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Employer Services SEMINAR

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Agenda

Introduction and Welcome	9:00 – 9:15 AM
New Employment Laws For 2026	9:15 – 10:15 AM
Labor Law Developments	10:15 – 10:40 AM
BREAK	10:35 – 10:45 AM
Wage and Hour / PAGA Update	10:45 – 11:45 AM
LUNCH	11:45 – 12:45 PM
Employer Compliance Struggles	12:45 – 1:45 PM
AI in the Workplace	1:45 – 2:10 PM
BREAK	2:10 – 2:15 PM
DEI	2:15 – 3:15 PM

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New Employment Laws in 2026

Overview: Legislative Themes and Business Implications

Legislative themes:

Restrictions on financial restraints and worker mobility

Transparency through notices, disclosures, and recordkeeping

Stronger enforcement tools and expanded damages

What this means for:

HR process design

In-house legal risk management

Hiring and Onboarding: Agreements, Notices and Records

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AB 692: Ban on “Stay-or-Pay” and Repayment Agreements

- California law already barred restraints on lawful work, but did not clearly prohibit repayment or debt terms
- Effective January 1, 2026
- Employers may NOT require a worker to agree to:
  - Repayment of any employment-related debt triggered by separation
  - Debt collection, acceleration, or termination of forbearance if employment ends
  - Any penalty, fee, or cost imposed because employment ends

AB 692: Prohibited Agreements

- Commonly impacted agreements:
  - Training repayment agreements
  - Relocation assistance
  - Sign-on or retention bonuses
  - Tuition reimbursement tied to continued employment
  - Mobility or repayment-upon-resignation clauses

AB 692: Exception #1: Tuition Repayment Agreement

- Permitted only if all requirements met:
  - Separate written agreement
  - Credential is not required for the employee's current job
  - Credential must be transferable
  - Repayment amount must be disclosed in advance and cannot exceed employer's actual cost
  - Repayment must be prorated over required service period and no accelerated repayment
- No repayment if employee is terminated (unless for misconduct)

AB 692 Exception #2: Upfront Discretionary Bonuses

Covers signing bonuses and relocation payments only if:

- Separate written agreement
- Employee informed of right to consult counsel
- Five business-day consideration period
- Repayment terms: 1) Interest-free; 2) prorated; and 3) retention period less than two years
- Employee may defer receipt until retention period completed

Repayment allowed only if separation is voluntary, or due to employee misconduct

AB 692: Enforcement, Remedies, & Risk

Private right of action (individual or representative)

Damages: greater of actual damages, or $5,000 per affected worker

Injunctive relief available

Mandatory attorneys' fees and costs

High exposure for:

- Boilerplate offer letters
- Legacy repayment templates/clawback templates
- Multi-state agreements not California-specific

SB 294: Workplace Know your Rights Act

- Prior law required limited workplace notices and Labor Commissioner enforcement
- SB 294 adds new, recurring notice and emergency-contact obligations for employers
- Standalone written notice required:
  - By February 1, 2026
  - Annually thereafter
- Advises employees of constitutional rights when interacting with law enforcement at work
- Labor Commissioner issued model notice: https://www.dir.ca.gov/dlse/Know-Your-Rights-Notice/Know-Your-Rights-Notice-English.pdf
- Notice must be distributed to all employees, not just new hires

SB 294: Employee Emergency Contact

Employees may name a designated emergency contact

Employers must notify the contact if the employee is arrested or detained at work (or during work duties if employer has actual knowledge)

Current employees must have opportunity to update their contact information at hire or by March 30, 2026

SB 513: Expanded “Personnel Records”

- Prior law gave employees access to personnel records related to performance or grievance
- SB 513 expands “personnel records” to include education and training
- Education and training records, including:
  - Employee name
  - Training provider
  - Dates and duration
  - Core competencies (skills, equipment, software)
  - Resulting certification or qualification
- Records must be produced within statutory timelines
- Incomplete records = compliance risk

Managing & Paying Employees: Wages, Equity, Training, and Leaves

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Statewide Minimum Wage & Exempt Thresholds

State minimum wage (1/1/26): $16.90/hour

White-collar exempt salary threshold: $70,304/year ($1,352/week)

Other exemption thresholds:

Computer professional: $58.85/hour

Physician: $107.17/hour

Raises cost of misclassification errors

SB 642: Equal Pay Act Expansion

- Previously, pay scale disclosures required, but no good faith estimate definition; wage claims limited to 2 years for sex/race disparities
- Now:

"Sex" covers all sexes, not just binary opposite sex

"Wages" includes all compensation and benefits, not just base pay

New claim deadline: 3 years to file; Up to 6 years of damages

Violation "occurs" when:

- Policy adopted
- Employee becomes subject to it
- Employee is affected by it

"Pay scale" redefined as good-faith estimate of expected wage range at hire

SB 464: Expanded Pay Data Reporting

- Employers (100+ employees) previously reported pay by race, ethnicity, and sex for 10 job categories; penalties were discretionary
- Mandatory penalties starting January 1, 2026:
  - $100 per employee
  - $200 per employee for repeat violations
- Starting January 1, 2027:
  - Job categories expand from 10 to 23
- Requires more sophisticated pay-equity analytics

SB 809: Independent Contractors and Employee Business Expenses

Before SB 809:

Vehicle-owning construction drivers could be treated as independent contractors under Dynamex/ABC test

No statewide amnesty program

Reimbursement for employee-owned vehicles not clearly required

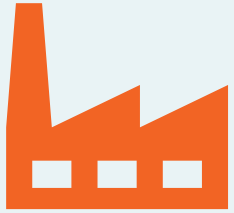
SB 809 Changes:

Creates Construction Trucking Employer Amnesty Program for past misclassification

Allows voluntary reclassification of owner-operators as employees

Requires reimbursement for required use of employee-owned vehicles (mileage, fuel, maintenance, insurance, depreciation)

AB 751: Meal/Rest Break Rules for Petroleum Facilities – Exemptions Made Permanent



Before AB 751:

Meal/rest periods required; one hour if missed

Safety-sensitive employees at petroleum facilities temporarily exempt until Jan 1, 2026

AB 751 Changes:

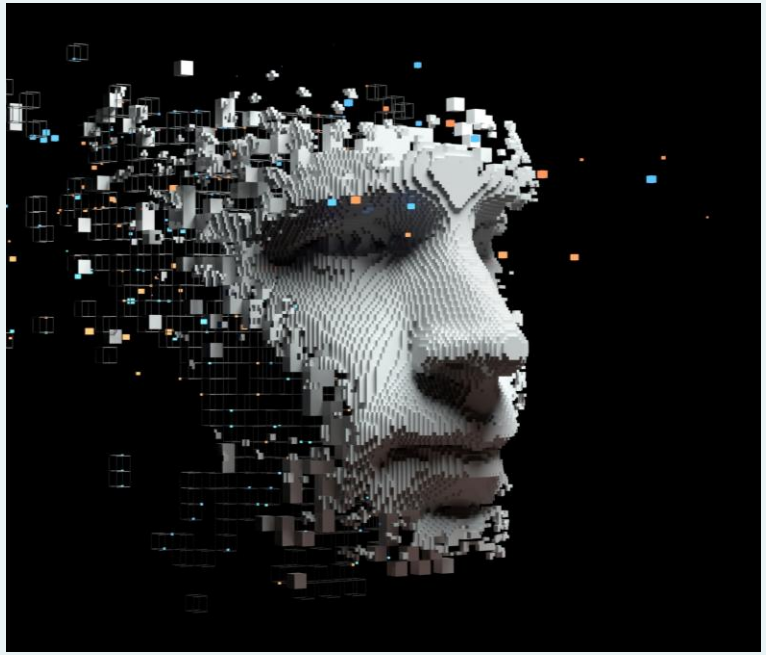
Allows on-duty rest breaks for safety reasons (10-minutes)

Exception to uninterrupted, duty-free rest is now indefinite (sunset repealed)

Missed/interrupted breaks still require one-hour premium pay

FEHA AI Regulations

- Effective October 1, 2025
- Applies to employers with 5 or more employees
- Governs use of Automated Decision Systems (ADS) in:
- Hiring and screening
  - Promotion and advancement
  - Termination and discipline
  - Performance evaluation
- Includes tools developed or administered by third-party vendors
- Employers must audit and ensure AI tools do not discriminate and comply with FEHA standards



SB 303: Training, Bias Mitigation, & Safe Harbor Clarification

Existing Law:

FEHA prohibits employment discrimination and empowers the Civil Rights Department to enforce violations

SB 303 Changes:

Good-faith employee admission of personal bias during training **does not by itself** constitute discrimination.

Evidence may still be used in claims; “by itself” is not a shield

Employers Should:

Document training purpose and structure

Avoid compelled admissions beyond training context

AB 963: Public Works Recordkeeping & Access

- Who Is Affected
  - Owners and developers on California public works projects
  - Expands duties beyond contractors
  - Expanded Record Production – Records must be provided upon request to:
    - Labor Commissioner (DLSE)
    - Awarding bodies
    - Joint labor-management committees
    - Multiemployer benefit trust funds
- Records Covered: Certified payroll records; construction contracts/subcontracts; and Project-related labor and benefit reports
- Timing Requirement: Within 10 business days of request
- Penalties for Non-Compliance: $100/per day/per worker (statutory cap applies)
- Contracts/other documents: $500/ per day of delay

Leave of Absence Updates

- **Existing law:**
  - Paid Family Leave covers care for immediate family members
  - Paid Sick Leave covers personal illness, injury or medical appointments
- **SB 590: Paid Family Leave Expansion (Effective 7/1/2028)**
  - PFL to include care for a "designated person" (Blood relatives or those with a family-like relationship)
  - Employee must attest to relationship under penalty of perjury
- **AB 406: Expanded Paid Sick Leave Uses (Effective 1/1/2026)**
  - PSL now covers: Jury duty and court appearances as a subpoenaed witness
  - Expanded unpaid leave protections for crime victims and families
  - Employees must provide reasonable notice when feasible

Restructuring & Workforce Changes

AB 858 – COVID Recall Rights Extension

- Extends recall and reinstatement obligations to January 1, 2027
- Applies to:
  - Hotels and private clubs
  - Event centers
  - Airport hospitality and service providers
  - Building services for commercial buildings
- Employers must:
  - Maintain recall lists
  - Offer positions in order of seniority
  - Provide written offers and response windows
- Continued litigation risk for non-compliance

SB 617: Cal-WARN Act Enhancements – Expanded Notice Content and Coordination Requirements

- Effective January 1, 2026
- Expands the content requirements of Cal-WARN notices under Labor Code § 1401
- Applies to covered establishments with 75+ employees
- Requires 60 days' notice for:
  - Mass layoffs (50+ employees at a site)
  - Relocations
  - Terminations of operations
- Goal: Provide workers with immediate access to reemployment and support resources

SB 617: New Notice Content

- Required Additions to WARN Notices
  - Whether employer is coordinating reemployment / Rapid Response services
    - Identify the workforce agency used, or state if none are arranged
  - Local Workforce Development Board contact information
  - CalFresh information
    - Statement of potential eligibility for food assistance
    - Application or contact information
  - Employer contact information (functional email address and phone number)

Enforcement, Litigation Trends & Risk Controls

Expanded Enforcement Authority

SB 261 – Wage Judgment Penalties

- Before: Employers could owe unpaid wages; remedies limited to basic judgment
- After: Treble damages if unpaid >180 days; mandatory attorneys' fees for prevailing employees

SB 648 – Tip/Gratuity Enforcement

- Before: Limited Labor Commissioner authority to enforce tip misappropriation
- After: Labor Commissioner can investigate/cite; penalties $100/per employee/pay period ($250 for repeat violations) and repayment of withheld tips

SB 477 – FEHA Group & Class Complaints

- Before: Individual complaints only; deadlines for civil action and right-to-sue notices fixed
- After: Defines "group/class complaints"; tolls deadlines for appeals, petitions, or dispute resolution; expands department's authority to bring civil actions on behalf of groups

SB 477 CRD Group & Class Complaints Procedure Overhaul

- Applies to FEHA employment and housing discrimination enforcement
- Codifies "group/class complaint" = pattern or practice allegations
- CRD can pause individual claims; defer right-to-sue until group/class resolved
- Expands filing/tolling period:
  - One year after CRD appeal resolution
  - During pendency of petitions to compel CRD action
  - During agreed-upon extensions with CRD
- Removes special venue rule for certain housing claims
- Goal: Streamline CRD handling of systemic, large-scale discrimination cases

Revived and Expanded Claims

AB 250 – Sexual Assault Claims

- Before:
  - Claims barred once statute of limitations expired (except limited prior revivals)
  - Cover-up by an entity required to revive claims
- After:
  - Revives claims 2026–2027 even if not all entities covered by cover-up
  - Includes claims against perpetrators and entities
  - Public entities exempt; claims already settled or litigated not revived

AB 1523 – Court-Ordered Mediation (Effective Jan 1, 2027)

- Before:
  - Court could not order mediation for cases > $50,000
- After:
  - Threshold raised to ≤ $75,000
  - Court may order mediation if case set for trial, no discovery disputes, and at least one-party requests
  - Court selects mediator if parties cannot agree; mediation concludes with agreement or non-agreement

Practical Risk Considerations

Wages & Tips: Track payroll, enforce rest breaks, and protect gratuities (SB 261, SB 648, AB 751)

Discrimination & Leave: Update policies, document accommodations, and comply with FEHA & leave laws (AB 692, SB 513, SB 642, SB 590, SB 617, SB 464, AB 858)

AI & Hiring: Audit automated decision systems for bias and maintain transparency (FEHA Regulations)

Litigation & Claims: Retain records for revived claims, coordinate group/class complaints, consider early mediation (SB 477, AB 250, AB 1523)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PERB
California Public Employment Relations Board

Labor Law Developments

Overview of the National Labor Relations Board (NLRB)

- **Role of the NLRB**
  - Enforces labor laws under the National Labor Relations Act (NLRA)
  - Protects workers' rights to organize and bargain collectively
  - Resolves disputes between unions, employees, and employers
- **Board Composition**
  - Five-member board, appointed by the President
  - General Counsel oversees investigations and prosecutions

The Board *David M. Prouty, Member* *James R. Murphy, Member* *Scott A. Mayer, Member*	*The General Counsel* *Crystal Stowe Carey, General Counsel* *Lynisa Michalski, Acting Deputy General Counsel* *Laural Wagner, Acting Associate to the General Counsel*

The Smith Seat Term expires on August 27 of years ending in 6 and 1.	The Madden Seat Term expires on August 27 of years ending in 5 and 0.	The Carmody Seat Term expires on August 27 of years ending in 8 and 3.	The Murdock Seat Term expires on December 16 of years ending in 7 and 2.	The Gray Seat Term expires on December 16 of years ending in 9 and 4.	Party in Control of the Board	From	To
David M. Prouty			James R. Murphy	Scott A. Mayer	Rep	01/07/2026	Present

NLRB Composition Changes

- **New Appointments:**
  - Two Republican members, just confirmed by the Senate, Scott Mayer and James D. Murphy to replace Democratic appointees
  - Pro-business General Counsel likely to reshape enforcement priorities
- **Impact of Republican Majority**
  - Predictable tilt toward management-friendly rulings
  - Greater scrutiny of union activities

The NLRB Under the Trump Administration

No quorum for almost all of 2025

D.C. Circuit held the President had the power to remove members of the NLRB without cause (Wilcox)

Reversal of Biden-era decisions/guidance

More employer-friendly, with general silence as to union support

Shifts Under the Trump Administration

- **Recission of at least 18 of Jennifer Abruzzo's NLRB policies by Acting General Counsel William Cowen in February 2025, including:**
  - "Full Panoply of Remedies"/*Thryv* (GC 21-06)
    - "Regions should request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices."
      - ✓ Health care expenses, credit card late fees, loss of a home or car, etc.
  - Non-Compete Agreements (GC 23-08, GC 25-01)
    - ". . . the proffer, maintenance, and enforcement of [non-compete] agreements violate Section 8(a)(1) of the Act."

Shifts Under the Trump Administration (Cont'd)

- Electronic Monitoring (GC 23-02)
  - "I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act."
- Cemex Standard (GC 24-01)
  - Cemex is still law, but the guidance has been rescinded.
  - "If the employer neither recognizes the union upon demand, nor files an RM petition within two weeks of that demand, and there is no other petition for a Board-conducted election being processed by the Region, the union may file a . . . charge against the employer."

Shifts Under the Trump Administration (Cont'd)

- Stay-or-Pay Provisions (GC 25-01)
  - ". . . stay-or-pay provisions both restrict employee mobility, by making resigning from employment financially difficult or untenable, and increase employee fear of termination for engaging in activity protected by the Act. Accordingly, I believe that such provisions violate Section 8(a)(1) of the Act unless they are narrowly tailored to minimize any interference with Section 7 rights."

Shifts Under the Trump Administration (Cont'd)

- Severance Agreement Terms/McLaren Macomb (GC 23-05)
  - McLaren Macomb found overly broad non-disparagement and confidentiality clauses tend to interfere with, restrain or coerce employees' exercise of Section 7 rights
  - GC 23-05 offered guidance that non-defamation (as opposed to non-disparagement) clauses may be lawful.
  - "[A] confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision . . ."

Thryv Remedies: Circuit Split

- **Ninth Circuit**
  - *NLRB v. North Mountain Foothills Apartments* (Oct. 28, 2025) upheld Ninth Circuit precedent that "*Thryv* remedies are equitable in nature" and "intended to restore the status quo."
- **Fifth Circuit**
  - *Hiran Management v. NLRB* (Oct. 31, 2025) held that *Thryv* "foreseeable pecuniary harms" must be vacated as beyond § 10(c), which authorizes only equitable relief (cease-and-desist, reinstatement, back pay/restitution) and not full compensatory/consequential damages for "foreseeable" downstream losses.

Until resolved, in Ninth Circuit venues, assume broad make-whole (plus reinstatement, back pay, tax gross-up, etc.)

New California Labor Law Legislation

State Legislation

State Legislation – AB 288 (PERB Backstop Authority)

- PERB may process ULPs for NLRA-covered workers when:
  - NLRB cannot act (e.g., lack of quorum/federal shutdown)
  - NLRB declines jurisdiction
- PERB may order full relief
- California Agricultural Labor Relations Board may treat NLRB precedent as persuasive, though not binding
- Statute currently subject to federal litigation
  - Injunction issued in part

State Legislation – AB 1340 (Transportation Network Company Drivers)

- Grants rideshare drivers' rights to:
  - Organize
  - Bargain collectively
  - Engage in concerted activity
- Allows potential sectoral bargaining through PERB
- Establishes reporting, procedural, and oversight requirements
- Significant implications for gig-economy employers

State Legislation – AB 339
(45 Day Requirement for Scope of Representation Contracting)

- Requires public agencies to give at least 45 days' written notice to recognized employee organizations before issuing requests for proposals/quotes, or renewing/extending any contract for services performed by bargaining-unit employees
  - The notice must include key details such as contract duration, scope, costs, and draft solicitation materials, so that unions have a meaningful opportunity to request bargaining

State Legislation – AB 339
(45 Day Requirement for Scope of Representation Contracting) (Cont'd)

- Exceptions to the new law:
  - certain "public works" contracts (construction, alteration, demolition, installation, repair, or maintenance);
  - certain contracts for professional services (architects, engineers, land surveyors);
  - emergency situations;
  - specialized data/software contracts


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Wage and Hour / PAGA Update

What We'll Cover

- 2026 Minimum Wage Increases
- Key Cases and Trends
- PAGA Amendments in Practice: What We're Seeing
- "Headless" PAGA Claims
- Current Status of Arbitration Agreements
- Recommendations for Employers

2026 Minimum Wage Increases

Ever-rising Minimum Wage

- State minimum wage increased on January 1 to $16.90; localities with higher minimum wages may implement their own minimum wage increases on July 1.
- Key local minimum wages:

Jurisdiction	Current Minimum Wage
Berkeley	$19.18
Los Angeles (City)	$17.87
Los Angeles (unincorporated County)	$17.81
Fremont	$17.75
Oakland	$17.34
Palo Alto	$18.70
San Diego	$17.75
San Francisco	$19.18
San Jose	$18.45

Ever-rising Minimum Wage

- The (state) salary threshold for exempt employees is now $70,304 per year, or $122,573.13 for "computer professionals."*
- Union contracts that require wages to be 30% higher than minimum wage also impacted ($21.97)

(*Source: California Dept. of Industrial Relations, 2026)

Key 2025 Cases

California Wage and Hour Law

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Prospective Meal Period Waivers Permitted

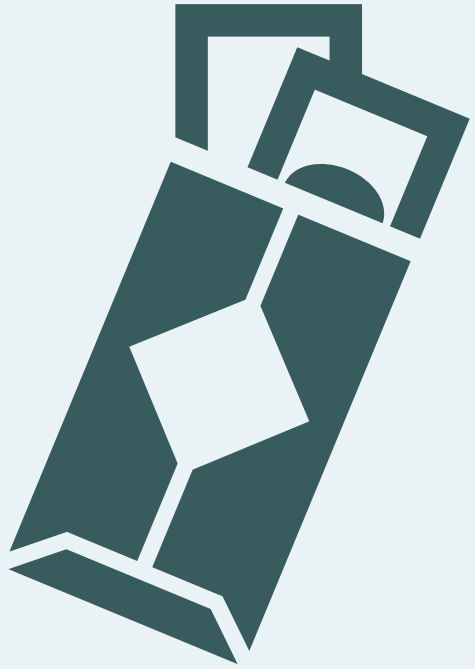
- ***Bradsbery v. Vicar Operating, Inc*. (2025) 110 Cal.App.5th 899**
  - Prospective waivers of first meal periods for shifts less than six hours are valid, so long as they meet Labor Code § 512 and Wage Order requirements, such as mutual consent and revocability.
  - Waivers need not be executed contemporaneously with each shift or day, holding that written waivers obtained upon hire are sufficient.

Liquidated Damages for Unpaid Minimum Wages; Employer Good Faith Defense

- ***Iloff v. LaPaille* (2025) 18 Cal.5th 551**
  - "Good faith" defense to recovery of liquidated damages under Labor Code sec. 1194 requires an affirmative attempt to determine and comply with legal requirements (borrowing language from FLSA jurisprudence).
  - Ignorance of the law is not adequate (as we already knew)

Hourly-plus-Bonus Pay Models Ok

- ***Mora v. C.E. Enterprises, Inc.* (2025) 116 Cal.App.5th 72**
  - Court found that hybrid payment structure often used by auto dealerships (and fitness studios) of paying workers an hourly wage supplemented by a bonus fully complies with state wage-and-hour law, including the rules governing piece-rate.
  - Employers may lawfully use hourly-plus-bonus models as long as the hourly component independently meets all wage obligations. The ruling also highlights the importance of clearly written pay plans, accurate timekeeping, and payroll practices that match the employer's stated policies.



Preclusive Effect of PAGA Settlements

- ***Brown v. Dave & Buster's of California, Inc.* (2025) 116 Cal.App.5th 164**
  - Employer facing multiple PAGA suits (Brown's was the fifth) settled an earlier filed suit, which precluded Brown's suit
  - Court found that Brown did not have standing to assert PAGA claims that would have arisen after the end of the release period from the prior settlement, as she had separated from employment years prior and had not suffered any violations in that time period
  - This is simple claims preclusion, but it provides some guidance on how to handle and resolve multiple PAGA suits

PAGA Amendments in Practice

What We're Seeing

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Recap: PAGA Reform

- In July 2024, legislation was signed bringing much needed reforms to PAGA (the Private Attorney General Act). This reform was in response to threats of a ballot measure seeking to repeal and replace the PAGA statute.
- The PAGA reforms apply to PAGA notices filed on or after **June 19, 2024**.

Key Components of the PAGA Amendments

1. Reduced penalties for taking “reasonable steps” to comply with Labor Law
2. Certain violations may now be “cured” to reduce penalties
3. Reduction in civil penalties for certain wage statement violations
4. No stacking of penalties
5. Distribution of PAGA recovery changed to increase % allocated to aggrieved employees
6. Penalties reduced by half for employers with weekly pay periods
7. Narrowed standing to serve as named plaintiff in PAGA matter
8. Early evaluation conferences through court to evaluate merits and attempt to resolve claims

Key Components of the PAGA Amendments

1. Reduced penalties for taking "reasonable steps" to comply with Labor Law
   - **Pre-notice** =15% cap on civil penalties
   - **Post-notice** (but within 60 days) = 30% Cap on Civil Penalties

Reasonable steps may include….

- Conducting periodic payroll audits and taking action in response to the results of audit
- Disseminating lawful written policies
- Training supervisors on applicable Labor Code and Wage Order compliance
- Taking appropriate corrective action with regard to supervisors not following policy/law

Key Components of the PAGA Amendments

2. Certain violations may now be "cured" to reduce penalties

Wage Statement Violations (Lab. Code § 226)	Unpaid Wage Claims (Etc.)
• Previously could only cure errors in dates of pay period, name, address • Now all wage statement claims may be cured • Allows cure by providing "digital access" to compliant wage statements	• Minimum Wage • Overtime • Meal Periods/Premiums • Rest Breaks/Premiums • Reimbursement • Misc. (fringe benefits, vacation, make-up time)

Key Components of the PAGA Amendments

3. Reduction in civil penalties for certain wage statement violations
   - Previously, the typical civil penalty was $100 for each aggrieved employee, per pay period
   - Now, it is:
     - $25 for certain technical violations that don't actually confuse the employee, or
     - $50 where the alleged violation resulted from an isolated, nonrecurring event

Key Components of the PAGA Amendments

4. No Stacking Penalties
   - An aggrieved employee cannot collect a civil penalty for
     - any violation of Sections 201, 202, 203 of the Labor Code,
     - or for a violation of Section 204 or 226,
     - that is neither willful or intentional
     - where the penalty would be in addition to the civil penalty collected by that aggrieved employee for the underlying unpaid wage violation.

Key Components of the PAGA Amendments

5. Distribution of PAGA Recovery Changed
   - 65% to LWDA, 35% to aggrieved employees
   - Previously, the distribution was 75% to LWDA and 25% to aggrieved employees

Key Components of the PAGA Amendments

6. Weekly Pay Periods: Penalty reduced by half for employers with weekly pay periods
   - PAGA was originally drafted assuming pay periods were biweekly or semi-monthly, not weekly. Resulted in double the potential penalties for employers who paid weekly, based on "pay period" language in statute.

Key Components of the PAGA Amendments

7. Narrower standing to serve as named plaintiff in PAGA matter*
   - Employee must have actually suffered each of the violation(s) alleged in the LWDA letter and complaint
   - Must have experienced the alleged violation within the 1-year statute of limitations
   - Otherwise, not an "aggrieved employee"

*But, we'll come back to this in the next section.

Key Components of the PAGA Amendments

8. Early evaluation conferences through court to evaluate merits and attempt to resolve claims
   - Large employer (100+ employees) may file a request for an EEC in court prior to or simultaneous with defendant's responsive pleading or other initial appearance in the court action; may also request a stay
   - Small employers (<100 employees) may submit a confidential proposal to the LWDA to cure one or more of the alleged violations, and LWDA may then determine whether cure is sufficient

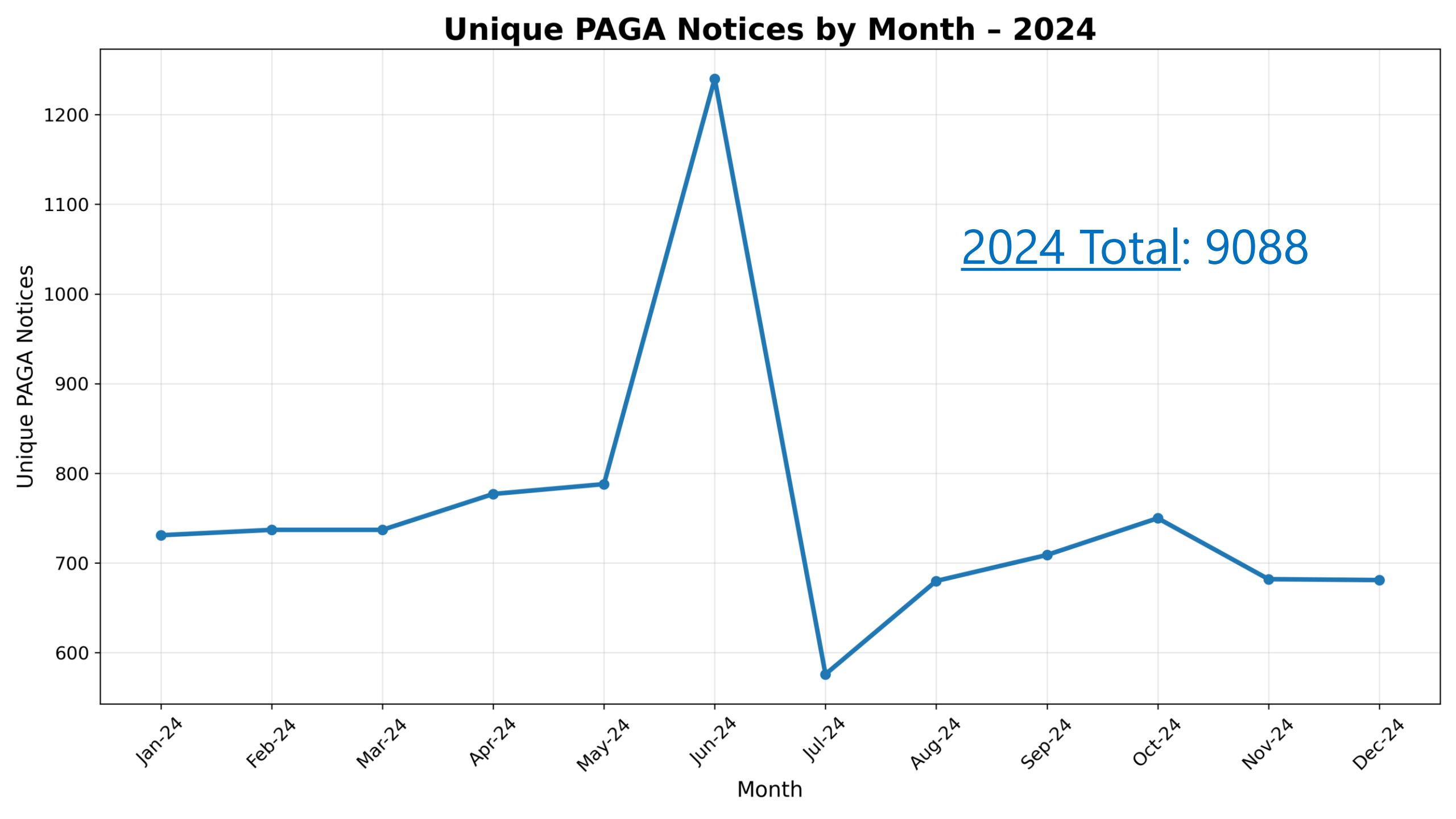
Key Components of the PAGA Amendments

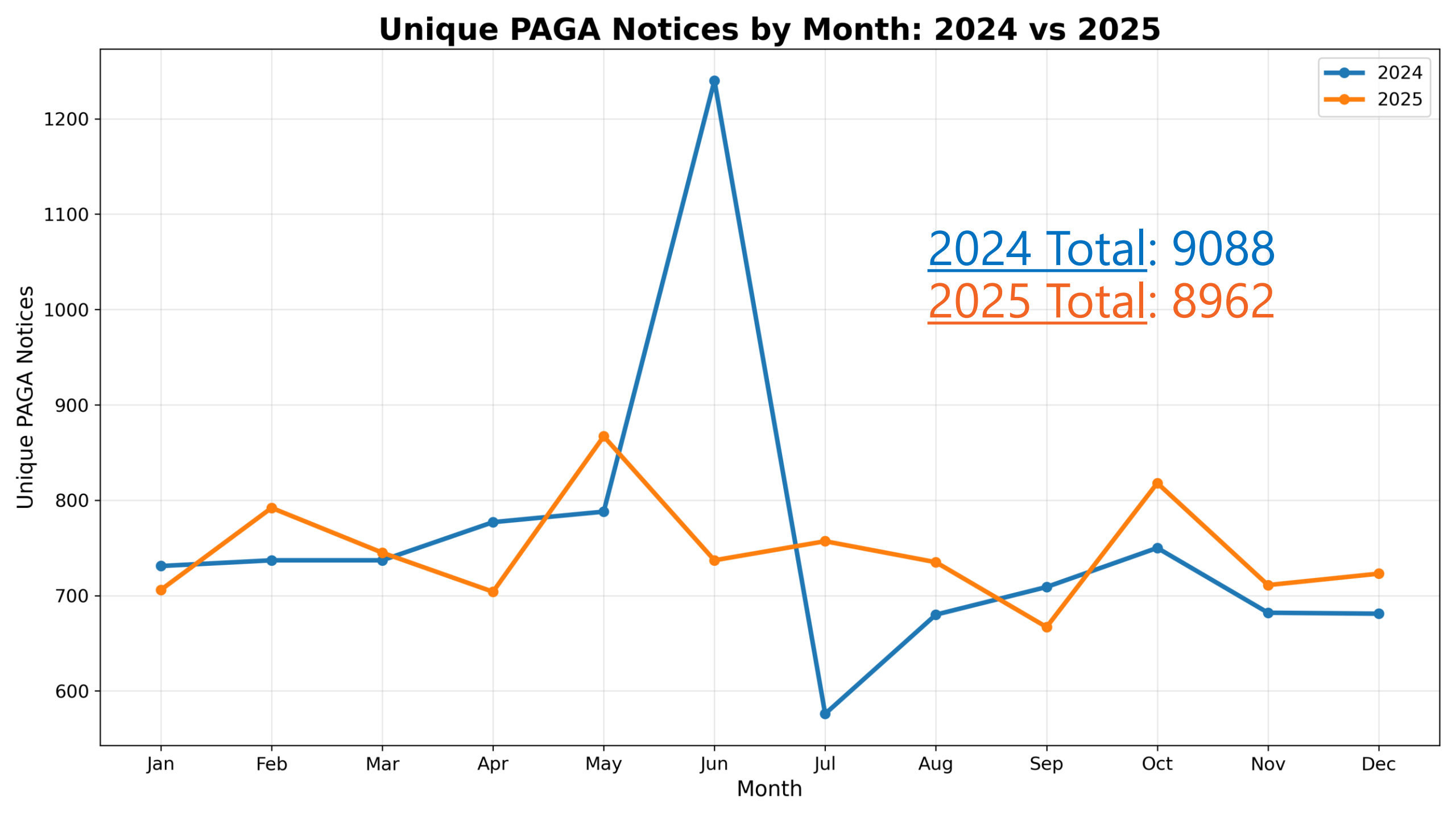
8. Early evaluation conferences through court to evaluate merits and attempt to resolve claims
   - Our experience with these conferences

So…are the reforms working?

Not much hard evidence yet.

- Number of PAGA notices filed with LWDA (perquisite to filing a lawsuit) held steady in 2025


Unique PAGA Notices by Month – 2024
2024 Total: 9088
Unique PAGA Notices
1200
1100
1000
900
800
700
600
Jan-24
Feb-24
Mar-24
Apr-24
May-24
Jun-24
Jul-24
Aug-24
Sep-24
Oct-24
Nov-24
Dec-24
Month


Unique PAGA Notices by Month: 2024 vs 2025
2024
2025
2024 Total: 9088
2025 Total: 8962
Unique PAGA Notices
1200
1100
1000
900
800
700
600
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep
Oct
Nov
Dec
Month

Not much hard evidence yet.

- One industry group (CABIA) found that cost of settlement has *increased* 30% since reforms

	PRE REFORM	POST REFORM
Number of Cases Reviewed	109	25
Median Gross Settlement Amount	$309,000	$400,000
Median PAGA Penalty Award to Aggrieved Employees	$10,000	$14,000
Employee PAGA Penalty Award as a Percentage of the Gross Settlement Amount (Median)	2.3%	2.9%

Source: CABIA (California Business & Industrial Alliance) Nov. 2025 article, "First Look: PAGA Reform Fails to Shrink PAGA Notices or Payouts" (https://cabiafoundation.org/).

On the other hand…

- Anecdotal evidence of faster, less expensive settlements due to penalty caps and limitations on standing
- California Chamber of Commerce reports that defense firms have been able to settle matters sooner and for more reasonably amounts, but does not name names. Also states that reforms have led to reduced litigation

Source: https://advocacy.calchamber.com/wp-content/uploads/2025/11/Jackson-Lewis-PAGA-Reform-Shows-Early-Successes-Just-the-Beginning.pdf; see also https://advocacy.calchamber.com/wp-content/uploads/2025/11/2025-10-22-CDF-PAGA-Reform-Letter.pdf.

“Headless” PAGA Claims

The California Supreme Court will be resolving a circuit split on whether employees may bring “headless” PAGA claims.

Dispute centers on PAGA's language allowing a plaintiff to bring a claim "on behalf of himself or herself ***and*** other current or former employees"

Source: Cal. Lab. Code § 2699(a) (emphasis added).

"on behalf of himself or herself *and* other current or former employees"

Second District Ct. of Appeals	Fourth and Fifth District
The word "and" means that there must be an individual claim by the plaintiff and claims on behalf of other employees. PAGA cases must have a head.	PAGA authorizes individual claims "and" it authorizes claims on behalf of other employees, but it does not require them to be brought together. (*I.e.*, "and" really means "or".)
Leeper v. Shipt (2024) 107 Cal. App. 5th 1001; *Williams v. Alacrity Solutions Grp.* (2025) 110 Cal. App. 5th 932	*Rodriguez v. Packers Sanitation* (2025) 109 Cal. App. 5th 69; *CRST Expedited, Inc. v. Superior Court* (2025) 112 Cal. App. 5th 872

Current Status of Arbitration Agreements

Ongoing changes in arbitration and PAGA cases require updated risk management strategies for California employers.

Other agreements signed at the same time can make an arbitration agreement unenforceable.

- ***Silva v. Cross Country Healthcare, Inc.* (2025) 111 Cal.App.5th 1311**
  - Arbitration agreements must be "conscionable"
  - In this case arbitration agreement and employment agreement, read together, compelled employees to arbitrate their claims while preserving broad judicial remedies for the employer
  - Court found the arbitration agreement unconscionable and declined to sever the unenforceable provisions and enforce the remainder

Arbitration fee forfeiture now limited

- ***Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310**
  - California Supreme Court rejected rigid, automatic-forfeiture reading of Code of Civil Procedure section 1281.98 requirement that employer pay for arbitration within 30 days or case can be sent back to court
  - Relief from forfeiture where late payment stems from **good-faith mistake, inadvertence, or other excusable neglect**
  - Forfeiture reserved for willful or otherwise inexcusable nonpayment
  - No more gotcha failures

Arbitration agreements from before July 2022 cannot compel arbitration of an individual PAGA claim.

- ***LaCour v. Marshalls of CA, LLC*, 2025 WL 3731034 (Cal. Ct. App. 2025)**
  - Arbitration agreement that did not specifically refer to "individual PAGA claims" and pre-dated before *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022) (case that first recognized distinction between an employee's "individual PAGA claim" and "non-individual" or representative PAGA claims), could not be used to compel arbitration of employee's "individual PAGA claim"

Arbitration agreements from before July 2022 cannot compel arbitration of an individual PAGA claim.

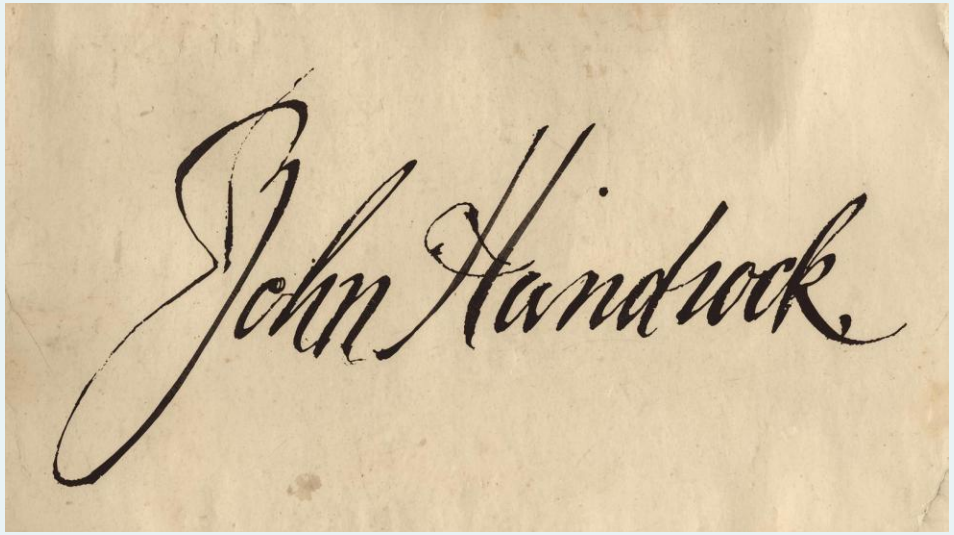
- ***LaCour v. Marshalls of CA, LLC*, 2025 WL 3731034 (Cal. Ct. App. 2025)**

  Language of arbitration agreement:

  - "[LaCour and Marshalls] agree to bring any dispute in arbitration on an individual basis only and not on a class, collective, or private attorney general representative action basis. [¶] . . . [¶] (c) There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action ('[PAGA Waiver]'). The [PAGA Waiver] shall be severable from this Agreement in any case in which a civil court of competent jurisdiction finds the [PAGA Waiver] is invalid, unenforceable, revocable, unconscionable, void or voidable. In such instances and where the claim is brought as a private attorney general claim, such private attorney general claim must be litigated in a civil court of competent jurisdiction." "The . . . [PAGA Waiver] shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration."

Return to Wet Signatures?

Electronic signatures continue to be challenged in the courts, with some courts ruling they are insufficient where the plaintiff claims not to remember signing or disavows their signature.



Recommendations for Employers

Mitigating Risk

- Consider instituting or reissuing arbitration agreements, with a class action waiver.
  - Update and re-issue existing agreements.
  - Consider wet signatures.
- Regularly review wage and hour policies and practices, including via regular payroll audits, and correct any issues.
- Train HR, supervisors, and managers on Labor Code compliance.
  - Focus on areas where lack of knowledge creates exposure, *e.g.* meal and rest breaks, off-the-clock work
- Maintain up-to-date and comprehensive written wage and hour policies.
- Review PAGA notices immediately and promptly discuss with your HB counsel.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Employer Services SEMINAR

LUNCH BREAK

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Employer Compliance Struggles: Legal Obligations That Employers Continue to Get Wrong

What We'll Cover

Reasonable Accommodations and the Interactive Process

Employee Classification

Issues and Developments in Hybrid and Remote Work Models

The Interactive Process

Employee informs Employer of medical disability

Employer must initiate a timely, good faith interactive process and individually assess Employee's limitations

If Employee can perform essential functions with a *reasonable* accommodation, Employer must accommodate

If accommodation causes undue hardship, Employer is not required to accommodate

Employer Duties

Accommodation Checklist

- ✓ **Modified Duties**: consider which non-essential functions can be modified
- ✓ **Schedule Changes:** e.g. switching from morning to night shift
- ✓ **Assistive Technology / Equipment**
- ✓ **Remote or Hybrid Work**
- ✓ **Reassignment to a Vacant Position:** employer should present similar positions to the disabled employee
- ✓ **Leave:** only if no effective accommodation exists

Assessing Vacant Positions

- Employers must evaluate alternative, vacant positions when the employee cannot perform their own position Cal. Code Regs. Tit. 2, 1106, subd. (d)
- Employer should document:
  - Search efforts to identify what, if any, vacant positions exist
  - If other similar roles exists, and whether they were presented to the employee
  - Any written communications to the employee, and the employee's written response concerning their interest in any vacancy
- Employer should assess recordkeeping hygiene, so information is documented and available if the threat of litigation arises
  - Memorialize calls and meetings
  - Preferential consideration for disabled employee requesting accommodation

Types of Medical Leave – California

- **Federal Family Medical Leave Act**
  - Private employers with 50 or more employees
  - All state, local, and federal government employers to give employees
- **California Family Rights Act**
  - Employers with 5 or more employees
- **California Pregnancy Disability Leave**
  - Carve out for disability because of pregnancy, childbirth, or a related illness
- **California Paid Family Leave**
  - Employers must provide and allow employees to use 40 hours paid sick leave

Leave as Accommodation

- **No Bright-line Rule**: There is no statutory maxima for the required or allowable amount of leave as an accommodation for a disability
- No requirement for indefinite leave
  - Implication: Courts tend to construe an employee's accommodation for an unknown or indefinite time as unreasonable
- EEOC emphasizes an **individualized, case-by-case** basis
- Factors include whether the leave:
  - Has a defined duration
  - Is made in advance
  - Facilitates the employee's eventual return to work

CRD v. Grimmway (E.D. Cal. 2025)

CRD Class Action as Disability Discrimination Enforcement Mechanism

- The CRD alleged that Grimmway maintained a **systemic, company-wide set of practices** that violated the ADA and FEHA. The main factual findings include:
  - Automatic Placement on "Interactive Process Leave"
  - Rarely modified positions or found alternate positions
  - No consideration of assistive technology
  - Despite claiming reassignment was available, employer had no document system to show preferential consideration claims

Metropolitan Water District (CRD Settlement)

CRD as Disability Discrimination Enforcement Mechanism

- CRD settlement required the employer to pay $125,000 and reinstate **365 hours of sick leave** and **736 hours of vacation leave** ($75,000) used by complainant in relation to a medical disability
- Managers and supervisors must attend workplace disability-rights and anti-discrimination trainings
- Takeaways:
  - Caution when using or requiring leave instead of assessing accommodations
  - Having a policy does not mean that it is followed in practice
  - Do not neglect CRD charges, especially where there is liability

Employee Misclassification Issues

Employee

Independent Contractor

Exempt

Non-Exempt

Common Classification Misconceptions

- Contractual language in an employment agreements classifying an employee does not trump the actual conditions of employment
- Paying a certain salary or wage does not automatically mean an employee is exempt
- Certain titles, such as those containing *supervisor* or *manager*, are not guaranteed to receive exempt classification unless the duties align with the title
- Guidance: If you are concerned you have misclassified employees, have counsel complete a compliance audit by reviewing job descriptions and actual duties

Exemption Categories

Executive: Managing a department, supervising at least two full-time employees, authority over hiring/firing, and exercising discretion and independent judgment in executive nature

Administrative: Work related to business operations with discretion and independent judgment

Professional: Advanced knowledge in a specialized field

Outside Sales: customarily and regularly spend more than half of working time away from place of business selling goods or services or obtaining orders for products, services, or use of facilities

Inside Sales: works in industry governed by IWC Orders 4 & 7, earns more than 1.5 times minimum wage *in each pay period*, and earns more than 50% of compensation from commissions in each workweek

Employee vs. Independent Contractor

- **The nature of the position dictates classification over language in an employment agreement** (i.e. unless the position itself is substantially altered, an employer cannot designate or change the character of the relationship from employee to independent contractor, and vice versa)
- Principal consideration is the extent of **control** and **direction** over when and how a putative contractor performs work
- California Standard is the **ABC Test** (three prongs)
- Tax Implications – W-2 vs. 1099

Hirdman v Charter Communications (Cal. Ct. App. 2025)

Sick leave pay calculation is the same for all exempt employees

- Plaintiff was an outside salesperson, classified as exempt from overtime/minimum wage under Wage Order 4
- As an outside salesperson, he spent most of his time out in the field, did not clock hours, was paid a salary plus commissions
- Hirdman argued outside salespersons are "exempt" only for the limited purpose of overtime/minimum wage exemptions
- Court held all employees exempt from overtime/minimum wages laws should use the paid sick leave calculation under Labor Code § 246

Issues and Developments in Remote Work

In 2024, the US Department of Labor (DOL) found:

- **32.5%** of employed people did some or all of their work at home
- **50%** percent of workers with a Bachelor's degree or higher did some work at home

Common Issues

- Whether remote work qualifies as a reasonable accommodation under ADA/FEHA
- Discrimination claims if employers do not equally evaluate remote work requests
- Determining application state and local laws where employee and employer are physically located in different states
- Managing health, safety, and workers' compensation issues in remote landscapes
- Privacy and confidentiality concerns for proprietary and protected information

Hybrid Work Trend

Workplace Vaccine Mandates

- Ninth Circuit upheld a LAUSD vaccine requirement against equal protection and due process challenges. *Health Freedom Defense Fund v. Carvalho* (9th Cir. 2025)
- In a **Failure to Accommodate** case, the Court of Appeals held that fear of exposure to COVID and self-reported concerns does not constitute a disability without medical substantiation. *Allos v. Poway Unified School District* (Cal. Ct. App. 2025)
  - Employer conducted six interactive process meetings + offered accommodations

Hybrid Work Trend

Attendance Policies, RTO, and Coffee Badging

- Employees briefly show up in the office—long enough to be seen, grab coffee, or swipe their badge—before returning to work remotely
- Reaction to strict or unpopular Return to Office mandates
- Emblematic of the misalignment between in-office expectations and actual work needs

Written Hybrid Work Policies

- A strong hybrid work policy should:
  - Clearly define eligibility to work remotely
  - Provide a specific procedure for requesting approval to work remotely
  - Direct employees to the employer's reasonable accommodation procedures
  - Set forth the conditions of an authorized remote work arrangement
  - Detail key employee responsibilities and expectations:
    - Work hours / Time Keeping
    - Safeguarding equipment and confidential information,
    - Workplace set up (including ergonomics) and reimbursable expenses
    - Secure remote access procedures

Remote Work as a Reasonable Accommodation

NOT a statutory requirement, BUT implicated in many situations.

- Employers must give all employees with disabilities an equal opportunity to work remote
- Working from home may trigger the ADA's reasonable accommodation requirement, even if the employer does not allow other employees to work remote
- Employers may be required to modify an existing position or policy for a new employee with a disability seeking to work remotely where the job can be performed at home

Requires employer to engage in interactive process.

- Must be conducted in good-faith and carefully documented

Essential Functions and job descriptions drive analysis.

- **Employers do not have to remove any essential job functions to permit an employee to work at home**, but the employer may need to reassign some minor job duties or marginal functions if they are the only obstacle to permitting an employee to work at home

Russo v. National Grid
(E.D.N.Y. – October 2025 Jury Trial)

Bellwether Case: Refusing To Allow Remote Work Can Bring Liability

- **Issue:** Whether employer unlawfully failed to accommodate plaintiffs' disabilities by revoking remote-work accommodations and requiring in-person work
- Brooklyn Jury awarded $3.1M (1.55M each) to two employees denied continued post-pandemic remote work despite medical needs
  - **$1M each in punitive damages -** signals disapproval of the employer's decision and broad sympathy for employees requesting remote work
- Employer failed to prove undue hardship from allowing remote work

Takeaway: Long periods of successful remote work performed during the pandemic undermine employer claims that physical presence is essential

Remote Work Reimbursements

- ***"An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties"*** Cal Labor Code § 2802
- Applies to full-time employees, part-time employees and hybrid work arrangements
- Duty cannot be waived—any agreement discharging an employer's duty to provide reimbursements is void as against public policy
- ***What are reimbursable expenses?***
  - **Phone and Internet** – a reasonable percentage of home internet and personal cell phone bills used for work, even if the employee already had the service or incurs no extra charge
  - **Home Office Supplies -** may include pens, notebooks, paper, printer ink, or other materials needed to perform job duties; up to larger items like desks, chairs, monitors, and ergonomic accessories
  - **Utilities** – generally **NOT** eligible for reimbursement


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AI in the Workplace:

Considerations for hiring, performance management, privacy and more

Agenda:

- How AI Might Play Out For Employers: A Look at *Mobley v. Workday*
- What Might Come From *Mobley?*
- What Is California Doing About AI?
- What Best Practices Should Employers Follow?

Legal Exposure In Employers Using AI

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Mobley v. Workday, Inc. (2024)
U.S. Northern District of CA

Case Overview:

Plaintiff Mobley alleges that he applied to over 100 jobs that used Workday's AI-powered applicant screening tools. Mobley did not get hired for any of these jobs. He claims that is because of Workday's tools, which he alleges discriminated on the basis of race, age, and disability in violation of federal and state anti-discrimination laws.

Mobley v. Workday, Inc. (2024)
U.S. Northern District of CA

Workday Algorithm-Based Applicant Screening Tool:

- Workday provides customers with a platform on the customer's website to collect, process, and screen application.
- Workday embeds AI and machine learning into its algorithmic decision-making tools, enabling the tools to make hiring decisions.
- Some jobs required a Workday assessment / personality test.

Mobley v. Workday, Inc. (2024)

The Plaintiff, Mobley, applied to over 100 jobs that used the Workday AI tools. Mobley's Resume Included the following information:

- Graduation date (1995)
- Morehouse College – a Historically Black College & University (HBCU)
- Employment history

Mobley v. Workday, Inc. (2024)

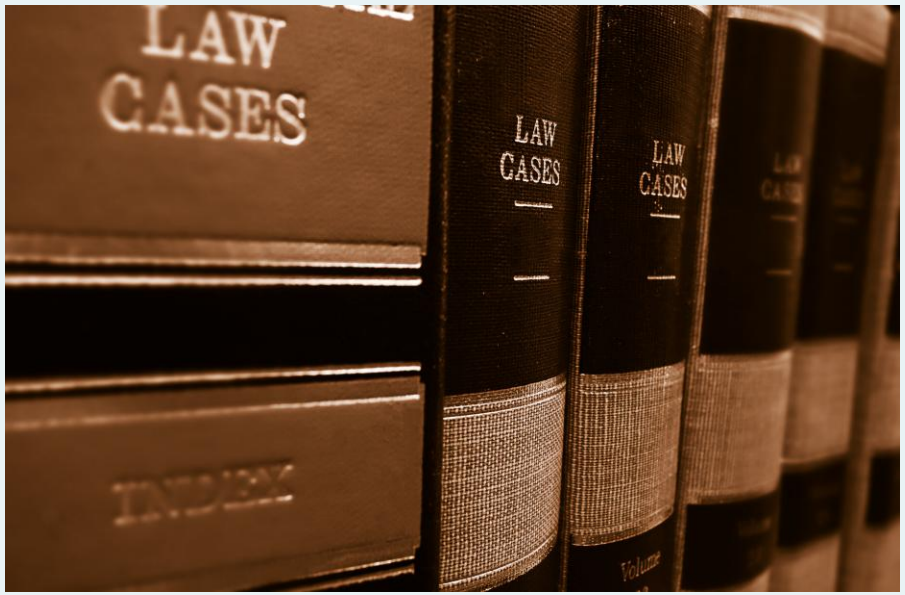
Mobley Alleges:

- That he was denied employment every one of the 100+ job applications he submitted to companies using Workday's platform.
- That he had one application rejected less than 1-hour later
- That the Workday assessment / personality test could reveal mental health disorders or cognitive impairments, and that those applicants could get screened out by performing worse.
- That Workday's tools discriminate against applicants who are African American, over age 40, and/or disabled.
- That he was rejected from a job that mirrored a role he was already in.

Mobley v. Workday, Inc. (2024)

Legal Claims:

- Mobley claimed race and age discrimination, and disparate impact on the basis of race, age, and disability.
- Mobley asserted Title VII, Section 1981, ADEA, and ADA violations, and aiding and abetting race/disability/age discrimination.
- Mobley argued Workday's customers delegate traditional hiring functions, including rejecting applicants, to Workday's algorithmic tool. He pointed to his rejection emails received in the middle of the night to show automated decision.



Mobley v. Workday, Inc. (2024)

The Court Held The Following:

- **Agents' Liability for Discrimination.** A third-party agent may be liable as an employer where the agent has been delegated functions traditionally exercised by an employer. Evaluating and dispositioning candidates was at the core of the traditional employment functions that the anti-discrimination laws seek to address. Such that Mobley adequately alleged Workday was an "agent" that fell within Title VII, ADEA, ADA "employer" definition.
- **Disparate Impact.** At pleading stage, disparity does not need to be precise, Mobley can survive motion to dismiss by pointing to obvious inconsistencies (ex. race composition of employees vs. race composition of surrounding population). Mobley rejected from 100+ jobs he was allegedly qualified, and at odd hours of the day, and Workday tools were the common denominator.

Mobley v. Workday, Inc. (2024)

The Court Also Held:

ADEA claim: Can be pursued as a class action against any employer on behalf of an employee "and other employees similarly situated."

Alleged "unified policy:" Mobley alleged the class members were "similarly situated" because all were victims of a "single policy" - Workday's AI recommendation system that scored, sorted, ranked, screened applicants – that he said had a high rejection rate for applications age 40+ causing disparate impact.

- **Candidate Skills Match (CSM):** Mobley claims it extracts skills from the job posting and the applicant's materials to determine if there is a skills match. It then reports the candidate as being "strong" "good" "fair" "low" "pending" "unable to recover."
- **Workday Assessment Connector (WAC):** Mobley claims it uses machine-learning to observe that a client-employer disfavors certain candidates who are members of a protected class and then decreases the rate it recommends those candidates.

What Does *Mobley* Signal To Employers?

- That employers should anticipate more disparate impact claims and that they may not be able to swiftly dismiss them or avoid preliminary class certification.
- That a court may consider an employer's AI tool to be an "agent" of the employer.
- That employers should work closely with their AI tool vendor to learn how it works, which filters are being used, and how the vendor addresses concerns of bias.
- That employers should have human oversight and involvement. This may reveal the AI tool is having a disparate impact on certain applicants on the basis of a protected trait or a proxy for that trait.

Eightfold AI Inc. Lawsuit

- **2026 AI Case.** Eightfold AI Inc. gives job applicants a "Match Score" of 0 to 5 based on the applicants' supposed likelihood of success.
- The Match Score examines whether the job candidate has skills overlap, the right title/seniority fit, and how the candidate's profile compares against those of the hiring manager and high-performing employees who hold or previously held the job. The AI tool then blends the data into a "calibrated prediction" on that candidate's likelihood of success in that job.
- **Plaintiff:** alleges Eightfold's tool discards lower scored candidates before a human can review, and that the technology collects so much data on a candidate, that it may be akin to a "consumer report" and operating in violation of the Fair Credit Reporting Act (FCRA) and CA Investigative Consumer Reporting Agencies Act (ICRAA) disclosure and authorization requirements.

AI is here to stay.

But what has California law done to help mitigate negative outcomes and consequences of AI?

California's Response to AI

California Law and AI

SB 947 (McNerney/Reyes)

Introduced Feb. 2, 2026

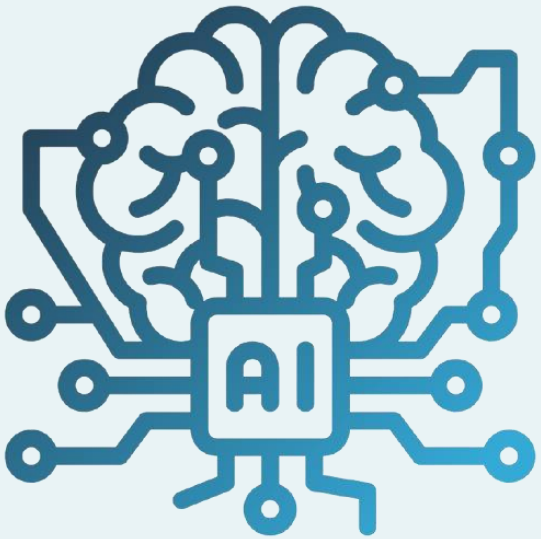
- Prohibits use of "ADS" tools in "employment-related decisions"
- Restricts use of "ADS" tools in adverse employment actions
- Notice requirements to employees
- Potential PAGA Penalties

SB 951 (Reyes)

Introduced Feb. 2, 2026

- Establishes "California Worker Technological Displacement Act"
- Requires employers to provide notice of technological displacement of workers and job transfer rights
- Creates damages and penalties for failure to provide notice

SB 947: Restricts Employer Use of ADS in Employment-Related Decisions



Automated Decision System ("ADS"): "Any computational process derived from machine learning, statistical modeling, data analytics, or artificial intelligence that issues simplified output, including a score, classification, or recommendation, that is used to assist or replace human discretionary decision-making and materially impacts natural persons."

Employer: All employers regardless of size, including public employers.

Employment-related decision: any decision by an employer that materially impacts a worker's wages, benefits, compensation, work hours, work schedule, performance evaluation, hiring, discipline, promotion, termination, job tasks, skill requirements, work responsibilities, assignment of work, access to work and training opportunities, productivity requirements, or workplace health and safety.

SB 947: Prohibition on ADS in the Workplace

An employer shall not use an ADS to do any of the following:

(1) Prevent compliance with or violate any federal, state, or local labor, occupational health and safety, employment, or civil rights laws or regulations.

(2) Infer a worker's protected status under Section 12940 of the Government Code.

(3) Conduct predictive behavior analysis on a worker.

(4) Identify, profile, predict, or take adverse action against a worker for exercising their legal rights, including, but not limited to, rights guaranteed by state and federal employment and labor law.

(5) Use or rely upon individualized worker data as inputs or outputs to inform compensation unless the employer can clearly demonstrate that any differences in compensation for substantially similar or comparable work assignments are based upon cost differentials in performing the task involved, or that the data was directly related to the tasks that the worker was hired to perform.

AN EMPLOYER SHALL NOT RELY SOLELY ON AN ADS WHEN MAKING A DISCIPLINARY, TERMINATION, OR DEACTIVATION DECISION.

SB 947: Restrictions on ADS for Adverse Actions

If an employer uses an ADS output to **assist in making a disciplinary, termination, or deactivation decision**, the employer shall direct a human reviewer to conduct an independent investigation and compile corroborating or supporting information for the decision. For purposes of this paragraph, "other information" may include, but is not limited to, any of the following:

(A) Supervisory or managerial evaluations.

(B) Personnel files.

(C) Work product of workers.

(D) Peer reviews.

(E) Witness interviews, that may include relevant online customer reviews.

SB 947: Restrictions on ADS for Adverse Actions (cont'd)

(c) If an employer cannot corroborate the ADS output, or the human reviewer has concluded that the ADS output is inaccurate, incomplete, or misleading, the employer shall not use the ADS output to discipline, terminate, or deactivate a worker.

(d) An employer shall not use customer ratings as the only or primary input data used to assist the employer to make employment-related decisions.

(e) A worker shall have the right to request, and an employer shall provide, a copy of the most recent 12 months of the worker's own data primarily used by an ADS to make a disciplinary, termination, or deactivation decision. A worker is limited to one request every 12 months for a copy of their own data used by an ADS to make a disciplinary, termination, or deactivation decision.

(f) For purposes of safeguarding the privacy rights of consumers, workers, and individuals, when an employer is required to provide worker data pursuant to this part, that worker data shall be provided in a manner that anonymizes the customer's, other worker's, or individual's personal information.

SB 947: Notice and Penalties

Post-Use Notice: If ADS is used to make a disciplinary, termination, or deactivation decision, the employer shall provide the affected worker with a written post-use notice at the time the employer informs the worker of the decision. The statute specifies the form and content of the information which must be provided.

Penalties: The requirements are enforceable by the Labor Commissioner. However, Alternatively to subdivision (a), any worker, or their exclusive representative, who has suffered a violation of this part may bring a civil action in a court of competent jurisdiction for damages caused by that adverse action, **including punitive damages**. An employer who violates this part shall be subject to a civil penalty of five hundred dollars ($500).

Labor Code Violation + Civil Penalties = PAGA Enforcement

SB 951: California Worker Technological Displacement Act - Requirements

WARN-Style Notice Requirements:

A covered employer shall provide at least a 90-day advanced written notice before any **technological displacement or termination of contract** affecting 25 or more workers or 25 percent of the workforce, whichever is less.

A covered employer shall provide a written technology hiring disruption notice when it executes a **technological reduction in hiring or cessation** in hiring due to the adoption of AI or other automating technology.

For covered employers with more than 100 workers, each worker affected by a technological displacement or termination of contract shall be entitled to the right of first bid on other positions at the employer.

SB 951: California Worker Technological Displacement Act - Definitions

Employer: All employers regardless of size, including public employers.

Technological displacement: The elimination of employment positions, or a reduction in hours equivalent to 25 percent or more of total workforce time, within any 12-month period, caused in whole or in substantial part by the introduction of an AI system or other automated technology.

Technological termination of contract: The termination of a contract for workers or services for the covered employer that is due to the use of AI or other automation that displaces or replaces human workers.

SB 951: California Worker Technological Displacement Act - Definitions

Worker: An individual employed or contracted by an employer for at least 6 months of the 12 months preceding the date on which notice is required under this article. “Worker” includes, but is not limited to, full-time and part-time workers and independent contractors, but does not include a seasonally employed individual who was hired with the understanding that their employment is seasonal and temporary, a volunteer, or an intern.

SB 951: California Worker Technological Displacement Act - Penalties

Damages: A covered employer that fails to give notice as required by paragraph (1) of subdivision (b) of Section 1414.2 before ordering a technological displacement or termination of contract due to AI or automation, is liable to each worker entitled to notice who lost their employment. The covered employer shall be liable for all of the following for each worker:

(1) Back pay at the average regular rate of compensation received by the worker during the last three years of their employment, or the worker's final rate of compensation, whichever is higher.

(2) The value of the cost of any benefits to which the worker would have been entitled had their employment not been lost, including the cost of any medical expenses incurred by the worker that would have been covered under a worker benefit plan.

(b) Liability under this section shall be calculated for the entire period of the employer's violation up to a maximum of 60 days, or one-half the number of days that the worker was employed by the employer, whichever period is shorter.

SB 951: California Worker Technological Displacement Act - Penalties

Class Actions: A person, including a local government or a worker representative, seeking to establish liability against an employer may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction.

> (b) The court may award reasonable attorney's fees and costs to any plaintiff who prevails in a civil action brought under this article.
>
> (c) If the court determines that an employer conducted a reasonable investigation in good faith and had reasonable grounds to believe that its conduct was not a violation of this article, the court may reduce the amount of any penalty imposed against the employer under this article.

PAGA: Unclear. The Labor Commissioner may enforce subdivision (a) and the notice requirements of Section 1414.2 through the procedures set forth in Section 98.3 or 1197.1

Best AI Practices For Employers

Best AI Practices for Employers

1. **Maintain Human Oversight & Involvement:**

   - Use AI as a *tool* to help guide humans, but not as a replacement for humans.
   - Humans know their workplace best.

2. **Update AI and Record-Keeping Policies:**

   - Preserve ADS data for four years.
   - Comply with AI use, access to data, and privacy rights / opt-out requirements.

3. **Understand & Audit AI Tools:**

   - Ask AI vendors to explain their tool and how it addresses the issue of bias.
   - Work with AI vendor to tailor the program's features to your company and to help avoid having filters that could screen out individuals based on protected traits or proxies for a protected trait. (Objective vs. Subjective filters)
   - Consider requiring contractual assurances from AI vendors regarding non-discrimination and data transparency.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Questions?

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Trump 2.0, One Year In: What's Happened in DEI and What's Next

What We'll Cover

- Looking Back at Our 2025 Predictions
- Grounding Ourselves With *Students for Fair Admission*
- Activity Under the Trump Administration
- The Litigation Landscape Since Last Seminar
- Activity in Federal and State Legislatures
- Activity in the Private Sector
- Where Do We Go From Here

Looking Back at 2025 Predictions

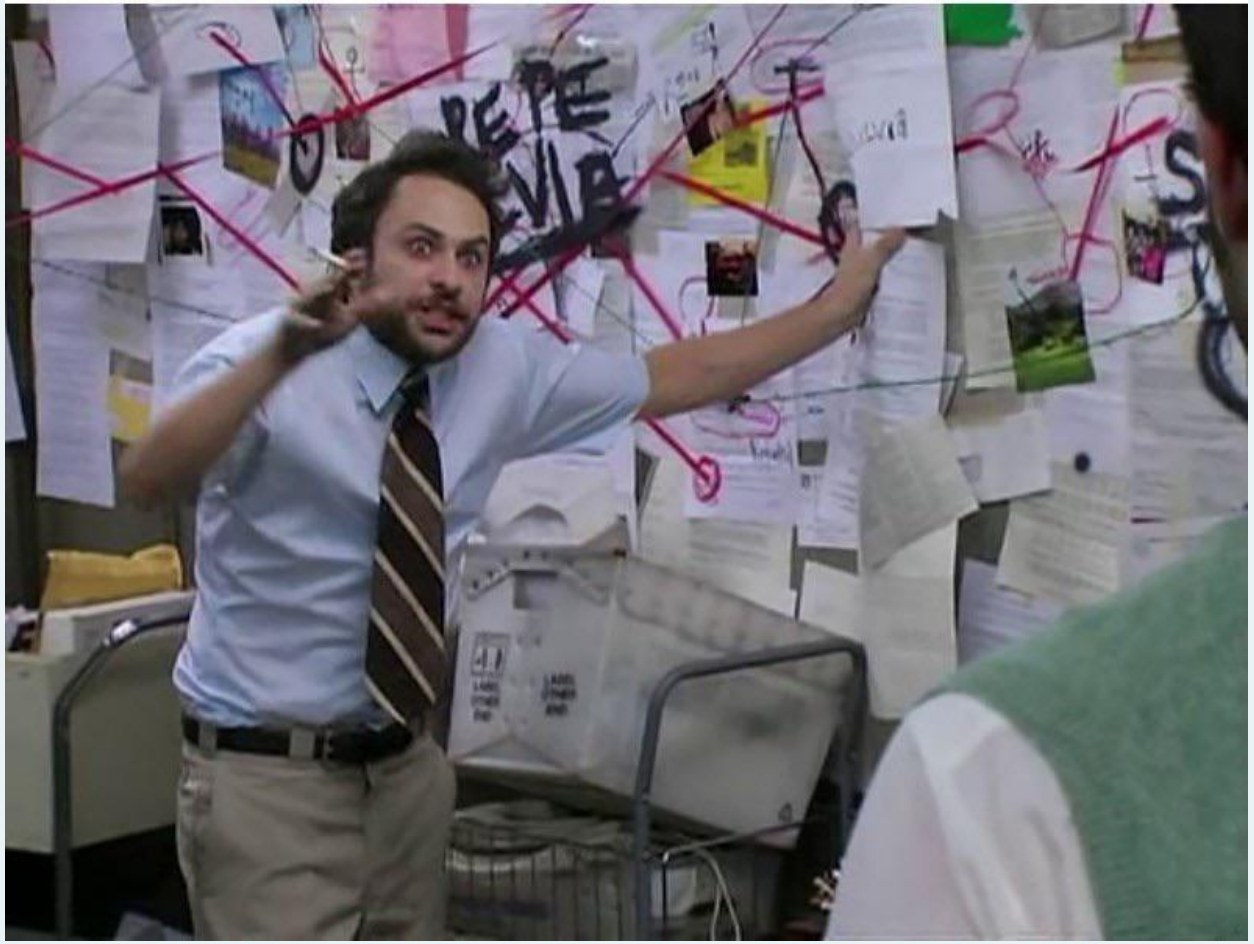
How Did We Do?

What We Predicted	Were We Right?
Informational-based DEI initiatives (such as trainings) would be hard to challenge	YES!
Narrative requirements (Roberts' "personal statement" option) would be a viable work-around	YES!
Resolution on "underrepresented groups" as an umbrella category	NO!
Public agencies will face greater risk	YES!
Change in direction at EEOC	YES!
Congressional investigations on various aspects of DEI, especially tax-exempt organizations, higher education, "woke capitalism"	SORT OF!
Reverse discrimination actions initiated by DOL/DOJ	SORT OF!

Key Legal Concepts

- Executive Orders and related implications
- Role of federal/executive agencies, e.g., EEOC, Dept. of Labor, Dept. of Transportation
  - Contract and grant awards
  - Promulgating rules/regulations, issuing legal interpretations/technical guidance
  - Oversight and investigation functions
  - Offensive litigation
- Private lawsuits (civil)
  - What is “standing”
  - What is “ruling on the merits” vs. “ruling on a motion”
  - What is the significance of majority vs. dissenting court opinions
  - Employment claims vs. Section 1981 claims

Bear With Us…



Grounding Ourselves With *Students for Fair Admission*

Students for Fair Admissions

- 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 and Harvard
  - 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
- Holding (June 2023) – cannot consider race or other protected category as a factor in admissions; limited to education context (Title VI and Title IX; not Title VII)
  - Nothing in the opinion prevents schools from pursuing diversity goals 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
- Policy undercurrent – discrimination no longer as relevant as it was when Grutter was decided

Other Relevant Points from *SFFA*

- Justice Roberts work around: can't consider race… but can consider "racialized experiences" (the "Narrative Requirement")
  - 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/standard of Title VI to Title VII, stating that together the laws "codify a categorical rule of individual equality, without regard to race"
  - Will become relevant… but in an unintended way!
- Official Statement from EEOC, June 2023: "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."

Ready to Dive In?

Activity Under the Trump Administration

Executive Branch Actions

- January 2025 Executive Orders re DEI
  - Rescinded multiple Biden EOs, including DEI initiatives in federal government – means removed *enforcement* arm of OFCCP pertaining to prior affirmative action requirements
  - Eliminated federal contractor affirmative action requirements in place for 60+ years
  - Ended all DEI programs in federal agencies, terminated all DEI personnel; requires agencies to identify federal contractors/grant recipients who receive funding for DEI or environmental justice programs
  - Directed all federal agencies to define sex as binary; rejects any reference of gender identity in federal law/policy interpretations; requires sex-segregated spaces on federal properties
  - Directed all federal agencies to take action against "DEI discrimination" in private industry
  - Directed AG to create a report containing a strategic plan to target sectors/entities "engaged in illegal DEI discrimination or preferences"
- March 2025 Executive Orders targeting DEI at law firms
- Nearly all of these Orders have now been challenged in courts… some already overturned

Executive Branch Actions

- April 2025 Executive Order on Disparate Impact Liability
  - Order seeks to eliminate the use of disparate-impact liability in all contexts "to the maximum degree possible"
  - Directs the repeal or amendment of regulations that impose disparate-impact liability on, and require affirmative action by, recipients of Title VI federal funding under Title VI; revokes the "Presidential approval" of these regulations
  - Directs Attorney General to initiate appropriate action to repeal or amend regulations.
  - Directs all federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability"

DOJ/DOL Activity

- Harmeet Dhillon appointed Assistant Attorney General for the Civil Rights Division at DOJ, specifically praised for her experience "suing corporations who use woke policies to discriminate against their workers"
- February 5, Attorney General Bondi Memo – Civil Rights Division will begin investigating, prosecuting, and penalizing "illegal DEI preferences, mandates, policies, programs, and activities in the private sector that are based on race or gender" so as to enforce "compliance with federal anti-discrimination laws"; specific exception for heritage month programming, holiday recognition
- May 2025 – DOJ launches "Civil Rights Fraud Initiative" to use False Claims Act to pursue claims against federal contractors/grant recipients who "knowingly violate" civil rights laws
  - Has resulted in a flood of "civil investigative demands" to federal contractors and grantees demanding documents and information relating to DEI programs as part of False Claims Act investigations

March 2025 EEOC/DOJ "Technical Guidance"

- Released two guidance documents on March 19: "What You Should Know" and "What to Do" – not a lot new in substance
- "New" material mostly under questions 7-9 in "What You Should Know" doc
  - Diversity goals not a defense to discrimination
  - Specifics on where a DEI program might become unlawful, such as hiring or promotion, compensation and benefits, internships, access to mentorship or development programs, job duties or assignments, and selection for interviews
  - How affinity groups might be unlawful if those groups receive different benefits, "programming content," or some amount of employer resources
  - Whistleblower hotline to report "DEI violations"
- Part of coordinated effort by Administration – similar guidance letters published around the same time by Department of Education, Department of Transportation

July 2025 Attorney General Memo

- July 29 – Attorney General Memo finally outlining what "illegal DEI" may mean
  - Identifies "best practices" as "non-binding suggestions" to help federal contract/grant recipients comply *with federal anti-discrimination law* – makes statements as to law generally, not limited to contractors only
  - Not a lot new apart from EEOC/DOJ Technical Guidance
  - What is new
    - "Segregation" of services – bathrooms, trainings, affinity groups, programs
    - "Best practice" recommendations to avoid discrimination (not actually new)
    - Idea of "proxies" for protected categories

More DOJ/DOL Activity

- September 2025 – DOL launches Project Firewall initiative, an H-1B enforcement initiative intended to ensure employers prioritize hiring qualified Americans over foreign workers, and holding employers accountable if they abuse the H-1B visa process
- December 2025 – DOJ issued a final rule, applicable to recipients of federal funding, intended to *eliminate* liability for "disparate impact" discrimination under Title VI of the Civil Rights Act of 1964
  - New rule still states Title VI will continue to prohibit *intentional* discrimination

EEOC Activity

- March 2025 – new Acting EEOC Chair Andrea Lucas issues letters to 20 law firms requesting information, "expressing concern," and implying pending investigations into DEI policies/practices
  - Especially targeted 3 types of initiatives – Mansfield Certification, diversity scholarships, affinity groups
  - Press release accompanying letters also establishes law firm DEI whistleblower channel
  - Data requests included detailed personal information on applicants/employees, dating back 6-10 years
  - March 18 response letter from former EEOC Commissioners and Chairs – March 17 letters are overreach and improper on procedural grounds
- April 2025, Doe v. EEOC – group of law students sue the EEOC alleging law firm letters improperly request their private personal information, citing same bases as former Commissioners response letter
  - Fall 2025 – dueling motions for summary judgment, EEOC moves to dismiss; no ruling yet

More EEOC Activity

- October 2025 - Brittany Panuccio sworn in as an EEOC Commissioner, restoring quorum that allows EEOC to vote on policy and regulatory matters, issue guidance, and authorize certain lawsuits; EEOC had not had a quorum since January 2025
- Following Panuccio's confirmation, EEOC Chair Andrea Lucas initiates press run saying that the agency is now "empowered to deliver on its conservative vision of civil rights"; since October, has included things like
  - Rescinding guidance on protections for transgender and nonbinary workers
  - Investigating universities' responses to antisemitism
  - Recovering funds for workers subject to Covid vaccine mandates despite religious objections
  - Issuing new guidance that attacks companies that hire foreign workers/visa holders for "anti-American national origin discrimination"

More EEOC Activity

- November 2025 – EEOC issued its first ever administrative subpoena in an investigation of employer illegal DEI activities; subpoena issued as part of EEOC investigation into Northwestern Mutual DEI policies
  - EEOC requested that Northwestern Mutual produce documents related to the company's DEI initiatives and make its diversity executive available for an interview
  - Northwestern Mutual offered to produce limited general corporate information regarding the department in which the complaining employee worked, but objected to other requests on grounds that investigation was procedurally improper
  - EEOC filed a motion to compel compliance in the Eastern District of Wisconsin; no ruling yet

More EEOC Activity

- November 2025 – EEOC issues new guidance, "Discrimination Against American Workers Is Against the Law"
  - States that national origin discrimination can include preferring foreign workers, or workers with a particular visa status, over American workers; employers not entitled to hire foreign workers over equally qualified American workers, "even if there is a customer or client preference, a lower cost of labor, or a belief that workers from one national origin group have a better work ethic"
  - "Anti-American national origin discrimination" can include discriminatory job ads, disparate treatment, harassment based on national origin, and retaliation for opposing national origin discrimination
  - Guidance relates to the Department of Labor's Project Firewall initiative

More EEOC Activity

- December 2025 – EEOC Chair goes on a press campaign and social media run announcing that she is in search of straight, white men who have been wronged by DEI to pursue claims against employers
- January 2026 – EEOC withdraws 2024 guidance document establishing framework for analyzing harassment claims, including instruction on how sexual orientation-based harassment and gender identity-based harassment constitutes sex-based harassment in violation of Title VII, pursuant SCOTUS 2020 ruling in *Bostock v. Clayton County*

FTC "Anti-Competition" Threats

- February 2025 – memo by Chairman of Fair Trade Commission lists "collusion or unlawful coordination on DEI metric" as an example of an unfair or anticompetitive labor practice, alleges such actions "may have the effect of diminishing labor competition by excluding certain workers from markets, or students from professional training schools, on the basis of race, sex, or sexual orientation"
- January 30, 2026 – Fair Trade Commission issues letters to 42 law firms warning them that it would be looking into how coordinated "DEI hiring" constitutes anticompetitive activity, referencing February 2025 memo
- Letters focused on Mansfield Certification program and "knowledge sharing calls" that occur as part of program

Other Agency Activity

- July 2025 – Dept. of Health and Human Services distributes “whistle-blower questionnaire” to staff, seeking reports of discrimination linked to DEI policies; survey asks respondents to report grants/contracts being rejected due to “discriminatory language,” and report any staff overlooked for promotions or hiring based on reverse discrimination
- September 2025 – in public battle with the FAA, Atlanta airport “voluntarily” forfeits $37.5M in federal funds after refusing to agree to new contract terms that required airport to certify it does not operate DEI programs that violate federal anti-discrimination law
- September 2025 – Dept. of Education withdraws over $6M in federal funds from NYC, Chicago, and Fairfax, VA schools after schools refused to withdraw policies related to gender identity and eliminate “black student success plans” aimed at increasing number of Black teachers hired/enrolling more Black students in advanced courses

The Litigation Landscape Since Our Last Seminar

Litigation "Against DEI" – Summary

- In 2025, American Alliance for Equal Rights (Blum) initiated dozens of new lawsuits, Students for Fair Admissions (Blum) and Do No Harm initiated about a dozen new lawsuits each, all targeting DEI initiatives in some form – state regulations, higher education, grant and scholarship programs, professional licensing requirements, relief programs, private sector
- Distinct difference between evaluation of Section 1981 claims and workplace discrimination and harassment claims (Title VII, FEHA); standing remains critical
- Informational-based initiatives (e.g., disclosing composition of boards, training on bias) are hard to challenge – cannot point to actual harm connected to employment action
- Narrative requirements (Roberts' "personal statement") upheld as an alternative solution in a variety of contexts
- Demographic tracking not in and of itself evidence of discrimination
- Still no resolution on "underrepresented groups" as an umbrella category

Relevant Litigation – Circuits/SCOTUS

- June 2025, *Ames v. Ohio Dept. of Youth Svcs* – SCOTUS rejects "background circumstances" doctrine in "reverse" discrimination cases; no higher *prima facie* showing for reverse discrimination plaintiffs, all discrimination claims evaluated on the **same standard**
- September 2025, *Chislett v. New York City Dept. of Education* – 2d Circuit holds that mandatory implicit bias training isn't inherently illegal, but may give rise to a race-based hostile work environment claim under **Section 1983** if the training discusses a particular race "with a constant drumbeat of essentialist, deterministic, and negative language"
- August 2023, *Hamilton v. Dallas County* – 5th Circuit upends long-standing precedent, holding that a plaintiff is **not** required to show an "ultimate employment decision" in order to prove they were subjected to an "adverse employment action"
  - In a concurring opinion, Justice Ho (Trump appointee) specifically notes that this decision can be used to challenge DEI initiatives
- April 2024, *Muldrow v. City of St Louis* – SCOTUS holds plaintiffs **not** required to show "significant disadvantage" to prove employer decisions are discriminatory

Other Interesting Cases

- May 2025, *Spitalnick v. King & Spalding, LLP* (S.D.Tex. and D.Md) – granted law firm's motion to dismiss on standing grounds after white, straight, female attorney alleges she didn't apply to internship program because she saw a job ad saying candidate must have diverse background
  - Plaintiff also cited March 2025 EEOC letters to law firms alleging LCLD programs were illegal, which court didn't buy and said not required to give deference to EEOC
- June 2025, *Langan v. Starbucks Corporation* (D.NJ) – granted Starbucks motion to dismiss a lawsuit filed by white, female employee, claiming she was wrongfully accused of racism and terminated after she rejected Starbucks' attempt to deliver "Black Lives Matter" T-shirts to her store; was evidence she had repeatedly used N-word, and her lawsuit was not timely filed
- September 2025 – Wells Fargo paid $85M to settle shareholder class action that alleged bank had a policy requiring half of candidates for high-paying positions to be from underrepresented groups but only conducted sham interviews to create appearance of compliance; shareholders alleged this was fraudulent scheme *to suggest that Wells Fargo was dedicated* to DEI principles

Federal Agency Litigation and the FCA

- Following January 2025 Executive Orders, federal agencies began inquiring whether federal contractors and grant run any programs or initiatives that constitute "illegal DEI"
  - In practice, this has meant no DEI at all
- Enforced primarily in two ways
  - Cancelling contracts, withdrawing funds under False Claims Act theory
  - Chilling effect forces contractors and grantees to "voluntarily" withdraw
- False Claims Act provides a right of action for the government to sue federal contractors or grant recipients who make false representations in order to secure grants/contracts

How the False Claims Act Works re DEI

- Elements of False Claims Act cause of action:
  - A **false** claim or statement
  - That is made with **knowledge** of falsity (or "in deliberate ignorance"/"reckless disregard of the truth")
  - That was **material** to payment
  - That **caused** the government to pay
- Federal agencies under the Trump Administration have changed the template language of contracts to require contractors and grant recipients to represent they do not operate "illegal DEI" programs and to agree in advance that compliance with anti-discrimination laws is *material* to the contract

How the False Claims Act Works re DEI

- In an FCA case involving DEI, government argues that a contractor or grant recipient falsely and knowingly certified compliance with anti-discrimination laws while still operating unlawful DEI programs
- Relevant defenses
  - The claim wasn't false, meaning the employer doesn't operate any unlawful DEI programs
  - The claim wasn't *knowingly* false, meaning the employer honestly thought its programs were legally compliant
  - The false statement wasn't material to the payment, meaning the DEI program didn't matter to the government's contracting or payment decision
- U.S. v. Kousisis (May 2025) – SCOTUS holds that materiality is ultimately a legal question, regardless of what's in the contract

How Have Those Cases Played Out

- March 2025, *Chicago Women in Trades v. DOL* (N.D.Ill.) – court grants a nationwide TRO blocking Dept. of Labor from enforcing the Certification Provision of Executive Order 14173; TRO also prohibited enforcement of the Termination Provision of EO 14151, which requires termination of all "equity-related" federal grants
- September 2025, *Rhode Island Latino Arts v. National Endowment for the Arts* (D.RI) – court grants summary judgment to artists groups and NEA grant recipients challenging Executive Order 14168, which sought to prohibit use of federal funds to promote gender ideology; plaintiffs alleged this amounted to viewpoint discrimination under 1A, and also that funding criteria regs published by NEA did not follow Administrative Procedures Act

How Have Those Cases Played Out

- November 2025, *Various States v. DOT* (D.RI) – court issues TRO that invalidated the "immigration enforcement condition" imposed by the DOT on grantees earlier in 2025; means that the DOT will not include any grant conditions requiring cooperation with federal civil immigration enforcement in any grant agreements
- January 2026 – Dept of Education withdraws 4th Circuit appeal of lower court ruling that blocked implementation of February 2025 "Dear Colleague" letter, which sought to require higher education institutions to cease all DEI or "proxy" work and certify compliance with Executive Orders banning DEI, or else lose federal funding; no reason given for the withdrawal/dismissal

Activity in Federal and State Legislatures

Federal Legislative Activity

- February 2025 – House Bill 925, "Dismantle DEI Act of 2025", prohibits federal funds from being made available to DEI-related activities in any federal agency, closes any agency office related to DEI, prohibits trainings related to DEI, and repeals/amends various statutes and Executive Orders related to diversity
- February 2025 – House Bill 1282, "Eliminate DEI in Colleges Act," prohibits federal funding for institutions of higher education that carry out DEI initiatives, defining DEI as "the concept according to which individuals are (1) classified on basis of race, color, sex, national origin, gender identity, or sexual orientation; and (2) afforded differential or preferential treatment on the basis of such classification"
- May 2025 – Senate Bill 1745, "Dismantling Ideological Policies for Semiconductors and Science Act," repeals/amends programs and requirements related to DEI that were passed as part of the CHIPS and Science Act of 2022, which sponsoring senators allege mandated research and funding to support DEI in scientific and technological fields

Federal Legislative Activity

- July 2025 – House Bill 4603, amends Public Utility Regulatory Policies Act of 1978 to prohibit state regulatory authorities from approving rates of electric utilities if the utility engages in certain DEI practices or considers ESG factors in establishing rates; prohibited DEI practices include employee trainings that reference any race or sex being "inherently or systemically superior or inferior, oppressive or oppressed, or privileged or unprivileged"
- September 2025 – House Bill 5315, "Fair Artificial Intelligence Realization Act of 2025," requires federal agencies, if procuring large language models, to procure only those that "do not manipulate responses in favor of ideological dogmas such as diversity, equity, and inclusion"
- September 2025 – House Bill 5399, "Equitable Arts Education Enhancement Act," directs Secretary of Education to establish a competitive grant program to support arts education at minority-serving institutions of higher education, noting that minority-serving institutions are "uniquely positioned to produce a diverse generation of art professionals and help bring much needed attention to works by BIPOC (Black, Indigenous, People of Color) artists"

State Legislative Activity

- 30+ states have introduced some form of DEI-related bills or constitutional changes; nearly all of these states are "red"
  - Legislation that seeks to constrain or ban public agencies from implementing DEI initiatives in contracting and procurement, funding, or appointments
  - Legislation that seeks to limit use of ESG criteria in financial matters
  - Legislation that seeks to limit what private employers can "train" on
  - Legislation that modifies existing anti-discrimination laws to address DEI initiatives and/or "reverse discrimination"
- Most of these laws are modeled after suggested legislation by the Goldwater Institute, an activist organization with the specific goal of "stopping woke takeover"
- Many of these laws have been challenged, e.g., *Honeyfund.com, Inc. v. Desantis*

State Legislative Activity

- No California laws that restrict, rollback, or ban anything DEI-related
- If anything, new laws support DEI initiatives
  - SB164, Diversity Reporting Law - Intended to address lack of funding for diverse-owned businesses; requires “venture capital companies” with a connection to California to file an annual report with the Department of Financial Protection and Innovation detailing demographic and financial data about founding people/business in which they invest
  - AB101, Ethnic Studies in High School – Will require that all California public high school students receive education in ethnic studies in order to graduate;
  - AB2925 – Will require state colleges and universities to include antisemitism training as part of DEI protocols
  - SB303 – States that an employee’s acknowledgment of personal bias that was made in good faith and solicited or required as part of a bias mitigation training does not, by itself, constitute unlawful discrimination; intent of legislature is to encourage employers to conduct bias mitigation training

Activity in the Private Sector

Reports from the Private Sector

- May 2025 – Forbes reports that the use of the acronym DEI in corporate reports decreased by 98% from 2024 to 2025
  - In review of over 1,300 financial filings, proxy statements, earnings calls, and other documents, use of the word “diversity” dropped by 62%, “equity” by 48%, and “inclusion” by 43%
  - Use of more neutral terms (e.g., “belonging”) increased between 2023-2024 but declined between 2024-2025
- September 2025 – HR Dive report based on analysis of 3000 largest publicly trade companies shows that DEI-related roles peaked at ~13,000 in 2022 but dropped to ~11,000 in late 2025
  - Among those who left DEI roles, more than half transitioned to non-DEI roles at different companies, one-third moved into non-DEI roles within the same company, and just 7% took on another DEI role
  - Analysis suggests expertise of DEI professionals is redirected to other parts of organizations
  - Organizations with dedicated DEI teams demonstrated higher levels of employee satisfaction and higher ratings of workplace culture

Reports from the Private Sector

- October 2025 – PricewaterhouseCoopers' latest annual survey of 638 public company directors indicates that fewer corporate boards plan to add women or people of color to their director pools to increase board diversity in the coming year
  - Only 9% of respondents plan to intentionally increase gender diversity (vs. 21% in 2024)
  - Only 6% of respondents plan to intentionally increase racial diversity (vs. 13% in 2024)
- December 2025 – Financial Times reports that executive pay linked to DEI metrics has dropped sharply among S&P 500 companies in the last year
  - Number of companies that disclosed use of DEI metrics in executive pay dropped 30%
  - Companies that disclosed use of DEI metrics without details fell by 46%
  - Only 23.3% of S&P 500 companies tied executive pay to DEI metrics in 2025

Where Do We Go From Here?

Likely Safe, in General

- Programs designed to make processes more equitable for all
  - Process for employee evaluation, recruiting approach, professional development
- Initiatives focused on diversity beyond race, e.g., socioeconomic background, education, first generation status, etc., even where there is some correlation with race
  - But note new "proxies" issue
- Policies tied to proactive outreach and effort rather than decision making
  - Expanding recruiting pool, "targeted recruiting"
- Collection and analysis of demographic information and other data
- Purely informational initiatives, like trainings (but be careful)

Potentially Risky, in General

- Policies *requiring* specific percentage of diversity in interview slates
- Limiting opportunities (e.g., scholarships, leadership programs) for a specific protected category
  - Or limiting opportunities to affinity groups, *unless* affinity groups open to all
- Basing leadership compensation decisions on achievement of certain diversity goals/results
- Requiring specific percentage of diversity in leadership
- Ineffective trainings or targeted trainings
- Titles and labels alone (?)
- Changing titles of programs/initiatives, but not the way they work

Other Key Lessons

- The federal government and private activists have a goal… and they are not stopping pursuit regardless of setbacks
- But there have been a lot of setbacks on the anti-DEI side!
  - Executive Orders
  - Federal agency contract/grant changes
  - EEOC offensive litigation
  - Private civil litigation in employment context
- Other than the few SCOTUS and high-level Circuit court decisions, the law that applies to the workplace has not changed – DEI not illegal

Other Key Lessons

- Despite the anti-DEI setbacks, risk of targeting is still a legitimate concern – even getting to a win is expensive
- But that doesn't mean DEI rollback is totally risk neutral or risk mitigating
  - Risk to culture, recruiting, branding, relationship with the public
  - Risk of other discrimination claims – and remember this is huge!
- Rebranding might be helpful, but worth doing more than just changing titles
- The fear is the point… and we should not let fear drive us to help these bad actors
- Well-structured DEI programs remain beneficial for all; merit and inclusion are not mutually exclusive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Questions?

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Employer Services SEMINAR

Thank you for joining us!