Employment Law Update

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ABOUT MEYERS NAVE

Meyers Nave is a full-service law firm that provides transaction, litigation, regulatory compliance, and general counsel legal services to corporations, public entities, non-profit organizations, and public-private partnerships throughout California. Our Labor and Employment attorneys provide day-to-day counseling, draft and review employee handbooks, and conduct internal training programs. We also handle workplace investigations, administrative claims, grievances, ULPs and employee relations issues, mediation, arbitration, and litigation in state and federal courts.

EMPLOYMENT LAW & LITIGATION

We provide sophisticated, operations-focused advice on complex issues such as employee classification, discipline and terminations, leaves of absence, workplace culture, social media, disability, employee privacy and free speech rights, and whistleblower laws. Our attorneys are experts in drafting and revising personnel policies, employee handbooks, and employment contracts, as well as conducting audits covering the entire organization or focusing on specific subjects such as hiring practices or workplace safety. When litigation is unavoidable, we have experience defending employers in single- and multi-plaintiff lawsuits.

LABOR LAW

Our labor lawyers serve as lead negotiator and labor counsel for employers that are involved with labor organizations representing every type of employee. We have negotiated hundreds of labor contracts for small, medium and large employers. We handle collective bargaining, concession and interest-based bargaining, meet and confer, discipline, grievances, unfair labor practice charges, fact-finding proceedings, interest arbitrations and administrative hearings. A key strength of our negotiations practice is our experience litigating and arbitrating the same issues negotiated at the bargaining table.

WORKPLACE INVESTIGATIONS

We have conducted over 250 high-profile investigations on virtually every type of current and emerging workplace misconduct allegation. We also advise on and supervise internal employer investigations to assure compliance with state and federal laws. Meyers Nave specializes investigations that involve the leadership ranks of an organization—elected officials, Board members, executive officers and management team members, department managers, and key personnel including police and fire chiefs, university faculty, and school administrators.

II. COMPENSATION AND WAGE AND HOUR

A. California Minimum Wage Increase

Effective January 1, 2023, the California minimum wage increased to $15.50 per hour for *all employers regardless of size.* Although the state minimum wage for small employers (25 or less employees) was scheduled to increase to only $15 per hour to match the rate that has been in effect for larger employers, the law requires the annual inflation adjustment to kick in early if the rate of inflation exceeds 7 percent.[1] The California Department of Finance declared that the inflation rate from July 1, 2021 to June 30, 2022 increased by 7.9 percent, thus California's minimum wage rate increased by 3.5 percent to $15.50.

Employers should note that that state's minimum wage increases also affect the salaries of exempt employees due to the requirement that exempt employees earn no less than two times the state's minimum wage for full-time work. This means that, beginning January 1, 2023, exempt employees (whether full-time or part-time) in California must be paid a minimum annual salary of no less than $64,480.

Employers must also consider local city or county minimum wage increases that may be even higher. For instance, effective January 1, 2023, the City of San Jose has increased the minimum wage to $17 per hour for all employees and the City of San Diego has increased its minimum wage to $16.30 per hour.[2] Therefore, employers operating within the cities of San Jose and San Diego must pay employees according to the higher local minimum wage. Other local jurisdictions may have implemented minimum wage increases for 2023; it is therefore important to check the minimum wage requirement in the locations where the employees are working.

Takeaways for ALL Employers:

Employers must update their minimum wage payments and postings to reflect state and local increases and ensure that exempt employees (both part-time and full-time employees) are being paid according to minimum annual salary requirements.

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[1] Cal. Lab. Code § 1182.12(c)(3)(B); State of California Labor Commissioners Office, *Minimum Wage*, (Nov. 21. 2022) https://www.dir.ca.gov/dlse/faq_minimumwage.htm.

[2] City of San Jose, *Minimum Wage Ordinance* (Nov. 21. 2022) https://www.sanjoseca.gov/your-government/departments-offices/public-works/labor-compliance/minimum-wage-ordinance#:~:text=Attention%3A%20Effective%20January%201%2C%202023,rate%20is%20%2416.20%20per%20hour.&text=For%20questions%20regarding%20the%20City's,email%20mywage%40sanjoseca.gov; City of San Diego, Media Release, (Sep. 30, 2022) https://www.sandiego.gov/sites/default/files/2022-09-30_city_of_san_diego_hourly_minimum_wage_will_increase_effective_january_1_2023.pdf.

B. Public Hospital Employees Must Receive Meal and Rest Periods (SB 1334)

Effective January 1, 2023, employees who provide direct patient care or who support direct patient care in a general acute care hospital, clinic, or public health setting and are employed by the state, counties, and municipalities in California, along with the Regents of the University of California, are entitled to meal and rest break periods similar to their private sector counterparts.[3]

Applicable workers must now receive an unpaid 30-minute meal period for shifts over five hours and a second unpaid meal period for shifts over 10 hours. Employees also must receive a paid 10-minute rest break every four hours or a major fraction thereof. Employees are entitled to an additional hour of pay at their regular compensation rate as a penalty for each workday that the employer does not provide a meal or rest break. As with their private employee peers, public hospital employees now entitled to these breaks may waive meal periods or take on-duty meal periods as allowed under existing California law. Employees under a valid collective bargaining agreement that addresses meal and rest breaks are exempt.

Takeaways for Public Employers:

- Public healthcare employers need to familiarize themselves with meal and rest period requirements, especially with respect to Wage Order Nos. 4 and 5;
- Public healthcare employers will need to implement policies and systems to ensure compliance with these new meal and rest period requirements including identifying non-compliance with meal and rest period expectations and automating premium payments in the event of a missed meal or rest break; and
- Review your organization's collective bargaining agreements to see if they address meal and rest periods.

C. Fast Food Accountability and Standards Recovery Act or FAST Recovery Act (AB 257)

The Fast Food Accountability and Standards (FAST) Recovery Act would establish the Fast Food Council within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards for wages, working hours, and other working conditions for fast food workers.[4]

The law would only apply to fast food restaurants, defined as establishments that are part of a chain of 100 or more establishments nationally that share a common brand or standards, and that primarily provide food or beverages for immediate consumption either on or off the

[3] SB 1334, codified in Cal. Lab. Code § 512.1.

[4] AB 257, codified in Cal. Lab. Code § 1470.

premises to customers who order or select items and pay before eating, with items prepared in advance, with limited or no table service. The law exempts bakeries that produce bread for sale as a stand-alone menu item on the premises and restaurants located within "grocery establishments," as defined.

The Council would consist of ten members comprised of representatives of fast-food restaurant franchisors, franchisees, employees, advocates for employees, and the government, all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council would be authorized to establish minimum standards for fast-food workers, including setting minimum wages and establishing standards for working hours and other conditions related to health, safety, and welfare, with only a few exceptions and limitations. The standards set by the Council would not supersede those provided for in a collective bargaining agreement *if* the agreement expressly provides for wages, hours of work, and working conditions that are better than the minimum standards established by the Council.

The law also makes it unlawful for a fast food restaurant operator to discharge, discriminate, or retaliate against any fast food restaurant employee for:

- Making a complaint or disclosing information regarding employee or public health and safety;
- Instituting, testifying in, or participating in a proceeding relating to employee or public health or safety or any Council proceeding; or
- Refusing to perform work in a fast food restaurant because the employee had reasonable cause to believe the practices or premises of the fast food restaurant would violate any specified worker and public health and safety laws, regulations or orders, or would pose a substantial risk to the health and safety of the employee, other employees, or the public.

Additionally, the law creates a private cause of action and right to reinstatement for employees in this regard, as well as a rebuttable presumption of unlawful discrimination and retaliation in certain circumstances.

Takeaways for Fast Food Employers:

This law has been stalled for now. A ballot measure will appear on the 2024 general election ballot.

III. EMPLOYEE LEAVE

A. New Requirements for Employers to Provide Unpaid Bereavement Leave (AB 1949)

Starting January 1, 2023, eligible employees are entitled to up to five unpaid days of bereavement leave upon the death of a family member, under Assembly Bill 1949 (AB 1949). The law also expands the small employer family leave mediation program.[5]

Key provisions of AB 1949 related to bereavement leave are as follows:

- Private employers with five or more employees and public sector employers are required to provide eligible employees up to five unpaid days of bereavement leave upon the death of a family member.
    - Employees are considered "eligible" if they have been employed by the employer for at least 30 days prior to the commencement of the leave.
    - A "family member" means a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.[6]
    - Employees eligible for AB 1949 leave must complete their leave within 3 months of the date of death.
    - The days of bereavement leave do not have to be taken consecutively.
- Leave must be taken pursuant to any existing bereavement leave policy of the employer. In the absence of an existing policy, the bereavement leave may be unpaid. However, the bill authorizes employees to use certain leave balances otherwise available to the employee, including accrued and available paid sick leave.
- It is an unlawful employment practice for an employer to:
    - Refuse to grant a request by an employee to take eligible leave;
    - Engage in specified acts of discrimination, interference, or retaliation relating to an individual's exercise of rights under the bill.
- If requested by the employer, the employee must provide documentation of the death of the family member within 30 days. The term "documentation" includes, but is not limited to, a death certificate, a published obituary, or written

[5] AB 1949 amends Cal. Gov. Code §§ 12945.21 and 19859.3, and adds Cal. Gov. Code § 12945.7.

[6] Those family members are further defined in Cal. Gov. Code § 12945.2.

verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

- Employers must maintain employee confidentiality relating to bereavement leave and shall not disclose any documentation except to internal personnel or counsel.

- The bill does not apply to an employee who is covered by a valid collective bargaining agreement that provides for prescribed bereavement leave and other specified working conditions.

Before, state law granted certain permanent employees of the state up to 3 days of bereavement leave, with up to 2 additional days of bereavement leave upon request if the death is out of state. The old law also specified that these 2 additional days are to be without pay or are to be charged against existing sick leave credits. AB 1949 recasts those provisions to specify that the first 3 days of bereavement leave are to be paid leave, and to remove the condition that the death be out of state for the additional 2 days. An additional changes makes clear that bereavement leave for specified permanent state employees cannot exceed three days with pay.[7]

Finally, AB 1949 requires the Civil Rights Department (CRD) to expand the small employer family leaves mediation pilot program (Pilot Program), created by Gov. Code Section 12945.21, to include mediation for alleged violations of the new bereavement leave entitlement. The Pilot Program applies to employers with between 5 and 19 employees, and shall remain in effect through January 1, 2024.

Takeaways for ALL Employers:

Employers with five or more employees and public employers should add a bereavement leave policy to their employee handbook and personnel policies and provide training to managers to ensure that they are aware of this new leave.

B. Employees Can Use Paid Sick Leave or Unpaid CFRA Leave to Care for a "Designated Person" (AB 1041)

Effective January 1, 2023, is Assembly Bill 1041 (AB 1041), which expands the definition of a "family member" to include a "designated person" under the California Family Rights Act (CFRA)[8] and California's sick leave law, the Healthy Workplaces Healthy Families Act (HWHFA).[9]

AB 1041 represents a significant change for California employers with respect to family and medical leave and paid sick leave. Under both the amended CFRA and HWHFA, employees can

[7] Cal. Gov. Code § 19859.3.

[8] Cal. Gov. Code §§ 12945.1-12945.2, 19702.3.

[9] Cal. Lab. Code §§ 245-249.

identify a designated person for whom they want to use leave when they request unpaid (CFRA) or paid (HWHFA) leave.

Under both amended laws, employers will be able to limit an employee to one designated person per 12-month period. How these laws will each define designated person, however, differs slightly.

CFRA Designated Person:

Under the CFRA, which applies to employers with five or more employees, employers are required to provide eligible employees with job-protected leave to care for numerous family members who have a "serious health condition."[10] Under the CFRA, a designated person means "any individual related by blood or whose association with the employee is the equivalent of a family relationship." The law does not define "equivalent of a family relationship." Employers will be able to request a health care certification for CFRA leave use for an employee's designated person, just as they may ask for a certification for use of leave for family members.

CFRA & FMLA:

With the new ability to take leave for a "designated person," employers who must also provide leave under the federal Family and Medical Leave Act (FMLA), may be required to provide as much as 24 weeks of unpaid leave. For example, CFRA considers a family member to include a domestic partner, grandchild, grandparent, and sibling, and now also permits leave to care for a "designated person." Since none of these categories overlap with federal FMLA leave, there is a possibility that the employer would have to provide 12 weeks of CFRA leave, and 12 weeks of FMLA leave.

> **Example:**
>
> An employee's father and maternal aunt each have a serious health condition. If the employee chooses the aunt as a designated person, the employee could use up to 12 weeks of CFRA leave to care for the aunt. Because the aunt is not an FMLA family member, those 12 weeks of leave would not count against the employee's federal leave entitlement, meaning the employee could then use up to 12 weeks of FMLA leave to care for the employee's father. Note, however, that if the order of care were reversed, and instead the employee elected first to provide up to 12 weeks of care for the employee's father, an employer could "double count" that leave under both the FMLA and CFRA, so the employee would be unable to use an additional 12 weeks of leave to care for the employee's aunt during that same 12-month period.

[10] Currently, CFRA includes leave to care for a child, parent, parent-in-law, stepparent, grandparent, grandchild, sibling, spouse, or state-registered domestic partner. Cal. Gov. Code § 12945.2.

Designated Person for Paid Sick Leave:

Under the HWHFA, California's paid sick leave law, employees are permitted to use paid sick leave for diagnosis, care or treatment of an existing health condition, or preventive care for an employee or an employee's "family member."[11] Under the old law, "family member" was defined as an employee's child, parent, spouse, state-registered domestic partner, grandchild, and sibling, including stepchild and stepparent relationships.[12] California's HWHFA applies to employers of all sizes.

AB 1041 extended paid sick leave to care for an employee's "designated person." For purposes of paid sick leave, a "designated person" means "a person identified by the employee at the time the employee requests paid sick leave." This definition does not require the person be related by blood, or even a family-equivalent relationship. Subject to guidance from California's Labor Commissioner, a designated person for HWHFA purposes possibly might include a roommate, a new romantic partner, or a friend.

HWHFA & Local Ordinances:

The amended HWHFA is not be the first law in California to allow employees to use paid sick leave for a designated person. Under the paid sick and/or safe leave ordinances in Berkeley, Emeryville, Oakland, and San Francisco (and under the San Francisco Public Health Emergency Leave Ordinance), an employee without a spouse or registered domestic partner can designate a person for whom they can use paid leave.[13] Unlike the amended HWHFA, which will allow an employee to designate a person at the time they request leave, these local ordinances require an employer to, shortly after employment begins, allow an employee to make a designation that will apply to future leave requests, and to update that designation annually.

The different designated-person standards could present a few challenges. Because under the HWHFA employees can make the designation at any time, employers will be less able to set a specific time period each year for HR to coordinate employees' family member designations. Further, the state law is silent concerning how the designation interacts with similar local laws, so an employee could possibly designate one person for whom to use leave under a local ordinance and a different person under state law.

The new law also expands the ability to take "kin care" leave:

Labor Code sections 233 and 234 are informally known as California's "kin care" law. In a nutshell, the kin care law requires that, if an employer provides employees paid sick leave employees can use for specific reasons, the employer must allow an employee to use a portion of that leave to

[11] Cal. Lab. Code § 246.5.

[12] Cal. Lab. Code § 245.5.

[13] For examples, see Berkeley Municipal Code 13.100.040(b.3) and Emeryville Municipal Code 5-37.03(c)(1).

care for or assist a family member for covered reasons. Since 2016, the kin care law has defined family member by using the HWHFA's definition.[14] Therefore, the new law's expansion of the definition of "family member" also expands who can be the beneficiary of "kin care."

Takeaways for ALL Employers:

- Employers should review and update their policies to reflect AB 1041, as well as prepare to handle use of these leaves to care for a "designated person."
- Employers must be prepared to track the use of CFRA and paid leaves to care for a "designated person."
- Employers should monitor the websites of California's Civil Rights Department (formerly the Department of Fair Employment and Housing) and Labor Commissioner for forthcoming guidance or proposed rules. .

C. New Paid Leave Requirements for Reserves or National Guard on Active Deployment (SB 984)

Senate Bill 984 ("SB 984") amends sections 19774 and 19775.1 of the Government Code, relating to military service. SB 984 adds National Guard active duty and inactive duty training drill periods to the type of short-term military leave of absences that are to be paid for the first thirty (30) days of leave. Currently, only active military leave must be paid for the first thirty (30) days. To be eligible for this new paid leave, an employee must have been employed with that employer for at least one (1) year. SB 984 went into effect on January 1, 2023.

The requirements of SB 984 are visualized by this table:

Leave Type	Old law	Amended law
Unpaid Leave for members of reserve military units and National Guard; authorizes employee members to elect to use vacation time or accumulated compensatory time off (Gov. Code § 19774)	Employees required to attend scheduled reserve drill periods; or perform other inactive duty reserve obligations shall be granted military leave of absence without pay, as provided by federal law.	Employees required to perform inactive duty obligations shall be granted military leave of absence without pay, as provided by federal law.

[14] "'Family member' has the same meaning as defined in Section 245.5." Cal. Labor Code § 233(b)(2).

Leave Type	Old law	Amended law
Paid Leave up to thirty (30) days for short-term military leave of absence for employees who have at least one year of continuous state service or sufficient recognized military service equal to one year (Gov. Code § 19775.1)	Employee who is granted a short-term military leave of absence for active military duty, but not for inactive duty, shall be entitled to receive their salary or compensation for the first thirty (30) calendar days of active duty served during their absence.	Employee who is granted a short-term military leave of absence for active military duty, including, but not limited to, scheduled military reserve unit drill periods and National guard active duty and inactive training drill periods, shall be entitled to receive their salary or compensation for the first thirty (30) calendar days of active duty served during their absence.

IV. WORKPLACE PROTECTION

A. WARN Act/Layoff Disclosure

The Worker Adjustment and Retraining Notification (WARN) Act protects employees, their families, and communities by requiring that employers give a sixty (60) day notice to the affected employees and both state and local representatives before a plant closes, or mass layoffs occur, in order to ensure time for affected individuals to transition and adjust to potential loss of employment. California employers are required to comply with both federal and state WARN Act requirements and should review requirements under both the Federal WARN Act[15] and the California WARN Act[16] to gain a full understanding of their obligations.[17]

Under the Federal WARN, employers are required to provide written notice sixty (60) days prior to a plant closing or mass layoff to employees (or their representative) and to the California Employment Development Department (EDD), Workforce Services Division. The Federal WARN Act generally applies to private for-profit employers, non-profit employers, and can also apply to some public or quasi-public agencies that operate in a commercial context and are separately organized from the regular government.

The California WARN Act expands on the requirements of the Federal WARN Act to provide further protection to employees. Under California WARN, a "covered establishment" is any industrial or commercial facility that employs, or has employed within the preceding twelve months, seventy five or more persons.[18] Employees must have been employed for at least six (6) of the twelve (12) months preceding the date of required notice in order to be counted towards the minimum requirement. In addition to the federal requirement of notice to the EDD, notice must also be given to the Local Workforce Development Areas[19] and the chief elected official of each city and county government within which the termination, relocation or mass layoff is to occur.

Failure to provide required notice under the California WARN Act subjects the employer to a possible civil penalty of five hundred dollars ($500) a day for each day of the violation. Additionally, employees may receive back pay to be paid at the employee's final rate or three year average of compensation, whichever is higher. The employer is also liable for the cost of

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[15] 20 C.F.R. § 639.2.

[16] Cal. Labor Code §1400.

[17] California Employment Development Department (EDD) WARN Act Overview: https://edd.ca.gov/en/Jobs_and_Training/Layoff_Services_WARN.

[18] Cal. Lab. Code § 1400(a).

[19] Local Workforce Development Area Administrators can be found at https://edd.ca.gov/en/jobs_and_training/Local_Area_Listing.

any medical expenses incurred by employees that would have been covered under the employee benefit plan.

Employers should note that any reasonable method of delivery that ensures receipt of notice is an acceptable way to send notices to employees. When sending notices to the EDD, employers should email eddwarnnotice@edd.ca.gov with the required information.

B. Employers Must Comply with Additional Requirements of the California Consumer Privacy Act of 2018 (CCPA) (as amended by the California Privacy Rights Act of 2020 (CPRA))

Since 2019, many companies have been required to comply with the California Consumer Privacy Act (CCPA), which protects consumer data collection and requires businesses to inform consumers when their personal information is collected and the purpose for its use. Businesses subject to the CCPA were required to disclose the categories of personal information collected about an applicant or employee and the purpose for the collection of such information, *prior to its collection*. The CCPA defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.

Employers were exempt from complying with the bulk of the CCPA requirements. However, starting January, 1, 2023, the California Privacy Rights Act (CPRA) amended the CCPA to substantially expand privacy and information security obligations of many employers doing business in California and will require significant changes to existing policies and practices for handling collected personal information.

Who is Subject to the CCPA?

The CCPA applies to businesses that meet the following criteria:

1. Collects consumer personal information for itself or by others on behalf of the business;

2. Does business in California; and

3. Satisfies one or more of the following criteria:

    (a) Has an annual gross revenue in excess of $25 million dollars in the preceding calendar year;

    (b) Alone or in combination, annually buys, sells, or shares the personal information of 100,00 or more consumers or households; or

(c) Derives fifty percent (50%) or more of its annual revenues from selling or sharing consumers personal information. [20]

What rights does the CCPA provide?

Under the CCPA, consumers and employees enjoy the following rights regarding the sharing or sale of personal information:

1. The **right to know** which personal information about the consumer is collected by the business, who it was collected from, the purpose of the collection, and if sold, to whom;

2. The **right to delete** personal information collected from the consumer;

3. The **right to opt-out** of the sale of personal information;

4. The **right to opt-in** to the sale of personal information of consumers under the age of sixteen (16);

5. The **right to non-discriminatory treatment** for exercising rights;

6. The **right to initiate a private cause of action** for any data breaches;

7. The **right to correct** inaccurate personal information; and

8. The **right to limit the use and disclosure** of sensitive personal information.[21]

Businesses who fail to comply with the CCPA are subject to an injunction and *per violation* penalties of $2,500 and up to $7,500 for each intentional violation and each violation involving personal information of minors. Enforcement of the statute began on January 1, 2023. Additionally, private rights of action may be filed for negligent data breaches.

What obligations does the CCPA create for employers?

A business subject to the CCPA must:

1. provide notice of consumer rights;

2. honor consumer rights;

3. fulfill disclosure and retention obligations;

4. facilitate consumer requests; and

[20] Cal. Civ. Code § 1798.199.10 et seq.

[21] *Id.*

5. implement security safeguards.

Takeaways for ALL Employers:

- Determine what type of employee and applicant personal information the company is collecting, where it is stored, and how it disclosed or shared with vendors or others.
- Prepare written policies and procedures to ensure disclosure at the time of collection of information, yearly privacy disclosures, a process to make requests, and timelines and responsibilities for complying with requests.
- Prepare written disclosures and data processing agreements.
- Ensure reasonable security procedures and practices for personal information.
- Provide training to staff who will be responsible for ensuring responses to CCPA requests.

C. Extended Statute of Limitations for Sexual Assault Claims (AB 2777)

The Sexual Abuse and Cover Up Accountability Act provides additional time for victims of sexual assault to pursue legal claims by increasing the statute of limitations for two types of sexual assault claims.[22]

The first change involves claims of adult sexual assault and addresses concerns that a recent extension of the relevant statute of limitations to ten years was insufficient to revive otherwise stale claims. For background, in 2019, California enacted AB 1619 extending the statute of limitations for sexual assault from two to ten years. However, AB 1619 did not expressly state that it was intending to revive otherwise time-barred claims. Thus, AB 2777 clarifies that any "sexual assault" claim based upon conduct that occurred after January 1, 2009 (ten years before AB 1619) and commenced after January 1, 2019, which would have been barred solely because of the statute of limitations, is timely if filed by December 31, 2026.

The second change involves damages suffered because of a cover up of sexual assault occurring on or after a victim's 18th birthday, which could include "related claims" such as wrongful termination and sexual harassment. For such claims that would otherwise be barred because the statute of limitations expired prior to January 1, 2023, it allows such claims to be revived if filed between January 1, 2023 and December 31, 2023. This provision theoretically applies to any time-barred covered claim and does not have a limit on the age of the claims that may be revived.

To qualify for this claim revival, a plaintiff must allege all of the following: (a) they were sexually assaulted; (b) one or more entities are legally responsible for damages arising out of this

[22] Cal. Code Civ. Proc. § 340.16.

alleged conduct; and (c) the entity or entities (including their agents, officers or employees) engaged in or attempted to engage in a "cover up" of a previous instance of sexual assault by an alleged perpetrator of such abuse.

For purposes of this new law, "cover up" means a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to this behavior from being public or disclosed to the plaintiff, including the use of non-disclosure or confidentiality agreements.

As noted, if revival occurs, it applies to any "related claims" arising out of the sexual assault, including wrongful termination and sexual harassment, except for claims: (a) litigated to finality in a court of competent jurisdiction before January 1, 2023, or (b) that have been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

Takeaways for ALL Employers:

- Review any nondisclosure agreements or confidentiality agreements to include language specifically stating that any confidentiality provision does not prevent an employee from discussing the underlying facts of any sexual assault in the workplace.

- Remind and train officers, directors, and human resources staff to avoid any practices that would incentivize silence surrounding sexual assault in the workplace.

- Promptly investigate any complaints of sexual assault and/or harassment and ensure accurate records are made and stored appropriately.

D. COVID-19 Exposure Notice Requirements (AB 2693)

In 2020, California enacted new mandatory employer notification requirements related to

potential COVID-19 exposures in the workplace.[23] Specifically, if an employer or a representative of the employer receives a "notice of potential exposure to COVID-19," the employer must provide notices within one business day of the notice of potential exposure, and potentially may also have to provide separate notice to local public health agencies within forty-eight (48) hours. Employer access to and usage of portions of the workplace that may constitute an imminent hazard to employees due to potential COVID-19 exposure may be prohibited by Cal-OSHA.[24] These requirements were set to expire on January 1, 2023.

AB 2693 extends some of the requirements through January 1, 2024, but reduces the notification requirements and provides an alternative option to post a notice in the

[23] AB 685, codified in Cal. Lab. Code § 6409.6 and § 6325.
[24] Cal. Lab. Code § 6409.6(c).

workplace.[25] The law allows employers who receive notice of potential exposure to place a notice in all places where notices of workplace rules are customarily posted stating the following:

1) The dates on which an employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period;

2) The location of the exposure, including the department, floor, building, or other area;

3) Contact information for employees to receive information regarding COVID-19-related benefits; and

4) Contact information for employees to receive the CDC cleaning and disinfection plan and Cal-OSHA COVID-19 prevention program.

The notice must be posted within one (1) business day from when the employer receives notice of potential exposure and must remain posted for not less than fifteen (15) calendar days. If the employer posts other workplace notices on an existing employee portal, the notice shall be posted on the portal. Alternatively, the employer may provide written notice to all employees who were on the premises at the same time as the confirmed case of COVID-19 but need not provide to all employees who were on the premises information about COVID-19-related benefits, the cleaning and disinfection plan, or the prevention plan. Employers are required to keep a log of all the dates the notice was posted.

Employers are no longer required to notify the local public health agency in the case of a COVID-19 "outbreak" and it removes the requirement for the State Department of Public Health to make publicly available information about COVID-19 outbreaks.

E. Extension of Workers' Compensation Protections Related to COVID-19 (AB 1751)

Certain workers' compensation presumptions regarding COVID-19 that were set to expire on January 1, 2023 have been extended and expanded through January 1, 2024, under AB 1751.

As of September 2020, the California Labor Code was amended to presume that any COVID-19-related illness of an employee arose out of and in the course of employment for purposes of awarding workers' compensation benefits if any of the following requirements were satisfied:

- An employee, who worked at a jobsite outside their home between March 19 and July 5, 2020, tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor services at the employee's place of employment at the employer's direction; or

[25] AB 2693.

- After July 6, 2020, any of the following categories of employees got sick or injured due to COVID-19:
    - First Responders and Health Care Workers, including active firefighting members of specified fire departments or units; certain peace officers; fire and rescue services coordinators who work for the Office of Emergency Services; employees who provide direct patient care or custodial employees in contact with COVID-19 patients who work for designated health facilities; paramedics and emergency medical technicians; employees providing direct patient care for a home health agency; providers of in-home supportive services; and other employees of designated health facilities; or
    - Employees whose employers have five or more employees, and who test positive for COVID-19 during an outbreak at their specific workplace.
        - An outbreak exists if within 14 days one of the following occurs at a specific place of employment: (1) four employees test positive if the employer has 100 employees or fewer; (2) four percent (4%) of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or (3) a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection of COVID-19.

This rebuttal presumption related to COVID-19 was set to expire on January 1, 2023. However, AB 1751 extends these protections to January 1, 2024 and expands the First Responder and Health Care Worker category to include active firefighting members of a fire department at the State Department of State Hospitals, the State Department of Developmental Services, the Military Department, and the Department of Veterans Affairs and to officers of a state hospital under the jurisdiction of the State Department of State Hospitals and the State Department of Developmental Services.

Takeaways for ALL Employers

Ensure managers and human resources staff recognize that COVID-19 related illnesses may be compensable workplace injuries and encourage employees to report workplace injuries.

F. Whistleblower Retaliation Standard

In *Lawson v. PPG Architectural Finishes, Inc.*, the California Supreme Court made it more difficult for employers to defend against claims of whistleblower retaliation under Labor Code

section 1102.5.[26] Labor Code section 1102.5 prohibits retaliation against employees who have disclosed or may disclose information to a government agency, with authority over the employee, or to one with authority to investigate or correct a violation of state or federal law or a local state, or federal rule or regulation. The Supreme Court clarified that in these types of claims, first, the employee bears the initial burden of demonstrating, by a preponderance of the evidence, that protected whistleblowing actions were a "contributing factor" in an adverse employment action against the employee. Then, the employer bears the ultimate burden of proving, by clear and convincing evidence, that the adverse employment action taken against the employee would have occurred "for legitimate independent reasons" even if Plaintiff had not engaged in protected whistleblowing activities.

Before the *Lawson* decision, courts used the *McDonnell Douglas* three-part burden shifting standard and the contributing factor standard inconsistently for whistleblower retaliation claims. The difference between the *McDonnell Douglas* standard and the contributing factor standard is which party bears the ultimate burden of proof. Under the *McDonnell Douglas* standard, the plaintiff has a higher evidentiary standard than the defendant, because the plaintiff bears the final burden of proving that an employer's proffered reason for an adverse employment action was mere pretext for retaliation.[27] The *Lawson* Court determined that the *McDonnell Douglas* standard is only applicable to discrimination cases.

Shortly after the *Lawson* decision, the California Court of Appeals held that the contributing factor standard also applies to the Whistleblower Protection Act pertaining to claims made by state university employees because the language in that Act is nearly identical to the language analyzed by the Supreme Court in *Lawson*.[28]

Takeaways for ALL Employers:

- Employers are advised to set systems in place to ensure that termination decisions are well documented, given the clarified whistleblower retaliation standard.
- Consult counsel before terminating employees that have made whistleblowing complaints or disclosures.
- Whistleblower claims will now be more difficult to resolve on summary judgment.

[26] *Lawson v. PPG Architectural Finishes, Inc.,* 12 Cal.5th 703 (2022).

[27] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[28] *Scheer v. Regents of the University of California*, 76 Cal. App. 5th 904.

G. Prohibition on Compelling Attendance During Emergency Conditions (SB 1044)

Effective January 1, 2023, in the event of an emergency condition, California employers are prohibited from taking or threatening adverse action against employees who refuse to report to, or leave a workplace/worksite due to *a reasonable belief* that the workplace or worksite is unsafe.[29]

Under SB 1044, emergency conditions refer to (1) "conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act" or (2) "an order to evacuate the workplace, a worksite, a worker's home, or the school of a worker's child due to a natural disaster or criminal act." SB 1044 protections do not apply to health pandemics such as COVID-19.

An employee's belief that the workplace or worksite is unsafe is measured by a reasonable person standard, meaning that if a reasonable person, under the circumstances, would conclude that there is a real danger of death or serious injury if that person enters or remains on the premises.

It is also now unlawful for an employer to prevent employees from using their mobile device to seek emergency assistance, assess the safety of a situation, or communicate with a person to verify their safety in such an emergency condition.

SB 1044 Does Not Apply to the Following:

1. First responders;
2. Disaster service workers;
3. Employees required by law to render aid or remain on the premises in case of an emergency;
4. An employee or a contractor of a health care facility who provides direct patient care, supports patient care operations during an emergency, or is required by law to participate in emergency response of evacuation;
5. An employee of a private entity that contracts with the state or any city, county or political subdivision of the state, including a special district, for purposes of providing or aiding in emergency services;
6. An employee working on a military base or in the defense industrial base sector;
7. An employee performing essential work on nuclear reactors or nuclear materials or waste;

[29] SB 1044; Cal. Lab. Code § 1139.

8. An employee of a company providing utility, communications, energy, or roadside assistance while the employee is actively engaged in or being called upon to aid in emergency response, including maintaining public access to services such as energy and water during an emergency;

9. An employee of a licensed residential care facility;

10. Employees of depository institutions such as: certain state and federally insured banks, mutual saving banks, or credit unions (does not include operating subsidiaries);

11. A transportation employee participating directly in emergency evacuations during an active evacuation;

12. An employee of a privately contracted private fire prevention resource; or

13. Employees whose primary duties include assisting members of the public to evacuate in case of an emergency.

Takeaways for ALL Employers:

- Employers with employees that do not fall within the list of exceptions above should establish or adjust workplace emergency policies.
- Employers who prohibit or limit use of personal cell phones by employees should review existing policies to ensure compliance with SB 1044.

H. Employer Obligation to Post Safety and Health Information in Multiple Languages

Employers have expanded obligations to post health and safety information under AB 2068. Under the old law, if the Division of Occupational Safety and Health (Cal/OSHA) made a finding that an employer violated health and safety standards or regulations, Cal/OSHA could issue a citation, which the employer was required to post at or near each place where the violation occurred, or in a place readily seen by all employees. However, the old law did not require the employer to post translations of these notices even if the majority of the worksite spoke a language other than English.

Assembly Bill 2068 (AB 2068) closed this language gap.[30] Effective January 1, 2023 any time a citation or special order or action is required to be posted, the employer must also post an employee notification prepared by Cal/OSHA in multiple languages. AB 2068 requires Cal/OSHA to prepare these notifications in English and the top seven non-English languages used by limited-English-proficient adults in California, as determined by the US Census Bureau's American Community Census, as well as Punjabi (if not already included). AB 2068 allows

[30] AB 2068 amended Cal. Lab. Code §§ 6318, 6431.

Cal/OSHA to enforce this posting requirement by citations and civil penalties of up to $12,471 per violation.

Takeaways for ALL Employers:

Employers must ensure they post all notices received from Cal/OSHA (and in all required languages) to avoid significant civil penalties.

IV. TRADITIONAL LABOR RELATIONS

A. Penalties for Discouraging Union Membership by Public Employers (AB 931)

Effective January 1, 2023, SB 931 allows unions to file a claim against an employer before the Public Employee Relations Board (PERB) alleging violations of Government Code § 3550, which prohibits a public employer from deterring or discouraging public employees or applicants from becoming or remaining union members. Previously, even if PERB sided with a union, the only available remedy was to issue a cease-and-desist order that required the offending employer to post a notice of its violations. Now, however, civil penalties of $1,000 per affected employee, not to exceed $100,000 are available, in addition to giving PERB the authority to award attorney's fees and costs to a prevailing union.

Takeaways for Public Employers:

The potential for significant penalties against a public employer who engages in impermissible anti-union activities means that employers need to clearly understand with specificity what constitutes anti-union activities.

B. Mass Communications Regarding Union Membership by Public Employers

Issued in early October 2022, the Public Employee Relations Board (PERB) found that the Regents of the University of California violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD) by distributing a FAQ to employees in the Administrative Officer II classification regarding their choice to join or support the Teamsters Local 2010. PERB found a violation because: (1) the University did not first provide the Teamsters with an opportunity to meet and confer over the communication; (2) distributing the FAQ in and of itself tended to influence employee free choice regarding joining or supporting the Teamsters; and (3) the University provided no business necessity for distributing the FAQ.

In their decision, PERB stated that any mass communication addressing the general subject matter of union membership or dues is a communication "concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization" under PEDD § 3553 (b), regardless of whether the communication expresses any particular viewpoint on those subjects or offers no viewpoint.

Takeaways for Public Employers:

Contact counsel if you are planning to make any mass communications regarding union membership to ensure any meet and confer obligation is satisfied, even if the communication provides general information.

C. Requirements of a "Name-Clearing Hearing" for Public Employees Under Certain Circumstances

In April of 2022, the U.S. District Court for the Eastern District of California provided some guidance on when a public employer complies with the requirements to offer a "Name-Clearing Hearing" to public employees.[31] In *Fitzgerald v. City of Fresno*, Plaintiff Fitzgerald was a police officer for the City of Fresno. Upon learning about the plaintiff's membership in the hate group the Proud Boys,[32] among other things, the City of Fresno terminated him pursuant to the Fresno Municipal Code, which allows for immediate termination under "extraordinary circumstances."[33] The plaintiff's termination proceeded without the opportunity to review all materials upon which his termination was based, and without conducting a pre-termination hearing to respond to the charges that led to his termination. The Fresno Municipal Code and the Memorandum of Understanding between the City of Fresno and the Fresno Police Officers Association allowed the plaintiff to appeal his termination by (1) filing an appeal before the Civil Service Board, (2) requesting a hearing before a hearing officer who would then make a recommendation to the Civil Service Board, or (3) filing for binding arbitration. The plaintiff chose to request a hearing before a hearing officer.

Thereafter, the Officer filed a lawsuit claiming, among other things, that he was deprived of liberty without due process in violation of the Fourteenth Amendment. Specifically, the plaintiff's argued that he was stigmatized as a racist without a "name-clearing" hearing in violation of his due process rights, thereby foreclosing his liberty to continue in his occupation as a police officer. A "name-clearing" hearing must be afforded to a public employee when they are "terminated for reasons 'sufficiently serious to stigmatize or otherwise burden the individual so that he is not able to take advantage of other employment opportunities,' and the public employer publicizes those stigmatizing charges." Defendants moved to dismiss the plaintiff's cause of action, arguing that he was afforded an opportunity for a post-termination "name-clearing" hearing, which the plaintiff failed to request.

The *Fitzgerald* Court explained that due process imposes no hard and fast requirements for the "name-clearing" hearing, including whether it is public, evidentiary in nature, or held prior to the deprivation of liberty or property interest. The Court ruled that the post-deprivation hearing afforded to the plaintiff, through the Fresno Municipal Code and the Memorandum of Understanding, sufficiently satisfied due process, and through that process the plaintiff had the opportunity to clear his name.

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[31] *Fitzgerald v. City of Fresno*, 1:21-CV-01409-AWI-SAB (E.D. Cal. Apr. 21, 2022).

[32] The Proud Boys are considered a "hate group" according to the Southern Poverty Law Center. (*See* https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys.)

[33] *See* Fresno Municipal Code Section 3-280(d).

Takeaways for Public Employers:

If you terminate an employee for reasons that are "sufficiently serious to stigmatize or otherwise burden the individual so that he is not able to take advantage of other employment opportunities" and you publicize the stigmatizing chargers, you must provide the employee with an opportunity to request a "name-clearing" hearing. You are not required to provide the employee with this "name-clearing" hearing prior to termination.

D. What Constitutes Sufficient Notice in a Notice of Adverse Action to a Public Employee?

Prior to dismissing or disciplining a permanent state employee, the employer must give the employee notice of the legal standard and reasons for the proposed disciplinary action and give the employee an opportunity to respond, termed a Notice of Adverse of Action ("NOAA").[34] In *Rodgers v. State Personnel Board*,[35] the California Court of Appeals addressed what constitutes sufficient notice in a NOAA.

Plaintiff Rodgers was employed by the Department of Corrections and Rehabilitation ("CDCR"). In May 2018, the CDCR served him with a NOAA that stated Rodgers refused to perform a required restraint check at the beginning of the shift and directed his officers to falsify records saying they had performed the checks. CDCR also alleged that, once the plaintiff found out that officers had reported his misconduct, he angrily confronted them and used profanity when questioning who had reported him. The CDCR alleged that the plaintiff's conduct violated the Government Code and informed the plaintiff that they would be reducing his salary by ten percent for two years. The plaintiff appealed his discipline to the State Personnel Board ("SPB").

After a hearing before an Administrative Law Judge ("ALJ"), which included testimony from the plaintiff and the five other officers involved, the ALJ issued a detailed ruling largely crediting the plaintiff's testimony over the officers' testimony. The ALJ found that the plaintiff had not refused to complete his duties, had not directed anyone to falsify records, and although he had angrily confronted officers and used profanity, he did it because he felt wrongly accused. Nonetheless, the ALJ found that the plaintiff's use of profanity violated the Government Code and upheld the reduction of his salary. The plaintiff brought his case to the Court of Appeal, claiming that the NOAA was insufficient to put him on notice that he could receive the entire punishment even if only one of the three allegations were substantiated. The Court agreed with the plaintiff, stating that because the SPB ALJ found that the plaintiff had engaged in significantly different conduct than that alleged in NOAA, the plaintiff lacked notice that such conduct would subject him to the full penalty proposed in the NOAA. In reaching its conclusion, the Court explained that the question is not whether misconduct occurred, but rather whether

[34] Cal. Gov. Code § 19574.

[35] *Rodgers v. State Personnel Board* (Cal. App. 4th Dist., Div. 2, Sept. 9, 2022) 83 Cal.App.5th 1.

the employee was on notice that the employee's specific conduct could subject them to the proposed penalty.

Takeaways for Public Employers

When preparing a NOAA that contains multiple allegations of misconduct, public employers should clarify within the notice whether the proposed discipline would be enforced even if only one of the multiple allegations is substantiated. If you are unsure about how to draft the notice, you should consult with counsel.

E. Lessons Learned from Recent Private Sector Organizing

Amazon, Starbucks, and Apple are on the growing list of employers that are navigating employee union organizing efforts to address dissatisfaction with working conditions. Apple workers in Towson, Maryland voted to form a union, making them the first of the giant retailer's staff to do so in the U.S. Efforts are underway at Apple stores in Georgia and New York as well. Amazon workers unsuccessfully sought to unionize in Alabama, but landed a win at the Staten Island facility. Fresh off the heels of the first corporate store unionization in Buffalo, N.Y., Starbucks is facing significant and speedy union campaigning efforts with employees at 54 stores in 19 states currently pursuing union elections.

So why do employees unionize? Usually because of dissatisfaction with how management treats employees, or perceived treatment, coupled with the belief that a union can make working conditions better. Pay and benefits are frequently at the top of worker grievances, but other hot button issues include insufficient staffing, a lack of transparency about business decisions and policies, unresponsiveness to worker grievances, and substandard working conditions. Signs that employees are dissatisfied include: increased questioning about wages and benefits, groups of employees attempting to "hide something" from the employer, poor performing employees suddenly acting emboldened, an increasing number of disgruntled employees, and employees using union buzzwords and phrases.

Takeaways for Private Employers:

- Employers should address employee concerns early and consistently, not just when organization efforts commence. This requires fair treatment of all employees, ensuring proper documentation of policies and employment decisions, transparency, providing well-established avenues to address worker grievances, promptly investigating and addressing workers grievances, and ensuring that salary and fringe benefits are (at the least) consistent with industry standard and local costs of living.

- Employers should have a dedicated employee relations team to continually audit working conditions for employees. This should include boots-on-the-ground reviews of facilities and meetings with facility supervisors.

- Supervisors should be properly trained on workers' rights and conflict resolution. Supervisors should also feel empowered to suggest changes to employee relations and HR teams, considering they are the first line of defense and most knowledgeable about departmental needs.

- Once organizing efforts commence, employers should be careful not to disproportionately apply rules against employees engaging in union activity or union organizers. For example, similar to the sustained allegations against Amazon, employers should not selectively enforce solicitation rules, specifically rules about what staff can and cannot do in break rooms and other non-work areas, against only employees engaging in union activity or union organizers. Employers should also ensure their supervisors are fully trained regarding what they can and cannot communicate regarding unions and union representation.

F. Expanding Weingarten Rights for Private Employers

The National Labor Relations Board (NLRB) issued *Troy Grove a Div. of Riverstone Group Inc*.,[36] which expanded "Weingarten rights" - the rights of employees to have a union representative during an investigatory interview. In that case, the NLRB held that strike replacement employees have the right to request a union representative during an investigatory interview that may lead to discipline.

Troy Grove, a mining aggregate company, had two quarries in which one unit of employees was represented by the International Union of Operating Engineers. Following the expiration of the collective bargaining unit, the employees voted to strike. Matt Kelly was hired as a strike replacement worker. After a series of attendance issues, the employer interviewed Kelly, who requested a union representative prior to the commencement of the interview. The employer denied the request for the specific union representative but instead offered to allow another employee to attend who was not a union representative. The employer offered no other options to Kelly. The employer terminated Kelly's employment due to his attendance issues. Troy Grove argued that because employers do not have an obligation to bargain with the union over the terms and conditions of employment for replacement strike employees, the rights to representation also do not attach to replacement strike employees. The NLRB decided that *Weingarten* rights are held by the employee and not the Union and grounded in Section 7 rights of employees to act in concern for mutual aid or protection; thus there is no attached bargaining obligation to be considered.

Takeaways for Private Employers:

The *Troy Grove* decision establishes a *Weingarten* right for strike replacement employees to request a union representative be present during an investigative interview that may lead to discipline.

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[36] *Troy Grove a Div. of Riverstone Group Inc*., 371 NLRB No. 138 (September 14, 2022).

V. ARBITRATION

A. Employers Cannot Require Arbitration of Sexual Assault or Harassment Claims (HR 4445)

A new federal law, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (HR 4445), allows a person alleging sexual assault or sexual harassment to void an arbitration agreement or collective action waiver.[37]

"Sexual assault dispute" is defined as "a dispute involving a nonconsensual sexual act or sexual contact" and "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

Although arbitration agreements or collective action waivers are otherwise enforceable, a person can choose to void the agreement in connection with a covered dispute and pursue the claim in either state or federal court.

The validity and enforceability of an arbitration agreement or collective action waiver will be determined by a court rather than an arbitrator, despite any contractual term to the contrary.

This law applies to any dispute or claim that arises on or after the March 3, 2022 enactment date. Therefore, the law may be invoked to invalidate arbitration agreements or collective action waivers that were signed before the new law came into effect, but not any disputes already in arbitration when it was passed.

Takeaways for Private Employers:

- Arbitration agreements that purport to cover sexual assault and sexual harassment claims are still otherwise enforceable. However, the employee may choose to void the agreement as to sexual assault and/or sexual harassment claims.
- Employers should be prepared to litigate sexual assault and/or sexual harassment claims that arise after March 3, 2022 in court while also arbitrating other claims of the employee that may be arbitrated.

B. Employers are Permitted to Compel Arbitration of Individual PAGA Claims

In an important ruling, in *Viking River Cruises, Inc. v. Moriana*, the United States Supreme Court held that the Federal Arbitration Act (FAA) preempts California's previous prohibition on using arbitration agreements that contain waivers of claims under California's Private Attorneys General Act (PAGA).[38] This clears the way for employers to require an employee to arbitrate their individual claims brought under PAGA. Additionally, with the individual PAGA claims

[37] 9 U.S.C. §§ 401, 402.

[38] *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022).

compelled into arbitration, the employee is effectively no longer able to represent other aggrieved employees as they no longer have the standing required to bring a representative claim.

Takeaways for Private Employers:

- Arbitration agreements are more useful than ever to prevent class actions and PAGA claims, and employers who do not use them should consider them.
- Consult with counsel to ensure that your arbitration agreements are enforceable.
- Conduct an audit to ensure all employees have signed arbitration agreements.

C. U.S. Supreme Court Determines Airline Cargo Workers are Exempt from the Federal Arbitration Act

On June 6, 2022, the U.S. Supreme Court decided *Southwest Airlines Co. v. Saxon*,[39] ruling that airline cargo loaders are exempt from the Federal Arbitration Act (FAA) under the statute's "transportation worker exemption." The case involved Southwest Airlines' attempt to enforce an arbitration agreement with employee Latrice Saxon (Saxon) that required individualized arbitration for wage disputes pursuant to the FAA. In siding with Saxon, the Court found that the employee's specific job duties placed her in a "class of workers" engaged in foreign or interstate commerce who are exempted from the FAA.

Although the Court ultimately sided with Saxon, the Court rejected her argument that *all* airline workers fall into the "transportation worker exemption." The Court stated that Saxon could not make such a generalization because it would expand the statutory text. Instead, the Court focused on Saxon's specific job duties, reasoning that employees like Saxon, who physically load and unload cargo off planes traveling in interstate commerce, "are as a practical matter, part of the interstate transportation of goods."

The decision in *Southwest Airlines v. Saxon* departed from the Court's tendency in recent years to favor arbitration and will likely have an impact on other jobs in the transportation and shipping industries. For example, Uber, Lyft, and Amazon all filed briefs backing Southwest, urging the Court not to interpret the FAA's exception as covering their workers. The ruling did not explicitly say how workers in those industries will be affected. Writing for the court, Justice Clarence Thomas rejected calls to exempt virtually all employees of major transportation providers. However, he also wrote that some workers are exempted from the arbitration law even if they don't physically cross a border.

[39] *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).

Takeaways for Private Employers:

- Employers should consider the enforceability of arbitration agreements under the FAA for employees who have a connection to interstate commerce, such as loading and unloading goods.

- Employers may want to consider updating their arbitration agreements to provide for the application of a state arbitration law should the FAA not apply, as an agreement that is not enforceable under the FAA may nonetheless be enforceable under state law.

VI. EQUITY IN THE WORKPLACE

A. California's Department of Fair Employment and Housing is Now the Civil Rights Department

The California Civil Rights Department (CRD) is not a new government agency—just the renamed California Department of Fair Employment and Housing (DFEH). This change became effective on July 1, 2022. The CRD operates under the direction of an executive officer known as the Director of Civil Rights. The CRD still reflects all the same existing powers and authorities of the DFEH; the rename is to more fully capture the services the department provides and hopefully increase public access to its services.

Takeaways for ALL Employers

- The CRD's new website can be found at https://calcivilrights.ca.gov (although the old DFEH web address currently re-routes to the new one).
- Employers should ensure they have the updated versions of CRD's required posters, guides, and fact sheets, to reflect the new name, logo, and website.
- Employers should review and update any handbooks and/or policies that referred to DFEH.

B. After-The-Fact *Possible* Non-Discriminatory Reasons for Adverse Employment Action Not Sufficient for Employer to Meet its Burden Under *McDonnell Douglas*

In *Dep't of Corr. & Rehab. v. State Pers. Bd.*,[40] the California Third District Court of Appeal addressed when an employer meets its burden to provide a legitimate, nondiscriminatory reason for its action in discrimination claims. The case involved a physician who was denied the opportunity to interview for vacant physician/surgeon positions at two different prisons for which others were chosen. The physician brought a complaint against the Department of Corrections and Rehabilitation (Department) alleging discrimination based on age, race, and gender in violation of FEHA. The State Personnel Board (Board) sustained the physician's complaint. The Board concluded that the physician established a prima case of unlawful discrimination by submitting evidence that she was not interviewed for positions for which she was well qualified and less-qualified persons were hired for those positions, raising an inference of discrimination based on age, gender and/or race. Under the *McDonnell Douglas* burden shifting, the Department was then required to rebut the presumption of discrimination by offering evidence that it had a legitimate, nondiscriminatory reason for its conduct. Instead, those responsible for hiring at the Department testified that they did not know the reasons why

[40] *Dep't of Corr. & Rehab. v. State Pers. Bd.*, 74 Cal. App. 5th 908 (3rd Dist. 2022).

the physician was not interviewed. The Board found that the Department failed to meet its burden.

The Department ultimately appealed the decision. For the first time on appeal, the Department set forth potential non-discriminatory reasons for the failure to interview the physician. The Court concluded that the Department did not meet its burden because the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct. Because the individuals responsible for hiring at the Department testified that they did not know the reasons why the physician was not interviewed, the Department's after-the-fact *possible* non-discriminatory reasons were insufficient.

Takeaways for ALL Employers

If an employer has legitimate, non-discriminatory reasons to support an adverse employment action, the employer should raise these reasons immediately, and not wait to raise them on appeal.

C. FEHA Protections Coming for Off-the-Job Marijuana Use (AB 2188)

Beginning January 1, 2024, employees will have more rights to use marijuana off the job. SB 2188 establishes a new category of employee protection under the California's Fair Employment and Housing Act (FEHA).[41] Once effective, employers will not be permitted to discriminate against employees based on their use of marijuana off-the-job and away from the workplace or based on employer required drug screenings that find non-psychoactive cannabis metabolites in the employee's hair, blood, urine, or other bodily fluid. The new protections apply to persons through hiring, termination, or any term or condition of employment.

Employers can still enforce drug and alcohol free workplace policies and may still test current employees if there is an individualized reasonable suspicion of impairment on the job.

AB 2188 does not apply to employees in building or construction trades and employment positions requiring a federal government background investigation or security clearance.

Takeaways for ALL Employers:

- Employers should update their drug and alcohol free workplace policies to be compliant with AB 2188.
- Employers may need to reconsider the type of test used to test marijuana impairment. Many blood or urine tests measure non-psychoactive marijuana chemicals that do not reflect current impairment, an instead reveal only whether the employee has consumed marijuana over an extended period of time.

[41] AB 2188, codified in Cal. Gov. Code § 12954.

- Coordinate with your testing provider to discuss which testing options are available and compliant with AB 2188.

- Inform employees covered by Department of Transportation rules that AB 2188 does not apply to them.

- Understand that employers who receive federal funds are still bound by federal regulations.

D. California's New Pay Transparency Law

Starting January 1, 2023, California's pay transparency law requires that: (1) all employers of 15 or more employees must include a pay scale in job postings, (2) all employers must provide current employees with pay scale information upon request, and (3) all employers must maintain a record of each employee's job title and wage history for the duration of employment and three years thereafter.[42]

Private employers with 100 or more employees must now submit to the state of California an annual pay data report including the median and mean hourly rates by race, ethnicity, and sex within each job category by May 10, 2023 and by the second Wednesday in May moving forward. Annual pay data reporting requirements also apply to private employers with 100 or more employees hired through labor contractors. California's pay transparency law builds on existing equal pay laws and annual pay data reporting requirements to "better identify gender and race-based disparities."

Takeaways for ALL Employers:

Pay Scale

- Employers should prepare pay scales for each position, as this information may be requested by current employees and applicants.

- Employers should create an internal system to process pay scale requests by current employees.

- Employers of 15 or more employees should establish policies and revise hiring processes to ensure compliance with new job posting requirements. Still to be clarified is whether employers seeking remote employees (who may or not work in California) must post pay scale information.

- There may be impending litigation as technical violations of the new pay scale requirements could lead to additional claims under the California Private Attorneys General Act ("PAGA").

[42] AB 1163, codified in Cal. Gov. Code § 12999 and Cal. Lab. Code § 432.3.

Takeaways for Private Employers:

Pay Data Report

- Private employers of 100 or more employees (including 100 or more employees hired through labor contractors), should establish practices to collect and analyze the information for pay data reports.

- Consider conducting an attorney-client pay equity analysis to determine whether your pay scale and pay data suggests adjustments are needed to increase pay equity.

E. Gender Dysphoria Considered by Some Courts as a Protected Disability Under the ADA

Under a new federal case, *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), the U.S. Court of Appeals for the Fourth Circuit held that people who suffer from gender dysphoria may qualify for protections under the Americans with Disabilities Action (ADA). Gender dysphoria is the sense that the person may feel that there is a mismatch between their biological sex and their gender identity. The court held that "gender dysphoria is a disability suffered by many (but certainly not all) transgender people," and that while being transgender is not a disability, the "clinically significant distress" felt by some transgender individuals may qualify for protections under the ADA.[43]

Although California courts and the Ninth Circuit have yet to tackle whether gender dysphoria absolutely qualifies for protection under the ADA, the Fourth Circuit Court's recognition that gender dysphoria is "closely connected" to transgender identity could mean employers may be liable under the ADA if they fail to consider appropriate accommodations or fail to engage in the interactive process when a transgender employee presents a request to perform workplace activities or functions in accordance with their gender identity.

Takeaways for ALL Employers:

- Managers and Human Resources staff should be trained to recognize that transgender employees may not be discriminated against in the workplace and that reasonable accommodations and an interactive process may be appropriate when a transgender employee presents a request to perform workplace activities or functions in accordance with their gender identity.

[43] *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022).

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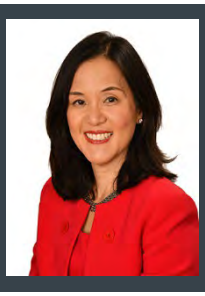

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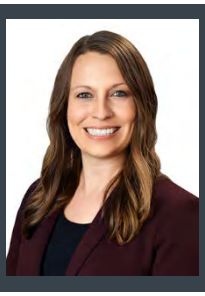

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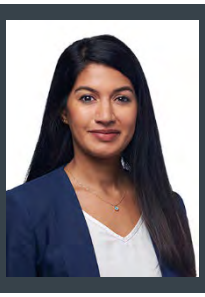

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