cases:
  - *Cornet, et al.* v. *Twitter, Inc.*
    - Release/waiver in exchange for severance?
  - Bitwise
- "Recessionary Discrimination" Claims?
  - Objective criteria of reductions in force to ensure certain groups of employees are not disproportionally impacted

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Notable California Cases

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Galarsa v. Dolgen California, LLC, 88 Cal. App. 5th 639 (2023)

Synopsis

- Plaintiff worked for Dollar General as an hourly-paid assistant manager from April 2016 until January 2017;
- Plaintiff electronically signed Dollar General's arbitration agreement prior to commencement of employment;
- February 2018: Plaintiff filed a complaint seeking civil penalties under Private Attorney General Act ("PAGA") for violations of the Labor Code;
- July 2020: Dollar General filed a motion to compel arbitration and stay the proceeding pending completion of arbitration, arguing that Plaintiff must individually arbitrate the alleged wage and hour violations that involved her.

Overview of Proceedings

- In November 2021, the California Court of Appeal, Fifth District, affirmed the Superior Court's order denying the petition to compel arbitration;
- Order vacated by US Supreme Court when it granted Dollar General's Petition for Writ of Certiorari and remanded the case for further consideration in light of *Viking River Cruises, Inc. v. Moriana (2022);*
- In February 2023, the California Court of Appeal, Fifth District, affirmed in part, reversed in part, and remanded with directions;
- In May 2023, the Supreme Court of California granted the petition for review and deferred further action pending consideration and disposition of the related case *Adolph v. Uber Technologies, Inc.*

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Galarsa v. Dolgen California, LLC, 88 Cal. App. 5th 639 (2023) (continued)

Holding

- Waivers of representative claims in arbitration agreements required as a condition of employment are invalid under *Iskanian;*
- Invalid waiver of representative claims is severed from the remainder of the arbitration agreement;
- Employer entitled to compel arbitration of Type A claims that arose from the contractual relationship between employer and employee (individual claims);
- Plaintiff still has standing to pursue PAGA claims on behalf of other aggrieved employees.

Take Away

- PAGA claims can be divided to enforce valid parts of arbitration agreements;
- Plaintiffs still have standing to pursue PAGA claims on behalf of other aggrieved employees.

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Piplack v. In-N-Out Burgers*, 88 Cal. App. 5th 1281 (2023)

Synopsis

- Former restaurant employees brought PAGA action in relation to employer's failure to reimburse business expenses related to purchase of uniform and cleaning products for uniform;
- Both employees signed arbitration agreements with PAGA waivers;
- Employer sought to compel arbitration of individual claims;
- Employees claimed that employer waived right to arbitrate by participating in trial proceedings.

Holding

- Plaintiffs' individual PAGA claims must be arbitrated;
- Plaintiffs retain standing to pursue representative claims.

Take Away

- Enforceability of Arbitration Agreements (PAGA): Arbitration agreements that require arbitration of *individual* PAGA claim are enforceable; the California Supreme Court's decision-to-come will determine whether Plaintiffs may pursue *representative* claims when their individual claims are compelled to arbitration.

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***Wood v. Kaiser Foundation Hospitals*, 88 Cal. App. 5th 742 (2023)**

Synopsis

- Former employee sued under PAGA, seeking civil penalties for alleged violations of California's sick pay statute, Healthy Workplaces, Healthy Families Act of 2014 [Cal. Lab. Code § 245 et seq.] (the "Act");
- The Act requires employers to provide eligible employees with at least three paid sick days per year.

Holding

- The Act, which precludes a private right of action, did not preclude an employee from enforcing the Act through PAGA.

Take Away

- Compliance and Enforcement.

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Naranjo v. Spectrum Security Services, Inc.*, 88 Cal. App. 5th 937 (2023)

Synopsis

- Former security officer filed a class action against employer, who provided secure custodial services to federal agencies, for violations of the Labor Code's meal break and rest break provisions.

Holding

- Good faith dispute as to whether wages were due at final payment not only precluded a "willfulness" finding under Labor Code § 203, but also a "knowing and intentional" finding under § 226.

Take Away

- The Good Faith defense.

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Garcia-Brower v. Nor-Cal Venture Group, Inc., 89 Cal. App. 5th 65 (2023)*

Synopsis

- Labor Commissioner investigated Labor Code violations and issued wage citation seeking over $900,000 in penalties for misclassification of fast-food restaurant managers;
- Corporation sought informal administrative adjudication challenging the citation;
- While the adjudication was pending, Labor Commissioner sought to depose corporation's person most knowledgeable.

Holding

- Labor Commissioner's deposition subpoena power exists solely in the investigatory phase, such that Labor Commissioner could not subpoena the corporation's person most knowledgeable during the hearing stage.

Take Away

- Cooperation with Administrative Agencies: Seek the advice of counsel. Follow established protocols - object as a matter of course.

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Murrey v. Superior Court, 87 Cal. App. 5th 1223 (2023)

Synopsis

- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 401, 402 (the "Act");
- Act applies to pre-dispute arbitration agreements and pre-dispute joint action waivers in the context of sexual assault and sexual harassment cases filed after its enactment.

Holding

- Act applies to contracts signed before or after the Act, in which the case is filed after the Act; but the Act is not retroactive to cases filed before or pending at the time the Act went into effect.

Take Away

- The Concept of Unconscionability: *Armendariz* factors.

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Atalla v. Rite Aid Corp., 89 Cal. App. 5th 294 (2023)

Synopsis

- Employee's supervisor sent text messages containing lewd photographs of himself to the employee while offsite and afterhours;
- Employee filed an action for sexual harassment, failure to prevent sexual harassment, wrongful constructive termination in violation of public policy, discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, and retaliation against former employer.

Holdings

- The Court of Appeal affirmed the holding that the harassment arose from a completely private relationship unconnected with the employment;
- The Court also held that there was no constructive termination of Employee's employment because the employer took immediate action, terminated supervisor, and invited Employee back to work.

Take Away

- Whether claims of sexual harassment against a supervisor may be imputed on the supervisor's employer depends on whether the harassment occurred while supervisor was acting in the capacity of a supervisor;
- An employer's quick action to eliminate an intolerable occurrence at work and invite the affected employee back to work could mitigate a finding of constructive termination.

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Lopez v. La Casa de Las Madres, 89 Cal. App. 5th 365 (2023)

Synopsis

- Plaintiff worked for Employer as a shelter manager;
- Plaintiff placed off work due to conditions or symptoms related to her pregnancy;
- Plaintiff experienced complications after giving birth and provided Employer with periodic certifications relating to her condition;
- Employer concluded that Plaintiff had elected to discontinue her employment after she missed to respond to further repeated inquiries about accommodation requests;
- Plaintiff filed an action for pregnancy discrimination, harassment because of pregnancy, disability discrimination, failure to accommodate, and failure to engage in the interactive process.

Holdings

- The Court of Appeal affirmed judgment in favor of Employer concluding that the Plaintiff failed to carry her burden of proving she had a condition related to pregnancy, could perform the essential functions of the job, and was denied a reasonable accommodation;
- The Court of Appeal affirmed that Plaintiff had failed to prove Employer had discriminated against her based on a disability because she did not prove that she was qualified to perform the shelter manager job with her condition.

Take Away

- An action for pregnancy discrimination under section 12945 (a)(3)(A) requires proof that (1) the plaintiff had a condition related to pregnancy, childbirth, or a related medical condition; (2) the plaintiff requested accommodation of this condition, with the advice of her health care provider; (3) the plaintiff's employer refused to provide a reasonable accommodation; and (4) with the reasonable accommodation, the plaintiff could have performed the essential functions of the job.

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Lin v. Kaiser Found. Hosps., 88 Cal. App. 5th 712 (2023)

Synopsis

- Employer eliminated an employee's position after employee suffered a workplace injury resulting in disability (modified duty);
- Shift from positive performance reviews and promotions pre-disability (1999-2018) to negative performance evaluations post-disability;
- Employer tentatively placed employee on termination list as part of planned layoffs, but employee was not actually terminated until after employee suffered workplace injury resulting in disability.

Holding(s)

- A reasonable jury could find that employee's negative evaluations and termination were substantially motivated by her disability—genuine issues of material fact existed, reversing summary judgment in employer's favor.

Take Away

- The Concept of Pretext: Employment actions should be closely evaluated where employee has a sustained history of positive performance reviews.

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Griego v. City of Barstow, 87 Cal. App. 5th 133 (2023)

Synopsis

- Former City fire captain challenged City's decision upholding his termination from employment.

Holding

- City did not abuse its broad discretion in affirming termination of fire captain's employment, despite the Superior Court's finding that evidence was sufficient to sustain only three of the seven allegations on which the termination was based: that fire captain coached softball while on duty, carried a concealed handgun without a permit, and filed a false court document, demonstrated a lack of credibility, reliability, and trustworthiness that constituted a reasonable basis for city to sustain termination.

Take Away

- Grounds for Termination.

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Clarkson v. Alaska Airlines, Inc., 59 F.4th 424 (9th Cir. 2023)

Synopsis

- Commercial airline pilot who was a military reservist sued airlines alleging employer violated USERRA (Uniformed Services Employment and Reemployment Rights Act) by denying short-term military leave;
- Employer failed to pay pilots who took short-term military leave while paying pilots who took comparable non-military leaves such as bereavement leave, jury duty, and sick leave.

Holding

- Issues of fact existed regarding the comparability of unpaid short-term military leave to other forms of paid leave based on duration, purpose, and control.

Take Away

- No one-size fits all;
- The Concept of Comparability.

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Castellanos v. State of Cal., 89 Cal. App. 5th 131 (2023)*

Synopsis

- Prop 22: The Protect App-Based Drivers and Services Act, was a voter-approved initiative allowing app-based rideshare and delivery network companies to treat their drivers as independent contractors;
- Ride-share drivers and the SEIU [Service Employees International union] sought to have Proposition 22 declared unconstitutional or various grounds.

Holding

- The Court of Appel did not strike down Prop 22 but concluded that the Act's definition of an amendment violated the separation of powers clause of the State Constitution.

Take Away

- App-based services may rise or fall with Prop 22.

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