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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With nearly 2,000 professionals in 35 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, oil and energy, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 35 个办公室的 2000 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、石油及能源、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

Non-Compete Provisions in Real Estate Joint Venture Agreements

By Alexis R. Alonzo and Ariel B. Robinson

A thorny question in any joint venture relationship is to what extent the partners are permitted to freely engage in business outside of the venture that may compete with the venture. On the one hand, certain partners are likely to engage in numerous projects of a similar nature and their freedom to do so is integral to their success; on the other hand, both partners have an interest in ensuring their venture is successful without conflicts of interest or poaching from a partner's competing projects. This article provides a brief overview of how non-compete provisions in a joint venture agreement may be negotiated and structured to address these issues. For simplicity, this article will assume there is a real estate venture (JV) between an investor (Investor Member) and an operator/developer (Operator Member) that owns certain real estate (Property), and is governed by a joint venture agreement (JV Agreement). The Investor Member and the Operator Member are sometimes referred to in this article individually as a "Member" and, collectively, as the "Members."

WHAT IS A NON-COMPETE PROVISION AND WHAT DOES IT TYPICALLY RESTRICT?

A non-compete provision restricts one Member or both Members from engaging in certain activities that are viewed as competitive with the JV. The typical provision would impose restrictions on acquiring an interest in, or developing, encumbering, selling, leasing, or managing, any property viewed as competitive with the Property (Competing Property) located within a specified area (Non-Compete Area), except for the benefit of the JV. Certain other activities may also be restricted in the JV Agreement, such as: (i) self-dealing directly relating to the Property (e.g., acquiring an additional interest in the Property that is not contemplated by the JV Agreement, such as an interest in the financing that is secured by the Property, or providing services to, or investing in, a lender or purchaser of the Property); and (ii) competition relating to existing projects in which a Member already has an interest (e.g., diversion of tenants, suppliers, or personnel from the Property to such projects). In this article, we will focus solely on restrictions on activities involving new Competing Properties within a prescribed Non-Compete Area.

WHO IS SUBJECT TO THE NON-COMPETE RESTRICTIONS?

In the authors' experience, the non-compete typically applies to the Operator Member and certain of its affiliates. The Operator Member may resist being subject to a non-compete (or try to narrow the application of the non-compete), especially if the JV is investing in an area where the Operator Member is based and does the bulk of its business. Many, if not most, investor members will seek some protection nonetheless. To the extent the Operator Member agrees to be subject to a non-compete, it will try to limit those affiliates who are subject to the restrictions. From the Investor Member perspective, obvious candidates to be restricted are the parties in control of the Operator Member and those entities which are controlled by one or more of such parties. The Operator Member may also want the Investor Member to be similarly restricted. However, many Investor Members will resist any such reciprocity arguing, among other things, that the Investor Member's involvement is immaterial because if another developer will be acquiring, developing, and operating a competing project, it will do so with or without the Investor Member and its affiliates. For simplicity, this article will assume that only the Operator Member (and certain of its affiliates) will be bound by the non-compete.

WHAT IS A COMPETING PROPERTY?

It is important that the Members carefully consider the definition of a Competing Property. From the standpoint of the Member benefiting from the non-compete, the definition should be broad enough to capture all properties that will actually compete, or have the potential to actually compete, with the Property. For example,

if the Property is a multifamily housing project, the definition of Competing Property could include not only "any multifamily property project," but also "any mixed-use project that has a multifamily component and any property that can reasonably be expected to be developed or redeveloped into a multifamily property or a mixed use property with a multifamily component."

From the standpoint of the Member bound by the non-compete, the definition should be narrow enough to exclude categories of projects that do not actually compete, especially those the Operator Member plans to pursue. For example, if the Property is a first-class luxury apartment building, the Operator Member may not want to be precluded from doing low-income housing apartment deals nearby. This can be difficult to draft, given the varied types of projects that are possible. For example, an apartment building might have a percentage of low income units but otherwise have market-rate units. In such instances, the Members may be required to determine whether any number of market-rate units is sufficient to trigger the non-compete, or whether some minimum percentage of the units must be market rate for such project to be prohibited by the non-compete.

NON-COMPETE AREA

The Non-Compete Area is typically a geographic area, often in the form of a radius restriction (e.g., "within a two-mile radius of the Property") or as depicted on a map. While the radius approach is common, it is not always clear what it means if no drawing of the area is included in the JV Agreement. Do the Members intend to cover a Competing Property if the distance from *any point* on the Competing Property to *any point* on the Property that is less than or equal to the prescribed radius? What if only a part of a Competing Property is within one or more circles that have a center at any boundary point of the Property and the prescribed radius? What if that portion of the Competing Property is open space that will not be improved? Is the land or only the building comprising the Competing Property covered by the radius? To avoid confusion and misunderstandings, it is recommended that the Members attach an exhibit to the JV Agreement that clearly depicts the Non-Compete Area.

FOR HOW LONG DOES THE NON-COMPETE RESTRICTION APPLY?

The Investor Member may want the non-compete to apply for so long as the JV owns the Property. By contrast, the Operator Member may argue for a shorter term. For example, in a multi-family development deal, the Operator Member may argue that it should be able to start working on a new multi-development prior to completing its development of the Property, so long as the initial lease-up of the Property is expected to be complete before the Competing Property is ready to hit the market. In response, the Investor Member may push for more protections, such as a minimum number of years (regardless of the status of the Property) following formation of the JV, or a requirement that the Property must reach a point of rent stabilization (e.g., at least 90 percent leased and occupied) before the Operator Member may pursue a Competing Property.

FIRST LOOK RIGHT

The Operator Member may offer instead to give the Investor Member a "first look" at the Competing Property, meaning that the Operator Member must first give the Investor Member the opportunity to invest in the Competing Property with the Operator Member before the Operator Member may pursue the Competing Property alone or with another investor. This is a common request of Operator Members who are asked to provide a non-compete because it gives them a path to pursue a Competing Property within the restricted area if they desire to do so. If the Investor Member rejects the deal following its "first look," then the Operator Member would have the right to proceed with the rejected deal, but as discussed below, this right may be subject to certain conditions.

Relationship Between New and Existing Deals

The Members will need to determine whether an accepted new deal will be done by the JV (e.g., with crossing of promote), or as part of a new parallel venture. Doing the deal through the existing JV is simpler from a documentation standpoint because the original JV Agreement may be drafted to contemplate the acquisition of additional assets so that no new JV Agreement must be entered into at the time a Competing Property is acquired. Even if the Members agree not to cross-promote between the original Property and new Competing Properties, separate distribution waterfalls may be built into the original JV Agreement for future projects. If the Members agree to acquire any Competing Property in a separate parallel venture, life may be more complicated. At the very least, a new JV Agreement must be drafted, negotiated, and executed, which takes time and legal fees.

In that event, the Investor Member may want the Members to agree that the parallel venture will be entered into on the same terms as the original JV, modified solely to reflect the facts, so that the Investor Member's ability to do the new deal is more reliable. However, the Operator Member may want to reserve its right to shop for better equity capital terms and merely allow the Investor Member to match those terms. If the Operator Member is successful in this request, the Investor Member may face a difficult choice in the future – whether to: (i) enter into a new venture on terms that it would not otherwise accept in order to protect its investment in the Property; or (ii) allow the Operator Member to compete with the Property.

CONDITIONS TO PURSUIT OF REJECTED DEAL WITHOUT INVESTOR

Even if the Investor Member rejects the deal offered for the Competing Property, it may attempt to place certain conditions on the Operator Member's ability to proceed with the rejected deal, such as those described below.

Second Look

The Investor Member may require the Operator Member to close the rejected deal within a certain time period after the Investor Member rejects the deal, on not materially better terms. The market may change after the Investor Member's rejection of the deal, so the Investor Member may want another look at the terms for the Competing Property if enough time passes or if the deal becomes available on materially better terms than those originally offered to the Investor Member. The Members must establish the relevant time period within which the closing must occur and may want to specifically define the applicable materiality standard.

No Diversion of Resources

The Investor Member may require that the new deal not interfere with Operator Member's performance under the JV Agreement (e.g., the Operator Member may not divert its on-site personnel or other key employees or resources to the new deal). A seasoned Operator Member may resist this requirement, arguing that it employs only experienced personnel and should not be required to do more than meet the standard of care in the JV Agreement. However, the Investor Member may be concerned that staffing changes could be disruptive to the operation of the Property, even if replacements are made with equally experienced personnel. For example, if a good on-site project manager has been working on a JV development that is only 80 percent complete, the Investor Member may not want someone with no familiarity with the specific project to take his or her place.

No Direct Competition with the Property

The Investor Member may require that any deal pursued separately by the Operator Member not be located within a narrower "blackout" area. In other words, the Operator Member would be completely restricted from involvement with a Competing Property within the smaller blackout area, unless the Members do the deal together. For example, the Investor Member may be willing to accept a first look right for Competing Properties within a 10-mile radius, but only if there is a strict prohibition on Competing Properties within a one-mile radius. In addition, the Investor Member may want to impose some restrictions on direct leasing conflicts outside of the "blackout" radius, especially in the case of office or retail projects.

Reimbursement of Dead Deal Costs

The Investor Member may require that the Operator Member reimburse the costs expended by the Investor Member and the JV in reviewing the rejected deal. If the Operator Member is willing to agree to a reimbursement condition, it may argue for limitations as to timing, for example that the reimbursement will occur only if and when the closing on the Competing Property occurs. It may also want to limit the amount of the reimbursement, for example, with a cap or limited solely to costs jointly approved by the Members.

CONCLUSION

A well-drafted non-compete provision will help the Members strike an appropriate balance between being sufficiently invested in the success of the Property and being able to run their respective businesses, which may inherently conflict with the business of the JV in some respects.

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房地产合资协议中的不竞争条款

原文作者：**Alexis R. Alonzo 及 Ariel B. Robinson**

任何合资企业关系中的一个棘手问题是合作伙伴在多大程度上被允许自由从事可能与合资企业有竞争关系的合资企业之外的业务。一方面，某些合作伙伴可能会参与许多类似性质的项目，且他们能这样做的自由是致使他们成功不可或缺的因素；另一方面，双方都有利益确保他们的企业在没有利益冲突或被合作伙伴的竞争项目挖角的情况下取得成功。本文简要概述了如何协商和架构合资协议中的不竞争条款以处理这些问题。为简单起见，本文将假设有一投资人（投资方）和一运营商/开发商（经营方）一起设立一个房地产合资企业（合资企业）来拥有特定房地产（房地产），并受合资协议（合资协议）的规范。投资方和经营方有时在本文中单独称为“合资一方”，且合称为“合资双方”。

什么是非竞争条款，它通常限制什么？

不竞争条款限制合资一方或合资双方从事某些被视为与合资企业竞争的活动。典型的条款规定除了为合资企业的利益，将对收购位于特定区域（非竞争区域）内的任何被视为与该房地产竞争的房地产（竞争房地产）的权益，或对从事对其的开发、抵押、出售、租赁或管理加以限制。某些其他活动也可能在合资协议中受到限制，例如：(i) 与该房地产直接相关的自我交易（例如，以合资协议未规定的方式取得该房地产的额外利益，例如以房地产担保所作的融资，或向房地产的贷款人或购买人提供服务或投资于房地产的贷款人或购买人）；及 (ii) 与合资一方已经拥有利益的现有项目进行竞争（例如，将租户、供应商或人员从房地产转移到该等项目）。在本文中，我们将只关注在规定的非竞争区域内对涉及新竞争房地产的活动的限制。

谁受不竞争限制的约束？

根据作者的经验，不竞争通常适用于经营方及其某些关联公司。经营方可能会抗拒被不竞争条款所限制（或试图缩小不竞争的适用范围），尤其是当合资企业投资于经营方所在的地区并从事其许多业务时。尽管如此，许多（如果不是大多数的话）投资方仍会寻求一些保护。在经营方同意遵守不竞争的程度内，它将试图限制那些受到限制的关联公司。从投资方的角度来看，明显应被限制的对象是经营方的控制方以及由一个或多个该等方所控制的实体。经营方也可能希望投资方受到类似的限制。然而，许多投资方会抗拒任何此类相互限制的规定，包括会主张说投资方的参与并不重要，因为如果另一个开发商将收购、开发和运营竞争项目，它将会在有或没有投资方及其关联公司的情况下进行。为简单起见，本文假设只有经营方（及其某些关联公司）受不竞争的约束。

什么是竞争房地产？

合资双方仔细考虑竞争房地产的定义是很重要的。从受益于不竞争规定的合资一方的角度来看，该定义应该足够宽泛，以涵盖将与房地产实际竞争或有可能实际竞争的所有房地产。例如，如果该房地产是一个多户住宅项目，则竞争房地产的定义不仅可以包括“任何多户住宅项目”，还可以包括“任何具有多户住宅组成部分的混合用途项目以及可以合理预期将被开发或重新开发成多户住宅或具有多户住宅组成部分的混合用途房地产的房地产。”

从受不竞争约束的合资一方的角度来看，该定义应足够狭窄，以排除实际上不会造成竞争的项目类别，尤其是经营方计划进行的项目。例如，如果房地产是一级的豪华公寓楼，经营方可能不希望被排除在附近进行低收入住房公寓项目。考虑到可能的项目类型多种多样，这可能很难起草。例如，一栋公寓楼可能有一定比例的低收入单位，但除此之外还有市场价单位。在这种情况下，合资双方可能需要确定任何数量的市场价格单位都将足以触发不竞争，或者是否市场价格单位必须达到一定最低的比例才能禁止此类项目竞争。

非竞争区

非竞争区域一般是一个地理区域，通常以半径限制的形式（例如，“在房地产的两英里半径范围内”）或以地图标示。虽然半径方法很常见，但如果合资协议中未包含该区域的图纸，则并不总是很清楚这意味着什么。如果从竞争房地产上的任何点到房地产上的任何点的距离小于或等于规定的半径，合资双方是否打算包括该竞争房地产？如果竞争房地产中只有一部分位于一个或多个以该房地产的任何边界点为中心且规定半径为圆心的圆内怎么办？如果竞争房地产的那部分是不会改善的开放空间怎么办？该半径包括土地或仅包括组成竞争房地产的建筑物部分？为避免混淆和误解，建议合资双方在合资协议中附上清楚描述非竞争区域的附件。

不竞争限制适用期间有多长？

只要合资企业拥有该房地产，投资方可能希望不竞争条款都适用。相反地，经营方可能会争取更短的适用期间。例如，在多户住宅开发项目中，经营方可能会主张说，它应该能够在完成其房地产开发之前开始进行新的多户住宅开发，只要该房地产的初始租赁预计将在竞争房地产准备投放市场之前完成。作为回应，投资方可能会要求更多保护，例如合资企业成立后的最低年限（无论房地产的状况如何），或房地产必须达到租金稳定点的要求（例如，至少 90% 的租赁和占用），然后经营方才可以寻求从事竞争房地产。

优先考虑权

经营方可以改为让投资方对竞争房地产有“优先考虑权”，这意味着经营方必须首先让投资方有与经营方一起投资竞争房地产的机会，然后经营方才能单独或与其他投资者寻求从事进行竞争房地产。这是经营方被要求提供不竞争保护时的一个常见要求，因为如果他们愿意，这为他们提供了在限制区域内寻求从事竞争房地产的途径。如果投资方在其“优先考虑权”后拒绝交易，则经营方将有权进行被拒绝的交易，但如下所述，该权利可能受某些条件的限制。

新的项目与现有项目之间的关系

合资双方将需要确定接受的新项目是由合资企业来完成（例如，通过交叉促销），还是作为新的平行的合资企业的一部分。从文件的角度来看，通过现有合资企业进行新的项目更简单，因为可以起草原始合资协议以考虑收购额外资产，因此在收购竞争房地产时不必签订新的合资协议。即使合资双方同意不在原始房地产和新的竞争房地产之间进行交叉推广，单独的分销安排也可以在原始合资协议中为未来的项目建立。如果合资双方同意以独立的平行的合资企业来收购任何竞争房地产，情况可能会更加复杂。至少，必须起草、谈判和执行新的合资协议，这需要时间和法律费用。

在这种情况下，投资方可能希望合资双方同意平行的合资企业将按照与原始合资企业相同的条款进行，仅作反映事实的修改，以使用投资方进行新交易的能力更为可靠。然而，经营方可能希望保留其购买更好的股权资本条款的权利，而只允许投资方匹配这些条款。如果经营方在此请求中获得成功，投资方将来可能会面临艰难的选择——是否：(i)以其不会接受的保护其对房地产的投资的条款进入新的合资企业；(ii) 允许经营方与房地产竞争。

在没有投资方的情况下进行被拒绝交易的条件

即使投资方拒绝进行被提供的竞争房地产的交易的机会，它也可能会尝试对经营方进行被拒绝交易的能力施加某些条件，如下所述。

再次考虑权

投资方可以要求经营方在投资方拒绝交易后的一定时间内在没有实质更好的条件下完成被拒绝的交易。投资方拒绝交易后市场可能会发生变化，因此如果经过足够长的时间或者如果交易以比最初提供给投资方的条款更好的条件提供，投资方可能希望再次考虑竞争房地产的条款。合资双方必须确定交割必须发生的相关时间段，并可能希望具体定义适用的重要性标准。

不挪用资源

投资方可以要求新的交易不会干扰经营方在合资协议下的履行（例如，经营方不得将其现场人员或其他关键员工或资源转移到新的交易中）。经验丰富的经营方可能会拒绝这一要求，主张说它只雇用有经验的人员，不应被要求做超出合资协议中规定的注意标准的工作。但是，投资方可能会担心人员变动可能会扰乱房地产的运营，即使由同样经验丰富的人员进行更换也是如此。例如，如果一位优秀的现场项目经理一直致力于仅完成 80% 的合资开发，投资方可能不希望不熟悉具体项目的人接替他或她的位置。

与房地产无直接竞争

投资方可以要求经营方单独进行的任何交易不得位于更较窄的“排除”区域内。换句话说，经营方将被完全限制参与较小排除区域内的竞争房地产，除非合资双方一起进行交易。例如，投资方可能愿意接受 10 英里半径内的竞争房地产的优先考虑权，但前提是严格禁止 1 英里半径内的竞争房地产。此外，投资方可能希望对“排除”半径之外的直接租赁冲突加诸一些限制，尤其是在办公或零售项目的情况下。

补偿未完成交易的成本

投资方可以要求经营方补偿投资方和合资企业在审查被拒绝的交易时花费的费用。如果经营方愿意同意补偿条件，它可能会主张对时间的限制，例如，只有在竞争房地产交割时才会发生补偿。它还可能希望限制报销金额，例如，设置上限或仅限于合资双方共同批准的费用。

结论

精心起草的不竞争条款将帮助合资双方在充分投资于房地产的成功与能够经营各自的业务之间取得适当的平衡，这在某些方面可能与合资企业的业务存在内在冲突。

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Federal Trade Commission's Glass Door into the (Made in) USA

By Anthony E. DiResta, Da'Morus A. Cohen and Benjamin A. Genn

HIGHLIGHTS:

- The Federal Trade Commission (FTC) continues its enforcement priority regarding "Made in USA" claims.
- For a marketer to substantiate an unqualified claim that a product is made in the United States, the marketer must – at the time they make the representation – rely upon a reasonable basis that the product is "all or virtually all" made in the United States.
- Companies must comply with the "all or virtually all" standard, including when temporarily shifting parts of its supply chain overseas.

The Federal Trade Commission (FTC) has increasingly prosecuted more deceptive U.S. origin claims under Section 5 of the FTC Act since the start of the COVID-19 pandemic than in the previous decade. This uptick in administrative enforcement increases the cost of compliance surrounding " Made in USA" claims, and companies should take notice regarding any origin claims they intend to make. In addition, in 2021, the FTC adopted the "Made in USA" Labeling Rule (The Rule),[1] which codifies and clarifies the FTC's longstanding position and guidance on U.S. origin claims. The Rule establishes the FTC's ability to pursue potentially strict punishments for those who violate the Rule's mandates related to product labeling.

The FTC regulates U.S. origin claims under its general authority to act against deceptive acts and practices.[2] The FTC has defined a deceptive advertisement or label under Section 5 as one that contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances.[3] And, the FTC has confirmed that a business's or marketer's objective claim is deceptive if the business or marketer lacks a reasonable basis for making such a claim.[4] Therefore, a "Made in USA" claim must be truthful and substantiated prior to being made.[5]

FTC CONTINUES TO RAMP UP ENFORCEMENT OF "MADE IN USA" CLAIMS

For a marketer to substantiate an unqualified claim that a product is made in the United States, the marketer must – at the time they make the representation – rely upon a reasonable basis that the product is "all or virtually all" made in the United States.[6] There is no hard-and-fast rule to prove compliance with the FTC's "all or virtually all" standard, but the product should contain no (or negligible) foreign content.

As codified in The Rule, a marketer must satisfy three prongs to label a product as "made," "manufactured," "built," "produced," "created," or "crafted" in the United States: 1) final assembly or processing of the product occurs in the United States, 2) all significant processing that goes into the product occurs in the United States and 3) "all or virtually all" ingredients or components of the product are made and sourced in the United States.[7] 16 CFR Part 323.2.

The FTC considers a number of factors when determining whether a product meets this standard. The FTC will likewise examine the percentage of a product's total manufacturing costs that are attributable to United

States-related costs on a case-by-case basis.[8] The FTC will consider the "remoteness of foreign content," including the percentage of the product's foreign material cost in addition to the degree to which foreign content is removed from the finished product.[9]

ENFORCEMENT ACTIVITY

In the past several years of the FTC's stronger enforcement of U.S. origin claims, the FTC has alleged the following common forms of misconduct to warrant regulatory intervention, including a recent settlement with Instant Brands, a manufacturer of kitchen and home products:

- Claiming home products were "Made in USA," even though the company had temporarily shifted its manufacturing outside of the United States due to supply chain issues as a result of the COVID-19 pandemic
- Express representations that a product is "Made in USA" or "Manufactured in America" while, in fact, a significant portion, if not all, of the product is imported from abroad and distributed directly to consumers
- Providing third-party vendors with marketing materials that falsely or deceptively misrepresent that the product originated or was assembled in the United States when all or virtually all of the product was not
- Express representations that a product is of U.S. origin while, in fact, foreign materials account for a significant portion of the product's material or manufacturing costs
- Licensing and distribution of misleading seals, graphics or promotional materials purporting to represent that a product is approved as "American-made" while having no reasonable basis to know that companies using the licensed promotional materials sell products of U.S. origin

BUSINESS GUIDANCE AND COMPLIANCE

The FTC has released business guidance to assist companies in complying with the "all or virtually all" standard. Remember, companies have a continuing obligation to ensure that their claims are truthful and substantiated, including when temporarily changing a supply chain to outside the United States.

For a company to make a lawful, ***unqualified*** U.S. origin claim, the final assembly of the product must occur within the United States, all significant processing that goes into the product must occur in the United States, and all or virtually all of the product's parts, ingredients or components, and processing must be made or sourced in the United States.

For a company to make a lawful, ***qualified*** U.S. origin claim, the company must include a clear and conspicuous qualification that 1) appears immediately adjacent to the representation and 2) accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing.

For a company to make a lawful claim that a product was ***assembled*** in the United States, the product must be last substantially transformed in the United States, the product's principal assembly must take place in the United States, and the United States assembly operations must be substantial.

Some of the key requirements – which all advertisers should keep in mind when they are thinking about their disclosures – include:

- When the claim is made in a television commercial or other audio-visual advertising, the disclosure should be presented simultaneously in both the audio and the video
- Disclosures in interactive electronic mediums must be unavoidable
- On product labels, the disclosure must be presented on the principal display panel

When qualifying a U.S. origin claim, the disclosure must appear "immediately adjacent to the representation," and it must accurately convey "the extent to which the product contains foreign parts, ingredients or components, and/or processing."

HOW WE CAN HELP

Holland & Knight's Consumer Protection Defense and Compliance Team includes a robust social media practice, with experienced attorneys that are recognized thought leaders in the field. From representing dozens of companies and individuals in federal and state investigations concerning advertising and marketing to compliance counseling and transactional contract matters involving celebrities, the firm's practice includes regulatory, compliance, litigation, investigation and transactional work in the social media space.

For more information or questions about the specific impact that social media advertising and marketing regulations can have on you or your company, contact the authors, or another member of the Consumer Protection Defense and Compliance Team or International Trade Group.

Notes

[1] An analysis and copy of the "Made in USA" Labeling Rule may be located in the *Federal Register*.

[2] 15 U.S.C. § 45(a)(2) (2020) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations…from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

[3] FTC, FTC Policy Statement on Deception (Oct. 14, 1983).

[4] FTC, Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984).

[5] FTC, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1, 1997).

[6] *Id.*

[7] 16 CFR Part 323.2.

[8] *Id.*

[9] *Id.*

联邦贸易委员会对进入美国（美国制造）的保护门

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重点摘要：

- 联邦贸易委员会 (FTC) 继续其关于“美国制造”声明的重点执法。
- 营销商要证实产品在美国制造的无条件声明，营销商必须——在他们做出陈述时——依赖合理的基础，即产品“全部或几乎全部”在美国制造。
- 公司必须遵守“全部或几乎所有”的标准，包括临时将部分供应链转移到海外时。

自 COVID-19 大流行开始以来，与过去十年相比，联邦贸易委员会 (FTC) 越来越多地根据 FTC 法案第 5 条起诉更多具欺骗性的美国原产地声明。行政执法案件的上升增加了关于“美国制造”声明的合规成本，因而公司应注意他们打算提出的任何原产地声明。此外，2021 年，FTC 通过了“美国制造”标签规则（规则），[1] 该规则规定并阐明了 FTC 对美国原产地声明的一贯立场和指导。该规则确立了 FTC 对违反该规则与产品标签相关规定的人进行可能的严厉惩罚的能力。

FTC 根据其一般权限监管美国原产地声明，以打击欺骗行为和做法。[2] FTC 根据第 5 条将欺骗性广告或标签定义为包含可能误导在这种情况下合理行事的消费者的重大陈述或事实遗漏的广告或标签。[3] 而且，FTC 已经确认，如果企业或营销商缺乏合理的依据来提出此类声明，则该企业或营销商的客观声明具有欺骗性。[4]因此，“美国制造”的声明必须是真实的并在做出之前得到证实。[5]

FTC 继续加大对“美国制造”声明的执法力度

营销商要证实产品在美国制造的无条件声明，营销商必须——在他们做出陈述时——依赖合理的基础，即产品“全部或几乎全部”在美国制造.[6]除了产品没有包含外国成分(或可忽视不计的外国成分)外，并未存在明确可证明符合 FTC 的“所有或几乎所有”的标准的公式。

正如规则中规定的那样，营销人员必须满足以下三个条件才能将产品标记为在美国“制造”、“产制”、“建造”、“生产”、“创造”或“制作”：1) 最终组装产品或加工发生在美国，2) 进入产品的所有重要加工发生在美国；和 3) 产品的“所有或几乎所有”成分或组件均在美国制造和采购。[7]美国联邦法规 16 篇第 323.2 部分。

FTC 在决定产品是否符合此标准时会考虑多种因素。 FTC 还将逐案审查产品总制造成本中可归因于美国相关成本的百分比。[8]FTC 将考虑“外国成分稀少的程度”，包括产品外国材料成本的百分比以及外国成分从成品中去除的程度。[9]

执法活动

在过去几年中，FTC 加强了对美国原产地索赔的执法力度，FTC 指控以下常见形式的不当行为需要监管干预，包括与厨房和家居产品制造商 Instant Brands 最近达成的和解：

- 声称家庭产品是“美国制造”，尽管该公司由于 COVID-19 大流行导致供应链问题暂时将其制造转移到美国以外
- 表示产品是“美国制造”或“美国生产”，而事实上，即使不是全部，也有很大一部分产品是从国外进口并直接分销给消费者的
- 向第三方供应商提供营销材料，这些材料虚假地或欺骗性地歪曲了产品在美国原产或组装的事实，而实际上所有或几乎所有产品都不是
- 表示产品原产于美国，而实际上外国材料占产品材料或制造成本的很大一部分
- 许可和分发误导性印章、图形或宣传材料，声称表示产品被批准为“美国制造”，但没有合理的依据知道使用许可宣传材料的公司销售美国原产产品

业务指导与合规

FTC 已发布业务指南，以帮助公司遵守“全部或几乎所有”标准。请记住，公司有持续的义务确保他们的声明是真实的和有根据的，包括暂时将供应链转移到美国以外的地方。

一家公司要提出合法、***无条件***的美国原产地声明，产品的最终组装必须在美国境内进行，进入产品的所有重要加工必须在美国进行，并且产品的所有或几乎所有部件、配料或组件，以及加工必须在美国制造或采购。

一家公司要做出合法、***有限定条件***的美国原产地声明，公司必须包括一个清晰和显眼的限定条件，即 1) 出现在紧邻表示的地方，以及 2) 准确传达产品包含外国零件、成分或组件的程度，和/或处理。

一家公司要合法声称产品是在美国***组装***的，产品必须在美国最后进行实质性改造，产品的主要组装必须在美国进行，并且美国的组装操作必须是重大的。

一些关键要求——所有广告商在考虑披露时都应牢记——包括：

- 当权利要求在电视广告或其他视听广告中提出时，披露应同时在音频和视频中呈现
- 交互式电子媒体中的披露必须是不可避免的
- 在产品标签上，披露信息必须出现在主要显示面板上

在限定美国原产地声明时，披露必须出现“紧邻陈述”，并且必须准确传达“产品包含外国零件、成分或组件和/或加工的程度”。

我们如何提供帮助

Holland & Knight 的消费者保护辩护与合规团队包括强大的社交媒体法律业务，以及经验丰富的律师，他们是该领域公认的观点领袖。从代表数十家公司和个人处理涉及广告和营销的联邦和州调查，到涉及名人的合规咨询和交易合同事宜，该公司的业务包括社交媒体领域的监管、合规、诉讼、调查和交易工作。

有关社交媒体广告和营销法规可能对您或您的公司产生的具体影响的更多信息或问题，请联系作者或消费者保护辩护与合规团队或国际贸易集团的其他成员。

附注

[1] “美国制造”标签规则的分析和副本可能位于*联邦公报*中。

[2] 15 USC § 45(a)(2) (2020)（“特此授权并指示委员会防止个人、合伙企业或公司……在商业中使用或影响商业的不公平竞争方法以及在商业中的不公平或欺骗行为或做法或影响商业。”）。

[3] FTC，FTC 关于欺骗的政策声明（1983 年 10 月 14 日）。

[4] FTC，关于广告证实的政策声明（1984 年 11 月 23 日）。

[5] FTC，关于美国原产地索赔的执行政策声明（1997 年 12 月 1 日）。

[6] *同上。*

[7] 美国联邦法规 16 篇第 323.2 部分。

[8] *同上。*

[9] *同上。*

Nearshoring Opportunities in Mexico Appeal to U.S., Chinese and Other Asian Companies

By Carlos Vejar, Ronald A. Oleynik, Nasim D. Fussell, Guillermo Uribe Lara and Ander Javier Aguirre

HIGHLIGHTS:

- Nearshoring is now clearly on the agenda of North American leaders, due in part because of supply chain disruptions derived from COVID-19, the United States' trade tensions with China and Russia's invasion of Ukraine. Whether for those reasons alone or in combination with other trends, investments mostly from the U.S. and Asian countries are pouring into Latin America.

- Mexico, in particular, has attracted the attention of different companies around the world because of certain conditions inherent to it, mainly its proximity to the United States; the benefits of free trade agreements signed by Mexico, particularly the modernized United States-Mexico-Canada Agreement (USMCA); and low labor costs, among others.

- As the leaders continue to discuss regional economic integration, proposals are developing in the U.S. Congress to strengthen ties with trading partners in the Americas amid growing tensions with China.

Nearshoring is now clearly on the agenda of North American leaders, due in part because of supply chain disruptions derived from COVID-19, the United States' trade tensions with China[1] and Russia's invasion of Ukraine. Whether for those reasons alone together or combined with other trends, investments mostly from the U.S. and Asian countries are pouring into Latin America.[2]

Nearshoring is not for everybody. Transferring a business operation to a nearby country is not necessarily an easy task, but it is indeed an opportunity that should not be overlooked.

Mexico, in particular, has attracted the attention of different companies around the world because of certain conditions inherent to it, mainly its proximity to the United States (the Mexico-U.S. border at approximately 3,150 kilometers – nearly 2,000 miles – is one of the top 10 longest in the world, as well as one of the busiest and most active economically[3]); the benefits of free trade agreements signed by Mexico,[4] particularly the modernized United States-Mexico-Canada Agreement (USMCA); and low labor costs,[5] among others.

The New York Times recently made the argument that Mexico is the next globalization stop after China, pointing to the trend that U.S.-based companies that used to obtain goods from suppliers located in Asia, mostly China, have started to look elsewhere for new locations and suppliers given the fact that obtaining such goods from regular suppliers has become increasingly more expensive and time-consuming.

Several inquiries have been raised on whether Mexico will replace China as the preferred destination for investments of countries such as the U.S. There are reasons to believe that this may happen, such as the tariffs imposed to Chinese products in the U.S. or the increment in salaries of Chinese workers. However, there are companies that may choose to stay in China since they are comfortable with doing business there, particularly those that fit in with the local Chinese high-tech capabilities and supply chain infrastructure.[6]

During the North American Leaders' Summit held in Mexico City on Jan. 9-10, 2023, leaders of the region stressed the importance to strengthen bonds for obtaining goods from providers located in the North American region rather than from different regions as is occurring today.

In order to achieve this goal, the leaders agreed to create a joint committee comprised of four representatives from each country that will focus on promoting the integration of the region's economies and, in the words of Mexico's President Andrés Manuel López Obrador, "substitute the importations to North America in order to achieve self-sufficiency of the area."[7]

DEVELOPMENTS IN THE U.S. CONGRESS

As the leaders continue to discuss regional economic integration, there are proposals developing in the U.S. Congress to strengthen ties with trading partners in the Americas amid growing tensions with China. Sen. Bill Cassidy (R-La.) and Rep. Maria Elvira Salazar (R-Fla.) recently introduced a discussion draft of a bill that would establish a sweeping foreign and economic policy that points toward the Western Hemisphere. It contains provisions that would encourage companies to nearshore supply chains from China to the Western Hemisphere through tax incentives and trade preferences. It also includes instructions to the U.S. Trade Representative to negotiate expansion of the USMCA with select countries in the region; creation of an "Americas Partnership" with countries in the Western Hemisphere focused on hemispheric integration; and, creation of an "Americas Investment Corporation" within the U.S. government that would provide for private sector economic development in partner countries through support to large-scale infrastructure investment and nearshoring and reshoring opportunities.

Although merely a discussion draft at this time, the 202-page bill demonstrates the significant amount of consideration being paid in Congress to nearshoring and shifting supply chains away from China.

RISKS AND OPPORTUNITIES

Among the bundle of nearshoring opportunities for the North America region, the semiconductor industry is probably the most promising,[8] not only for U.S. companies but for existing Asian companies that would be interested in assuring their participation in this new promising value chain, which based on current trends is most likely to occur. Of the 5.09 million square feet of space in Mexican industrial parks that have been leased by foreign companies, approximately 80 percent are Chinese-based companies. About 15 percent were rented by U.S.-based companies, along with 3 percent by Japanese companies and 2 percent by Korean companies. Chinese companies also have leased 4.23 million square feet of Mexican industrial park space to install production lines in the Mexican cities of Monterrey, Saltillo, Juarez, Tijuana, Queretaro and Mexico City.[9]

As an example of how nearshoring is already impacting on the Mexican economy, the Mexican state of Baja California has informed that during the first semester of 2022 it had received investments from 55 different companies based in the U.S., China, South Korea, Germany and France, which correspond to a total amount of $1.22 billion. These investments are primarily from the medical, electronic, automotive, metal and food industries.[10]

Moreover, this investment by Chinese companies in Mexican industrial parks continues to increase.[11] There are published plans of expansion from Chinese companies into the Mexican states of Jalisco, Nuevo Leon and Guanajuato. All demonstrating the realization that company managers have regarding the advantages of nearshoring in Mexico, as well as the states' push to obtain more investments from Chinese companies.[12] It is undeniable that no opportunity is free of risks. Mexico's energy production capabilities are being questioned. Although the USMCA leaders have shown interest in working together to develop new opportunities in the development of renewable energies, there are other problems that need to be addressed such as the limited

capacity of industrial parks in Mexico, which requires seeking or developing facilities outside of the industrial parks.[13]

HOW WE CAN HELP

Holland & Knight is well equipped to assist clients navigating complex cross-border transactions such as those experienced by companies that are seeking to take advantage of the nearshoring opportunities.

Our U.S. and Mexico trade practices makes us a one-stop firm with deep knowledge of U.S. and Mexican regulations and programs such as the Maquila Program (IMMEX), tariff classifications, rules of origin or USMCA knowledge. Holland & Knight attorneys also have plenty of experience in regulatory compliance, labor law, real estate complexities, transfer pricing agreements, infrastructure and general business practices (e.g., tax and environmental issues), as well as other areas of the law required to succeed in such endeavors.

Holland & Knight will continue to keep our clients informed of major legislative and regulatory modifications that could affect how business is being conducted to allow for improved decision-making in favor of our clients' interests.

For more details regarding nearshoring, contact the authors or another member of Holland & Knight's International Trade Group.

Notes

[1] Remarks by U.S. Secretary of Commerce Gina Raimondo on the U.S. Competitiveness and the China Challenge, U.S. Department of Commerce, Nov. 30, 2022.

[2] Nearshoring will be an enormous boon to Latin American industry in 2023, *Fortune*, Dec. 23, 2022.

[3] With more than 170,000 kilometers (approximately 105,600 miles) of paved roadways, more than 100 commercial ports and 70 airports, Mexico has a vast network infrastructure for performing supply chain operations.

[4] Mexico has signed 12 different free trade agreements with countries around the world.

[5] Mexico has one of the lowest minimum salaries in the Organization for Economic Cooperation and Development (OECD).

[6] Reshoring from China to Mexico - How Prevalent is it Really?, china-briefing.com, May 27, 2022.

[7] AMLO anuncia creación de grupo para sustituir importaciones en América del Norte, *El Financiero*, Jan. 10, 2023; and López Obrador's remarks about 'import substitution' raise eyebrows, InsideTrade.com, Jan. 13, 2023.

[8] North American semiconductor industry will prevent 'over-reliance' on Asia: Trudeau, Globalnews.ca, Jan. 11, 2023; and North American leaders set aside tensions to focus on chips and migration, *Financial Times*, Jan. 10, 2023.

[9] Mexico Attracts Most Nearshoring Opportunities in the Region, mexicobusiness.news, Dec. 5, 2022.

[10] Nearshoring, una larga fila en México, forbes.com.mx, Nov. 16, 2022.

[11] China lidera la inversión en espacios industriales para nearshoring en México, eleconomista.com.mx, Nov. 25, 2022.

[12] Chinese investment in manufacturing on the rise in Mexico, mexiconewsdaily.com, Sept. 16, 2022.

[13] Mexico's industrial parks benefit from nearshoring, *Opportimes*, Sept. 8, 2022.

墨西哥的近岸外包机会对美国、中国和其他亚洲公司具有吸引力

原文作者：Carlos Vejar, Ronald A. Oleynik, Nasim D. Fussell, Guillermo Uribe Lara 及 Ander Javier Aguirre

重点摘要：

- 近岸外包现在显然已列入北美领袖们的议程，部分原因是 COVID-19 导致的供应链中断、 美国与中国的贸易紧张局势以及俄罗斯入侵乌克兰。无论是出于这些原因还是与其他趋势相结合，主要来自美国和亚洲国家的投资正涌入拉丁美洲。

- 尤其是墨西哥，因其固有的某些条件而引起了世界各地不同公司的关注，主要是它靠近美国、墨西哥签署的自由贸易协定的好处，特别是更新的美国-墨西哥-加拿大协定 (USMCA)、以及低廉的劳动力成本等。

- 随着领袖们继续讨论区域经济一体化，美国国会正在制定提案，以在与中国的紧张局势升高的情况下加强与美洲贸易伙伴的关系。

近岸外包现在显然已列入北美领袖们的议程，部分原因是 COVID-19 导致的供应链中断、美国与中国的贸易紧张局势[1]以及俄罗斯入侵乌克兰。无论是单独出于这些原因还是与其他趋势相结合，主要来自美国和亚洲国家的投资正涌入拉丁美洲。[2]

近岸外包并不适合所有人。将业务转移到邻近国家不见得是一件容易的事，但这确实是一个不容忽视的机会。

尤其是墨西哥，因其固有的某些条件而引起了世界各地不同公司的关注，主要是它靠近美国（墨美边境约 3,150 公里——近 2,000 英里——是最世界上最长的 10 个边境之一，也是经济上最繁忙和最活跃的边境之一[3]）、墨西哥签署的自由贸易协定的好处，[4]特别是更新的美国-墨西哥-加拿大协定 (USMCA)、以及低廉的劳动力成本等[5]。

*《纽约时报》*最近提出墨西哥是继中国之后的下一个全球化点的论点，指出鉴于从经常的供应商处获得此类商品变得越来越昂贵和耗时这一事实，过去从位于亚洲（主要是中国）的供应商那里获得商品的美国公司已经开始在其他地方寻找新的地点和供应商。

墨西哥是否会取代中国成为美国等国家的首选投资目的地已有多项质疑。有理由相信这可能会发生，例如美国对中国产品征收关税或中国员工的薪水增加。然而，有些公司可能会选择留在中国，因为他们认为合适在中国开展业务，尤其是那些适合中国当地高科技能力和供应链基础设施的公司。[6]

在 2023 年 1 月 9 日至 10 日于墨西哥城举行的北美领袖峰会期间，该地区的领袖们强调了建立从位于北美地区的供应商那里获得商品的紧密关系的重要性，而不是像现今这样从不同地区获得商品.

为了实现这一目标，领袖们同意成立一个由每个国家的四名代表组成的联合委员会，重点促进该地区经济的一体化，用墨西哥总统 Andrés Manuel López Obrador的话来说，“取代北美进口的角色，以实现该地区的自给自足。”[7]

美国国会的发展

随着领袖们继续讨论区域经济一体化，美国国会提出了在与中国日益紧张的情况下加强与美洲贸易伙伴关系的提议。参议员 Bill Cassidy（共和党-路易斯安那州）和众议员 Maria Elvira Salazar（共和党-佛罗里达州）最近提出了一项法案的讨论草案，该法案将制定一项针对西半球的全面外交和经济政策。它包含鼓励公司通过税收优惠和贸易优惠将供应链从中国近岸到西半球的条款。它还包括指示美国贸易代表与该地区的特定国家谈判扩大USMCA、与西半球国家建立以西半球一体化为重点的“美洲伙伴关系”、及在美国政府内部创建“美洲投资公司”，通过支持大规模基础设施投资和近岸外包和回岸机会，为伙伴国家的私营部门经济发展提供支持。

虽然目前只是一份讨论草案，但这份 202 页的法案表明国会正在考虑将供应链从中国转移到近岸外包。

风险与机遇

在北美地区的众多近岸外包机会中，半导体行业可能是最有前途的，[8]对除了对美国公司外，这对有兴趣确保参与这一新的有前途的价值链的现有亚洲公司也是如此，该价值链基于当前趋势最有可能发生。在外国公司租赁的墨西哥工业园区的509万平方英尺空间中，约80%是中国公司。大约 15% 由美国公司租用，3% 由日本公司租用，2% 由韩国公司租用。中国企业还租赁了墨西哥工业园区423万平方英尺的空间，在蒙特雷、萨尔蒂约、华雷斯、蒂华纳、克雷塔罗和墨西哥城等墨西哥城市设置生产线。[9]

作为近岸外包已经对墨西哥经济产生影响的一个例子，墨西哥下加利福尼亚州表示，在 2022 年第一季度，它收到了来自美国、中国、韩国、德国和法国的 55 家不同公司的投资，相当于总额为 12.2 亿美元。这些投资主要来自医疗、电子、汽车、金属和食品行业。[10]

此外，中国企业对墨西哥工业园区的投资还在不断增加。[11]中国公司已公布了向墨西哥哈利斯科州、新莱昂州和瓜纳华托州扩张的计划。所有这些都表明公司管理人已经意识到墨西哥近岸外包的优势，以及各州推动从中国公司获得更多投资的努力。[12]不可否认，没有机会是没有风险的。墨西哥的能源生产能力受到质疑。尽管 USMCA 领袖们已表示有兴趣合作开发可再生能源发展的新机会，但还有其他问题需要解决，例如墨西哥工业园区的容量有限，这需要在工业园区以外寻求或开发设施。[13]

我们可如何提供帮助

Holland & Knight 有能力协助客户处理复杂的跨境交易，例如寻求利用近岸外包机会的公司所面临的交易。

我们在美国和墨西哥的贸易实务经验使我们成为对美国和墨西哥的法规和计划（例如加工厂计划 (IMMEX)、关税分类、原产地规则或 USMCA 知识）有深入了解的一站式事务所。 Holland & Knight 的律师在监管合规、劳动法、有关房地产的复杂问题、转让定价协议、基础设施和一般商业业务（例如，税收和环境问题）以及为成功开展业务所需的其他法律领域拥有丰富的经验。

Holland & Knight 将继续让我们的客户了解可能会影响业务开展方式的重大立法和监管修改，以便改进决策制定以维护我们客户的利益。

有关近岸外包的更多详细信息，请联系作者或 Holland & Knight's International Trade Group的其他成员。

附注

[1] 美国商务部长吉娜 • 雷蒙多 (Gina Raimondo) 关于美国竞争力和中国挑战的讲话，美国商务部，2022 年 11 月 30 日。

[2] 近岸外包将在 2023 年为拉丁美洲工业带来巨大的福音， *《财富》杂志*，2022 年 12 月 23 日。

[3] 墨西哥拥有超过 170,000 公里（约 105,600 英里）的铺设道路、100 多个商业港口和 70 个机场，拥有用于执行供应链运营的庞大网络基础设施。

[4] 墨西哥与世界各国签署了 12 项不同的自由贸易协定。

[5] 墨西哥是经济合作与发展组织 (OECD) 中最低工资最低的国家之一。

[6] 从中国回流到墨西哥——到底有多普遍？ ，china-briefing.com, 2022 年 5 月 27 日。

[7] AMLO anuncia creación de grupo para sustituir importaciones en América del Norte， *El Financiero* ，2023 年 1 月 10 日；洛佩斯 • 奥夫拉多尔(López Obrador) 关于“进口替代”的言论令人侧目，InsideTrade.com，2023 年 1 月 13 日。

[8] 北美半导体行业将防止对亚洲的“过度依赖”：特鲁多，Globalnews.ca，2023 年 1 月 11 日；和北美领导人搁置紧张局势，专注于芯片和移民， *《金融时报》* ，2023 年 1 月 10 日。

[9] 墨西哥在该地区吸引了最多的近岸外包机会，mexicobusiness.news，2022 年 12 月 5 日。

[10] 近岸外包，una larga fila en México ，forbes.com.mx，2022 年 11 月 16 日。

[11] China lidera la inversión en espacios industriales para nearshoring en México ，eleconomista.com.mx，2022 年 11 月 25 日。

[12] 中国对墨西哥制造业的投资呈上升趋势，mexiconewsdaily.com，2022 年 9 月 16 日。

[13] 墨西哥的工业园区受益于近岸外包， *Opportimes* ，2022 年 9 月 8 日。

R&D Considerations in the Time of Non-Deductibility

By Mary Kate Nicholson, James Dawson, Chad M. Vanderhoef, Bradley M. Seltzer, Daniel Graham Strickland and Alexander R. Olama

HIGHLIGHTS:

- Specified research and development (R&D) and experimental expenditures no longer are deductible beginning with the 2022 tax year following revisions made to Internal Revenue Code Section 174 as part of the Tax Cuts and Jobs Act.
- In preparation for the move from expenditure deductibility to amortization, the IRS has provided procedures addressing how R&D expenses should be treated on 2022 tax returns.
- Given the fast-approaching filing deadline, companies are encouraged to begin reevaluating their R&D tax strategies.

The close of 2022 means family gatherings, holiday fun and one step closer to the end of research and development (R&D) expense current deductibility. Prior to the Tax Cuts and Jobs Act (TCJA), Internal Revenue Code Section 174 allowed a taxpayer to deduct specified research or experimental expenditures in the taxable year such R&D expenses were incurred. As amended by the TCJA, for tax years beginning after Dec. 31, 2021, Section 174(a)(1) provides that specified research or experimental expenditures are not currently deductible. Instead, such expenditures must be charged to a capital account and amortized ratably over a five-year period (15-year period in the case of specified research or experimental expenditures attributable to foreign research within the meaning of section 41(d)(4)(F)) beginning with the midpoint of the taxable year in which such expenditures are paid or incurred.

In preparation for the move from deductibility to amortization under Section 174, the IRS has released procedures for taxpayers to change the treatment of R&D expenses on the fast-approaching 2022 tax return. Revenue Procedure 2023-11[1] provides a method to obtain automatic consent under Section 446 to change methods of accounting for specified research or experimental expenditures under Section 174, as amended by the TCJA.

ON WHAT BASIS IS THE ACCOUNTING METHOD CHANGE MADE?

Pursuant to Section 13206(b) of the TCJA, the change to amortization from deduction under Section 174 is to be treated as a change in method of accounting, for purposes of Section 481, initiated by the taxpayer. The change in method of accounting is made on a cutoff basis for any R&D expenditures paid or incurred in taxable years beginning after Dec. 31, 2021, meaning that no Section 481(a) adjustments are required. Generally, under the cutoff method, only the items arising on or after the beginning of the year of the change are accounted for under the new method of accounting. If items arise before the year of change, such items continue to be accounted for under the former method of accounting. Notably, audit protection does not apply for expenditures paid or incurred in taxable years beginning after Dec. 31, 2021, if a change in method is made for the taxable year immediately subsequent to the first taxable year in which new Section 174 becomes effective.

HOW IS THE CHANGE MADE?

The automatic change in method of accounting to comply with amended Section 174 is made by filing a statement with the taxpayer's original federal income tax return for the first taxable year in which Section 174 becomes effective. The taxpayer is not required to file a Form 3115, Application for Change in Accounting Method, unless a change in the method to account for R&D expenses under Section 174 is made for a taxable year subsequent to the taxable year of the taxpayer in which Section 174 becomes effective. Therefore, for changes in subsequent tax years, a modified Section 481(a) adjustment is required to take into account R&D expenditures paid or incurred in taxable years beginning after Dec. 31, 2021. Therefore, a taxpayer with a calendar year taxable year would need to file a statement with their original income tax return for taxable year 2022 to apply the method change on a cutoff basis.

NOW WHAT?

The required method change associated with the move to non-deductibility under Section 174 is a good time to reevaluate your company's R&D tax strategy.

- **Section 41 or Section 174:** The unavailability of immediate deductions under Section 174 further moves the spotlight to Section 41, which provides a credit for increasing research activities.
    - Taxpayers with taxable income should consider the documentation strategy for eligibility to claim the Section 41 credit, which is now more valuable than an amortizable expense under Section 174. The Section 41 credit is available for qualified research expenses defined, in part, as "research with respect to which expenditures may be treated as specified research or experimental expenditures under Section 174." Therefore, a taxpayer that previously deducted R&D expenses under Section 174 will likely satisfy the first prong of eligibility for the credit under Section 41 for consistent activities.
    - Startups unable to utilize the credit under Section 41 should consider whether an amortizable expense under Section 174 or an immediate deduction under Section 162 is more appropriate.
- **Ability to File an Amended Return:** Revenue Procedure 2023-8 makes clear that an accounting method change to comply with amended Section 174 is required, either on a cutoff basis in the first taxable year after Dec. 31, 2021, or on a modified cutoff basis in a taxable year subsequent to the first taxable year after Dec. 31, 2021.
- **Domestic versus Foreign Research:** The length of amortization under amended Section 174 is dependent upon whether the R&D expenses are attributable to foreign research (any research conducted outside the U.S., the Commonwealth of Puerto Rico or any possession of the U.S.). The prevalence of technology and web-based research may blur the lines between foreign and domestic research.
- **Audit Risk:** The Inflation Reduction Act enhanced funding for IRS enforcement; accordingly, taxpayers seeking to claim a credit under Section 41 should review procedures for contemporaneously substantiating their claims far in advance of tax filing season. Taxpayers should consider the following questions in substantiating a credit for research expenses:

- Who bears the risk of failure of the research? The taxpayer must generally carry the risk to claim the Section 41 credit.
- Who has the rights to the research? The taxpayer with the rights to the research is eligible to claim the credit. Under Treas. Reg. Section 1.41-2(a)(1), if the research is intended to be transferred in return for license or royalty payments and the taxpayer does not use the product of the research in the taxpayer's trade or business, the taxpayer is ineligible for the credit.
- Is the research properly considered as contract research? Only a portion of contract research expenses are eligible for the credit under Section 41.
- Is the research for the development of internal-use software? There are limitations for claiming a credit for the development of internal-use software.
- What documentation is available to substantiate the claim? Taxpayers should consider documents detailing that the process of experimentation is technological in nature, for the development of new or improved business component, and for a permitted purpose. Personnel with knowledge or expertise to evaluate the eligibility of research for the credit should be involved in the documentation process.

For additional information or assistance, contact the authors.

Notes

[1] Rev. Proc. 2023-11 modifies and supersedes Rev. Proc. 2023-8, which modified Rev. Proc. 2022-14, 2022-7 I.R.B. 502.

研发费用不可抵扣时的考量

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重點摘要:

- 自 2022 纳税年度起，作为《减税和就业法》的一部分对《国内税收法》第 174 条进行了修订，特定研发 (R&D) 和实验支出不再可以扣除。
- 为准备从支出扣除转向摊销，美国国税局提供了解决研发费用应如何在 2022 年纳税申报表中处理的程序。
- 鉴于申报截止日期临近，鼓励公司开始重新评估其研发税收策略。

2022 年的结束意味着家庭聚会、节日欢庆和研发 (R&D) 费用目前可扣除的结束更近了一步。在减税和就业法案 (TCJA) 出台之前，《国内税收法》第 174 条允许纳税人在此类研发费用发生的纳税年度中扣除特定的研究或实验支出。根据 TCJA 的修订，对于 2021 年 12 月 31 日之后开始的纳税年度，第 174(a)(1) 条规定，特定的研究或实验支出目前不可扣除。相反，此类支出必须记入资本账户，并在五年内按比例摊销（对于第 41(d)(4) (F))节所指的可归因于外国研究的特定研究或实验支出，则为 15 年），从支付或发生此类支出的纳税年度的中点开始。

为了准备根据第 174 条从扣除额转为摊销，美国国税局发布了程序，要求纳税人在即将到来的 2022 年纳税申报表上更改研发费用的处理方式。收入程序 2023-11 [1] 提供了一种根据第 446 条获得自动同意的方法，以根据 TCJA 修订的第 174 条更改特定研究或实验支出的会计方法。

会计核算方法变更的依据是什么？

根据 TCJA 的第 13206(b) 条，依第 174 条从扣除到摊销的变化，就第 481 条的目的而言，应被视为由纳税人发起的会计方法变更。对于在 2021 年 12 月 31 日之后开始的纳税年度内支付或发生的任何研发支出，会计方法的变更是基于截断基础进行的，这意味着不需要根据第 481(a) 条进行调整。一般而言，在截断方法下，只有在变更当年或之后发生的项目才采用新会计法进行会计处理。如果项目发生在变更年度之前，则该项目继续按原会计方法核算。值得注意的是，如果在新第 174 条生效的第一个纳税年度之后的纳税年度发生方法变更，则审计保护不适用于在 2021 年 12 月 31 日之后开始的纳税年度中支付或发生的支出。

如何进行变更？

为符合修订后的第 174 条，会计方法的自动变更是通过纳税人在第 174 条生效的第一个纳税年度的原始联邦所得税申报表中提交的。纳税人无需提交 3115 表，即会计方法变更申请，除非在第 174 条规定的纳税人纳税年度之后的纳税年度根据第 174 条对研发费用的核算方法进行了变更变得有效。因此，对于后续纳税年度的变化，需要修改第 481(a) 条的调整，以考虑在 2021 年 12 月 31 日之后开始的纳税年度支付或发生的研发支出。因此

，具有日历年度纳税年度的纳税人将需要在 2022 纳税年度的原始所得税申报表中提交一份声明，以在截止日期应用方法变更。

现在该如何做？

与根据第 174 条转向不可扣除相关的所需方法变更是重新评估贵公司研发税收策略的好时机。

- **第 41 条或第 174 条：**根据第 174 条不能立即扣除，进一步将焦点转移到第 41 条，它为增加的研究活动提供了税收抵免。
    - 有应税收入的纳税人应考虑申请第 41 条抵免资格的文件策略，这比第 174 条下的可摊销费用更有价值。第 41 条抵免可用于部分定义为“与根据第 174 条，哪些支出可被视为特定的研究或实验支出。”因此，先前根据第 174 条扣除研发费用的纳税人很可能满足第 41 条下一致活动抵免资格的第一个要件。
    - 无法利用第 41 条规定的抵免额的初创企业应考虑第 174 条规定的可摊销费用或第 162 条规定的立即扣除是否更合适。
- **提交修訂報税表的能力：**收入程序 2023-8 明确要求更改会计方法以符合修订后的第 174 条，无论是在 2021 年 12 月 31 日之后的第一个纳税年度的截止日期，还是修改的截止日期以 2021 年 12 月 31 日之后的第一个纳税年度之后的纳税年度为基础。
- **国内与国外研究：**修订后的第 174 条下的摊销期限取决于研发费用是否归因于国外研究（在美国、波多黎各联邦或美国的任何财产之外进行的任何研究）。技术和基于网络的研究的普及可能会模糊国内外研究之间的界限。
- **审计风险：** 《降低通货膨胀法案》增加了国税局执法的资金；因此，寻求根据第 41 条申请抵免的纳税人应在纳税申报季节之前审查同时证实其申请的程序。纳税人在证实研究费用抵免时应考虑以下问题：
    - 谁承担研究失败的风险？纳税人通常必须承担申请第 41 条抵免的风险。
    - 谁有权进行研究？拥有研究权的纳税人有资格申请抵免。依具财政部规则第 1.41-2(a)(1) 节，如果研究旨在转让以换取许可或特许权使用费，并且纳税人不在纳税人的贸易或业务中使用研究的产品，则纳税人没有资格获得抵免。
    - 该研究是否被恰当地视为合同研究？根据第 41 条，只有一部分合同研究费用有资格获得抵免。
    - 是研究内部使用软件的开发？为内部使用软件的开发申请抵免是有限制的。

- 有哪些文件可以证实这一说法？纳税人应考虑文件，详细说明实验过程本质上是技术性的，用于开发新的或改进的业务组件，并用于允许的目的。具有评估研究的抵免资格的知识或专业知识的人员应参与文件编制过程。

如需更多信息或帮助，请联系作者。

附注

[1] 税收程序 2023-11 修改并取代 税收程序2023-8，而税收程序2023-8修改了 税收程序2022-14及2022-7 I.R.B 502。

New California Labor and Employment Laws for 2023

By Linda Auerbach Allderdice, John H. Haney, Thomas E. Hill, Lauren N. Polk, Samuel J. Stone, Tina Tellado, Mary T. Vu and Billy Sahachartsiri

HIGHLIGHTS:

- The California Legislature has enacted several new laws that will impact the workplace in 2023.
- In addition to changes among various state labor and employment laws, the minimum wage has increased.
- This Holland & Knight alert provides a brief summary of select employment laws that took effect on Jan. 1, 2023, unless stated otherwise.

The California Legislature has enacted several new laws that will impact the workplace in 2023. This Holland & Knight alert provides a brief summary of select employment laws that took effect on Jan. 1, 2023, unless stated otherwise.

- **Minimum Wage Increases:** As of Jan. 1, 2023, the California state minimum wage will increase to $15.50 for all employers, regardless of employee headcount. This also means that as of Jan. 1, 2023, exempt employees in California must be paid a minimum annual salary of $64,480.

  "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.

  Covered exempt computer professional employees must be paid a minimum of $53.80 per hour, or $112,065.20 in annual salary.

- **SB 1162 (Expanded Pay Data Reporting and Mandatory Pay Scale Disclosures):** This bill requires private employers with 100 or more employees to submit a pay data report to the Civil Rights Department annually on or before the second Wednesday of May, beginning May 10, 2023. The pay data report is separate from an employer's EEO-1 and must include the median and mean hourly rate for each combination of race, ethnicity and sex within each job category. Additionally, beginning Jan. 1, 2023, employers with 15 or more employees must include the pay scale for a position in any job posting. Employers must also provide an employee with the pay scale for the employee's current position upon the employee's request (for additional information, see Holland & Knight's previous alert, "California Expands Pay Data Reporting and Mandates Pay Scale Disclosures," Oct. 18, 2022).

- **AB 1041 (CFRA and Paid Sick Leaves Expanded to Cover Employee's Care for "Designated Person"):** This bill expands on the categories of individuals for whom an employee may take leave to care for under the California Family Rights Act (CFRA) and California's Healthy Workplaces Healthy Families Act (HWHFA). Under the amended CFRA, an employee may take unpaid leave to care for a "designated person," defined as "any individual related by blood or whose association with the

employee is the equivalent of a family relationship." Similarly, an employee may take paid leave to care for a "designated person" under the amended HWHFA, defined as "a person identified by the employee at the time the employee requests paid sick days." Under both the amended CFRA and HWHFA, an employee may identify a designated person at the time they request leave. An employer, however, may limit an employee to one designated person per 12-month period.

- **AB 1949 (New Requirement to Provide Five Days of Bereavement Leave):** AB 1949 requires covered employers to offer employees up to five days of bereavement leave. Under AB 1949, employees who have been employed for at least 30 days may take five days of bereavement leave for a family member, defined as a spouse, domestic partner, child, parent, parent-in-law, sibling, grandparent or grandchild. Bereavement leave need not be taken consecutively, but, it must be completed within three months of the death. Notably, the statute states that leave "shall be taken pursuant to any existing bereavement leave policy of the employer." Therefore, employers have three options for compliance depending on current practice: 1) If no existing bereavement leave policy exists, then the five days mandated by the new law may be unpaid; 2) If an existing policy provides for less than five days of *paid* bereavement leave, employees are entitled to take not less than a total of five days of leave, consisting of the number of paid days of leave available under policy with the remaining days to be unpaid (e.g., a policy providing for two paid days of bereavement leave would result in an employee taking two days of paid bereavement leave and three days of unpaid bereavement leave under the law); or 3) If an existing policy provides for less than five days of unpaid bereavement leave, employees are entitled to take not less than a total of five days of unpaid bereavement leave. In all situations, employees may use vacation, personal leave, sick leave or other compensatory time off to substitute for unpaid leave. Interfering with leave or improperly denying leave are unlawful employment actions; however, an employer is permitted to ask for proof of documentation of death within 30 days of the first day of leave.

- **AB 2693 (Updated Requirements for COVID-19 Exposure Notification Requirements to Employees):** In light of the COVID-19 pandemic, California law previously required employers to provide written notice of potential COVID-19 exposure to employees within one day of receiving notice of such exposure. This bill revises an employer's COVID-19 notification requirement by authorizing an employer to alert employees to a potential exposure of COVID-19 by prominently displaying the exposure notice. This bill will no longer require employers who experience a COVID-19 outbreak in their workplace to notify the local public health agency within 48 hours.

- **SB 1044 (Retaliation Prohibited in the Event of an Emergency Condition):** This bill prohibits an employer, in the event of an emergency condition, from taking or threatening adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe, except as specified. "Emergency condition" means either 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 a workplace, a worksite, a worker's home or the school of a worker's child due to natural disaster or a criminal act, but does not include a health pandemic. The bill also prohibits an employer from preventing any employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to confirm their safety. The bill requires an employee to notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite, as specified. However, these new protections do not apply when emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worksite, the worker or the worker's home have ceased.

- **AB 2777 (Statute of Limitations Extended for Sexual Assault Claims):** This bill, until Dec. 31, 2026, revives claims seeking to recover damages suffered as a result of a sexual assault that occurred on or after Jan. 1, 2009, that would otherwise be barred solely because the statute of limitations has or had expired. The bill also revives claims seeking to recover damages suffered as a result of sexual assault that occurred on or after the plaintiff's 18th birthday when one or more entities are legally responsible for damages and the entity or their agents engaged in a "cover up" as defined, and any related claims, that would otherwise be barred prior to Jan. 1, 2023, solely because the applicable statute of limitations has or had expired, and authorizes a cause of action to proceed if already pending in court on the effective date of the bill or, if not filed by Jan. 1, 2023, to be commenced between Jan. 1, 2023, and Dec. 31, 2023. This bill does not revive claims that have been litigated to finality before Jan. 1, 2023, or claims that have been compromised by written settlement agreements entered into before Jan. 1, 2023.

- **AB 2068 (Requires Employers to Post OSHA Information Regarding Citations or Orders in English and Other Specified Languages):** AB 2068 requires that certain Cal-OSHA information be posted in the workplace in multiple different languages. The bill aims to narrow the gap between California's regulatory environment – which often requires English-only notification – and California's increasingly diverse, skilled workforce. Under the new law, any time Cal-OSHA issues a citation, order or special order that is required to be posted in the workplace, the employer must post the citation/order/notice in English *and* the top seven non-English languages used by limited-English-proficient adults in California, as determined by the most recent U.S. Census Bureau American Community Survey, plus Punjabi (if not already included in the top seven). Cal-OSHA is responsible for drafting the alternate-language notices, which, like their English counterparts, must be posted at or near each place a violation referred to in the order/citation occurs.

- **AB 2188 (Protections for Off-Site, Off-Duty Marijuana Use Beginning Jan. 1, 2024):** This bill amends the FEHA by adding a provision explicitly protecting a person's off-site, off-duty marijuana use. The bill 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, the bill does not cover all workers. Additionally, employers may still use scientifically valid drug tests conducted through methods that screen for *current* impairment, as AB 2188 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. The bill will take effect on Jan. 1, 2024, giving employers one year to update their policies, practices and procedures and to train personnel for the changes.

- **SB 1126 (Expands California's State-Run Retirement Program):** Under existing law, eligible employers are required to offer a payroll deposit retirement savings arrangement to allow eligible employees to participate in CalSavers, if the employer does not sponsor or participate in a retirement plan. This bill expands an "eligible employer" to include a person or entity that has at least one eligible employee while excluding sole proprietorships, self-employed individuals or other business entities that do not employ any individuals other than the business owners. This bill will also expand the CalSavers program to include eligible employers with one or more eligible employees by Dec. 31, 2025.

For more information or questions on the new California labor and employment laws and their potential impact on employers and employees, contact the authors.

2023 年加州新劳动及雇佣法律

原文作者：Linda Auerbach Allderdice 、John H. Haney 、Thomas E. Hill 、Lauren N. Polk 、Samuel J. Stone 、Tina Tellado 、Mary T. Vu 及 Billy Sahachartsiri

重點摘要:

- 加州立法机构颁布了几项新法律，这些法律将在 2023 年对工作场所产生影响。
- 除了各种州劳动和雇佣法律的变化外，最低工资也有所提高。
- 除非另有说明，本 Holland & Knight 提示文章简单摘要的特定雇佣法律于 2023 年 1 月 1 日生效。

加州立法机构颁布了几项新的法律，将在 2023 年对工作场所产生影响。除非另有说明，本 Holland & Knight 提示文章简单摘要的特定雇佣法律于 2023 年 1 月 1 日生效。

- **最低工资增加：**2023 年 1 月 1 日起，无论员工人数为多少，所有雇主的加州最低工资将上涨至 15.50 美元。这也意味着从 2023 年 1 月 1 日起，应对加州的豁免员工支付至少 64,480 美元的年薪。

  州内多个地区都颁布了“足以生活工资条例”，因此应确认当地标准以确保符合所有规范工资的要求。

  适用的豁免计算机专业人员的最低工资为每小时 53.80 美元，或年薪 112,065.20 美元。

- **参院第 1162 号法案（扩展薪酬数据报告和强制性薪酬等级披露）：**该法案要求拥有 100 名或更多雇员的私人雇主从 2023 年 5 月 10 日开始，每年 5 月的第二个星期三或之前向民权部提交薪酬数据报告. 薪酬数据报告与雇主的 EEO-1 是分开的，并且必须包括每个工作类别中每个种族、民族和性别组合的中位数和平均时薪。此外，从 2023 年 1 月 1 日开始，拥有 15 名或更多员工的雇主必须在任何职位发布中包含职位的薪酬等级。雇主还必须根据员工的要求向员工提供其当前职位的薪酬等级（有关更多信息，请参阅 Holland & Knight 之前的提示文章，“加州扩大薪酬数据报告并强制披露薪酬等级”，2022 年 10 月 18 日） 。

- **众院第1041法案（CFRA 和带薪病假扩大到涵盖员工对“指定人员”的护理）：**该法案扩大了根据加州家庭权利法案 (CFRA) 和加州的健康工作场所健康家庭法(HWHFA)，员工可以请假照顾的个人类别。根据修订后的 CFRA，雇员可以休无薪假来照顾“指定人员”，该人员被定义为“任何有血缘关系的人，或者与雇员的关系等同于家庭关系的人”。同样，根据修订后的 HWHFA，员工可以带薪休假照顾“指定人员”，该人员被定义为“在员工申请带薪病假时由员工确定的人员”。根据修订后的 CFRA 和 HWHFA，员工可以在请假时指定指定人员。但是，雇主可以将雇员限制为每 12 个月内只有一名指定人员。

- **众院第 1949 法案（提供五天丧假的新要求）：** 众院第 1949 号法案要求适用的雇主为雇员提供最多五天的丧假。根据 众院第 1949 号法案，受雇至少 30 天的员工可以为家庭成员休五天丧假，家庭成员定义为配偶、同居伴侣、子女、父母、岳父母、兄弟姐妹、祖父母或孙子女。丧假不必连续休，但必须在死亡后三个月内休完。值得注意的是，该法规规定休假“应根据雇主的任何现有丧假政策进行”。因此，根据现行做法，雇主有三种合规选择： 1) 如果现有丧假政策不存在，那么新法律规定的五天可能是无薪的； 2) 如果现有政策规定的*带薪*丧假少于五天，则员工有权享受不少于五天的假期，包括政策规定的带薪休假天数和剩余无薪天数（例如，规定两天带薪丧假的政策将导致雇员根据法律休两天带薪丧假和三天无薪丧假）；或 3) 如果现有政策规定的无薪丧假少于五天，则员工有权享受不少于五天的无薪丧假。在任何情况下，员工都可以使用休假、事假、病假或其他补假来代替无薪假。干扰休假或不当拒绝休假属于非法雇佣行为；但是，允许雇主在休假第一天后的 30 天内要求提供死亡证明文件。

- **众院第 2693 号法案 （针对员工的 COVID-19 接触通知要求的更新要求）：**鉴于 COVID-19 大流行，加州法律此前要求雇主在收到此类接触通知后一天内向员工提供可能接触 COVID-19 的书面通知。该法案修改了雇主的 COVID-19 通知要求，授权雇主通过突出显示暴露通知来提醒员工注意 COVID-19 的潜在暴露。该法案将不再要求在工作场所爆发 COVID-19 疫情的雇主在 48 小时内通知当地公共卫生机构。

- **参院第 1044 号法案 （在紧急情况下禁止报复）：**如果员工有理由相信工作场所或工作场所不安全，除非另有规定，该法案禁止雇主在紧急情况下对拒绝报告或离开在受影响的区域内的工作场所或工作地点的任何雇员采取或威胁采取不利行动。“紧急情况”是指 1) 自然力或犯罪行为导致工作场所或工作场所的人身或财产安全遭受灾难或极端危险的情况；或 2) 由于自然灾害或犯罪行为，命令疏散工作场所、工地、工人的家或工人子女的学校，但不包括健康流行病。该法案还禁止雇主阻止任何雇员使用雇员的移动设备或其他通信设备以寻求紧急援助、评估情况的安全性或与人通信以确认他们的安全。该法案要求雇员将紧急情况通知雇主，要求雇员按照规定离开或拒绝到工作场所或工地报到。但是，当对工作场所、工地、员工或员工的家庭造成迫在眉睫和持续的伤害风险的紧急情况已经停止时，这些新的保护措施将不适用。

- **众院第 2777 号法案 （性侵犯索赔的诉讼时效延长）：**该法案在 2026 年 12 月 31 日之前回复了寻求追回因 2009 年 1 月 1 日或之后发生的性侵犯而遭受的损害的索赔（如果该索赔仅因时效已过期而不得提出）的权利。该法案还回复了寻求追回因原告 18 岁生日当天或之后发生的性侵犯而遭受的损害赔偿的索赔权利（如当时一个或多个实体对损害负有法律责任，并且该实体或其代理人进行了所定义的“掩盖”）、以及任何相关的索赔权利（如果该索赔在 2023 年 1 月 1 日前仅因时效已过期而不得提出），并且如果在诉讼已经在进行中，或者，如果未在 2023 年 1 月 1 日之前提出但将于 2023 年 1 月 1 日至 2023 年 12 月 31 日之间提出，该法案则授权诉讼理由继续进行。该法案不会回复在 2023 年 1 月 1 日之前已经诉讼终局的索赔权利，或者因 2023 年 1 月 1 日之前签订的书面和解协议而受到损害的索赔权利。

- **众院第 2068 号法案 （要求雇主以英语和其他指定语言发布关于处罚或命令的 OSHA 信息）：** 众院第 2068 号法案要求在工作场所以多种不同语言发布某些 Cal-OSHA 信息。该法案旨在缩小加州监管环境（通常只需要英文通知）与加州日益多样化、技能娴熟的劳动力之间的差距。根据新法律，任何时候 Cal-OSHA 发布需要在工作场所张贴的处罚、命令或特别命令时，雇主必须以英语*和雇主*使用的前七种非英语语言张贴处罚/命令/通知加州英语能力有限的成年人，根据最近的美国人口普查局美国社区调查确定，加上旁遮普语（如果尚未包括在前七名中）。 Cal-OSHA 负责起草替代语言通知，与英文通知一样，必须张贴在命令/处罚中提到的违规行为发生的每个地方或附近。

- **众院第 2188 号法案 （自 2024 年 1 月 1 日起对场外、下班后吸食大麻的保护）：**该法案通过添加明确保护个人在下班后吸食大麻的条款来修订 FEHA。该法案禁止雇主因为申请人或雇员 1) 在工作之外

  和工作场所之外使用大麻；或 2) 通过药物筛查测试发现其头发、血液、尿液或其他体液中含有非精神活性大麻代谢物而歧视他们。但是，该法案并未涵盖所有员工。此外，雇主仍可使用通过筛选*当前*损害的方法进行的科学有效的药物测试，因为众院第 2188 号法案不允许员工在工作中拥有、被损害或使用大麻，即使是出于医疗目的。它也不会剥夺雇主根据现行健康和安全法维持无毒品和无酒精工作场所的权利。该法案将于 2024 年 1 月 1 日生效，给雇主一年的时间来更新他们的政策、做法和程序，并为这些变化培训人员。

- **参院第 1126 号法案 （扩大加州的州营退休计划）：**根据现行法律，如果雇主不赞助或不参与退休计划，符合条件的雇主必须提供工资存款退休储蓄安排，以允许符合条件的员工参与 CalSavers。该法案将“符合的雇主”扩大到包括拥有至少一名合格雇员的个人或实体，但不包括独资企业、个体经营者或不雇用除企业主以外的任何个人的其他企业实体。该法案还将扩大 CalSavers 计划，以在 2025 年 12 月 31 日之前将拥有一名或多名合格雇员的符合的雇主包括在内。

有关新加州劳动及雇佣法律及其对雇主和雇员的潜在影响的更多信息或问题，请联系作者。

About This Newsletter
有关本期刊

Information contained in this newsletter is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel. Holland & Knight lawyers are available to make presentations on a wide variety of China-related issues.

本期刊所刊载的信息仅供我们的读者为一般教育及学习目的使用。本期刊并不是为作为解决某一法律问题的唯一信息来源的目的所设计，也不应被如此使用。此外，每一法律管辖区域的法律各有不同且随时在改变。如您有关于某一特别事实情况的具体法律问题，我们建议您向合适的律师咨询。美国霍兰德奈特律师事务所的律师能够对许多与中国相关的问题提出他们的看法及建议。

About the Authors
关于本期作者

Ander Javier Aguirre has more than eight years of litigation experience in international trade and customs law. He has experience with various issues such as customs law, international trade, free trade agreements and World Trade Organization (WTO) agreements. In addition, he has experience advising companies in the participation of antidumping procedures, litigation and obtaining preferential tariff treatment programs such as the Maquiladora, Manufacturing and Export Services Industry (IMMEX) program, among others.

Linda Auerbach Allderdice heads the firm's Labor, Employment and Benefits Practice Group in California. She works with clients in a wide range of industries, including transportation and logistics, hospitality, entertainment, consumer products, commercial and residential real estate, event planning and production, banking, personnel services and staffing, data and asset protection, education, manufacturing and distribution, security services, technology, insurance, marketing, legal services, healthcare and retail. She is experienced in handling complex litigation in all aspects of labor and employment law, including wage and hour class action and Private Attorneys General Act (PAGA) litigation, discrimination, harassment and whistleblower claims, and trade secret litigation. She also advises clients on compliance with local, state and federal labor and employment laws, handles labor and employment due diligence as part of merger and acquisition (M&A) deal teams, works with clients on litigation prevention strategies and conducts workplace investigations.

Alexis Reeves Alonzo practice focuses on complex real estate transactions, including representing institutional investors, real estate funds, opportunity funds, and public and private homebuilders in real estate joint ventures, as well as the acquisition, disposition and financing of all classes of commercial real estate. She has represented borrowers and lenders in a number of mortgage and mezzanine financing transactions, including construction loans and revolving line of credit facilities.

Da'Morus A. Cohen focuses his practice on a wide array of consumer protection and compliance matters, including governmental investigative and enforcement proceedings, regulatory compliance, and advertising and promotional marketing compliance, including social media and digital media. He regularly provides advertising counsel and regulatory advice to leading Fortune 500 and Fortune 100 companies in many different product and service categories, including telecommunications, healthcare, retailing, publishing, entertainment, social media, digital media, gaming, food and beverage, and financial services.

James Dawson is a highly experienced tax litigation attorney and tax advisor with extensive knowledge resolving Internal Revenue Service (IRS) controversies in audit, appeals and litigation. For more than 13 years, he served as staff attorney for the IRS' Office of Chief Counsel, where he developed, prepared and tried complex factual and legal cases for trial before the U.S. Tax Court. His practice focuses on representing corporations and individual taxpayers in federal tax audits and in federal tax litigation.

Anthony E. DiResta co-chairs the firm's Consumer Protection Defense and Compliance Team. He is a nationally recognized leader in defending governmental law enforcement investigations and litigation, who has successfully defended companies and individuals in dozens of high-profile, "bet-the-company" investigations by the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), and almost all of the state attorneys general – *with many of those investigations being closed*. He is accomplished in crisis management. In addition to managing the investigations or litigation involved, he has developed strategic communication plans, including media relations, and counseled executives and boards of directors.

Nasim D. Fussell has a wealth of trade legislation and negotiation experience, having served in numerous trade-related roles in the public and private sectors. She advises clients on trade legislation, negotiations and regulatory issues. She provides legal and policy counsel pertaining to forced labor, customs and trade compliance, supply chains, investment, exports, enforcement of trade agreements and market access issues, among others.

Benjamin A. Genn focuses his practice on complex commercial disputes and government investigations in all stages of state and federal court litigation. He is well versed in handling matters for individuals, organizations and small to large corporations regarding business litigation, class action litigation, regulatory issues, government enforcement, internal investigations and white collar crime.

John H. Haney represents employers in a variety of matters involving wage and hour compliance, wrongful termination, discrimination, retaliation, harassment, leave and reasonable accommodation laws, workers' compensation, employee/independent contractor classification, exempt/nonexempt employee classification, trade secret protection, reductions in force, union matters, internal investigations, executive compensation, benefits, payroll and staffing agency vendors. In addition, he has experience with employment on-boarding, corporate transactions, state and federal agency investigations, single-plaintiff actions, wage and hour class actions, Private Attorneys General Act (PAGA) representative actions, occupational safety and health regulations, and COVID-19 workplace issues.

Thomas E. Hill is a highly accomplished national class action defense attorney, and an experienced trial and appellate lawyer. He has served as lead counsel for some of the largest employers in the country, and done so in more than 600 civil lawsuits filed across 30 states. He has also first-chaired more than 250 adversarial proceedings to decision, including jury, bench and administrative trials and arbitrations. The many Fortune 500 companies that he has represented as lead counsel in class litigation and/or at trial include the most-recognized "brand names" within the financial services, retail, hospitality, healthcare, technology, energy, construction and infrastructure, and gig-economy industries.

Guillermo Uribe Lara focuses on matters related to banking and securities law, national and international capital markets (including real estate capital markets), structured finance and syndicated loans. He also handles matters related to the compliance and surveillance of the Mexican securities market. He has been responsible for the first and biggest Fibra in Mexico (Mexican REIT). He has advised on five additional Fibra initial public offerings (IPOs) and several Mexican Certificados de Capital de Desarrollo (CKDs). His work includes major real estate acquisitions, including offers, rights offers and the debt deals (debt capital markets, and traditional and structured finance, both local and international).

Mary Kate Nicholson advises clients in all aspects of federal and international tax planning, including mergers and acquisitions (M&A), restructurings and spinoffs for corporations and partnerships, as well as in tax controversy matters before the IRS. She also focuses her practice in the renewable energy sector, and advises clients on tax credits such as investment tax credits (ITCs), production tax credits (PTCs), carbon capture, hydrogen, electric vehicle, and fuels and other energy tax credits. She represents clients in the traditional and renewable energy sectors in legislative and regulatory efforts, including in obtaining public and private guidance from the U.S. Department of the Treasury and the IRS.

Alexander R. Olama focuses his practice on domestic and international tax planning for individuals and tax controversy representation. He is well versed in offshore tax compliance, including providing advice with respect to the Internal Revenue Service (IRS) Offshore Voluntary Disclosure Program (OVDP), IRS Streamlined Filing Compliance Procedures, Foreign Account Tax Compliance Act (FATCA), Report of Foreign Bank and Financial Accounts (FBAR), expatriation planning and tax treaty issues.

Ronald A. Oleynik is co-head of the firm's International Trade Practice. His experience includes a broad range of industrial security, customs, export control, trade policy, and public and private and international trade matters. He has substantial experience in assisting clients in complying with U.S. trade embargoes and economic sanctions programs involving countries such as Cuba, Iran, North Korea, Russia, and Syria. He works frequently with the Treasury Department's Office of Foreign Assets Control, which is responsible for implementing, administering and enforcing sanctions regulations that restrict business transactions involving designated countries and their nationals.

Lauren N. Polk focuses her practice on wage and hour, discrimination, harassment, retaliation, employee/independent contractor classification and wrongful termination issues.

Ariel B. Robinson represents private and institutional investors, owners and developers in connection with complex real estate transactions, with an emphasis on acquisitions and dispositions, leasing and development. Her experience includes a wide range of asset types, including office and industrial buildings, multifamily projects, land for residential development, and retail, mixed-use and hospitality projects.

Billy Sahachartsiri represents employers in all aspects of employment litigation, including discrimination, retaliation, harassment, wrongful termination, and wage and hour issues. He also defends employers in complex wage and hour class actions and representative actions brought under the Private Attorneys General Act (PAGA) involving off-the-clock, overtime, minimum wage, and meal and rest break claims.

Bradley M. Seltzer brings more than 40 years of experience representing Fortune 100 utility, energy and telecommunications (telecom) clients in complex tax matters, including tax planning, accounting and controversy. He defends clients in large tax disputes with the IRS at the trial and appellate court levels, and prepares private letter rulings, technical advice requests and accounting method changes for the IRS. He has extensive experience testifying at public hearings on behalf of clients regarding proposed regulations that affect the utility industry, such as interest synchronization, consolidated tax adjustments, and the normalization consequences of dispositions or deregulation and nuclear decommissioning issues.

Samuel J. Stone works with clients in a broad range of industries on sensitive, high-stakes employment and litigation matters, complex civil and government investigations, and advice-and-counsel issues. He has represented employers and individuals at all stages of litigation and appeal, including navigating and securing favorable pre-complaint resolutions, first-chairing numerous bench trials, administrative hearings and appeals, and successfully defending favorable results on appeal. He is frequently called upon to handle high-stakes trade secret and restrictive covenant litigation; whistleblower, harassment, discrimination, and retaliation claims and investigations; and wage-and-hour class and representative actions.

Daniel Graham Strickland focuses his practice in the area of federal tax controversy, representing taxpayers in all types of tax controversy matters. He also focuses his practice in the renewable energy sector, advising clients on energy tax credits and incentives from conception to litigation. In the context of tax controversy, he guides clients through IRS audits, prepares administrative claims and protests of IRS actions, and litigates tax and tax-related cases throughout the United States. His experience covers a wide range of procedural and complex tax issues, including valuation, foreign and energy tax credits, classification of investment as debt or equity, judicial substance doctrines and penalty defenses.

Tina Tellado focuses her practice on the representation of employers in all aspects of employment and labor law, with a particular emphasis on wage-and-hour complex collective, class and representative litigation, as well as discrimination and harassment claims. She has served as first and second chair in such matters pending in federal, state and arbitration forums nationwide for more than a decade. Her extensive experience representing employers in nationwide class and collective actions and complex employment litigation includes the defense of alleged overtime, minimum wage, off-the-clock, classification of exempt or nonexempt overtime status, misclassification as an independent contractor or contingent worker, and meal and rest break claims.

Chad M. Vanderhoef focuses his practice on tax controversy and litigation, offshore tax and reporting compliance (e.g., Report of Foreign Bank and Financial Accounts / FBARs, international information returns), cross-border tax planning, and foreign investment in U.S. real estate. His practice includes representing clients in tax controversy matters, including U.S. Tax Court and federal district and appellate court litigation, as well as Internal Revenue Service (IRS) examination and appeals. In addition, he advises clients in connection with IRS tax and reporting remediation options.

Carlos Véjar counsels companies on international trade strategies, investments, government procurement, regulatory compliance, unfair trade practices, intellectual property and customs procedures, as well as commercial, private and international trade arbitration matters. He has been appointed as panelist for the United States-Mexico-Canada Agreement's (USMCA) general dispute settlement chapter and Mexico's roster for disputes concerning unfair trade practices, ICSID list of mediators and WTO list of experts.

Mary T. Vu represents employers in a broad range of industries on sensitive, high-stakes employment and litigation matters, including breach of contract, wrongful termination, discrimination, retaliation, sexual harassment, leave and reasonable accommodation, workers' compensation, employee classification, trade secret protection, reductions in force, wage and hour compliance, executive compensation, benefits, payroll and staffing agency vendors.

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