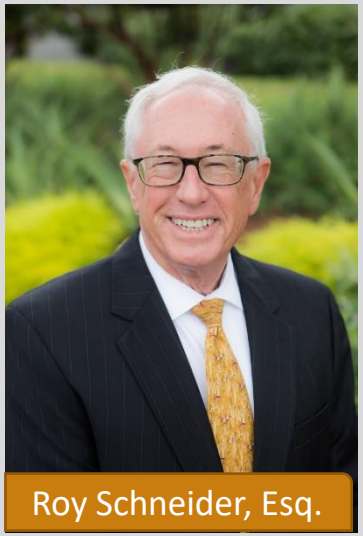
Employment Law Update, 2022

January 25, 2022



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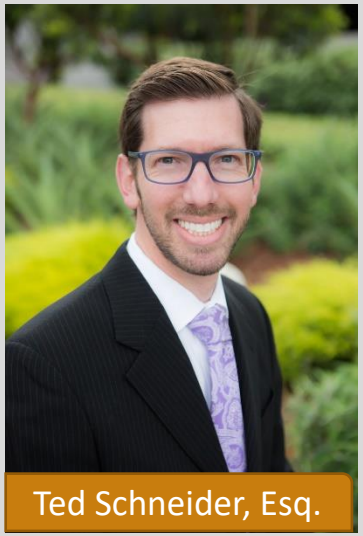

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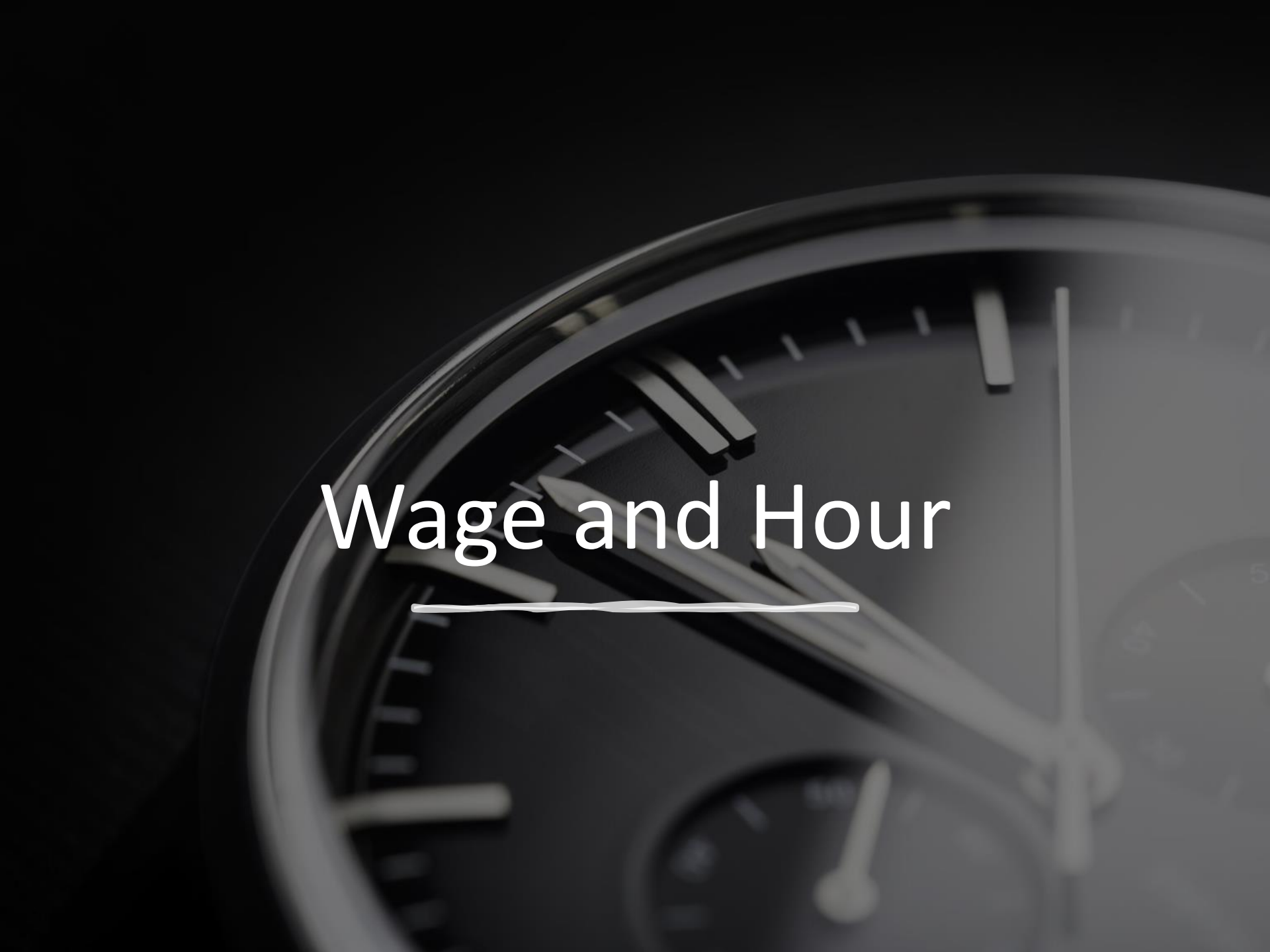

Wage and Hour

CALIFORNIA STATE MINIMUM WAGE

EFFECTIVE DATE	Minimum Wage for Employers With 26 or More Employees	Minimum Wage for Employers With 25 or Fewer Employees
January 1, 2021	$14.00/hour	$13.00/hour
January 1, 2022	**$15.00/hour**	**$14.00/hour**
January 1, 2023	$15.00/hour*	$15.00/hour*

*Once the minimum wage reaches $15 per hour for all businesses, wages could then be increased each year up to 3.5 percent (rounded to the nearest 10 cents) for inflation as measured by the national Consumer Price Index.

CALIFORNIA FAMILY RIGHTS ACT "CFRA"

AB 1033 – CFRA, Parent-In-Law

Clarifies that employees can take CFRA leave to care for a parent-in-law with a serious health condition.

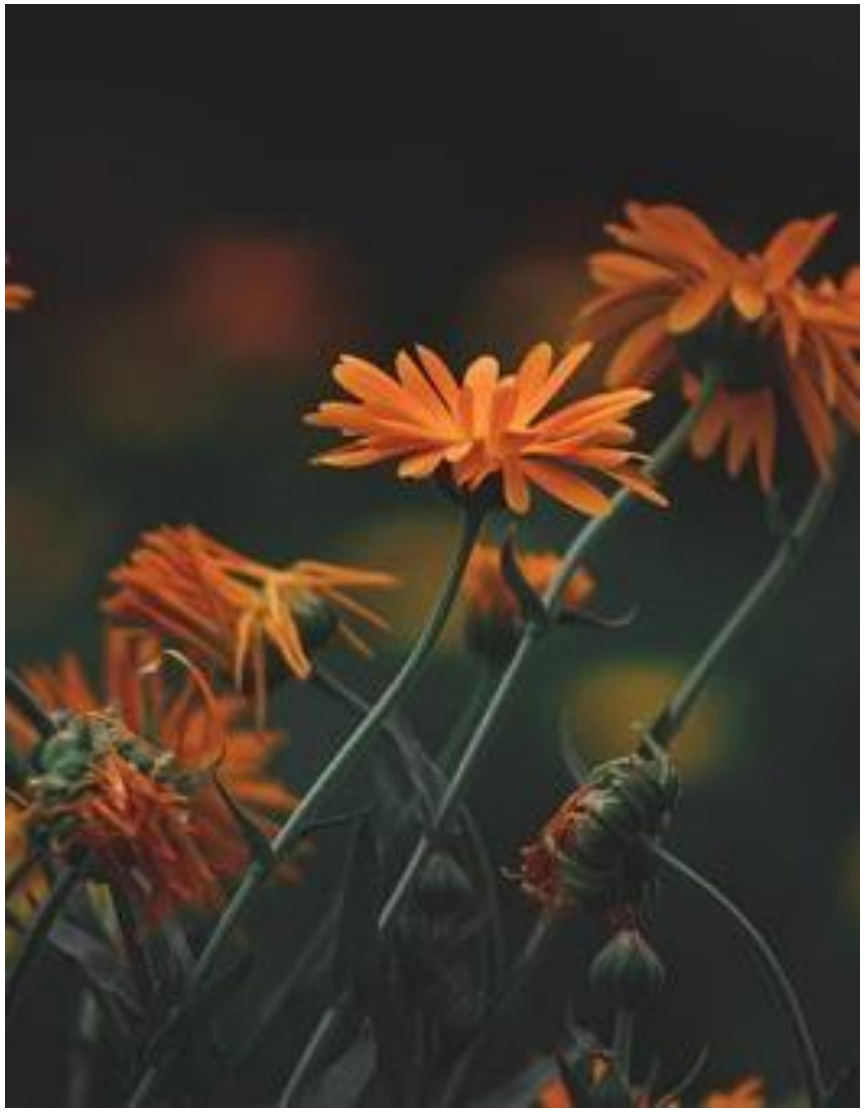
Adds more detailed provisions to CFRA small employer mediation program.

- Employers with 5 – 19 employees.
  - Makes participation in the mediation program a prerequisite to filing a civil action.
  - Requires Department of Fair Employment and Housing (DFEH) to inform employees of this requirement.
  - Clarifies that a small employer may stay a civil lawsuit or arbitration proceeding to pursue mediation if the complaint should have been subject to the mediation pilot program.

SAFETY AND WAGE ENFORCEMENT PENALTIES

SB 606 – Workplace Health & Safety

- Two new Cal/OSHA violation categories:
  - “Enterprise-Wide” Violations.
  - “Egregious” Violation.
  - Effective January 1, 2022.



SB 606 – Workplace Health & Safety: Enterprise-Wide Violations

- Creates a rebuttable presumption that an employer with multiple worksites has committed an "enterprise-wide" violation if Cal/OSHA determines:
  - The employer has a non-compliant written policy or procedure or there is evidence of a pattern of practice.
  - Enterprise-wide citations will carry the same penalties as repeated or willful citations, up to $134,334 per violation.

SB 606 – Workplace Health & Safety: Egregious Violations

- The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. For purposes of this paragraph, “catastrophe” means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
- The violations resulted in persistently high rates of worker injuries or illnesses.

SB 606 – Workplace Health & Safety: Egregious Violations, Continued…

- The employer has an extensive history of prior violations of this part.
- The employer has intentionally disregarded their health and safety responsibilities.
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

SB 606 – Workplace Health and Safety

- Requires each instance of an employee exposed to that violation to be considered a separate violation for the issuance of fines and penalties.

AB 1003 – Intentional Wage Theft

- Punishable as GRAND THEFT under the California Penal Code.
  - Amount greater than $950 for one employee.
  - More than $2,350 for two or more employees in a consecutive 12-month period.
  - Prosecutors may charge as misdemeanor or felony.
  - “Employee” includes independent contractor
  - “Employer” includes independent contractor’s hiring entity.

SB 572 – Enforcement of Wage Liens

- Wage liens against employers
  - Lien on real property to secure amounts due to the Commissioner under any final citation, findings or decision.

EMPLOYERS MUST PAY REST, MEAL BREAK PREMIUM PAY AT "REGULAR RATE"

- Labor Code Section 226.7 states that when an employer doesn't provide a meal or rest break that complies with the rules, it must pay the employee one hour of additional pay at the employee's "regular rate of compensation."

- The California Supreme Court in Ferra v. Loews Hollywood Hotel, LLC (July 15, 2021) clarified, and increased employer's financial obligations, by defining "regular rate of compensation."

- The Court concluded that the employee's "regular rate of compensation" for meal and rest period premium pay is the same as the employee's "regular rate of pay" for purposes of overtime pay, which may be higher than the employee's hourly rate, if they receive other compensation, which include commissions, piece-rate earnings, and non-discretionary bonuses.

CALIFORNIA SUPREME COURT NIXES ROUNDING FOR PURPOSES OF MEAL PERIODS

- Rounding time punches has historically been a common timekeeping practice. Many employers will round time punches to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. Is that practice allowed for clocking out and in from meal breaks? No. The California Supreme Court, in the case of Donohue v. AMN (February 25, 2021) held that rounding may not be applied to meal periods.

- The Supreme Court reasoned that the timing of meal periods are precise obligations, designed to ensure the welfare of workers. "The precision of the time requirements set out in Labor Code section 512 and Wage Order No. 4—'not less than 30 minutes' and 'five hours per day' or 'ten hours per day'—is at odds with the imprecise calculations that rounding involves," the court stated. "The regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time."

CALIFORNIA SUPREME COURT WEIGHS IN ON WHEN STATUE OF LIMITATION BEGINS TO RUN ON HARASSMENT CLAIM

- The California Supreme Court ruled in Pollock v. Tri-Modal Distribution Services, Inc., that the time to file for a claim based upon a failure to promote brought under the harassment provision of the FEHA, starts to run when the employee *knows or reasonably should know* of the employer's allegedly unlawful refusal to promote the employee.

- In this case, the key issue was whether the statute of limitations (which was one year from when the violation occurred to file a claim with FEHA at the time and now has been extended to 3 years) began to run when another employee received the promotion, or when the plaintiff should have reasonably known she was not getting the promotion and someone else was. The Supreme Court clarified that the limitations begins to run when the employee should reasonably have known of the employer's unlawful refusal to promote.

ELECTRONIC DELIVERY OF WORKPLACE NOTICES

SB 657 provides that whenever an employer is required to physically post information meant to appraise employees of their rights under applicable statutes, it "may also distribute that information to employees by email".

Posting requirements do not change. The new law simply allows email notification but does not negate the employer's pre-existing obligation to post physical copies of such notices in the workplace.

Note that penalties for not posting notices required by the Department of Labor will be increased by more than $400. Make sure your place of business has all the required federal and state postings.

DIRECT CONTRACTOR LIABILITY

- SB 727 extends direct contractor's liability for penalties, liquidated damages, and interest owed by a subcontractor on account of performance of the labor for contracts entered into after January 1, 2022.

CALIFORNIA BANS PIECE RATE PAY FOR GARMENT WORKERS

- Recent reports have revealed that garment workers in Los Angeles, which number more than 45,000, don't receive the required minimum wage, meal and rest breaks or overtime pay. Only about one-third are working for employers who are compliant with the wage and hours laws.

- Many garment works who make clothes for major retailers, while working for contractors on a piece-rate basis, actually earn about $4.00 an hour and work 10 our more hours per day. This has raised substantial ethical concerns.

- Effective January 1, 2022, SB 62 will prohibit employers from paying their employees engaged in garment manufacturing by a piece-rate.

- The legislation also expands liability for unpaid wages, including wage theft by contractors, to fashion brands, garment manufacturers, contractors, retail facilities, and others who contract with another person for the performance of garment manufacturing. Such liability is joint and several for the full compensation, penalties, and attorneys' fees due to a garment manufacturing employee.

- Employees will be able to enforce their rights under the law solely by filing a claim with the Labor Commissioner.

- SB 62 also requires garment manufacturers and brand guarantors (the person who contracts with garment manufactures) to maintain certain records for four years.

CALIFORNIA'S BAN ON MANDATORY ARBITRATIONS IS IN FLUX

- California's ban on mandatory employment arbitration agreements, commonly known as AB 51 signed into law in 2019, continues to follow a winding path through the courts.

- AB 51, to take effect January 1, 2020, prevented employers from requiring employees to, as a condition of employment, sign arbitration agreements about employment-related disputes under the Labor Code or FEHA.

- On December 30, 2019, a coalition of business organizations and the U.S. Chamber of Commerce, successfully obtained a temporary restraining order, turning into a preliminary injunction on February 7, 2020, with the U.S. District Court declaring AB 51 invalid as violating the Federal Arbitration Act. The State of California appealed the ruling.

- In a split decision on September 15, 2021, the U.S. Court of Appeals for the Ninth Circuit vacated the preliminary injunction and, in effect reinstated the efficacy of AB 51. In October, the U.S. Chamber of Commerce and other parties filed a petition for an *en banc* review by the full panel of the Ninth Circuit. While this petition is pending, the U.S. District Court's injunction against enforcement of AB 51 remains in effect.

- For now, employers should continue to be wary about requiring applicants and current employees to sign arbitration agreements for employment-related claims as a condition of employment. Although voluntary arbitration agreements with applicants and employees are permissible, caution should be exercised, and such agreement presented only after consulting with legal counsel.

SETTELEMENT AND SEVERANCE AGREEMENTS

SB 331 – Prevention of Use of Non-Disclosure Provisions

- Prevention of use of non-disclosure provisions in cases of alleged workplace harassment or discrimination based on any characteristic protected under the FEHA, not just those based on sex. Required confidentiality of amount paid for any settlement remains in effect.

SB 331 – Prevention of Use of Non-Disclosure Provisions

- Includes allegations of discrimination or harassment based on:
  - Race
  - Religious Creed
  - Color
  - National Origin
  - Ancestry
  - Physical Disability
  - Mental Disability
  - Medical Condition;
  - Genetic Information
  - Marital Status
  - Sex
  - Gender
  - Gender Identity
  - Gender Expression
  - Age
  - Sexual Orientation; or Veteran or military status.

SB 807 – Employer Record Retention Requirement

Extends record retention requirement to four years (instead of two), with specified extensions when a complaint has been filed.

Modifies Department of Fair Employment and Housing ("DFEH") authority in a variety of ways.

SB 93: Rehiring and Retention

Requires that employers in certain industries, particularly the hospitality industry, make written job offers to employees whom they laid off because of COVID-19.

Employees have five business days to respond, and employers must keep records for three years.

Applies from April 16, 2021 to December 31, 2024

WORKER CLASSIFICATION

AB 701 – Warehouse Distribution Centers

- Specifically targets warehouse distribution centers.
  - Requires covered employers to provide each nonexempt employee working at a warehouse distribution center a written description of each quota to which they are subject, including
    - Tasks to be performed.
    - Materials produced or handled.
    - Time periods.
    - Any potential adverse employment actions resulting from failure to meet quotas.
  - Employees cannot be required to meet quotas that prevent compliance with meal or rest periods, bathroom breaks, or health and safety laws.

AB 1561 and AB 1506- Exemptions from AB 5

- Exempts insurance claims adjusters, insurance third-party administrators, construction industry subcontractors, and manicurists from the ABC test for determining whether a worker is an independent contractor.

- AB 1506
  - Adds exemption for newspaper carriers from the ABC test.

DYNAMEX APPLIES RETORACTIVELY

- In Vazquez v. Jan-Pro Franchising International, the California Supreme Court answered “yes” to the Ninth Circuit’s question, “Does your independent contractor ABC Test in Dynamex apply retroactively?”

- The Court concluded that there is no reason to depart from the general rule that judicial decisions are given retroactive effect.

- Employers defending against independent contractor misclassification cases that predate the 2018 Dynamex decision should reevaluate those issues under the more demanding ABC Test rather than rely on the more favorable, but outdated Borello Test.

COVID-19 UPDATES

AB 654 – COVID-19 Notice and Reporting

Revises language used to describe COVID-19 notice requirements to make it more consistent.

Require the employers, when giving notice to the local public health agency of a COVID-19 outbreak, to give that notice within 48 hours or one business day, whichever is later.

Expands the employers exempt from the COVID-19 outbreak reporting requirement to various licensed entities, including, but not limited to, community clinics, adult day health centers, community care facilities, and child day care facilities.

SB 336 – Public Health, COVID-19

- When the California Department of Public Health (CDPH) or a local health officer issues an order or mandatory COVID-19-related guidance, they must:
  - Publish the order or guidance on their website along with order or guidance's effective date.
  - The CDPH or local health officer must also create an opportunity to sign up for an email distribution list to receive updates on the order or guidance.

COVID-19

In addition to the new laws, employers should continue to monitor COVID-19 regulatory developments.

On December 16, the Occupational Safety and Health Standards Board readopted the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards (ETS) for the second time. The emergency standards took effect on January 14, 2022 and apply to most workers in California.

A federal emergency regulation related to vaccines for large employers (100 or more employee), after which Cal/OSHA will be required to adopt an equivalent or more stringent standard within 30 days.

Employers should also continue to monitor their local ordinances for supplemental paid sick leave, vaccine leave or other COVID-19-related measures.

COVID-19 – Federal Mandate

- Applies to businesses with at least 100 employees and are covered by OSHA's Emergency Temporary Standard (ETS).
  - This had been blocked by the Supreme Court.
- Federal mandate requiring certain workers to get vaccinated or test weekly, starting January 4.
  - OSHA Paused Vaccine-or-Testing Rule.
  - For now, employers are not required to comply with the rule's deadline.
  - Employers should plan now.

COVID-19 – Federal Mandate

Health Care Workers – Medicare- and Medicaid-certified providers and suppliers.

Police and Firefighter Unions challenge city mandates in Los Angeles, Chicago and New York.

Court upholds airlines' COVID-19 vaccination policy.

Workers that refuse to get vaccinated.

- Employees refuse to get vaccinated for medical reasons, including pregnancy-related reasons, or based on sincerely held religious beliefs, unless an accommodation would cause undue hardship for the business.

COVID-19 Workplace Emergency Temporary Standard (ETS)

- Revised ETS, effective **January 14, 2022 – April 14, 2022**
  - Exclusion Rules for Close Contacts
  - Exclusion Rules for Positive Test

COVID-19 Workplace Emergency Temporary Standard (ETS), Continued…

Excluding Employees from the Workplace/ Return to Work Criteria

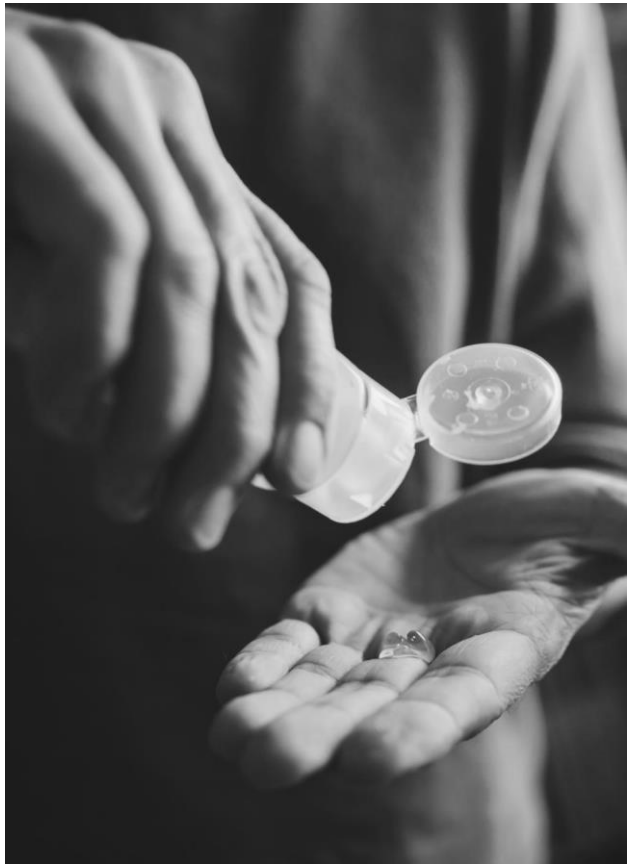
Vaccination status	Isolation or quarantine	Period of time to be excluded from work
All workers that test positive for COVID-19, regardless of vaccination status	Isolation	• Must be excluded from the workplace for at least 5 days. • A worker can return to work after day 5 if they do not have symptoms and test negative. • If a worker cannot test or declines to test,[1] they can return to work after 10 days. • Must wear a face covering around others at work for a total of 10 days after the positive test.
Unvaccinated workers exposed to someone with COVID-19	Quarantine	• Must be excluded from the workplace for 5 days after the close contact and take a test on day 5. • A worker can come back to work after day 5 if they test negative and do not have any symptoms. • If the worker cannot test or declines to test,[1] they can return to the workplace after day 10 if they do not have symptoms. • Must wear a face covering around others at work for 10 days after exposure. • If the worker develops symptoms, they must be excluded pending a test result.
Booster-eligible, but not boosted workers exposed to someone with COVID-19	No quarantine	• Does not need to be excluded from work if asymptomatic but must have a negative test 3-5 days after close contact. • Must wear a face covering around others at work for 10 days after exposure. If the worker develops symptoms, they must be excluded pending a test result.
Workers received a booster, or are fully vaccinated but not yet booster-eligible.	No quarantine	• Does not need to be excluded from work if asymptomatic, but must take a test on day 5 after exposure. • Must wear a face covering around others at work for 10 days after exposure. • If they develop symptoms, the worker must be excluded from the workplace pending a test result.

FLSA - Compensability of Time Spent

- Compensation under FLSA for time spent on activities related to COVID-19 health screenings, testing, and vaccination.
  - Activities that occur during normal working hours.
    - Any time an employer requires testing or vaccination during working hours, it is paid time off.
  - Activities that occur outside normal working hours.
    - If there is a policy for vaccination or testing that needs to be done outside of working hours, for the employee to perform their job, it is paid time off.
    - If there is no policy and the employee decides to test or vaccinate, it is not paid time off.

Unchanged Requirements

- COVID-19 Prevention Program
  - Employers must establish, implement, and maintain an effective written COVID-19 Prevention Program that:
    - Identifies and evaluates exposures.
    - Implements effective policies and procedures to correct unsafe and unhealthy conditions.
    - Allows adequate time for handwashing and cleaning frequently touched surfaces and objects.



Unchanged Requirements, Continued…

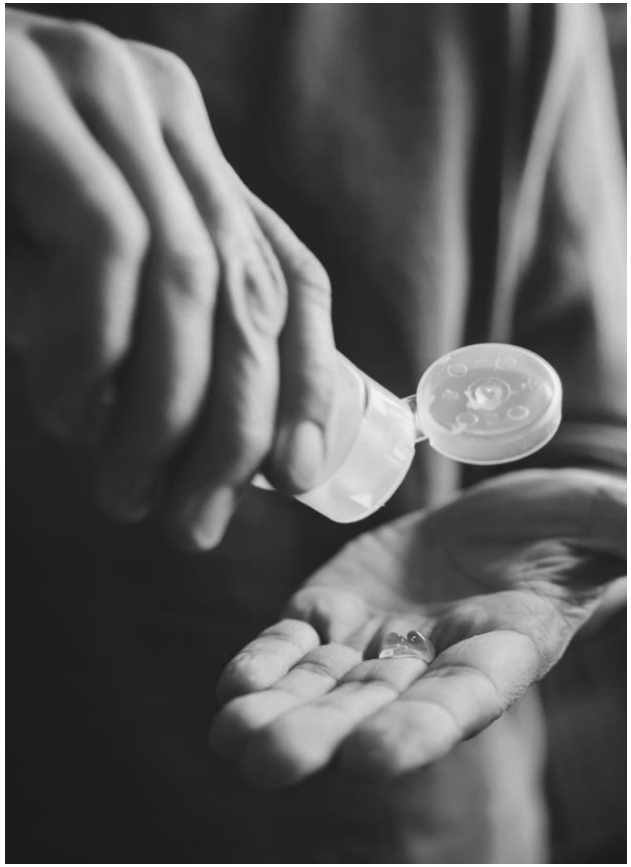
Effective Training and Instruction

- Employers must provide training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19 related benefits.

Notification

- Public Health departments of outbreaks
- Employees of exposure and close contacts

Offer COVID-19 testing



Thank you for Attending!

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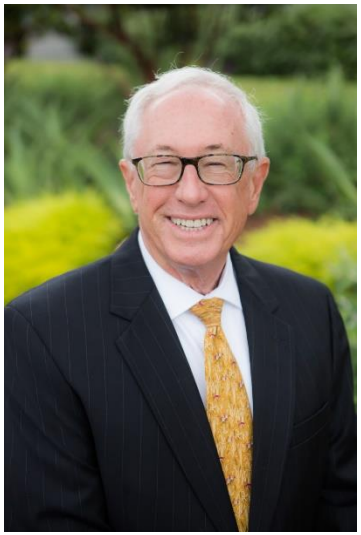

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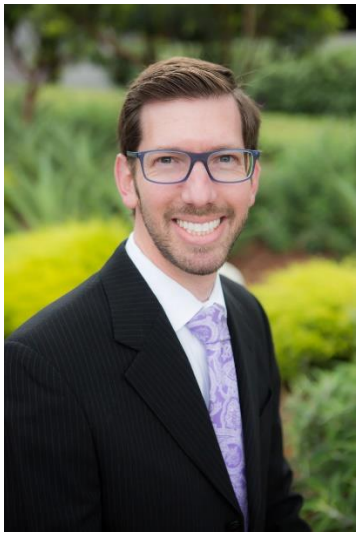

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