2024 Annual

Labor & Employment Seminar

HansonBridgett

2024 New California Employment Laws

JOSUE APARICIO / JENNIFER PUZA / SANDY RAPPAPORT / SONIA SALINAS

JANUARY 2024

Agenda

- Mandatory Paid Sick Leave Changes
- Workplace Violence Prevention Plan Requirements
- New Workplace Violence TRO Rules
- Time Off for Reproductive Loss
- Retaliation Protections
- Stronger Restrictions on Non-Competition
- Minimum Wage Updates
- Updated Labor Code Section 2810.5 Notice Requirements
- COVID 19 Guidance
- Recall Rights After Layoff
- New Cannabis-Related Employment Laws

Mandatory Paid Sick Leave Changes (SB 616)

- Now must provide at least 5 days/40 hours per year (whichever is greater)
  - Can limit use of paid sick leave to 5 days/40 hours per year
- Up-front or accrual method still permitted
  - An accrual method other than a 1:30 schedule must result in 24 hours by the 120th day of employment and 40 hours by the 200th day of employment
- Accrual cap is now 10 days/80 hours
- Preempts local ordinances that conflict with certain provisions
  - More generous leave requirements are not preempted
- Employees previously exempt due to CBA sick leave provisions are now covered for certain provisions:
  - Use of paid sick leave
  - Retaliation for using paid sick days
    - Review no-fault attendance policies

Workplace Violence Prevention Plan Requirements (SB 553)

- Operative July 1, 2024:

Workplace Violence Prevention Plan

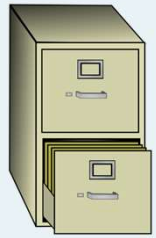
- Establish
- Implement
- Maintain
- Written & Accessible

Incident Log

- Record every workplace violence incident

Train Employees

- Provide effective training to employes



Maintain Records

- Maintain records of workplace violence, evaluation, and correction for a minimum of 5 years

Workplace Violence Prevention Plan (WVPP)

should include the following, and be operative, by July 1, 2024:

Implementation

Persons responsible for implementing

Procedures to involve employees and representatives

Methods to ensure employees are trained and violence is addressed

Training

Provide plan to all employees with:

Definitions

How to report

Corrective measures

Violence prevention

Incident log

Q&A opportunity

Compliance

Ensure supervisor and nonsupervisory compliance

Prohibit retaliation if employee report

Incident Occurrence

Establish procedure:

How to report and investigate

How to inform employees of investigation and any corrective action

Plan to address workplace violence emergencies and alert employees

Post-Incident

Procedure for:

Post-incident response and investigation

Review effectiveness of plan and revisions needed

Recording in incident log. Retain 5 years minimum.

Prevention

Evaluate and identify workplace violence hazards:

Inspect / Identify unsafe conditions, work practices, employee concerns and reports

Timely correct hazards

WVPP Requirement Applies To:

WHO:

- All employers, employees, places of employment, employer-provided housing.

WHAT: 4 Types of Violence

- (1) A person who has no legitimate business at the worksite
- (2) A customer, client, patient, student, inmate, or visitor against an employee
- (3) A present or former employee, supervisor, or manager against an employee
- (4) A person who does not work there, but has or is known to have had a personal relationship with an employee.

Exempt from WVPP Requirement:

- **Covered by CCR § 3342:**
  - Health care facilities, service categories, operations, employers
- **Law Enforcement Agencies**
- **Teleworking Employees**
- **Places of employment where less than 10 employees working at the place at a given time, and where it is not accessible to the public.**

Coming soon: New Workplace Violence TRO Rules (SB 553, SB 428)

Current Law:

Authorized:
- Employer

TRO for:
- Unlawful violence
- Credible threat of violence

Showing:
- Reasonable proof

Operative January 1, 2025:

Authorized:
- Employer
- Collective bargaining representative

TRO for:
- Unlawful violence
- Credible threat of violence
- Harassment

Showing:
- Clear and convincing evidence

"Harassment:"

- Knowing and willful
- Directed at a specific person Seriously alarms, annoys, or harasses the person
- Serves no legitimate purpose.
- "Reasonable person" standard – cause substantial emotional distress

Time Off for Reproductive Loss (SB 848)

- Must provide 5 days of leave (consecutive or not) for reproductive loss events
  - Including miscarriage, failed adoption, failed surrogacy, stillbirth, unsuccessful assisted reproduction
  - Employee may use any vacation, personal, sick or PTO leave available
- Applies to employers with at least five employees and all public employers
- Applies to employees who have worked for employer for at least 30 days
- Must be taken within 3 months of event or end of leave under another entitlement
- More than one event is covered
  - Can limit to 20 days of leave within a 12-month period
- Cannot request documentation
- Must maintain confidentiality

Updates to Retaliation Protections (SB 497)

- **Rebuttable Presumption:**
  - If employer engages in any prohibited action within 90 days of the employee's protected activity, then there is now a rebuttable presumption in favor of employee's claim.
    - Protected activity: making certain complaints/claims, whistleblowing
- **Previous Law:** applied to employers that were a corporation or LLC
- **Now:** applies to employers, not just corporations and LLCs
- **Previous Law:** penalty up to $10K for each violation
- **Now:** penalty up to $10K per employee, for each violation

Stronger Restrictions on Non-Competition (AB 1076, SB 699)

- Unlawful to include a non-compete provision in employee contract absent very narrow exceptions
- This applies to contracts signed out of state
- Employees whose agreements include restrictive covenants can sue
  - Employees can obtain injunctions; damages; civil penalties; attorneys' fees
- Existing noncompetes?
  - **Must notify employees (including former employees employed after 1/1/22) in writing by February 14, 2024 that the clause is void**
  - Failure to notify = unfair competition

Minimum Wage Updates

State Minimum Wage	Health Care Worker	Fast Food Workers
January 1, 2024 **$16/hour**	**2024 to 2026** **Gradual increases, across multiple types of health care employers, to a minimum wage up to $25/hour**	**April 1, 2024** **$20/hour**

SB 525 – Health Care Workers

Sector	2024	2025	2026	2027	2028
Health care facility with 10,000+ employees, integrated system, dialysis clinic, county facility (population over 5 million)	**$23/hour** June 1, 2024	**$23/hour** May 31, 2025 **$24/hour** June 1, 2025	**$24/hour** May 31, 2026 **$25/hour** June 1, 2026	**$25/hour adjusted**	**$25/hour adjusted**
Hospital with high payor mix, independent hospital with elevated government payor mix, rural independent health care facility, county facility (pop. less than 250K)	**$18/hour** June 1, 2024	**Increases 3.5% annually** until May 31, 2033 **$25/hour** From June 1, 2033			
Clinics (limited services and unaffiliated, community, rural, urgent care)	**$21/hour** June 1, 2024	**$21/hour**	**$21/hour** May 31, 2026 **$22/hour** June 1, 2026	**$22/hour** May 31, 2027 **$25/hour** June 1, 2027	**$25/hour adjusted**
All other covered health care facility employers	**$21/hour** June 1, 2024		**$21/hour** May 31, 2026 **$23/hour** June 1, 2026		**$23/hour** May 31, 2028 **$25/hour adjusted** June 1, 2028

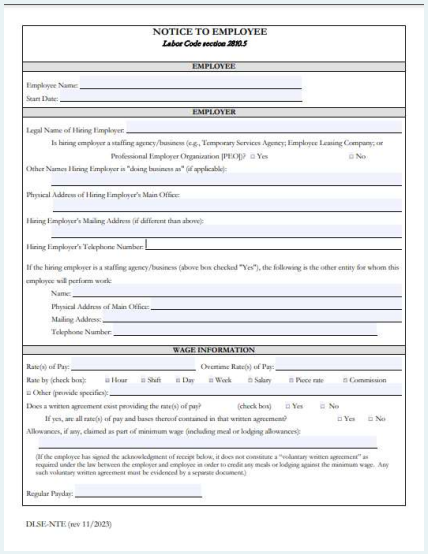
AB 1228 – Fast Food Workers

- **Minimum Wage:**

Applies to:	April 1, 2024	January 1, 2025 - 2029
National Fast-Food Chains	$20/hour Enforced by Labor Commissioner	Fast Food Council may increase minimum wage on an annual basis by no more than the lesser of (rounded to the nearest $0.10): • 3.5% • Consumer Price Index

- **Exemptions:**
  - Restaurant located in grocery establishment
  - Establishment operating a bakery that sells bread as a stand-alone menu item
- **Fast Food Council:** established within the Dept. of Industrial Relations.
  - Purpose is to establish minimum standards on wages, working hours, working conditions to ensure health, safety, welfare, and cost of living.
  - Deemed a gov't agency under Labor Code section 1102.5. Employer cannot discriminate or retaliate against employee participation in or testimony to the Council.

Updated Labor Code Section 2810.5 Notice Requirements (AB 636)



NOTICE TO EMPLOYEE

Labor Code section 2810.5

EMPLOYEE

Employee Name:

Start Date:

EMPLOYER

Legal Name of Hiring Employer:

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? ☐ Yes ☐ No

Other Names Hiring Employer is "doing business as" (if applicable):

Physical Address of Hiring Employer's Main Office:

Hiring Employer's Mailing Address (if different than above):

Hiring Employer's Telephone Number:

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name:

Physical Address of Main Office:

Mailing Address:

Telephone Number:

WAGE INFORMATION

Rate(s) of Pay: Overtime Rate(s) of Pay:

Rate by (check box): ☐ Hour ☐ Shift ☐ Day ☐ Week ☐ Salary ☐ Piece rate ☐ Commission

☐ Other (provide specifics):

Does a written agreement exist providing the rate(s) of pay? (check box) ☐ Yes ☐ No

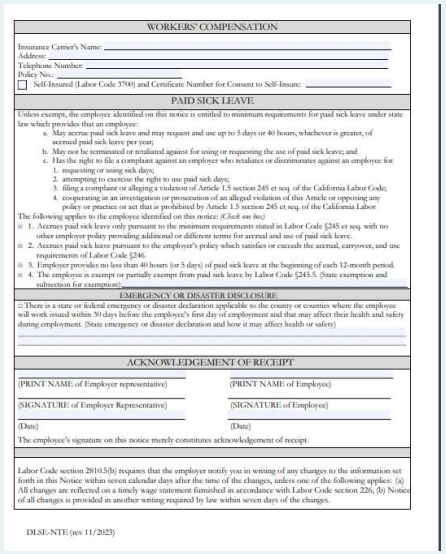
If yes, are all rate(s) of pay and bases thereof contained in that written agreement? ☐ Yes ☐ No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

(If the employee has signed the acknowledgement of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday:

DLSE-NTE (rev 11/2023)



WORKERS' COMPENSATION

Insurance Carrier's Name:

Address:

Telephone Number:

Policy No.:

☐ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure:

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

a. May accrue paid sick leave and may request and use up to 5 days or 40 hours, whichever is greater, of accrued paid sick leave per year;
b. May not be terminated or retaliated against for using or requesting the use of paid sick leave; and
c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
   1. requesting or using sick days;
   2. attempting to exercise the right to use paid sick days;
   3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
   4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor

The following applies to the employee identified on this notice: *(Check one box)*

☒ 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.
☐ 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.
☐ 3. Employer provides no less than 40 hours (or 5 days) of paid sick leave at the beginning of each 12-month period.
☐ 4. The employee is exempt or partially exempt from paid sick leave by Labor Code §245.5. (State exemption and subsection for exemption):

EMERGENCY OR DISASTER DISCLOSURE

☐ There is a state or federal emergency or disaster declaration applicable to the county or counties where the employee will work issued within 30 days before the employee's first day of employment and that may affect their health and safety during employment. (State emergency or disaster declaration and how it may affect health or safety)

ACKNOWLEDGEMENT OF RECEIPT

(PRINT NAME of Employer representative) (PRINT NAME of Employee)

(SIGNATURE of Employer Representative) (SIGNATURE of Employee)

(Date) (Date)

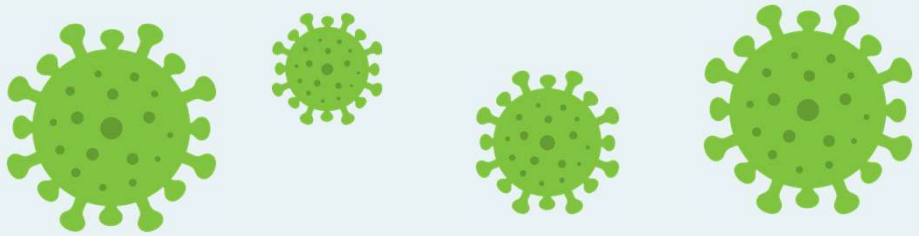
The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

DLSE-NTE (rev 11/2023)

- Notice must include:
  - information about federal and state emergency declarations applicable to county where employee is employed
  - special information, in Spanish, for employees admitted under federal H-2A agricultural visa program
  - Labor Commissioner updated template available by 3/1/24

COVID-19 Guidance



- **CDPH January 9, 2024 COVID Guidance Updates:**
  - The CDPH has moved away from the 5 days of isolation guidance. It now relies on clinical symptoms to determine when to end isolation.
  - **New guidance (applies to Cal/OSHA regs):**

Test Positive + Have COVID Symptoms	Test Positive + No COVID Symptoms
Stay home until: • 24 hours have passed with no fever (without the use of fever-reducing medications) AND • Symptoms are mild and improving **When return to work:** • Must wear face mask indoors for 10 days, from the start of symptoms	**Can return to work, but:** • Must wear face mask for 10 days from the date of the first positive COVID test

Recall Rights After Layoff (SB 723)

Extends re-hire rights through December 31, 2025

- **"Laid-Off Employee:"** (1) worked for the employer for 6 months or more AND (2) was separated on or after March 4, 2020 due to COVID-19 pandemic reasons.
- **Presumption:** that separation due to a lack of business, reduction in force, other economic, non-disciplinary reason, is due to a COVID pandemic related reason.
- **Employer ("enterprise"):** hotel, private club, event center, airport hospitality operation, airport service provider, building services (janitorial, maintenance, security).
- **Employer duties:** ***(may be waived in valid CBA)***
  - Within 5 business days of establishing a position → shall offer laid-off employees, in writing, email, and text message, all positions that become available for which the employee is qualified.
  - Can offer positions in order of preference. If more than one entitled preference, can offer to laid-off employee with greatest length of service
  - Must retain records for at least 3 years (from date of written notice regarding layoff)
  - If decline to rehire laid-off employee, must notify that employee with all decision reasons

Clearing The Haze On California's New Cannabis-Related Employment Laws

- AB 2188 and SB 700
- Created Gov. Code Section 12954
- Addition to California's Fair Employment and Housing Act (FEHA)
- Effective January 1, 2024

Clearing The Haze
What Does AB 2188 Require?

- Creates Anti-Discrimination Protections for employees *and applicants*.

- It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, based upon:
  - (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.

Clearing The Haze

"off the job and away from the workplace…"

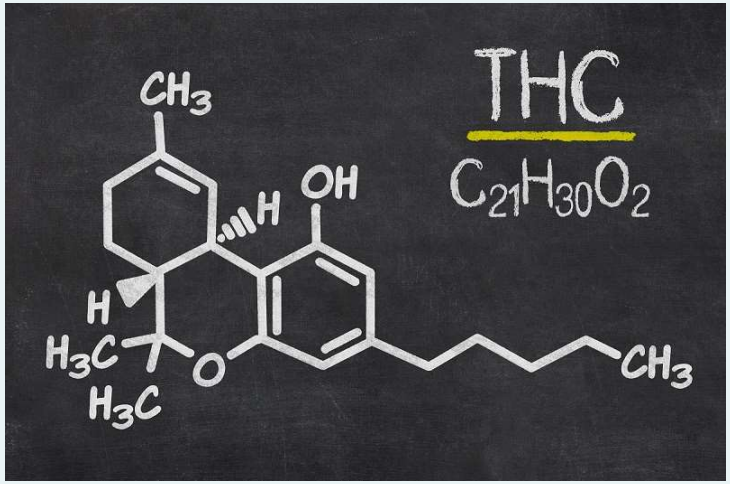
- Coming to work "high" is NOT protected.
- Coming to work "high" is ***NOT*** protected.
- Coming to work "high" is ***NOT*** protected.

- **Subdivision (d):**
  - "This section does **NOT** permit an employee to possess, to be impaired by, or to use, cannabis on the job, or affect the rights or obligations of an employer to maintain a drug- and alcohol-free workplace …"

Clearing The Haze

What are Nonpsychoactive Cannabis Metabolites?

- THC is the chemical compound that causes psychoactive effects—it's what makes you feel "high."
- Once metabolized, THC is stored in the body as a ***nonpsychoactive*** cannabis metabolite—a metabolite that does not indicate impairment.



- **NOTE:** The presence of nonpsychoactive cannabis metabolites can vary depending on the route of consumption (eating vs. inhaling), and among occasional or chronic users.

Clearing The Haze

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***.

Clearing The Haze
What does SB 700 Require?

- Added Subdivisions (b) and (c).

- **Subdivision (b):** Applicants.
  - It is unlawful for an employer to request information from an applicant for employment relating to ***the applicant's prior use of cannabis***.
- **Subdivision (c):** Applicants and Employees.
  - "Information about a person's prior cannabis use ***obtained from the person's criminal history*** is subject to subdivisions (a) and (b)…"
  - "… unless the employer is permitted to consider or inquire about that information under Section 12952 ***or other state or federal law***."

Clearing The Haze

Employers Permitted to Consider/Inquire About Prior Cannabis Use

- **Labor Code Section 432.8**: Prohibits most CA employers from inquiring about or considering a "non-felony conviction for possession of marijuana that is two or more years old."
- **Labor Code Section 432.7** – Prohibits most CA employers from inquiring about or considering information concerning
  - an arrest or detention that did not result in conviction;
  - any pretrial or posttrial diversion program;
  - a conviction that has been judicially dismissed or ordered sealed pursuant to law;
  - anything while person was subject to the jurisdiction of the juvenile court.

Clearing The Haze

Are All Employees Protected?

Does **NOT** apply to "an ***employee*** in the ***building and construction*** trades."

- Emphasis on employee; not employer or industry.
- Exemption does not apply to Subdivisions (b) and (c).

NOTE: "Building" & "Construction" are undefined

- An employee who regularly performs work ***associated with construction***, including work involving **alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work**, or perform work related to building or construction. (IWC Wage Order No. 16)

Clearing The Haze
Are All Employees Protected?

- Does **NOT** apply to "*applicants or employees* hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense … or equivalent regulations applicable to other agencies."

- This exemption applies to *all* of Section 12954.

Clearing The Haze

Are All Employees Protected?

Subdivision (e): "This section does not ***preempt*** state or federal laws requiring applicants or employees to be tested for controlled substances … as a condition of:"

- Employment;
- Receiving federal funding or federal licensing-related benefits; OR
- Entering into a federal contract.

Clearing The Haze

Federal Department of Transportation

- DOT requires drug testing for safety-sensitive transportation employees.
- FMCSA requires 5-panel drug test, including Marijuana (THC).
- On May 2, 2023, the U.S. DOT published a final rule amending its regulated drug testing program to allow for oral fluid testing.
  - Oral fluid testing = saliva-based test
  - Oral fluid testing is a newer test, so it has not been subjected to the same legal scrutiny as urine or hair follicle testing.

Clearing The Haze

Drug-Free Workplace Act

- **Federal** – Federal contractors are required to comply with the federal Drug Free Workplace Act if they have a contract for more than $100,000.
  - Does not require drug testing.

- **California** – Private employers that have been awarded a contract or grant by a state agency must certify that they comply with the requirements of the California Drug-Free Workplace Act and provide a drug-free workplace.
  - Does not require drug testing.

Questions?

Josue Aparicio
Senior Counsel | San Francisco, CA
415.955.5094
japaricio@hansonbridgett.com

Jennifer Puza
Associate | Walnut Creek, CA
925.478.2024
jpuza@hansonbridgett.com

Sandy Rappaport
Partner | San Francisco, CA
415.955.5053
srappaport@hansonbridgett.com

Sonia Salinas
Partner | Los Angeles, CA
213.395.7630
ssalinas@hansonbridgett.com

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Labor Law Developments

PAT GLENN / MOLLY KABAN / GYMMEL TREMBLY

JANUARY 2024

Agenda

- **Private Employers**
  - National Labor Relations Board
  - Work Rules
  - Severance Agreements
  - Election Rules
  - Joint Employer
  - Union Recognition
- **Public Employers**
  - Public Transit Autonomous Vehicle Technology
  - Temporary Employees

PRIVATE EMPLOYERS

National Labor Relations Board

- The NLRB safeguards private sector employees' right to organize and determine whether to have a union as their bargaining representative.
  - Consists of a 5 Person Board and a General Counsel who are appointed by the President with the consent of the Senate.
  - Board members are appointed for 5-year terms
- Unfair Labor Practices: Generally, the process for an ULP includes:
  - Charge, Investigation, Complaint and Answer, Hearing or Decision, Disposition.

Work Rules

- **Stericycle, Inc., 372 NLRB No. 113 (2023)**
- New legal standard for evaluating employer work rules that do not expressly restrict employees' protected concerted activity under Section 7 of the National Labor Relations Act is facially unlawful under Section 8(a)(1) of the Act.
- Under the *Stericycle* standard:
  - The General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights.
  - If the General Counsel does so, then the rule is presumptively unlawful.
  - The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.
  - If the employer proves its defense, then the work rule will be found lawful to maintain.

Severance Agreements

- **McLaren Macomb, 372 NLRB No. 58 (2023) and GC Memo.**
- Prohibits an offer of severance in exchange for confidentiality and non-disparagement terms that would have the "reasonable tendency to restrain, coerce, or interfere" with Section 7 rights.
- Does not ban all severance agreements.
- Bans overbroad provisions which restrict employees from engaging in protected activity.
- The rights of employees protects activity outside of the employer-employee relationship such as accessing the Board, their union, judicial or administrative or legislative forums, the media or other third parties.
- Protected activity also extends to communications with former employees.
- It does not matter whether or not the employee actually signed the severance agreement for purposes of finding a violation of the Act since the proffer itself is coercive since it conditions severance on the employee waiving their statutory rights.
- The decision has retroactive effect and may invalidate agreements entered into before February 21, 2023.

Severance Agreements

- Extends to other employer communications with employees such as pre-employment letters or offers of employment.
- Review employer communications, including settlement agreements, to be sure that provisions do not:
  - Interfere with an employee's right to make public statements about the workplace.
  - Chill the tendency to assist fellow employees, including future cooperation with the Board's investigation and litigation of unfair labor practices about any matter arising under the NLRA at any time in the future.
  - Chill the tendency to assist former employees to raise complaints about the former employer with their former coworkers, the union, the Board, other government agency, the media, or almost anyone else.
  - Have a reasonable tendency to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the agreement.
  - Prohibit the subject employee from discussing the terms of the agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept an agreement.

Severance Agreements

- Ca Code of Civil Procedure § 1001 prohibits a settlement agreement from preventing disclosure of factual information related to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, filed in a civil or administrative action.
- Gov. Code § 12964.5 prohibits an employer from requiring that the employee sign a non-disparagement agreement or other document which denies the employee the right to disclose unlawful acts in the workplace in exchange for a raise, a condition of employment or continued employment.
- Prohibits an employer or former employer from including in any agreement related to the employee's separation from employment (e.g., severance, settlement, separation agreements) from prohibiting the disclosure of information about unlawful acts in the workplace.
- This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process.

“Quickie” Election Rules

- Representation petitions are filed by employees, unions, and employers seeking to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer.
- The NLRB investigates and determines if an election should be held.
- If parties do not agree on the voting unit and other issues, the NLRB regional office holds a pre-election hearing to determine whether an election should be conducted.
- NLRB published a new rule governing these elections. Changes to representation election procedures include, among others:
  - Allowing pre-election hearings to begin more quickly;
  - Ensuring that important election information, i.e., the Notice of Petition for Election, is disseminated to employees more quickly;
  - Making pre- and post-election hearings more efficient; and
  - Ensuring that elections are held more quickly.

Joint Employer Status

- Effective February 26, 2024, the NLRB's new standard for determining joint-employer status applies.
- Two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities share or codetermine one or more of the employees' essential terms and conditions of employment.
- Essential terms and conditions of employment are defined as:
  - wages, benefits, and other compensation;
  - hours of work and scheduling;
  - the assignment of duties to be performed;
  - the supervision of the performance of duties;
  - work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
  - the tenure of employment, including hiring and discharge; and
  - working conditions related to the safety and health of employees.

Union Recognition

Cemex Construction Material Pacific, 372 NLRB No. 130 (2023)

- Establishes a new framework for when the NLRB or the court will issue bargaining orders.
- When a union presents an employer with a demand to be recognized, the employer must either:
  - i) recognize the union as the employee representative without an election and bargain with it over wages, hours, and other terms and conditions of employment; or
  - ii) promptly (i.e., within two weeks of receiving the union's demand) file with the NLRB an RM petition for an election to test the union's majority status or the appropriateness of the proposed bargaining unit (unless the union has filed its own petition for an election).
- If an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and the Board will order the employer to recognize and bargain with the union without the election.

Penalties

- *Noah's Ark Processors, LLC*, Case 14-CA-255658 (Apr. 20, 2023)
  - In cases involving repeated or serious unlawful conduct warranting a broad order, the Board will consider the following remedies, among others:
    - Explanation of Rights: Providing a written explanation of employees' rights Notice/Explanation of Rights Reading: Reading the notice (and any explanation of rights) aloud in a formal setting and in the presence of other employees and Board agent.
    - Publication: Publishing the notice and any explanation-of-rights document in "local publications of broad circulation and local appeal."
    - Visitation: Visitation by the Board to ensure compliance with a Board order.

Other Notable Decisions

- NLRB Limits Past Practice as a Justification for Unilateral Changes: *Wendt Corporation,* 372 NLRB No. 132 (2023)
- NLRB Clarifies *Wright Line* Mixed-Motive Standard: *Intertape Polymer Corp*., 372 NLRB No. 133 (2023)
- NLRB Eases Test for Concerted Activity: *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023)
- NLRB Expands Section 7 Protections for Employee Advocacy on behalf of Non-Employees: *American Federation for Children, Inc*., 372 NLRB No. 137 (2023).
- NLRB finds the "proffer, maintenance, and enforcement" of non-compete agreements in employment contracts and severance agreements violate the NLRA: General Counsel Memorandum to all Regional Directors

PUBLIC EMPLOYERS

Public Transit Autonomous Vehicle Technology

Public transit employers must give at least 10-months notice, in writing, to the union representative of the workforce affected by autonomous vehicle technology of its intent to begin a procurement process to acquire or deploy any autonomous transit vehicle technology for public transit services that would eliminate job functions or jobs.

If the Union makes a written bargaining request, the employer must bargain over:

- Developing the new autonomous transit vehicle technology
- Implementing the new autonomous transit vehicle technology
- Creating a transition plan for affected workers
- Creating plans to train and prepare the affected workforce to fill new positions created by a new autonomous transit vehicle technology
- Related mandatory subjects of bargaining.

Bargaining must begin 30 days after the Union received notice of the employer's intent to begin the procurement process, or 10 days of the employer receiving the written request to bargain, whichever is later.

Temporary Employees

Public employers covered by the Meyers-Milias-Brown Act

If the employer hired temporary employees to perform the same or similar work as union employees, the employer must:

- upon the union's request:
  - automatically include the temporary employees in the same bargaining unit as the permanent employees if the requested classification of temporary employees is not presently within the unit.
  - The employer will bargain with the union over wages, hours, and terms and conditions of employment for the newly added temporary employees if the parties' current memorandum of understanding does not address them. Bargained-for terms will be included as an addendum to the existing MOU. Thereafter, the terms and conditions of employment governing both permanent and temporary workers will be included in a single MOU.
  - The same terms and conditions of employment for permanent and temporary employees are not required.
- Provide each temporary employee, at hire, their job description, wage rates, eligibility for benefits, anticipated length of employment, and procedures to apply for open, permanent positions; and, give this same information to the union within 5 business days of hiring the temporary employee.
- Provide the union information of newly hired temporary employees which includes their anticipated or actual end date of employment.

"Temporary employee" means a temporary employee, casual employee, seasonal employee, periodic employee, extra-help employee, relief employee, limited-term employee, per diem employee, and any other public employee who has not been hired for a permanent position.

Notable Decisions

- *City and County of San Francisco*, (2023 PERB Dec. No. 2858-M): awarding a remedy of bargaining costs related to an employer's unlawful conduct.
- *City and County of San Francisco*, (2023 PERB Dec. No. 2867-M): the City's charter provisions that prohibited city workers from striking are unenforceable.
- *County of Sonoma*, (2023 PERB Dec. No. 277a-M): Public agencies must comply with the MMBA's meet-and-confer requirement before submitting to voters an initiative affecting matters within the scope of representation.
- *City of Compton,* (2023 PERB Dec. No. A506-M): PERB does not evaluate whether the parties are at impasse before factfinding.

Questions?

Pat Glenn
Partner | San Francisco, CA
415.955.5047

pglenn@hansonbridgett.com

Molly Kaban
Partner | San Francisco, CA
415.955.5090

mkaban@hansonbridgett.com

Gymmel Trembly
Associate | San Francisco, CA
415.955.5809

gtrembly@hansonbridgett.com

2024 Annual

Labor & Employment Seminar

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Class, Collective and PAGA Actions – The Latest

ADRIANNA KOURAFAS / DIANE MARIE O'MALLEY / KATIE RONEY

JANUARY 2024

Agenda

- **New Class and PAGA Cases** – What you should know about
  - rounding
  - regular rate
  - off-the-clock and
  - Equal Pay Act claims.
- **Arbitration** – Consequences of New Cases – Options.
- **Common Continued Labor Code Violations** – What we are seeing.

ALL THESE CLAIMS APPLY EQUALLY TO PUBLIC AND PRIVATE EMPLOYERS.

New and Pending Cases and Issues

1. **Rounding – Question presently before the CA Supreme Court:**

"Under California law, are employers permitted to use neutral time - rounding practices to calculate employees' work time for payroll purposes?"

- ***Woodworth v. Loma Linda University Medical Center***; **93 Cal.App.5th 1038 (2023) (pet to rev granted February 2023) -** Woodworth rounded with a neutral policy. Time punches were rounded down to the nearest tenth of an hour. (For example, if employee clocks in for a 7:00 a.m. shift at 6:59 a.m., the time punch is rounded down to 6:54 a.m. If employee clocks in at 7:05 a.m., the time punch is rounded down to 7:00 a.m. If employee clocks in at 7:00 a.m., no rounding occurs - time punch is already at the nearest tenth of an hour. 51.4% of employees were paid for more time than they were on the clock, 47.4% were paid for less, and the remaining 1.1% were unaffected.

New and Pending Cases and Issues

1. **Rounding – Question presently before the CA Supreme Court:**
   - ***Woodworth v. Loma Linda University Medical Center*; 93 Cal.App.5th 1038 (2023) (pet to rev granted February 2023)**
     - **Court held:** If an employer can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for 'all the time' worked. The evidence in this case showed that under the rounding policy, (1) the medical center captured the exact number of minutes employees worked, and (2) Woodworth and many other employees were not paid for all time worked.

New and Pending Cases and Issues

1. **Rounding – Question presently before the CA Supreme Court:**
   - ***Camp v. Home Depot U.S.A., Inc*., 84 Cal. App. 5th 638 (2022) (pet to rev granted February 2023-may be cited) - Home Depot rounded clock-in and clock-out times to the nearest quarter hour.**
     - Plaintiff Camp had lost a total of 470 minutes over approximately four and a half years due to the rounding policy. Plaintiff Correa did not lose any wages as a result of the rounding policy. Home Depot contended it was entitled to summary judgment because its rounding policy was neutral on its face, neutral as applied, and otherwise lawful under *See's Candy Shops, Inc. v. Superior Court* (2012).

New and Pending Cases and Issues

1. Rounding

- ***Camp v. Home Depot – Court rules:***
  - **Court held:** "We conclude that Home Depot, in relying on its quarter-hour rounding policy, did not meet its burden to show that there was no triable issue of material fact regarding plaintiff Camp's claims for unpaid wages, where Home Depot could and did track the exact time in minutes that an employee worked each shift and those records showed that Camp was not paid for all the time he worked. We will therefore reverse the judgment against plaintiff Camp and direct the trial court to enter a new order denying Home Depot's summary judgment motion as to Camp."

New and Pending Cases and Issues

2. Regular Rate – "Percentage Based Bonus" – no recalculation necessary

***Lemm v. Ecolab Inc.*, 87 Cal. App. 5th 159 (2023)**

- Court finds: payment of a bonus based on percentage of total earnings, which included both regular wages and overtime earnings, comported with federal and California law. Employer need not recalculate.

New and Pending Cases and Issues

Regular Rate – "Percentage Based Bonus" – *Lemm v. Ecolab Inc*.

- Plaintiff is a route sales manager - his compensation was calculated pursuant to an annual incentive compensation plan - his compensation was comprised of hourly wages and a nondiscretionary monthly bonus – Lemm was entitled to the bonus whenever he met target metrics - the amount of the bonus varied from month to month based on the compensation plan factors. The monthly bonus was paid every four to six weeks pursuant to a schedule set out in the compensation plan. If Lemme met his goal, his gross wages for the month were increased by an additional 5 percent.

New and Pending Cases and Issues

- **Regular Rate**
  - ***Lemm v. Ecolab Inc.* –**

    - Lemm's hourly wages, including any overtime or double time wages, were paid every two weeks. The overtime and double time hours were determined by state and federal guidelines and did not comprise part of the calculation of the monthly bonus. Gross wages for the purpose of calculating the bonus included straight time, overtime, and double time wages.

New and Pending Cases and Issues

- **Regular Rate - *Lemm v. Ecolab Inc.* –**
    - Court reasoned: a requirement for an employer to pay overtime on a percentage bonus that already includes overtime pay makes the employer pay `overtime on overtime.' This is not a requirement under the law. By paying a bonus based on a percentage of gross earnings that includes overtime payments the employer automatically pays overtime simultaneously on the bonus amount.

New and Pending Cases and Issues

3. **Off-the-clock work – computer boot up and shut down time**

   ***Cadena v. Customer Connexx LLC*, 2:18-cv-00233-APG-DJA (D. Nev. May. 22, 2023) -** (FLSA) – call center hourly employees not paid for time spent booting up their computers before clocking into a timekeeping program at the beginning of their shifts and for time spent powering down the computers after clocking out of the timekeeping program at the end of their shifts.

   Court held: "The plaintiffs have not raised a triable issue regarding whether the time they spent pre- and post-shift was more than de minimis or that when it was, their time was not adjusted as requested."

New and Pending Cases and Issues

- **Off-the-clock work**

  ***Cadena v. Customer Connexx LLC*, 2:18-cv-00233-APG-DJA (D. Nev. May. 22, 2023)**

  - Court limited its holding to the facts of the case — only where employee reports to ER worksite to boot up computer – not remote workers

  - California Labor Law impact? ***Troester v. Starbucks***

New and Pending Cases and Issues

4. Equal Pay Act - Cal. Lab. Code § 1197.5

- ***Rasmussen, et al. v. The Walt Disney Company, et al.,*** Case. No. 19STCV10974, Superior Court of California County of Los Angeles – class action filed by Senior Financial Analyst in 2019; court grants class certification in December 2023 for most non-unionized female employees below the Vice President level. Approximately 8900 women.
- Case brought under the Equal Pay Act and the Fair Employment and Housing Act.

New and Pending Cases and Issues

4. Equal Pay Act - Cal. Lab. Code § 1197.5

- ***Rasmussen, et al. v. The Walt Disney Company –*** Complaint alleges:
  - "Disney's uniform policies, procedures and practices suffer from a lack of transparency, adequate quality standards and controls, sufficient implementation metrics, management/HR review, and opportunities for redress or challenge."
  - Executive Leadership team is 77% male.

New and Pending Cases and Issues

4. Equal Pay Act - Cal. Lab. Code § 1197.5

- ***Rasmussen, et al. v. The Walt Disney Company –*** Complaint alleges:
  - Ms. Rasmussen's base salary was $109,958. Each of the six men holding the same Manager, Product Development title had a much higher base salary.

    "The lowest-paid male Manager received $16,000+ more in base salary.

    The highest-paid male Manager was paid almost $40,000 more.

    When comparing the average base salary of male Managers, Rasmussen was shortchanged more than $26,000.

    One recently-hired male Manager—with several years less experience than Plaintiff was paid $20,000+ more."

New and Pending Cases and Issues

4. Equal Pay Act - Cal. Lab. Code § 1197.5

- ***Rasmussen, et al. v. The Walt Disney Company –*** Court class certification order:
  - Grants certification under the Equal Pay Act for a multitude of positions.
  - Denies class certification under the FEHA as individual inquiries would be necessary.

New Pending Cases

- ***California Civil Rights Department v. Activision Blizzard, Inc.*** (December 2023) Equal Pay Act class action settlement - Activision Blizzard - video game company ("Call of Duty," "World of Warcraft, "Guitar Hero,") - **$54M settlement after two-year investigation** – Complaint alleges:
  - "Defendants' workforce is only about 20 percent women.
  - Very few women ever reach 10 top roles at the company. The women who do reach higher roles earn less salary, incentive pay and total compensation than their male peers.
  - Female employees receive lower starting pay and also earn less than male employees for substantially similar work. Defendants promote women more slowly and terminate them more quickly than their male counterparts.

New Pending Cases

- ***California Civil Rights Department v. Activision Blizzard, Inc.*** (December 2023) – Complaint allegations regarding Defendants' earlier efforts:

  – When women complained to human resource personnel about the lack of equal employment opportunities, especially in comparison to their male counterparts, their complaints fell on deaf ears or were met with an empty promise to investigate the issue. Indeed, despite having retained Paul Hastings LLP from 2015 to 2017 and Miller Law Group in 2018 to allegedly provide analysis related to compensation data, Defendants failed to take effective and reasonable steps to prevent pay discrimination as the pay disparity between male and female employees was not remedied and continued."

New Pending Cases

California Civil Rights Department v. Activision Blizzard, Inc.

- If approved by the court, the settlement agreement will require Activision Blizzard to:
- Pay approximately $54,875,000.
- Distribute any excess settlement funds to charitable organizations focused on advancing women in the video game and technology industries or promoting awareness around gender equality issues in the workplace.
- Retain an independent consultant to evaluate and make recommendations regarding Activision Blizzard's compensation and promotion policies and training materials.
- Continue its efforts regarding inclusion of qualified candidates from underrepresented communities in outreach, recruitment, and retention.

New Pending Cases

California Civil Rights Department – Announces class actions "Preserve Key Legal Tool for Tackling Systemic Wage Discrimination" and takes affirmative steps to influence pending cases

November 2023 Press-Release –

"The California Civil Rights Department (CRD) today announced submitting a friend-of-the-court brief in support of a class action lawsuit brought on behalf of a group of more than 3,000 women against Oracle America, Inc. (Oracle) over alleged pay disparities."

"Class action lawsuits serve a critical role in augmenting the state's efforts to enforce civil rights protections by allowing affected individuals to work together to pursue legal remedies.**"**

Old and Pending Cases

The problem with class actions: time, money and operational disruption -

- ***Benton v. Telecom Network Specialists, Inc*., Court of Appeal, Second District, Division 7, October 13, 2023, Not Reported in Cal.Rptr.2023 WL 678338 –** 2006 filed case
  - Telecom Network Specialists (TNS) provides personnel services to the telecommunication industry. TNS's customers own cell phone towers or supply cell phone equipment. TNS, in turn, locates "skilled technical laborers" to perform installation, maintenance and repair of equipment at its customer's cell sites.
  - Wage and Hour class action (meals and rest breaks, overtime) on behalf of approximately 750 members when filed.

Old and Pending Cases

- **Benton v. Telecom Network Specialists, Inc. -** Telecom Network Specialists (TNS) provides personnel services to the telecommunication industry. TNS's customers own cell phone towers or supply cell phone equipment. TNS, in turn, locates “skilled technical laborers” to perform installation, maintenance and repair of equipment at its customer's cell sites.

Old and Pending Cases

- ***Benton v. Telecom Network Specialists, Inc.***
- **18 years in the making** - and still not over . . .
  - On June 27, 2006, Benton filed a class action complaint
  - Second amended complaint filed in 2008
  - Motion for class certification (April 2012) denied at trial level
  - Appeal – Appellate Court remands to Trial Court
  - Trial Court decision on Remand

Old and Pending Cases

- ***Benton v. Telecom Network Specialists, Inc.,***
- **18 years in the making** - and still not over . . .
  - Trial Court decision on Remand:
    - "plaintiffs could not establish TNS's liability through common proof because: (1) the technicians worked under "a diversity of workplace conditions" that enabled some of them to take meal and rest breaks; and (2) the staffing companies that hired and paid many of the TNS technicians had adopted different meal, rest break and overtime policies throughout the class period."

Old and Pending Cases

- ***Benton v. Telecom Network Specialists, Inc.,***
  - Another Appeal - 2023 - and Appellate court reverses again and remands:
    - "The trial court's order denying class certification is reversed and the matter is remanded for the court to reconsider the class certification motion. "
    - For the meal and rest claims, the Appellate Court rules:
      - » Evidence that some employees worked under conditions that permitted them to take breaks is not a sufficient basis for denying certification;
      - » Evidence that staffing companies had diverse meal and rest period policies is not a sufficient basis for denying certification.

Old and Pending Cases

Benton v. Telecom Network Specialists, Inc.

- For the overtime claim:
  - The trial court did not identify a proper basis for denying certification. In describing the reasons for the denial, the court states only that the analysis of plaintiffs' meal and rest break claims "holds true for the proposed overtime class." As with plaintiffs' meal and rest claims, the trial court failed to evaluate whether plaintiffs' theory of recovery could be proved (or disproved) through common facts and law. Instead, the court appears to have concluded that, to establish TNS's liability, each technician would have to make an individualized showing that he or she incurred overtime and that his or her staffing company failed to pay them the applicable overtime rate. Those issues, however, relate to the existence and amount of each technician's damages.

Arbitration Agreements and Class, Collective and Representative Waivers

Current State of the Law

The law coming into 2023:

- **Class action waivers:** Generally ok
  - *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)
  - *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348
- **Collective action waivers:** Generally ok
  - *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
  - *Gonzales v. Charter Communications, LLC*, 497 F. Supp. 3d 844 (C.D. Cal. 2020)
- **Representative action (PAGA) waivers:**
  A company can compel a representative plaintiff to arbitrate their individual PAGA claims under the FAA, and representative claims in court must be dismissed.
  - *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (June 2022)

July 2023: *Adolph v. Uber Techs., Inc.* (CA Supreme Court decision)

- **Class action waivers:** Still generally ok
- **Collective action waivers:** Still generally ok
- **Representative action (PAGA) waivers:**
  - Can still compel named plaintiff to arbitrate claims individually, but named plaintiff can still pursue representative action in court.
    - Only "standing" requirement is that named plaintiff suffered at least one Labor Code violation

To use, or not to use?

1. Opinions vary
2. What's the risk?
   - Proceeding in multiple venues
   - Plaintiffs could exercise their right to demand arbitration even where you don't want to arbitrate
     - Mass arbitration

To use, or not to use?

- **Mass arbitration**
  - Potentially hundreds of demands for arbitration
  - …and hundreds of filing fees, due within 30 days of the demand
    - Under California law, company is responsible for filing fees
      - » AAA = $2450
      - » JAMS = $2,000
      - » 200 claims = $400,000 - $490,000
  - Examples: Uber, Lyft, Intuit (Turbo Tax), Amazon (Echo)

To use, or not to use?

3. If amending an existing agreement, there are some other changes that you would be required to make if you update the agreement that may not be desirable

Strategies to mitigate risk when using waivers

If you want your waiver/arbitration agreement to be valid, it is important to consult with an employment attorney who has experience drafting these provisions. The law in this area is complex and it keeps evolving.

Common Continued Labor Code Violations

Split Shifts

- Split shift = work schedule that is interrupted by non-paid and non-working time periods established by the employer.
- A “split shift premium” must be paid each time an employee’s schedule includes a split.
  - Premium = one hour of pay at the state minimum wage, or the local minimum wage if there is one, whichever is greater.

Day of Rest

- California labor laws require that employees receive one rest day each *workweek*.
- An employer cannot discipline an employee for refusing to work on the 7th day in a workweek and is subject to a penalty for causing or inducing an employee to forego a day of rest.
- An employee who is fully apprised of the entitlement to rest may independently chooses not to take a day of rest.

Regular Rate of Pay

- The “regular rate of pay” is used as the basis for calculating overtime pay for non-exempt employees in California. Overtime is paid at 1 ½ times to 2 times the employee’s regular rate of pay.
- Must be paid at the regular rate of pay:
  - Overtime
  - Meal Break Premiums
  - Rest Break Premiums
  - Paid Sick Leave
- All non-discretionary income must be included in the regular rate of pay calculation, such as:
  - Bonuses
  - Commissions
  - Shift differentials

Statutory Exclusions from Regular Rate

Non-exhaustive list of commonly used statutory exclusions to the regular rate of pay calculations:

- Gifts
- Payments Not for Hours Worked
- Reimbursements
- Excludable Benefits
- Certain Premium Payments (e.g., Overtime)
- Reporting and Call-Back Pay
- “Predictability Pay”

Non-Discretionary v. Discretionary Bonuses

- Discretionary bonuses are excludable from the regular rate of pay.
- A bonus is discretionary only if all the statutory requirements are met:
  - The employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine whether to pay the bonus;
  - The employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine the amount of the bonus; and
  - The bonus payment is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.

Non-Discretionary Bonuses

- **MUST** be included in the regular rate of pay calculation
- Examples of common non-discretionary bonuses include:
  - Bonuses based on a predetermined formula, such as individual or group production bonuses
  - Bonuses for quality and accuracy of work
  - Bonuses announced to employees to induce them to work more efficiently
  - Attendance bonuses
  - Safety bonuses (i.e., number of days without safety incidents)

Discretionary Bonuses

Examples of common discretionary bonuses include:

- Bonuses for overcoming a challenging or stressful situation
- Bonuses to employees who made unique or extraordinary efforts not awarded according to pre-established criteria
- Employee-of-the-month bonuses
- Severance bonuses and
- Referral bonuses to employees not primarily engaged in recruiting activities

Wage Statements

- Do your wage statements accurately portray *all* applicable Labor Code Section 226(a) items?
  - Is the employer name and address on your wage statement the correct "legal entity that is the employer"?
  - Are you reflecting the paid sick leave balance on the wage statement?

On-Duty Meal Breaks

- Unless the employee is relieved of all duty during his or her 30-minute meal period, the meal period shall be considered an "on duty" meal period that is counted as hours worked, which must be compensated at the employee's regular rate of pay.
- An "on duty" meal period permissible only when the nature of the work prevents an employee from being relieved of all duty and when, by written agreement between the employer and employee, an on-the-job paid meal period is agreed to.
- The written agreement must state that the employee may, in writing, revoke the agreement at any time.

Other Items to Keep in Mind

- Are you providing new hires with a **Labor Code Section 2810.5 Notice** providing all required information?
- Have you updated your **workplace posters** for 2024?
- Is any **"make-up" time** policy compliant with Labor Code Section 513?
- Are you providing a **final paycheck in-hand** on the last day of employment when terminating an employee?
- Are employees using **personal devices** to communicate about work?

Reference Materials

- Please see the reference materials for a one-page Tip Sheet of common issues we see in wage and hour class action cases.

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TIP SHEET OF ITEMS FOR CLASS ACTION AUDIT

By now, everyone is familiar with, and hopefully has compliant, meal and rest break policies. But remember, there are *many other* rules to follow. The following is of just **some of the areas that pop up in wage and hour class action cases** in addition to the meal and rest break claims that we handle that we want to point out to you:

- Do you have **split shifts**? Are you paying employees correctly?
- Do any employees work **seven days in a row** in a workweek and, if so, is there evidence of voluntariness for working that seventh day?
- Are you paying the **regular rate of pay** for overtime, meal and rest break premiums and sick pay?
- Are you **including all non-discretionary income** in your regular rate of pay calculation? Bonuses, commissions, shift differential, etc.?
- Do your **wage statements** *accurately* portray all applicable Labor Code Section 226(a) items?
  - Is the **employer name and address on your wage statement** the correct "legal entity that is the employer"?
  - Are you reflecting **paid sick leave balance** on the wage statement?
- If your overnight shift employees are taking **on-duty meal breaks**, what are you doing for rest breaks? Are any other employees taking on-duty meal periods and, if so, are they doing so correctly?
- Do you still **round employee time**? Is it neutral and do you audit it?
- Do your employees engage in any activities *that plaintiffs claim is* **off-the-clock work**? Such as: responding to work related messages after hours, being required to check their schedules or other work activities, spending time waiting to boot up computers before clocking in, frequently waiting in line to clock in?
- Are you providing new hires with a **Labor Code 2810.5 Notice** providing notice of rates of pay and other matters?
- Have you updated your **workplace posters** every year?
- Is any **"make-up" time** policy compliant with Labor Code Section 513?
- Are you providing a **final paycheck in-hand** on the last day of employment when terminating an employee? Are you deducting any items from that final paycheck?
- Are employees using **personal devices** to communicate about work?
- Are your **exempt** employees truly exempt?
- Are you inappropriately making your employees pay for any **business-related expenses**, such as paying for lost name tags or replacing company-issued uniforms.

Questions?

Adrianna Kourafas
Senior Counsel | Los Angeles, CA
415.955.5134

akourafas@hansonbridgett.com

Diane Marie O'Malley
Partner | San Francisco, CA
415.955.5045

domalley@hansonbridgett.com

Katie Roney
Associate | San Francisco, CA
415.955.5117

kroney@hansonbridgett.com

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Impact of Recent Supreme Court Decisions on Diversity Initiatives

JENNIFER MARTINEZ, CDEIO

JANUARY 2024

What I'll Cover

- Relevant Points from *Students for Fair Admissions*
- Legal Landscape Since *SFFA*
  - Congressional/Administrative Actions
  - Blum/AAER Litigation Filed and Threatened
  - Other Relevant Litigation
- What the Experts Are Saying
- Where Do We Go From Here
  - What DEI programs are and are not
  - Decision points for your organization

Relevant Points from *SFFA*

- Students for Fair Admissions is a private organization specifically dedicated to dismantling affirmative action and overturning prior precedent, *Grutter v. Bollinger* (2003); led by conservative activist Ed Blum (not a student)
- Challenged admissions policies at University of North Carolina (public) and Harvard (private)
  - Schools argued that their admissions policies followed *Grutter* – used race and other protected categories in a holistic, narrowly tailored way; just a "plus factor" not a determining factor
- Limited to education context (Title VI and Title IX; *not* Title VII) – cannot consider race or other protected category as a factor in admissions
- Policy undercurrent – discrimination no longer as relevant as it was when Grutter was decided

Relevant Points from *SFFA*

- Nothing in the opinion prevents educational institutions from pursuing diversity goals, including racial diversity, through race-neutral or even race-conscious practices (e.g., targeted recruiting, collecting and monitoring racial data), so long as they do not give admissions preferences to students based on their race
- Justice Roberts work around: can't consider race… but can consider "racialized experiences"
  - Specifically, can consider "statement of interest" where an applicant talks about how race or other protected category has been a part of adversity they have had to overcome
- Justice Gorsuch concurrence: tries to connect language and standard of Title VI to Title VII, stating that together the laws "codify a categorical rule of individual equality, without regard to race"

Congressional/Administrative Actions

- **June 29, 2023 Official Statement from EEOC Chair, Charlotte Burrows**: "*SFFA* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."
- **July 13, 2023 Republican AGs of 13 states** sent letters to Fortune 100 CEOs based on *SFFA*, citing Gorsuch's concurrence, and warning that race-based employment and contracting decisions are unlawful and related programs would be heavily scrutinized
- **July 17, 2023 Sen. Tom Cotton (R-Arkansas)** sent letter to 51 BigLaw firms, threatening investigations and litigation if the firms continued advising clients on DEI programs and maintaining programs of their own: "Congress will increasingly use its oversight powers—and private individuals will increasingly use the courts—to scrutinize the proliferation of race-based employment practices."

Congressional/Administrative Actions

- July 19, 2023, Democratic AGs of 21 states send own letter to Fortune 100 CEOs in response to Tom Cotton's and Republican AG's letters, calling those letters pure intimidation, affirming that corporate DEI programs are permissible and necessary, even post-*SFFA*
  - Key point: reminder of still lingering discrimination against underrepresented groups that could be exacerbated if DEI programs are rolled back
- Response of law firms/Fortune 100 companies
  - Meh.
  - Law firm consultant: "Did you ever watch 'Succession' where the dad said, 'You are not serious people'? I feel like this is not a serious person."
  - Tom Cotton letter and Republican AGs letter both reflect lack of understanding of what DEI programs are about
  - BUT, many firms/companies have pulled back in small ways

Blum/American Alliance for Equal Rights

- Perkins Coie/MoFo – 1L diversity scholarships targeted; these firms still had policies in place that explicitly stated race-based preferences for the scholarships; Section 1981 claims (not Title VII)
  - Both firms immediately revised policies to remove this language and all references to "underrepresented groups"; lawsuits dropped as moot
- Winston & Strawn – 1L diversity scholarship targeted; scholarship meant for anyone from an "underrepresented group"
  - Also sent demand letters to Fox Rothschild, Adams and Reese, Hunton Andrews Kurth; Adams cancelled program entirely
- Fearless Fund – Atlanta-based venture capital firm that explicitly invests only in Black women led companies; Section 1981 claims (not Title VII)
  - Preliminary injunction halting program upheld November 2023; appealed to 11th Circuit, to be heard this month

Blum/American Alliance for Equal Rights

- Lawsuit targeting SEC rules
  - Approved by the SEC in 2021, Nasdaq rules require companies listed on the exchange to disclose the race, gender, and sexual orientation of their board members
  - Rules challenged by Blum because they "disadvantage white men" under the Equal Protection Clause of the 14th Amendment
  - Lawsuit dismissed on the ground that Nasdaq is a private and not governmental entity; dismissal upheld by 5th Circuit, but Blum has threatened to appeal
  - Meanwhile, SEC released its first ever DEI and Accessibility Strategic Plan that includes two goals that contemplate the use of the agency's regulatory authority to promote the inclusion of underrepresented groups

Other Relevant Litigation

- Jones Day sued in April 2019 for gender discrimination based on lesser amount of paternity leave (still ongoing)
  - Discrimination claim based on additional leave time for pregnancy disability since it only applies to women
  - Might just be bad facts – evidence of negative comments by partners, retaliation
- NYU Law Review sued in October 2023 for "bias against straight white men"
  - Takes issue with Law Review's stated goal of seeking a "diverse staff of editors" and goes one step further than *SFFA* and attacks "statements of interest" practice
  - Claims alleged under Title VI and Title IX of the Civil Rights Act
  - Plaintiff's attorneys are known conservative political activists

Other Relevant Litigation

- Attack on Environmental, Social, and Governance ("ESG") programs and policies
  - Many ESG programs and policies include the goal of promoting DEI, or supporting social justice aims
  - Late 2022, the Department of Labor established a rule that fiduciaries of retirement plans regulated by ERISA *can* (but don't have to) consider ESG factors when selecting plan investments and exercising shareholder rights; opponents contend rule violates ERISA because it threatens financial well-being of workers
  - Most challenges using ERISA as the legal vehicle for attack (1974 federal law that established minimum standards for pension plans in private industry)
  - September 2023 – DOL rule upheld by district court judge; challengers appealed to the 5th Circuit, with appeal to be heard early 2024
  - Other similar actions pending against American Airlines, New York public agency pensions

What the Experts Are Saying

- What is likely to be safe no matter what
  - Programs designed to make processes more equitable for all
  - Initiatives that focus on aspects of diversity beyond race, e.g., socioeconomic background, education, first generation status, etc., even where there is some correlation with race
  - Policies tied to outreach and effort rather than decision-making (e.g., expanding where recruiting is done vs. requiring a specific number of diverse candidates in a specific hiring process)
- What has a chance of creating risk
  - Policies requiring specific percentage of diversity in interview slates
  - Limiting opportunities (e.g., scholarships, leadership programs) for a specific protected category
  - Basing leadership compensation decisions on achievement of certain diversity goals/results
  - Requiring specific percentage of diversity on boards of directors or in leadership

Where Do We Go From Here

- What DEI programs *actually* do
  - Recognize that diverse workplaces produce better business outcomes, which is something employers should encourage
  - Ensure that workplace decisions are as free from bias as possible, and at minimum, do not perpetuate systemic discrimination
  - Re-evaluate practices so that policy decisions are made with thoughtfulness and intentionality
  - Ensure that all people feel safe coming to the workplace as their authentic selves
  - Ensure that all people feel like they are valued and heard

Where Do We Go From Here

- Multiple studies confirm that diverse workplaces where people feel included are:
  - 2.2 times more likely to exceed financial targets
  - 2.4 times more likely to have positive customer experiences
  - 3.7 times more likely to adapt well to change
  - 4.3 times more likely to innovate effectively
  - 5.1 times more likely to retain talent
- Surprise: when you focus on ensuring a positive and fair experience for the underrepresented, *everyone* benefits

Where Do We Go From Here

- What DEI programs and initiatives *are not*
  - "Entitlement" programs for women and people of color
    - Quotas have long been and still are impermissible
    - Assuming that someone is in a position because of their background and not their qualifications is a *you* problem
  - Movement to "color blindness"
  - White or male or straight "guilt"
    - Recognizing that macro systems of bias exist ≠ individual people are evil
    - Recognizing that everyone has unconscious bias ≠ individual people are evil

Decision Points for Your Organization

- The big picture
  - Consider that *SFFA* may have been wrongly decided and does not apply to the workplace in any event; we already have a well-known workplace framework
  - Republican AGs, Blum, and other activists are threatening and litigating based on a fundamental misunderstanding of what DEI programs look like and are about
  - The fear is the point. And we should not let fear drive us to help Ed Blum.
- While there is risk of "reverse discrimination" challenges to DEI initiatives, there is greater risk in pulling back from these initiatives
  - Risk to culture, recruiting, and branding
  - Risk of other discrimination claims

Questions/Discussion

Jennifer Martinez
Partner | Walnut Creek, CA
415.995.5842

jmartinez@hansonbridgett.com

2024 Annual

Labor & Employment Seminar

HansonBridgett

AI in Employment Law - Consequential Decision-Making

ALEXA GALLOWAY / WARREN HODGES

JANUARY 2024

Agenda

- **Background on AI**
- **Potential Legal Risks of AI in the Workplace**
- **Recent Legal Trends Regarding AI in the Workplace**
- **Best Practices for Employers**

What is AI?

"… a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to -

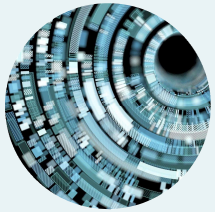
a) perceive real and virtual environments

b) abstract such perceptions into models through analysis in an automated manner; and

c) use model inference to formulate opinions for information or action"

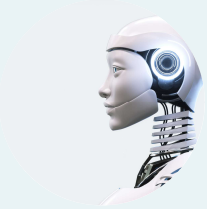
(15 USC 9401(3))

Examples of AI in the Workplace



Platform

Algorithms for workplace management



Chatbots

Digests and generates text that mimics human language

Cobots (Collaborative Robots)

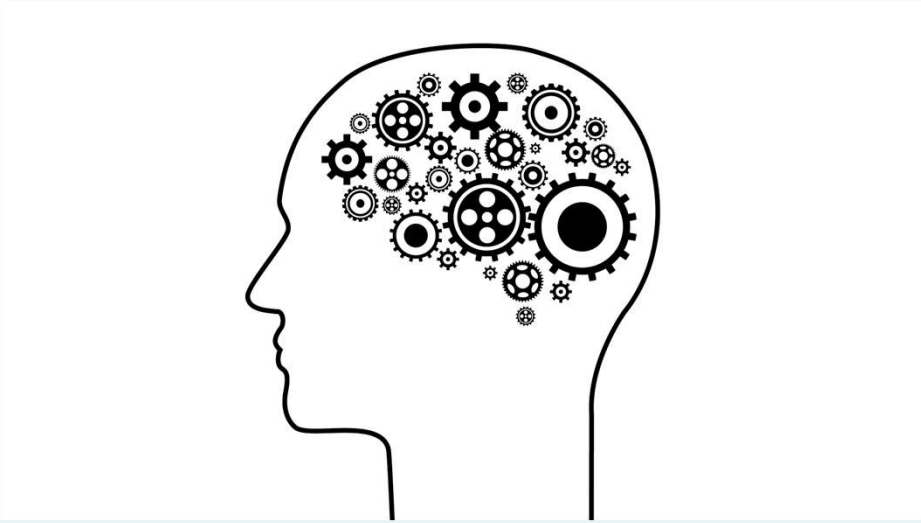
Assists and collaborates with manual workers

Utilizing AI in the Workplace – Practical Considerations

- ***Hiring Decisions***
  - ***Pros:*** Reduces Human Bias
  - ***Cons:*** Perpetuates Disparate Impact Practices
- ***Streamline Processes***
  - ***Pros:*** Faster Results
  - ***Cons:*** Hallucination Concerns
- ***Employee Evaluations***
  - ***Pros:*** Reduces Discretion (i.e. implicit bias)
  - ***Cons:*** Unreliable

Why Understanding AI Matters

- 80% of U.S. Labor Force will be or are already using AI.
- Improper Use Could Result In:
  - Potential Reputational Harm;
  - Inadvertent Disclosure of Confidential Information;
  - Employer Liability.



Potential Legal Risks of AI in the Workplace

Utilizing AI in the Workplace: Legal Risks

- Existing laws and regulations are ***equally*** applicable to an employer's use of AI
- Includes:
  - Privacy Issues
  - Intellectual Property Violations
  - Wage and Hour Issues
  - Discrimination Claims (Title VII, ADA, ADEA, similar state and local laws)
  - Inadvertent disclosure of personal information (HIPAA concerns)

Ex: *EEOC v. iTutorGroup, Inc., et al.*
(No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022))

- Tutoring provider programmed online software to automatically reject female applicants age 55 or older and male applicants age 60 or older
- 200 applicants in total were rejected
- EEOC found conduct violated ADEA
- Matter resolved via settlement for $365,000.00

Ex: *Mobley v. Workday, Inc.*
(Case No. 4:23-cv-00770 (N.D. Cal Feb. 21, 2023)

- Plaintiff applied to 80-100 positions with companies that used Workday – which provides applicant screening tools.
- Plaintiff alleged that the algorithm-based screening system disproportionately denied employment opportunities to applicants based on race, age and disability.
- Pending Motion to Dismiss

Legal Trends Regarding Use of AI in the Workplace

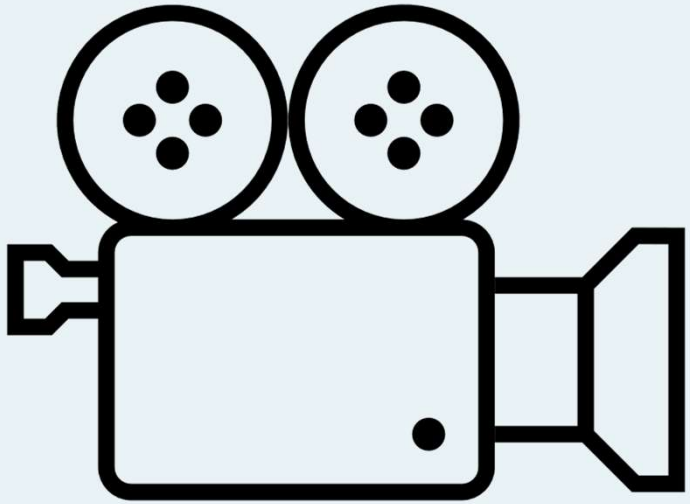
AI Bill of Rights Blueprint

- Published in 2022 by the White House to ***"…guide the deployment of AI so the rights of the American public are protected".***
- **Five Principles:**
    1. Safe and Effective Systems
    2. Algorithmic Discrimination Protections
    3. Data Privacy
    4. Notice and Explanation
    5. Human Alternatives, Consideration and Fallback

Emerging AI Laws (Illinois)

Artificial Intelligence Video Interview Act ("the AI Act")

- Employers that use AI tools to analyze video interviews of applicants must make certain disclosures and obtain consent from the applicants.
- Employers who rely solely on AI to make interview decisions must maintain records of demographic data to submit to the state of Illinois.

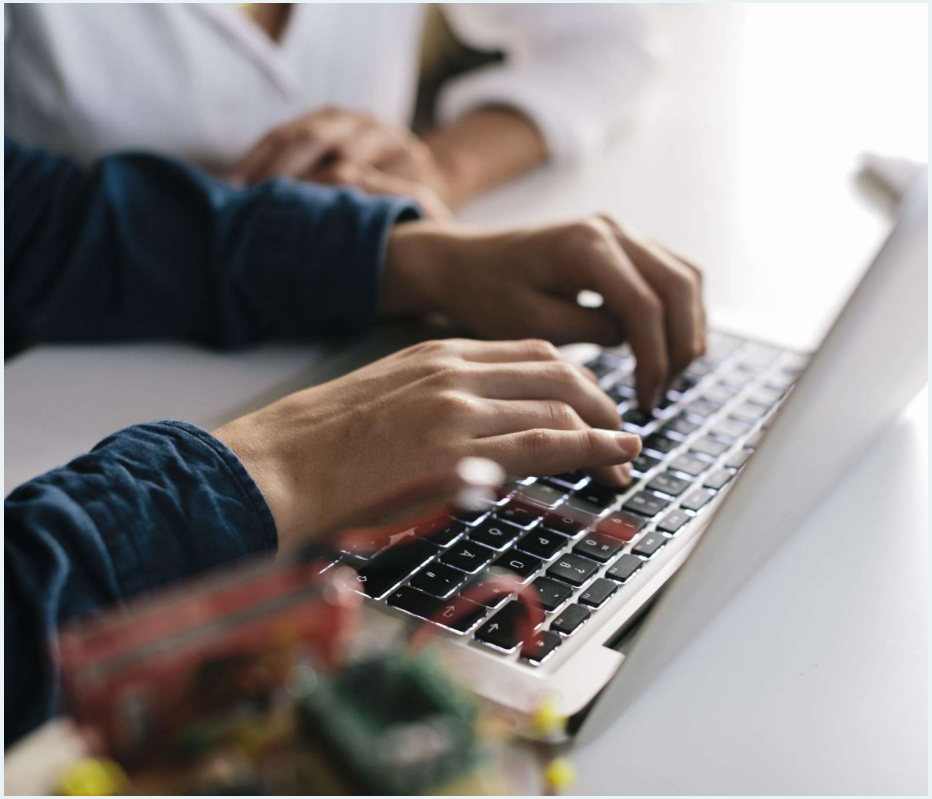


Emerging AI Laws (Maryland)

Facial Recognition Law (HB 1202)

- An employer is restricted from facial recognition services during pre-employment interviews ***unless*** an employer receives written consent from the applicant via waiver.

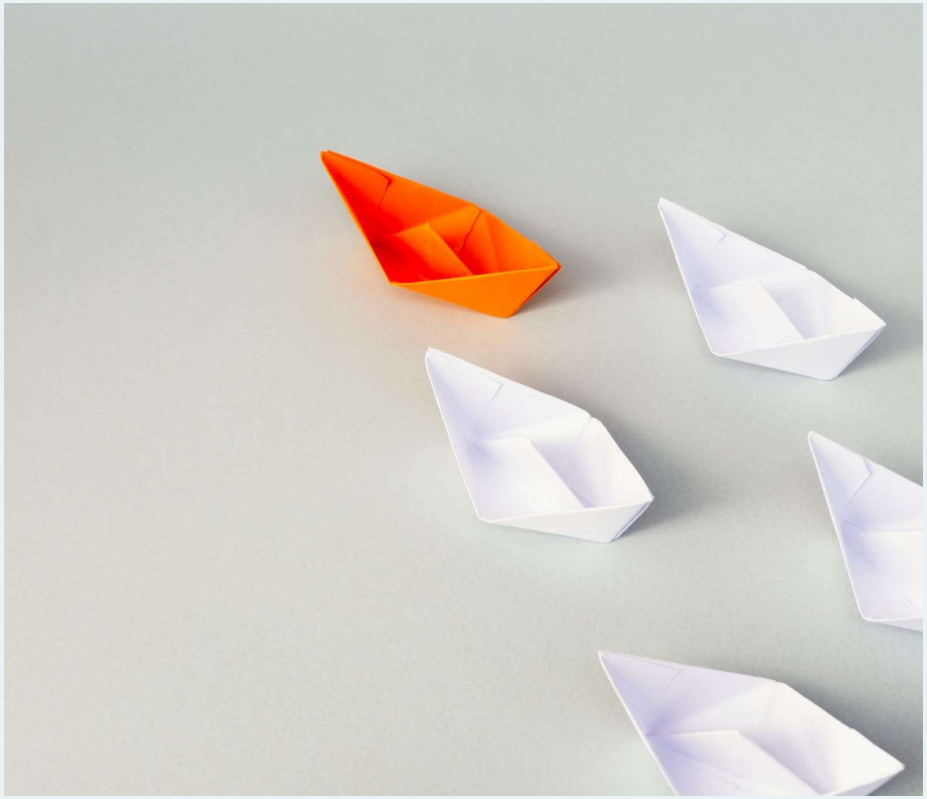
Emerging AI Laws (New York City)



- Local Law 144
- Regulates AI-associated HR technology ***unless*** a publicly available bias audit is completed.
- Requires employer to notify the employee ***how*** the tool will be used.
- Employee consent ***not*** required but employee has the right to request an alternative selection process or accommodation.

Federal Guidance re AI Use

- May 2022 - EEOC provided technical guidance relating to use of AI in assessing applicants and employees under the ADA.
- Three Areas of Concern:
    1. Failing to provide reasonable accommodation by relying on the AI tool
    2. AI use causes inadvertent screening out of an individual with a disability
    3. AI makes a disability-related inquiry or constitutes as a medical exam



Federal Guidance re AI Use (cont.)

Practical Tips to Avoid Liability:

1. Make accommodations process transparent
2. Give notice before providing AI assessments
3. Only measures qualifications ***truly*** necessary for the job
4. Confirm Vendor Compliance

Looking Ahead: AI Regulation in California

- November 2023 (Draft) Regulations Released by the CPPA Concerning AI Use on Consumers
  - Defines automated decision-making technology ("ADMT")
    - ***"Anything that uses computation as a whole or part of a system"*** to ***"facilitate human decision making"***
  - Provides Opt Outs
  - Requires employers to notify job applications if a decision regarding their employment was a result of ADMT.

Best AI Practices for Employers

Best AI Practices for Employers

1. **<u>Implement</u>** written policies governing employee use of AI

Consider:

- Authorized Uses;
- Prohibited Uses;
- Procedures for Tracking & Documenting Use of AI tools.

Best AI Practices for Employers

2. **Audit** AI technology to ensure compliance with anti-discrimination laws

Make Certain:

- It does not contain biased or discriminatory content;
- Does not disclose personal or confidential information;
- Accurately states facts.

Best AI Practices for Employers

3. **Be Cautious** of harmful outcomes

Determine:

- How ***much*** to allow employees to use AI to perform job functions;
- The potential legal risks that may follow.

Best AI Practices for Employers

4. <u>Be Transparent</u>:

Provide Adequate Notice of:

- Use of AI in the Workplace;
- Availability of Opt-Out/ Accommodations

Best AI Practices for Employers

5. **<u>Provide Adequate Training</u>** to staff regarding use of AI tools

Ex:

- How the AI Tool Works;
- Recognizing and Processing Reasonable Accommodation Requests;
- Using Alternative Means of Rating Job Applicants & Employees When Unfair Disadvantages Exist.

Questions?

Alexa Galloway
Associate | Los Angeles, CA
213.839.7714

agalloway@hansonbridgett.com

Warren Hodges
Counsel | Sacramento, CA
916.491.3035

whodges@hansonbridgett.com