2024 MID-YEAR UPDATE

Labor & Employment Seminar

July 2024

HansonBridgett

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Agenda

Introduction and Welcome

New Employment Laws and Notable Cases

Workplace Violence Prevention Plan ("WVPP") – Is Your Plan Compliant?

PAGA Developments

Introduction

New Employment Laws, Laws to Watch, and Notable Cases

EEOC's Final Rule Implementing the Pregnant Workers Fairness Act

Effective June 18, 2024

- PWFA Overview
- Final Rule:
  - Certain accommodations are assumed reasonable.
  - Broad scope of covered conditions.
  - Informal requests could trigger statutory obligations.
  - Employers cannot seek documentation for certain requests.
  - Employer must respond to requests with "expediency."

FTC Non-Compete Ban

Effective September 2024

- **Little Impact in California:** California law bars non-competes and precludes enforcement.
- Final Rule prohibits employers from (1) entering into or attempting to enter into a non-compete; (2) enforcing or attempting to enforce a non-compete, or (3) representing that a worker is subject to a non-compete.
- "Worker" defined broadly; includes independent contractors.
- Permits "garden leave" agreements and non-competes pursuant to sale of business.

Naranjo Decision – Employer's "Good Faith" Belief

Naranjo v. Spectrum Services, Inc. (May 6, 2024 CA SC)

- **Wage Statement Claim**: "knowing and intentional" failure to include certain information on wage statements.
- ***Naranjo* Holding**: employer doesn't violate law if it reasonably and in good faith believed that it was providing complete accurate wage statement.
- **Practical Implications:** easier for employer to defeat wage statement claims.

“Hours Worked” – Wage Order 16 Clarified

Huerta v. CSI Electrical Contractors (March 25, 2024 CA SC)

- Key Takeaways:
  - Requiring an employee to go through a security gate mandated only by the employer is considered directing an employee and is compensable.
  - Broadly applicable requirements that an employer wants its employees to follow do not amount to a level of control sufficient to render the time compensable.

Can a Lateral Job Transfer be Discriminatory?

Muldrow v. City of St. Louis (April 17, 2024 USSC)

- United States Supreme Court
- Title VII prohibits discrimination in "compensation, terms, conditions, or privileges of employment…"
- Lateral transfer did not diminish plaintiff's title, salary, or benefits
- Key Takeaways:
  - A lateral transfer can constitute discrimination so long as plaintiff shows "some harm" in an identifiable term or condition of employment.
  - Harm need not be significant, serious, or substantial.

"Protected Activity" Under the National Labor Relations Act

Home Depot USA, Inc. and Antonio Morales Jr. (NLRB February 21, 2024)

- NLRA protects private sector employees' rights to engage in "protected concerted activity"
- Retail Employee refused to remove hand-drawn "BLM" from his orange work apron
- Key Takeaway:
  - Employee's refusal to remove BLM was "concerted" because it related to prior employee protests about racial discrimination.
  - Employee's conduct was for "mutual aid or protection" because the issue of racial discrimination involved employee's working conditions.

Cal/OSHA Heat Illness Prevention in Indoor Places of Employment

June 20, 2024, Cal/OSHA Standards Board approved a new heat illness rule that would cover: (Office of Administrative Law has 30 working dates to approve)

- All indoor work areas in the following scenarios:
  - The temperature equals or exceeds 87 degrees when employees are present.
  - The heat index equals or exceeds 87 degrees when employees are present.
  - Employees wear clothing that restricts heat removal, and the temperature equals or exceeds 82 degrees.
  - Employees work in a high-radiant-heat area and the temperature equals or exceeds 82 degrees.
- There are exceptions.
- Requires a written Heat Illness Prevention Plan that can be incorporated into existing IIPP.

AB 1870 – Workers Compensation Notice to Employees

Notice of ability to consult a licensed attorney:

(signed into law July 15, 2024)

Existing Law: Employers subject to the Workers' Compensation system are generally required to post a notice to employees.

New Law: Will require the notice to inform employees they "may consult a licensed attorney to advise them of their rights under workers' compensation laws."

PERB – Pre-Filing Procedures for PECC Charge under Government Code 3558(a) (effective July 1, 2024)

An unfair practice charge alleging a public sector employer violated Gov. Code Section 3558(a), must allege:

- That the exclusive representative notified the public employer in writing of the facts and theories of the alleged violations.

A public employer is not liable for violations:

- That it cures within 20 days from the date it received written notice of the alleged violations from the exclusive representative.

However, a public employer cannot avoid liability by curing an alleged violation if:

- In the 12 months immediately preceding its curative action, the employer cured three (3) alleged Gov. Code section 3558(a) violations (three-cure limit).

July 1, 2024 Minimum Wage Increases for California Cities & Counties

Alameda, CA:	$17.00/hour	**Malibu, CA:**	$17.27/hour
Berkeley, CA:	$18.67/hour	**Milpitas, CA:**	$17.70/hour
Emeryville, CA:	$19.36/hour	**Pasadena, CA:**	$17.50/hour
Fremont, CA:	$17.30/hour	**San Francisco, CA:**	$18.67/hour "government supported employees" are subject to a minimum wage of $16.51/hour.
Los Angeles, CA:	$17.28/hour	**Santa Monica, CA:**	$17.27/hour
Los Angeles County (unincorporated	$17.27/hour	**West Hollywood, CA:**	$19.08/hour *

Bill to Watch: AB 2557 – Local Government Contracts for Special Services and Temporary Help

Bill Status: as of July 3, 2024, bill amended and re-referred to Appropriations Committee

Proposed Law:

July 1, 2025: each Board of Supervisors/Legislative body that solicits for and enters into a contract (under various Gov. Code sections) for functions that are currently, or were in the five (5) years prior, performed by represented county employees, shall:

- Post the contract and related documents to its Internet website.

July 1, 2026: each of those contracts shall include specific information.

Before beginning the specified contract procurement process or before modifying or renewing, the Board/Legislative body shall give reasonable notice to the exclusive employee representative of the workforce affected by the contract.

Exceptions: (1) contract less than $100,000; (2) contract to provide services for work not usually performed by public employees.

Bill to Watch: SB 1100 – Driver's License Discrimination

Bill Status: as of July 2, 2024, bill passed and re-referred to Appropriations Committee

Proposed Law: would make it an unlawful employment practice to include a statement in various employment materials, that:

- An applicant must have a driver's license *unless* the employer reasonably expects the job duties to require driving AND
- The employer reasonably believes that using an alternative form of transportation would not be comparable in travel time or cost to the employer.

QUESTIONS?

Workplace Violence Prevention Plan ("WVPP") – Is Your Plan Compliant?

WVPPs: What Now?

- SB 553 - Deadline to implement WVPPs was July 1, 2024.
- You have your plan in place. What else do you need to do?

WVPPs: What Now?

Is your written plan actually compliant?

- Use of Cal/OSHA model plan does not ensure compliance with Labor Code section 6401.9.

WVPPs: What Now?

Is your written plan actually compliant?

- Does your plan address workplace hazards (risks) specific to your business, or even sub-areas of your business?
- Did you obtain employee involvement or feedback?
- Have you made provisions for employees who work "in the field" away from the office?
  - WVPP should cover "workplaces" where you have 10+ employees OR that are accessible to public
- Do you actually have the processes in place that your written plan says you do?

WVPPs: What Now?

Have you provided compliant training?

- All employees must be trained when the WVPP is first established (i.e., now, if you haven't already done it), and at least annually thereafter.
- And, you **must** keep records regarding the content, the trainer, and certifying attendance for at least one year.

WVPPs: What Now?

Have you provided compliant training?

- Content of training dictated by statute (Lab. Code § 6401.9(e))
  - WVPP definitions
  - The WVPP itself and how to obtain a free copy
  - How employees can participate in developing and implementing plan
  - How to report incidents to company or law enforcement
  - How to ask questions
  - How to get a copy of a violent incident log
- Must also be customized
  - Must train on "[w]orkplace violence hazards specific to the employees' jobs…"

WVPPs: What Now?

Have you done your initial inspection(s)?

- What guidelines or criteria did you use to look for hazards?
- Were any hazards (unsafe conditions or practices) identified? Were they corrected?
- How is the inspection documented?

WVPPs: What Now?

Do you know what you need to do if there ever is a workplace violence incident?

- During the incident
  - Emergency response and alerts
- Post-incident response
  - Investigation, reporting and recordkeeping

WVPPs: Post-Incident Response Checklist

Steps to complete if an employee is injured:

- ❑ First ensure that any employee who is injured receives medical treatment
- ❑ Serious injuries or illnesses, or deaths, must be reported to Cal/OSHA immediately (hotline: 1-800-321-OSHA)
- ❑ Record injury on Cal/OSHA Form 300
- ❑ Injured employees must also be given a notice of worker's compensation eligibility within one (1) day of the violent incident
- ❑ For any injury that results in lost time beyond day of incident, complete Cal/OSHA Form 5020, "Employer's Report of Occupational Injury or Illness"

WVPPs: Post-Incident Response Checklist

Steps to complete after all incidents, even threats:

- ❑ Fill out the Violent Incident Report form, which goes into the Violent Incident Log
  - ❑ Ensure no personal identifying information (like name or address) appears in the final Report/Log
- ❑ Investigate and document investigation and findings
  - ❑ WVPP Administrator or designee should investigate and evaluate the violent incident to determine whether any changes can be implemented (to WVPP, physical premises, or other policies and procedures) to minimize the risk of future violent incidents
- ❑ Implement any changes "(corrective actions")
- ❑ If any employee violated the WVPP, consider and issue any discipline

WVPPs: What Comes Next?

- Cal/OSHA is developing a **workplace violence prevention standard** that meets the requirements of Labor Code section 6401.9 and will submit it to the Occupational Safety and Health Standards Board (OSHSB) by December 31, 2025.

- OSHSB must adopt the standard by December 31, 2026.

QUESTIONS?

PAGA Amendments:
What to Expect, and What Not to Expect

On The Agenda

- What Has Changed
- What Hasn't Changed
- Employers' Reasonable Steps
- Employers' Right to Cure
- Changes to Civil Penalties
- Procedural Changes/Standing

Not On The Agenda

Litigation Strategies and Pitfalls

PAGA Reform: SB 92, AB 2288, and What Has Changed

Joint Bills:

- AB 2288: Amends “Substantive” Statute (Labor Code § 2699)
- SB 92: Amends “Procedural” Statutes (Labor Code § § 2699.3, 2699.5)

Areas of Change:

- Consideration of employer’s "reasonable steps" in assessing civil penalties
- Employer's right to cure alleged violations
- Reduction of civil penalties for some violations in some circumstances
- Standing requirements and manageability, except for claims by non-profit legal aid orgs

What Has Not Changed

- Plaintiffs' attorneys' incentive to sue under PAGA (emphasis on litigation rather than pre-lawsuit reconciliation)
- One-way fee-shifting
- Pleading standards
- Minimal class-action style protections
- Civil penalties are the same regardless of employer size
- Difficulty in complying with certain labor code provisions for well-intentioned employers

Reasonable Steps

Two Categories of "Reasonable Steps" and Non-Exclusive Elements

Pre-Notice Reasonable Steps = 15% Cap on Civil Penalties (Lab. Code §2699(g))

- Steps must be taken **before** receiving either LWDA letter **or** request for records from plaintiffs' counsel
- Periodic payroll audits
- Action taken in response to results of audit (think of it like investigation, consider whether to waive privilege)
- Disseminate lawful written policies
- Train supervisors on labor code and wage order compliance
- Take appropriate corrective action with regard to supervisors

Post-Notice Reasonable Steps = 30% Cap on Civil Penalties (Lab. Code §2699(h))

- Take action within 60 days of receiving LWDA letter
- Conduct audit of alleged violations
- Take action in response to results of audit
- Disseminate lawful written policies
- Train supervisors on labor code and wage order compliance
- Take appropriate corrective action with regard to supervisors

EXCEPTIONS:

Not available for 2nd violations

Not available if malice, fraud or oppression

Reasonable Steps: Unanswered Questions

- How does the employer know the amount of penalties in order to assess the 15/30 percent cap? Early evaluation conference (not available to small employers unless curing)? After trial?
- "Whether the employer's conduct was reasonable shall be evaluated by the totality of the circumstances and take into consideration the size and resources available to the employer, and the nature, severity and duration of the alleged violations." (Lab. Code § 2699 (g)(2), (h)(2).)
  - What does this mean?*
- At what point in litigation is the reasonableness of employer's actions determined? Summary judgment? Trial?
- Must the employer waive attorney-client privilege over its audit to establish reasonable steps?
- May audit results be used as evidence of liability against the employer if proffered as evidence of reasonable steps?

The Right to Cure

Key Alleged Violations That Can Be Cured

Wage Statement Violations (Lab. Code § 226)

- Previously only curable defects were inclusive dates of the pay period and name/address
- Now allows ***all*** wage statement claims to be cured
- Allows cure by providing "digital access" to compliant wage statements

Claims for "Unpaid Wages" and Others

- Minimum Wage
- Overtime
- Meal Periods/Premiums
- Rest Breaks/Premiums
- Reimbursement
- Misc. (fringe benefits, vacation, make-up time)

Curing Wage Statement Violations

- Incorrect Employer Name or Address (Lab. Code § 226 (a)(8)): Provide written notice of correction to each "aggrieved employee“
- All Others (Lab. Code § 226 (a)(1)-(7), (9)): Provide a "fully compliant" wage statement to each "aggrieved employee" for "each pay period during which the violation occurred" going back 3 years
- “…if such information is customarily provided in digital form, reasonable access to a digital or computer-generated record or records maintained in the ordinary course of business containing the same information required on a fully compliant, itemized wage statement…” (Lab. Code § 2699(d)(2)(B))
- **Successful Cure = No Penalty**

Curing Unpaid Wages – A Two-Tiered Approach?

Definition of **Cure** – Generally: "'[C]ure' means that the employer corrects the violation alleged by the aggrieved employee, is in compliance with the underlying statutes specified in the notice required by this part, and each aggrieved employee **is made whole**." (Lab Code § 2699 (d), Sentence 1.)

Wages Apparently Undisputed

Sentence 2: "An employee who is owed wages is made whole when the employee has **received an amount sufficient to recover any owed unpaid wages*** due under the underlying statutes specified in the notice **dating back three years** from the date of the notice, **plus 7 percent interest**, any **liquidated damages** as required by statute, and **reasonable lodestar attorney's fees and costs to be determined by the agency or the court.**"

"Dispute Over Amount"

Sentence 3: "In case of a dispute over the amount of unpaid wages due, nothing in this part prohibits an employer from curing the alleged violations by **paying amounts sufficient to cover any unpaid wages that the agency or court determine could reasonably be owed to the aggrieved employees based on the violations alleged in notice**."

What Do You Buy When You Cure Unpaid Wages?
(Lab. Code §2699(j))

Reasonable Steps + Cure = NO PENALTIES:

"An employer who satisfies subdivision (g) or (h) [reasonable steps] and cures a violation shall not be required to pay a civil penalty for that violation."

Cure Wage Statements = No Wage Statement Penalties:

"An employer who cures a violation of subdivision (a) of Section 226 as set forth above shall not be required to pay a civil penalty for that violation."

Cure without Reasonable Steps:

"Any other employer shall pay a civil penalty of no more than fifteen dollars ($15) per employee per pay period for the statute of limitations set forth in Section 340 of the Code of Civil Procedure for any violations that the employer cures."

So, once you have paid:

- "an amount sufficient to recover unpaid wages," going back 3 years to all "aggrieved employees," PLUS
- 7 percent interest on those allegedly unpaid wages, PLUS
- Liquidated damages, PLUS
- "Reasonable loadstar attorneys' fees and costs,"

You still owe $15.00 per aggrieved employee, per pay period, for each alleged violation even after paying to cure.

Lack of Clarity:

For "Small Employers" (>100 employees), successful cure determination by the LWDA bars aggrieved employee from pursuing a "civil action." (Lab. Code § 2699.3(c)(2)(D).)

It is not clear how to reconcile these statutes.

Speaking of Small Employer Cure…

The Process for "Small Employers" with Fewer than 100 Employees

You have approximately 122 days to get the money to cure.

- Step 1: Submit a confidential proposal to cure within 33 days of LWDA Notice
  - 89 days left to get the $$$
- Step 2: LWDA may set a conference with the parties within 14 days
  - 75 days left to get the $$$
- Step 3: If LWDA agrees to set a conference, must occur within 30 days of the decision
  - 45 days left to get the $$$
- Step 4: **Time's Up** Deadline to pay to cure is no more than 45 days from the date of the conference (and submit sworn statement of completion, proof of payment, and any other information necessary to determine sufficiency of cure)
- BUT…If the attempt to cure is not "facially sufficient," OR IF LWDA DOES NOT ACT AT ALL, Small Employers may proceed to Large Employer Cure

The Cure Process for "Large Employers" With 100 or more Employees

- Employer "may" request "early evaluation conference" at time of responsive pleading
- Early Evaluation Conference: like mediation, with cure
- Neutral must be a judge or commissioner or other such person designated by the court
- Court must grant request "absent good cause for denying" request and
- Conference set within 70 days
- Defendant submits plan to cure and/or basis for disputing any allegations within 21 days
- Plaintiff submits statement including:
  - factual basis for alleged violations
  - amount of penalties and basis for calculation
  - amount of attorneys' fees and costs incurred to that date being claimed
  - settlement demand
  - basis for accepting/rejecting Defendant's plan to cure
- Court may defer acceptance if less than all violations are subject to cure
- If cure denied by neutral, employer can file motion with court*
- Evaluation process may not extend beyond 30 days…? Doesn't make sense with the prior timing requirements

Changes to Civil Penalties

Civil Penalties - Changes to Wage Statement Claims (Lab. Code §2699 (f))

- Cure = No Penalty
- No cure, but employee can "promptly and easily determine" accurate information = $25 per employee, per pay period. (Lab. Code §2699 (f)(2)(A)(i).)
- No cure on employer name or address error, but employee "would not be confused or misled about the correct identity of their employer" = $25 per employee, per pay period (no reason not to cure). (Lab. Code §2699 (f)(2)(A)(i).)

- **No Stacking Penalties**: Lab. Code § 2699 (i): "An aggrieved employee shall not collect a civil penalty for … a violation of Section 226 that is neither knowing or intentional nor a failure to provide a wage statement, **that is in addition to the civil penalty collected by that aggrieved employee for the underlying unpaid wage violation**."
- Question: If employee alleges off-the-clock work, is that a minimum wage violation, a wage statement violation, or both?

Civil Penalties – "Isolated Nonrecurring Event“
(Lab. Code §2699 (f)(2)(A)(ii))

The Rule:

- "The civil penalty is **fifty ($50)** for each aggrieved employee per pay period if the alleged violation resulted from an **isolated**, **nonrecurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods.“**
- One of the purposes of this provision was to reduce liability for meal and rest break violations that were not part of a widespread unlawful policy or practice.

Questions:

- What does it mean to be "isolated"?
- What does it mean to be "nonrecurring"?
- What does "30 consecutive days" mean? 30 shifts? Existence of unlawful policy, however applied, for 30 consecutive days?
- For meal periods, what if the employee had meal period violations in 4 consecutive pay periods, but not 30 consecutive days (or shifts)?
- What about temporary employees or seasonal workers?
- Other obvious scenarios we won't address so as not to tip off plaintiffs

Civil Penalties – Miscellaneous Changes

- Distribution goes 65 percent to LWDA, 35 percent to aggrieved employees
- Employers with weekly pay periods: Penalty reduced by half
- Heightened $200.00 penalty if:
  - Prior citation or court ruling that same violation was unlawful
  - Employer acted with malice, fraud, or oppression

Standing and Manageability

PAGA Plaintiff's Standing

- Employee must have suffered the violation(s) alleged in the LWDA letter and complaint
- Must have experienced the alleged violation within the 1-year statute of limitations (specified 1-year SOL)
- Exception: Old rules apply to still apply to a "nonprofit legal aid organization that has obtained Section 501(c)(3) tax-exempt status" and has brought PAGA cases for at least 5 years prior to January 1, 2025

Not Clear:

- Does an employee lose standing if the claim is settled or otherwise dismissed? (*Kim v. Reins Int'l Cal.* (2020) 9 Cal.5th 73 CA SC)
- At what point in the litigation does standing get adjudicated? Employers are still incurring costs of defense until court rules
- You can think about what the implications are going forward, which we won't illuminate here

“Aggrieved” Employees

- Aggrieved employees are only those who experienced the same violation as the named plaintiff

- Must have experienced violation within the 1-year statute of limitations

Manageability

- "The superior court may limit the evidence to be presented at trial or otherwise limit the scope of any claim filed pursuant to this part to ensure that the claim can be effectively tried." (Lab. Code §2699 (p), addresses *Estrada v. Royal Carpet Mills* (January 18, 2024) 15 Cal.5th 582 CA SC).
- These are trial considerations. If you are at the point of arguing manageability, you are likely deep into litigation and significant cost of defense.

Reform and Repeal Are Very Different: Final Thoughts

QUESTIONS?

Thank You