Schneiders & Associates LLP
A BUSINESS LAW FIRM

EMPLOYMENT LAW UPDATE, 2024

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WAGE AND HOUR

2024 NEW CALIFORNIA EMPLOYMENT LAWS

- New wage and hour laws will go into effect on January 1, 2024, as well as recent court decisions impacting wage and hour practices and requirements.

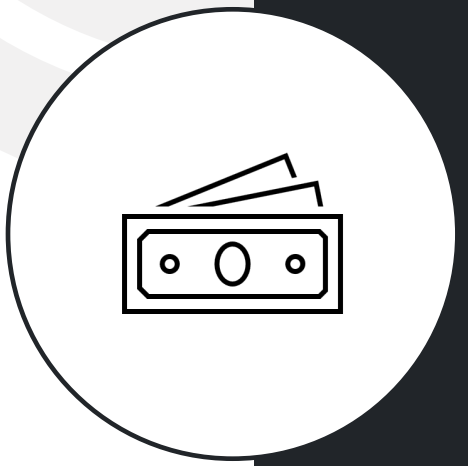
- Work closely with legal counsel to prepare and assess the best approach to comply with the new requirements.

CALIFORNIA STATE MINUMUM WAGE

Effective Date	Minimum Wage – Employers with 26 or more employees	Minimum Wage – Employers with 25 or fewer employees
January 1, 2022	$15.00/hour	$14.00/hour
January 1, 2023	$15.50/hour	$15.50/hour
January 1, 2024	**$16.00/hour**	**$16.00/hour**

CALIFORNIA STATE MINIMUM WAGE, CONTINUED…

- "Living wage ordinances" in various locales within the state have been enacted, so local standards should be confirmed to ensure compliance with all governing wage requirements.



CALIFORNIA STATE MINIMUM WAGE, CONTINUED…

- Covered Exempt computer professional employees must be paid a minimum of $55.58 per hour, or $115,763.35 in annual salary.

- On April 1, 2024 - Covered fast food restaurant employers will see an increase in minimum wage.
  - Fast food workers will increase, to $20 per hour, beginning April 1, 2024.

- On June 1, 2024 – Covered healthcare facility employers will see an increase in minimum wage.
  - The new minimum wage for healthcare facilities will range from $18 to $23 per hour, depending on the size and location of the facility. Fast food workers will also see a similar increase, to $20 per hour, beginning April 1, 2024.

MINIMUM WAGE SALARY: EXEMPT EMPLOYEES

As of January 1, 2024 –

Employers regardless of size, will be required to pay a minimum salary of **$66,560 to all exempt employees**.

- Exempt employees include employees under the executive, professional, and administrative exemption.
- Exempt employees receive 2x the California minimum wage,
- Previous minimum salary for exempt employees was $64,480.

Emergency or Disaster Declaration Information: Wage Theft Prevention Notice (AB 636)

- Requires employers to provide each employee with written notice (referred to as a Wage Theft Prevention Notice), at the time of hiring, with the basic terms of employment as set forth in California Labor Code Section 2810.5, such as rate(s) of pay, payday, legal name of the employer and any "doing business as names," address, workers' compensation information and paid sick leave information, among other items.

- Allows employers to communicate these items "in the language the employer normally uses to communicate employment-related information to the employee," though the California Labor Commissioner publishes a template Wage Theft Prevention Notice for employer use.

- Adds a new requirement that the written notice provide information on "the existence of a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, and that was issued within 30 days before the employee's first day of employment, that may affect their health and safety during their employment."

    - On Dec. 14, 2023, the California Labor Commissioner published an updated Wage Theft Prevention Notice to address this new requirement. Thus, employers who use the Labor Commissioner's template Wage Theft Prevention Notice should update their template notice accordingly.

INDUSTRY- SPECIFIC AND OTHER BILLS

HEALTH CARE

- SB 525 establishes new minimum wage rates for covered health care employees at covered health care facilities as of June 1, 2024. The law defines these terms as follows:

- “Covered health care facilities” include, but are not limited to, facilities part of an integrated health care delivery system, acute care hospitals, acute psychiatric hospitals, special hospitals, licensed skilled nursing facilities (if owned, operated, or controlled by a hospital, integrated health care delivery system, or health care system), licensed home health agencies, outpatient clinics of hospitals, community clinics, urgent care clinics, physician groups, county correctional facilities that provide health care services, and ambulatory surgical centers certified to participate in Medicare.

HEALTH CARE, CONTINUED…

- “Covered health care employees” are those who provide patient care, health care services, or services supporting the provision of health care. They include contracted or subcontracted employees under certain circumstances.

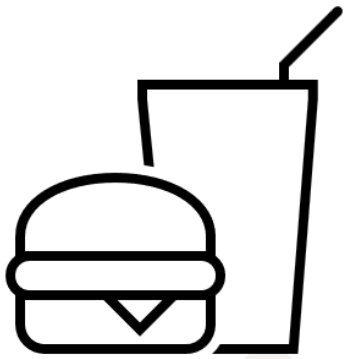
- The relevant minimum wage rate varies under the law depending on which of four tiers the covered health care facility falls within. For example, covered health care facilities with at least 10,000 full-time employees fall within the first tier of SB 525, so the minimum wage for these facilities’ covered health care employees is as follows:
  - From June 1, 2024, to May 31, 2025, inclusive, $23 per hour;
  - From June 1, 2025, to May 31, 2026, inclusive, $24 per hour; and
  - From June 1, 2026, and until adjusted below, $25 per hour.

- Additional details regarding the four tiers, including which covered health care facilities are included and the minimum wages are outlined under SB 525.

FAST FOOD MINIMUM WAGE INCREASE (AB1228)

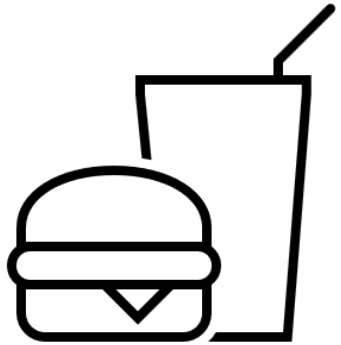
Fast Food Accountability and Standards (FAST) Recovery Act

- As of January 1, 2023, the California FAST Recovery Act was supposed to create, among other things, a Fast Food Council responsible for establishing and implementing binding minimum standards for wages, hours, training, and working conditions. However, a court order stayed the law from taking effect late last year pending the outcome of a voter referendum scheduled for November 2024 (the "Referendum").
- This year, legislators worked with fast food industry and labor union representatives to reach a compromise in the form of AB 1228, which raises the minimum wage for fast food workers and significantly modifies the FAST Recovery Act.
- Pending the referrendum, AB 1228 will apply to "national fast food chains," which the law defines as limited-service restaurants that share a common brand or are characterized by standard options for décor, marketing, packaging, products, etc., and are primarily engaged in providing food and beverages for immediate or off-premises consumption.



FAST FOOD MINIMUM WAGE INCREASE, CONTINUED…

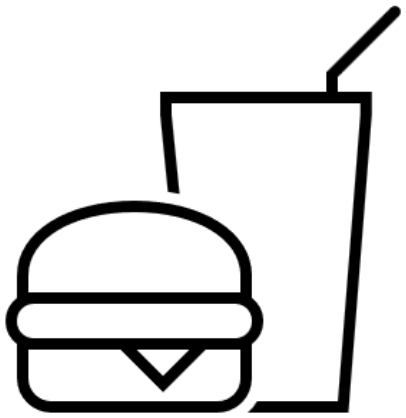
- Beginning April 1, 2024, AB 1228:
  - Repeals the FAST Recovery Act and establishes a Fast Food Council with more limited authority.
  - It eliminates provisions in the prior law regarding joint liability for fast food franchisors for their franchisees' civil liability for employment law violations.
  - It raises the minimum wage rate for fast food workers in the state to $20 per hour.
- Beginning January 1, 2025, AB 1228:
  - Authorizes the Fast Food Council to establish annual minimum wage increases through January 1, 2029, up to 3.5 percent or the rate of change in the U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers, whichever is lower.
  - The law also preempts local municipalities from establishing higher minimum wage rates for fast food restaurant employees specifically; however, local municipalities are still permitted under the law to establish a higher minimum wage that is generally applicable to all industries.



FOOD HANDLER CARDS (SB 476)

- The California Health and Safety Code currently requires certain workers to obtain a food handler card within thirty days of their hire date and to maintain this card throughout their employment as a food handler.

- SB 476 requires employers to cover any cost associated with obtaining a food handler card. In addition to the certification program cost, this obligation includes payment for employees' time required to complete training, the cost of testing, and any element required for the completion of the certification program.



HOSPITALITY AND BUSINESS SERVICE PROVIDERS (SB 723)

- In the spring of 2021, California enacted legislation (SB 93) requiring covered employers in the hospitality and business services industry to notify and offer to rehire qualified former employees who were laid off during the COVID-19 pandemic.

  - "Covered employers" include hotels or private clubs with 50 or more guest rooms, airports, airport service providers, event centers, and, in certain situations, retail and commercial buildings.

  - Under SB 93, eligible employees are only entitled to these recall rights through December 31, 2024.

HOSPITALITY AND BUSINESS SERVICE PROVIDERS (SB 723)

- SB 723 broadens the scope of employees' recall rights under SB 93 in three important ways.
  - **First**, SB 723 expands the definition of "laid-off employees" who are entitled to recall rights. Under SB 93, "laid-off employees" are those workers: (1) who were employed by their employer for at least six months during the 12-month period before January 1, 2020, and (2) whose most recent separation from active service was due to the pandemic. Under SB 723, "laid-off employees" are those workers: (1) who were employed by their employer for at least six months; (2) whose most recent separation from active employment occurred on or after March 4, 2020; and (3) whose most recent separation from active employment was due to the pandemic.
  - **Second**, establishes a presumption for determining whether a separation from active employment is "due to the pandemic." Under the new law, separations due to a lack of business, a reduction in force, or other economic/non-disciplinary reasons will be presumed to be a result of the pandemic.
  - **Third**, extends the law's sunset from December 31, 2024, to December 31, 2025.

LEAVE PROTECTION LAWS

PAID SICK LEAVE EXPANSION (SB 616)

- Amends California's Healthy Workplaces, Healthy Families Act of 2014 to raise the amount of paid sick time employees can obtain each year from three to **five** days (or 40 hours) for full-time employees.

- The law also expands the annual accrual limit from six days (or 48 hours) to 10 days (or 80 hours).

- Employers using the "front-loading" method of allowing paid sick leave must now supply five days (40 hours) at the beginning of the year. Employers using a different accrual process must now guarantee an employee has at least 40 hours of accrued sick leave by the 200th calendar day of employment, in addition to the requirement that employees have at least three days (24 hours) by the 120th day of employment.

- Employees must be allowed to use at least five days (40 hours) each year.

PAID SICK LEAVE EXPANSION (SB 616) - SUMMARY

Under SB 616, an employer must either:

1) Frontload 40 hours/five days of paid sick leave (previously, 24 hours/three days) at the beginning of each year of employment, calendar year or 12-month period (in which case the employer does not need to accrue or carry over unused sick leave),

2) Accrue one hour of paid sick leave for every 30 hours worked (in which case the employer must carry over paid sick leave from year to year but can implement an 80-hour/10-day accrual cap (previously, 40 hours/five days) and can limit the employee's use to 40 hours/five days (previously, 24 hours/three days) in each year of employment, calendar year or 12-month period, or

3) Use a different accrual method provided that the accrual is on a regular basis so that employees have no less than 24 hours of paid sick leave by their 120th day of employment or each calendar year or in each 12-month period and, as a new requirement, no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year or in each 12-month period.

REPRODUCTIVE LOSS LEAVE

- This new law requires employers of five or more employees to provide up to five days of protected leave to employees who
  1) have worked for the employer for at least 30 days and
  2) have suffered a reproductive loss event. SB 848 requires employers to offer a leave of up to five days following a “reproductive loss event.”

- A reproductive loss event is defined as the day or, for a multiday event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth or an unsuccessful assisted reproduction. The five days of protected leave are not required to be taken consecutively but should be taken within three months of the event.

- In the event of an employee experiencing more than one reproductive loss event within a 12-month period, the employer is obligated to provide up to 20 days within a 12-month period. The protected leave is not required to be paid leave; however, employees may use other types of leave concurrently.

- The bill does not require any paperwork or forms from the employee to utilize reproductive loss leave and, since it is protected leave, employers are prohibited from retaliating against employees who exercise their right to take this leave. Additionally, an employer must maintain confidentiality relating to reproductive loss leave.

HARRASMENT AND WORKPLACE VIOLENCE

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553)

- New Requirement to Develop and Implement a Workplace Violence Prevention Plan.
  - This law adds Section 6401.9 to the California Labor Code, which requires nearly all California employers to establish, implement and maintain an "effective" workplace violence prevention plan by July 1, 2024.
  - “Workplace violence” is defined as “any act of violence or threat of violence that occurs in a place of employment that results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress, regardless of whether the employee sustains an injury.”

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- Under the new law, a covered employer must establish a workplace violence prevention plan that includes, among other things, the following:

1) The names or job titles of the individuals responsible for implementing the plan,
2) Procedures to obtain the active involvement of employees in developing and implementing the plan, including their participation in identifying, evaluating and correcting workplace violence hazards, designing and implementing training, and reporting and investigating workplace violence incidents,
3) Procedures for the employer to respond to reports of workplace violence and to prohibit retaliation against the employee who reported the incident,
4) Procedures to develop and provide training on the employer's plan,
5) Procedures to correct workplace violence hazards in a timely manner,
6) Procedures for post-incident response and investigation, and
7) Procedures for the employer to review and update the plan for effectiveness at least annually, or when a deficiency is observed, or after an incident of violence.

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- SB 553 covers virtually all employers. Covered employers must also maintain detailed records regarding the workplace violence hazard identification, evaluation and correction, the employer's investigations and a detailed violent incident log. For every “workplace violence incident,” the violent incident log must include:
  - The date, time and location of the incident.
  - The type of workplace violence.
  - A detailed description of the incident.
  - A classification of who committed the violence.
  - A classification of circumstances at the time of the incident.
  - Where the incident occurred.
  - The type of incident, including, but not limited to, whether it involved a physical attack, threat of physical force, sexual assault, etc.
  - Consequences of the incident, including whether security or law enforcement was contacted and their response.
  - Information about the person completing the log.

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- Moving forward, employers will need to provide training on an annual basis. Additionally, certain training records must be maintained for one to five years, depending on the type of record. The required training also must be conducted when the plan is first established and annually thereafter.

- Additional training must be provided when a new or previously unrecognized workplace violence hazard has been identified and when changes are made to the plan.

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- The initial training **must include:**
  - The employer's plan, how to obtain a copy of the employer's plan at no cost, and how to participate in development and implementation of the employer's plan.
  - How to report workplace violence incidents or concerns to the employer or law enforcement.
  - Workplace violence hazards specific to employees' jobs, corrective measures the employer has implemented, how to seek assistance to prevent or respond to violence, and strategies to avoid physical harm.
  - The violent incident log and how to obtain copies of required records.
  - An opportunity for interactive questions and answers with a person knowledgeable about the employer's plan.

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- Finally, employers must create and maintain training records for a minimum of one year, and the following records **must be maintained** for a minimum of five years:
  - Records of workplace violence hazard identification, evaluation and correction.
  - Violent incident logs.
  - Records of workplace violence incident investigations.

WORKPLACE VIOLENCE PREVENTION SAFETY PLAN (SB 553), CONTINUED…

- Employers must make required records available to the California Division of Occupational Safety and Health (Cal/OSHA), and records of workplace violence hazard identification, evaluation, correction, training records and violent incident logs must be made available to employees upon request.

- Although Cal/OSHA can begin enforcing SB 553 on July 1, 2024, it must propose its own workplace violence standards by December 31, 2025, and adopt such standards by December 31, 2026.

- SB 553 also made changes to existing law permitting employers to petition for temporary restraining orders (TROs) on behalf of employees. The law now permits union representatives to petition for TROs after hearing on behalf of employees (who can decline to be named) who have suffered unlawful violence or a credible threat of violence from any individual that can reasonably be construed to be carried out or to have been carried out at the workplace.

DEFAMATION PRIVILEDGE (AB 933)

- Assembly Bill 933 expands defamation privilege to communications about incidents of sexual assault, harassment, or discrimination made without malice. Prevailing defendants in defamation actions related to privileged communication are entitled to various damages. This shift encourages prudence among alleged perpetrators contemplating defamation suits against those speaking out about workplace misconduct.

REBUTTABLE PRESUMPTION OF RETALIATION (SB 497)

- SB 497 (New **90-Day Rebuttable Presumption** for Workplace Retaliation): SB 497, also known as the Equal Pay and Anti-Retaliation Protection Act, amends California Labor Code Sections 98.6, 1102.5 and 1197.5 to create a rebuttable presumption of retaliation if an employee is disciplined or terminated within 90 days of engaging in certain protected activity.

- The new presumption applies if an employer takes adverse action (such as discharge, discipline, demotion or threat of discharge or demotion) against an employee within 90 days of the employee engaging in certain protected activity. This presumption ultimately makes it easier for employees to establish a prima facie case of retaliation. Under the current law, employees must establish a prima facie case of retaliation by showing:

  1) They engaged in a protected activity,

  2) Their employer took an adverse action against them and 3) there was a casual nexus between the employee's protected activities.

REBUTTABLE PRESUMPTION OF RETALIATION (SB 497), CONTINUED…

- Under SB 497, however, if the 90-day presumption applies, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the alleged retaliation.

- If the employer is able to do so, the burden shifts back to the employee to demonstrate that, despite the non-retaliatory justification, the discipline was nonetheless retaliatory in nature.

- SB 497 further directs civil penalties up to $10,000 *per employee* for *each* violation, to be awarded to the “employee who suffered the violation."

DISPUTE RESOLUTION/EMPLOYMENT CONTRACTS

NO AUTOMATIC STAY DURING APPEALS OF MOTIONS TO COMPEL ARBITRATION DECISIONS

- SB 365 (Elimination of Automatic Stay of Litigation Pending Arbitration Appeal):
  - Under current law, trial court proceedings are automatically stayed pending an appeal of an order denying a motion to compel arbitration.
  - However, effective Jan. 1, 2024, such an appeal will no longer automatically stay trial court proceedings.
  - Instead, employers (and others seeking to arbitrate) may have to litigate the merits of the underlying claims while the case is appealed unless the court exercises its discretion to order a stay.

NO AUTOMATIC STAY DURING APPEALS OF MOTIONS TO COMPEL ARBITRATION DECISIONS, CONTINUED…

As with other recent California laws adverse to arbitration, SB 365 substantially changes existing law and is likely subject to challenge on the basis that it is preempted by the Federal Arbitration Act ("FAA").

SB 365 also conflicts with recent U.S. Supreme Court precedent that held that a district court must stay proceedings pending an interlocutory appeal on the question of arbitration.

NONCOMPETE AGREEMENTS

- SB 699/AB 1076 (California's New Nationwide Focus on Noncompetition Agreements): For decades, California has taken arguably the most pro-employee-mobility position on noncompetition and non-solicitation agreements in the country – generally, post-employment noncompetition and non-solicitation agreements are outright prohibited.

- SB 699 adds a new Section 16600.5 to the California Business and Professions Code that boldly provides that "[a]ny contract that is void under this chapter is unenforceable regardless of where and when the contract was signed" (emphasis added). This blanket ban applies "regardless of whether the contract was signed and the employment was maintained outside of California."

NONCOMPETE AGREEMENTS, CONTINUED…

- An employer will now commit a civil violation for entering into or enforcing a void noncompete. Employees will also now have a private cause of action against their employer. Employers are affirmatively prohibited from entering into noncompetition agreements (existing law established that noncompetition agreements were void against public policy, but there was no affirmative prohibition) or from attempting to enforce a noncompetition agreement. Employees have a private right of action to enforce the law and can obtain injunctive relief, actual damages and an award of attorneys' fees if they prevail.

- In a similar vein, AB 1076 requires employers to contact all current or former employees who were employed after January 1, 2022, and had (or have) contracts containing a noncompete clause, informing them that the noncompete clause is void. The notice must be completed by February 14, 2024, and is required to be in writing and delivered to both the last known physical address and email address of the employee. If an employer fails to send this notice, it constitutes a violation of California's Unfair Competition Law.

NEW LABOR CODE

PROSECUTION FOR CALIFORNIA LABOR CODE VIOLATION

- AB 594 (Changes to California Labor Code Permits Public Prosecutors to Prosecute Actions for Wage Hour Violations): Until Jan. 1, 2029, this law will authorize a public prosecutor to file an action, either civil or criminal, for a violation of specific provisions of the California Labor Code related to payment of wages to employees and willful misclassifications of individuals as independent contractors.

- Thus, AB 594 empowers local prosecutors to pursue a civil or criminal action for violations of the California labor code that arise within their jurisdiction.

- This bill also provides that arbitration agreements that require individual arbitration and limit representative actions shall have no impact on the public prosecutor or the Labor Commissioner to enforce the California Labor Code. If actions brought under this law are successful, recovered wages are prioritized for payments to the affected workers and civil penalties will be paid to California's General Fund. The law also permits public prosecutors to seek injunctive relief and prevailing attorney's fees and costs.

MISCELLANEOUS EMPLOYMENT LAW UPDATES

CANNABIS USE

- AB 2188/SB 700 (Protections for Off-Site, Off-Duty Marijuana Use): AB 2188 and SB 700 amend the Fair Employment and Housing Act (FEHA) by adding provisions explicitly protecting a person's off-site, off-duty marijuana use. The new law, effective Jan. 1, 2024, prohibits employers from discriminating against applicants or employees because they have 1) used cannabis off the job and away from the workplace, or 2) were found to have non-psychoactive cannabis metabolites in their hair, blood, urine or other bodily fluids by a drug screening test.

- However, these new protections do not cover all workers, such as exempting those in the building and construction trades. Employers are also prohibited from requesting information from a job applicant relating to the applicant's prior use of cannabis. Information about prior cannabis use obtained from the person's criminal history is subject to the new protections, unless the employer is permitted to consider or inquire about that information under state or federal law.

- Employers may still use scientifically valid drug tests conducted through methods that screen for current impairment, as the new law does not permit employees to possess, be impaired by or use cannabis on the job, even for medicinal purposes. It also does not eliminate an employer's right to maintain a drug- and alcohol-free workplace under current health and safety laws.

SCOPE OF FEHA DEFINITION

- The California Fair Employment and Housing Act (FEHA) generally prohibits "any employer" from making a medical or psychological inquiry of an applicant. It also states that the term "employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly.

- On August 21, 2023, the California Supreme Court addressed a question posed by the Ninth Circuit Court of Appeals regarding the scope of potential liability under the FEHA. In Raines v. U.S. Healthworks Medical Group (2023) 15 Cal.5th 268, the Ninth Circuit asked the Supreme Court to answer the following question: "*Does California's Fair Employment and Housing Act, which defines 'employer' to include 'any person acting as an agent of the employer' permit a business entity acting as an agent of the employer to be held directly liable for employment discrimination?*" The Supreme Court concluded that an employer's business-entity agent can be held directly liable under the FEHA for employment discrimination in appropriate circumstances when the agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer.

IMMIGRATION AND NATIONALITY ACT'S ANTIDISCRIMINATION PROVISION

- Employers must follow (or at least avoid violating) federal immigration law, lest they end up criminally prosecuted or forced to pay a hefty fine. 8 U.S.C. § 1324b prevents employers from discriminating against citizenship status or national origin in hiring, firing, or recruitment practices. Specifically, Apple had favored workers with temporary visas for permanent labor certification (PERM) (8 C.F.R. § 656, et seq.) positions and deterred U.S. applicants (including U.S. citizens, lawful permanent residents, asylees, and refugees) from applying for those positions, according to the DOJ's investigation.

IMMIGRATION AND NATIONALITY ACT'S ANTIDISCRIMINATION PROVISION

- The PERM program is administered by the Department of Labor (DOL) and "allows an employer to hire a foreign worker to work permanently in the United States." (DOL, Permanent Labor Certification.) One key issue is that with PERM-related positions, the employer must certify that there are not enough U.S. workers available for the position, thus allowing the employer to hire a visa-holder instead. (20 C.F.R. § 656.1.)

- Regardless of the employer's goal, whether to seek some economic benefit, retain high-performing talent, or assist a temporary visa employee in obtaining permanent U.S. status, any employer subject to federal immigration hiring regulations must ensure their hiring practices meet those federal standards. The best practice is to maintain consistent hiring practices and avoid significant variation, even if the intent is to help a favored employee. The cost of noncompliance may end up being a significant fine (Apple will pay $6.75 million in civil penalties and $18.25 million as a back pay fund) and direct government oversight of hiring practices.

New Cases

RAINES V. U.S. HEALTHWORKS MEDICAL GROUP (2023) 15 CAL. 5TH 268

- In this putative class action, plaintiffs allege that their employment offers were conditioned upon their completion of pre-employment medical tests conducted by U.S. Healthworks Medical Group (USHW). They further allege that during the screenings, USHW asked intrusive and illegal questions unrelated to the applicants' ability to work in violation of FEHA.

- Applicants asserted FEHA claims against the prospective employers that used USHW as an "agent" of the employers.

- The Ninth Circuit asked the Supreme Court to answer the following question: "Does California's Fair Employment and Housing Act, which defines 'employer' to include 'any person acting as an agent of the employer' permit a business entity acting as an agent of the employer to be held directly liable for employment discrimination?"

- The Supreme Court concluded that **an employer's business-entity agent can be held directly liable** under the FEHA for employment discrimination in appropriate circumstances when the agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer.

- Practical Implications: This case significantly expands the scope of FEHA. Employers must exercise additional caution when delegating employment-related responsibilities, like pre-employment medical screening or background checks, to third parties.

ATALLA V. RITE AID CORP., 2023 WL 2521909 (CAL. CT. APP. FEB. 24, 2023

- Plaintiff, a pharmacist, sued Rite Aid alleging that a district manager had sexually harassed her, including a series of late-night text messages containing a video of a sexual act and a photo of genitals.

- The Court relied on evidence demonstrating a long-standing personal relationship, and that the parties texted about family, vacations, food and dining, alcohol and drinking, people and pets, exercise, chit chat about work, and they regularly met for coffee, lunch, holiday and birthday dinners, and were acquainted with each other's spouses.

- The Court of Appeal explained that Rite Aid was not strictly liable because Rite Aid demonstrated that the harassment occurred outside of work and that Atalla a willing participant in the personal friendship that pre-existed Atalla's employment.

DURAN V. EMPLOYBRIDGE HOLDING CO., 92 CAL. APP. 5TH 59 (2023)

- Summary: Both individual and non-individual representative PAGA claims were excluded from arbitration pursuant to arbitration agreement's broad carve-out for "claims under PAGA."

- Plaintiff Griselda Duran brought an action pursuant to the California Labor Code Private Attorneys General Act ("PAGA") against her employer, Defendant EmployBridge LLC. As part of her employment application, Plaintiff electronically signed an arbitration agreement, which contained a class and representative action waiver. That waiver provided: "Except as prohibited under applicable law, . . . neither [Plaintiff] nor the Company will assert any class action, collective action, or representative action claims against each other in arbitration, in any court, or otherwise; and [Plaintiff] and the Company shall only submit their own respective, individual claims in arbitration and will not seek to represent the interests of any other person."

- The agreement also included a carve-out provision stating that "claims under PAGA . . . are not arbitrable under this Agreement." Defendant moved to compel arbitration, arguing that the court should compel arbitration of Plaintiff's claim on an individual, nonrepresentative basis and that the representative action waiver was enforceable. The trial court denied the motion, concluding that the issues presented were not subject to arbitration because the agreement specifically excluded PAGA claims from arbitration under its carve-out provision. Defendant appealed.

- Court's Decision: The California Court of Appeal affirmed. As the court explained, because the agreement's carve-out provision was unambiguous, it was unreasonable to interpret the phrase "claims under PAGA" to include some PAGA claims (i.e., non-individual, representative PAGA claims) while excluding others (i.e., the individual PAGA claims). The Court of Appeal held that both individual and non-individual representative PAGA claims were excluded from arbitration pursuant to an arbitration agreement's broad carve-out for "claims under PAGA." "If [Defendant] intended the clause to be a truism—that is, only nonarbitrable PAGA claims would not be arbitrable under the agreement—it should have drafted the clause to say so."

- This case presents an important reminder to proceed carefully when drafting employment agreements, especially arbitration agreements. Employers should avoid recycling or reusing old agreements, or adopting "off the shelf" agreements without reviewing them.

(PENDING REVIEW) CASTELLANOS V. STATE OF CALIFORNIA, 89 CAL. APP. 5TH 131 (2023)

- Background: In 2019, the California Legislature codified the holding in Dynamex by enacting Assembly Bill No. 5 ("AB5"), which established a test for distinguishing between employees and independent contractors. The net effect of AB5 is that workers are presumed to be employees with few narrow and complicated exceptions. Consequently, AB5 made it nearly impossible for workers and businesses of any kind to lawfully engage with each other on an independent contractor basis and for businesses to retain independent contractors without incurring the risk of, at best, being placed into an arduous audit process or, at worst, being deemed to have improperly classified its workers, and all of the repercussions associated with that finding.

- State of California brought suit against Uber and Lyft claiming that these businesses violated AB5 by failing to classify their drivers as employees. In response, several app-based companies (including DoorDash and Instacart) asked California voters, in ballot measure Proposition 22, to exempt app-based drivers and delivery businesses from AB5. Proposition 22 made certain guarantees to workers in lieu of standard employee benefits – including 120% of minimum wage for active driving time (but not for waiting time), a partial health care subsidy for drivers who clocked enough hours per week, and covering costs for on-the-job injuries. Proposition 22 passed in November of 2020 with 58% of the vote.

- In Castellanos, a group of app-based drivers in California and the Services Employees International Union sought a writ of mandate, claiming Proposition 22 unconstitutionally limits the power of California's legislature to govern by removing its abilities to grant workers the right to organize and give access to the state's workers' compensation program.

- The California Court of Appeals upheld Proposition 22, which treats ride-hailing companies' drivers as independent contractors instead of as employees. The validity of Proposition 22 under the state Constitution is a question now pending before the California Supreme Court.

ATKINS V. ST. CECILIA CATHOLIC SCHOOL (2023) WL 3142316

- Summary: The ministerial exception did not apply as a matter of law to a teacher at a religious school who neither taught religion nor engaged in religious activities with the students apart from an occasional end-of-day prayer.

- Atkins, a long-term employee and working her final year as a part-time art teacher, was terminated. She sued to school for age discrimination. The school argued that the claim was barred by the ministerial exception.

- Court's Decision: The California Court of Appeal reversed. On appeal, Plaintiff contended that she was not subject to the ministerial exception because of her secular job duties as an office administrator and art teacher. The court held that Defendant was not entitled to summary judgment because Plaintiff did not teach religion, nor was she required to. Apart from an occasional end-of-the-day prayer, Plaintiff did not lead the students in any religious activities or services and did not attend such services herself. Her agreement to conduct herself in accord with the teachings of the Catholic Church in the context of her office position did not show that Defendant entrusted her as a teacher responsible for forming the faith of the students. Viewing the evidence in the light most favorable to Plaintiff, the court held that triable issues of material fact existed and that Defendant was not entitled to summary judgment.

Questions?

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