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Employment Law Update

What You Need to Know for 2024

Presented by
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Shannon R. Finley is a shareholder in the firm's San Diego office and focuses her practice on employment law, representing California employers in disputes ranging from single plaintiff wrongful termination cases to complex class actions, and everything in between. In addition to defending employers in litigation, Ms. Finley provides guidance to employers, advising on best practices to avoid lawsuits before they arise.

Ms. Finley is a speaker and author on issues including best hiring practices, wage and hour law, discrimination, leaves of absence, and social media. She was recognized as a Rising Star by San Diego *Super Lawyers*® and received the C. Hugh Friedman New Lawyer Award from Lawyers Club for her leadership and professionalism in the San Diego Legal Community. Ms. Finley was also recognized by *Best Lawyers: Ones to Watch* for her work in Litigation – Labor & Employment and was honored as one of the 2020 & 2022 Leaders in Law and 2021-2023 Women of Influence in Law by the *San Diego Business Journal.*

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Ryan H. Nell is an employment attorney responsible for representing California employers statewide in both counseling and comprehensive litigation support. With the ever-changing landscape of California and federal employment law, Ryan prides himself on assisting clients in staying ahead of the curve in an effort to avoid legal trouble before it arises. He has extensive experience representing clients in harassment, retaliation, and discrimination matters, as well as large-scale wage and hour lawsuits.

Ryan speaks regularly on a wide range of topics aimed at assisting California employers in the avoidance of legal trouble before it arises, and his work in the field has led to his recognition as a Rising Star by San Diego *Super Lawyers*®. Mr. Nell was also included in the 2021-2024 editions of *Best Lawyers: Ones to Watch* for his work in Labor and Employment Law – Management.

Judicial Updates

Mandatory Arbitration Agreements

- *Chamber of Com. of the United States of Am. v. Bonta*, 62 F.4th 473 (9th Cir. 2023)
  - The court held that AB 51, which prohibited employers from requiring employees "to waive any right, forum, or procedure" established by the FEHA as a condition of employment, is preempted by the FAA because it undermines federal policy favoring arbitration.

Late Payment of Arbitration Fees

- *Doe v. Superior Court* (2023), 95 Cal.App.5th 346
  - Confirmed an employee can go back to court if an employer fails to pay arbitration fees and costs on time.
  - An employer must actually pay arbitration fees and costs by the due date. Demonstrating payment is "in the mail" by the due date is not enough.
  - An employer loses all rights to enforce the arbitration agreement for late payment.

Whistleblowing of "Known" Wage Violations

- *In People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023), 14 Cal. 5th 719
  - An employee filed a report of systematic violations for unpaid wages against a bar owner.
  - The lower court said this was not a protected disclosure because the bar owner already knew of the violations.
  - The California Supreme Court disagreed: whistleblower laws protect information that is already known to the employer.

Staffing Employee – Waiting Time Penalties

- *Young v. RemX Specialty Staffing* (2023) 91 Cal. App. 5th 427
  - For employees working at a staffing company, a "discharge" within the meaning of Labor Code § 201.3(b)(4) occurs when the staffing employee is fired from the temporary services employer (i.e., staffing agency), and not when the staffing agency terminates an employee from a particular work assignment.

Compensable Time – Computer Booting

- *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022)
  - Time spent booting up work computers by customer call center employee was "integral and indispensable" to their principal duties and was therefore compensable under the FLSA.
    - However, time spent shutting down their work computers was not compensable.

COVID Expense Reimbursement

- *Thai v. Int'l Bus. Machines Corp.*, 93 Cal. App. 5th 364 (2023)
  - Plaintiff sued under Labor Code 2802, alleging IBM failed to reimburse for expenses incurred to perform regular job duties from home following Governor Newsom's Covid-related stay-at home order.
  - IBM argued that the Governor's order was an intervening cause of the work-from-home expenses and had absolved IBM of liability under section 2802.
  - Employer must reimburse necessary expenses incurred by employees while working from home pursuant to California's COVID-19 stay-at-home orders even though the employer did not directly cause the expenses.

Employers Owe No Duty Of Care To Prevent The Spread Of COVID To Employees' Household Members

- *Kuciemba v. Victory Woodworks, Inc.* (2023) 31 F.4th 1268
  - Plaintiff claimed that he contracted COVID-19 while working and that as a result, his family members also became ill with the infection.
  - The Court ruled that California employers owe no duty of care to prevent the spread of COVID-19 to employees' household members.

Neutral Rounding Policy Questioned

- *Camp v. Home Depot USA* (2022) 84 Cal. App. 5th 638
  - An employee alleged that Home Depot's policy of rounding clock-in and clock-out times to the nearest quarter-hour resulted in unpaid minimum and overtime wages.
  - As a result, plaintiff claims he wasn't paid for at least 470 minutes for over four and a half (4.5) years of work due to the rounding policy.
  - The Appeals Court questioned the ongoing validity of case law approving of neutral rounding policies because the guidance provided by more recent California Supreme Court opinions had called into question the efficiencies historically attributed to time rounding, given that advances in technology had enabled employers to track time more precisely.
  - The California Supreme Court agreed to hear the case, which could limit how employers in the state use time rounding to calculate employees' work hours.

Cal/OSHA COVID-19 Prevention Non-Emergency Regulation (Effective Until February 2025)

- California still has Non-Emergency Regulations (NER) which remain in effect until February 2025.
- Employers must ensure employees are protected in the workplace should an outbreak occur in the workplace.
- During the COVID-19 pandemic, an outbreak was defined as three or more employees in an exposed group testing positive for COVID-19 within a 14-day period.
- California Department of Public Health revised its definition of outbreak to be 3 positive COVID-19 cases during a 7-day period.

Infinite Furlough – Immediate Vacation Payout

- *Hartstein v. Hyatt Corp.*, 82 F.4th 825 (9th Cir. 2023)
  - Hyatt temporarily laid off employees in March 2020 due to COVID without a return-to-work date.
  - In June 2020, Hyatt informed employees that their employment would be terminated and paid all unused accrued and earned vacation.
  - In a class action, a former employee asserted employees should have received final paychecks, including vested vacation, at the time of the initial temporary layoff in March 2020.
  - The Ninth Circuit adopted the enforcement guidance of the California Division of Labor Standards Enforcement and held that "a temporary layoff with no specific return date within the normal pay period is a discharge within the meaning of [Labor Code section] 201."
  - The Ninth Circuit opined that when a California employer furloughs an employee with no definite return date, it must immediately pay accrued, unused vacation time.

Enforcement of Release Agreement Executed By Employee

- *Castelo v. Xceed Fin. Credit Union* (2023) 91 Cal. App. 5th 777
  - Castelo sued Xceed for wrongful termination and age discrimination in violation of FEHA.
  - Plaintiff signed a two-part release: (1) a release of claims through the date of execution and (2) "Reaffirmation" that Castelo was supposed to sign on her last day of her employment six weeks later.
    - Castelo signed both releases at the same time (i.e., six weeks before her employment ended).
  - Castelo argued that the release violated Cal. Civ. Code § 1668, which prohibits pre-dispute releases of liability.
  - Summary judgment granted and upheld in favor of Xceed.
  - The court held the releases were not barred by the statute because they did not have the purpose of immunizing Xceed from liability for a future violation of law.

Business Entity Agents Of Employer Share Potential FEHA Liability

- *Raines v. U.S. Health Works* (2023) WL 5341067 (Cal. S. Ct. 2023)
  - In this putative class action, employees alleged their employment offers were conditioned upon their completion of pre-employment medical tests performed by U.S. Healthworks Medical Group (USHW).
  - Employees alleged that during the screenings, USHW asked intrusive and illegal questions unrelated to the applicants' ability to work in violation of FEHA.
  - The employees asserted FEHA claims against prospective employers that used USHW as an "agent" of the employers.
  - The Court examined FEHA's definition of "employer" and concluded the definition encompasses third-party corporate agents such as USHW.

Employer Must Prove "Substantial Increased Costs" Would Result From Religious Accommodation

- *Groff v. DeJoy*, 143 S.Ct. 2279 (2023)
  - A USPS employee refused to work on Sundays saying it was necessary for a day of rest and worship.
  - The Supreme Court held that "more than a de minimis cost, as that phrase is used in common parlance, does not suffice to establish undue hardship under Title VII."
  - The Court held that undue hardship is demonstrated when "a burden is substantial in the overall context of an employer's business."
  - The Court further concluded that when "[f]aced with an accommodation request … it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary."
  - The Court found that an employer must accommodate an employee's religious beliefs unless it can show that doing so would "*result in substantial increased costs in relation to the conduct of its particular business*."

Gender Neutral Offensive Conduct Does Not Bar Harassment and Hostile Work Environment

- *Sharp v. S & S Activewear*, Case No. 21-17138 (9th Cir. 2023)
  - Both former female and male employees of apparel manufacturer S&S Activewear ("S&S") alleged that S&S permitted its managers and employees to routinely play "sexually graphic, violently misogynistic" music in its warehouse in Reno, Nevada.
  - Employees alleged the music and related conduct created a hostile work environment in violation of Title VII.
  - The district court granted the employer's motion to dismiss, reasoning that the music's offensiveness to both men and women and audibility throughout the warehouse nullified any discriminatory potential.
  - The Ninth Circuit vacated the district court's dismissal and ruled music offensive to both women and men is not a certain bar to stating a Title VII claim for sexual harassment and hostile work environment.

Employer Not Strictly Liable For Harassment Outside of Workplace Due to Pre-Existing Personal Friendship

- *Atalla v. Rite Aid Corp.*, 2023 WL 2521909 (Cal. Ct. App. Feb. 24, 2023)
  - Atalla, a pharmacist, sued Rite Aid alleging that a district manager had sexually harassed her, including a series of late-night text messages containing a video of a sexual act and a photo of genitals.
  - The Court reviewed evidence demonstrating a long-standing personal relationship between the parties, including texts about family, vacations, food and dining, alcohol and drinking, people and pets, exercise, chit chat about work, and they regularly met for coffee, lunch, holiday and birthday dinners, and were acquainted with each other's spouses.
  - The Court of Appeal held Rite Aid was not strictly liable because it demonstrated that the harassment occurred outside of work and that Atalla was a willing participant in the personal friendship that pre-existed Atalla's employment.

Employee Uncorroborated, Self-Serving Testimony Insufficient Evidence of Pretext

- *Opara v. Yellin*, 57 F.4th 709 (9th Cir. 2023)
  - Opara was terminated from her employment as an IRS revenue officer after the IRS determined she had committed several violations.
  - Opara alleged she was terminated based on age and national origin discrimination.
  - The district court granted summary judgment, and the Ninth Circuit affirmed.
  - The court concluded that because Opara's evidence consisted entirely of Opara's own uncorroborated and self-serving testimony, it was insufficient to raise a genuine issue as to pretext concerning the reasons.

New Laws

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SB 235 – Initial Disclosures

- For cases filed on or after January 1, 2024, SB 235 requires parties to a civil action in state court to exchange initial disclosures with all other parties within 60 days of a demand by any party to the action, unless modified by stipulation.
- Similar to the initial disclosures already required pursuant to the Federal Rules of Civil Procedure, these disclosures must include:
  1) The name and contact information of persons likely to have discoverable information and the subject of the information;
  2) a copy or description of all documents in support of the party's claims or defenses, or that is relevant to the action; and
  3) contractual agreements or insurance policies under which an insurance company or person may be liable to satisfy a judgment entered in the action, or to indemnify or reimburse for payments made to satisfy the judgment.
- Documents and information used solely for impeachment purposes are expressly excluded from these disclosures.
- The new law also increases sanctions imposed from $250 to $1,000.

SB 428 – Restraining Orders on Behalf of Employees

- Starting January 1, 2025, SB 428 will allow employers to seek restraining orders on behalf of their employees when they have:
  - Been harassed;
  - suffered unlawful violence;
  - experienced a credible threat of violence in the workplace or reasonably construed to be carried out in the workplace, where there is "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose."
- SB 428 will prohibit a court from issuing such an order if it would prohibit speech or activities protected by the National Labor Relations Act or provisions governing the communications of exclusive representatives of public employees.

SB 553 - Workplace Violence Prevention Plan

- The new law, effective July 1, 2024, requires nearly all employers in the State of California to prepare a Workplace Violence Prevention Plan, train employees on how to identify and avoid workplace violence, and maintain a violent incident log.
- SB 553 also has similar provisions that allow employers to seek temporary restraining orders on behalf of employees suffering violence or credible threats of violence, similar to SB 428.

SB 476 – Associated Costs for Food Handler Card

- SB 476 requires an employer to pay costs associated with an employee obtaining a food handler card, including:
  - The time it takes for the employee to complete the training (which would be considered "hours worked").
  - Cost of the food handler certification program.
  - The time it takes to complete the certification program.
- The law also prohibits an employer from conditioning employment on an applicant or employee having an existing food handler card.

SB 497 – Rebuttable Presumption of Retaliation

- SB 497 amends sections 98.6, 1102.5, and 1197.5 of the Labor Code.
- It creates a rebuttable presumption of retaliation if an employer subjects an employee to an adverse action within 90 days of an employee engaging in the conduct described by those sections.
  - Such as making complaints or claims related to rights under the jurisdiction of the Labor Commissioner, making complaints about unpaid wages, or making complaints about equal pay violations.
- The law also increases the civil penalty imposed on an employer under Labor Code section 1102.5 from $10,000 generally to $10,000 per employee per violation.

SB 616 – Paid Sick Leave

- SB 616 amends sections 245.5, 246, and 246.5 of the Labor Code.
- The new law increases the annual amount of paid sick leave from three days or 24 hours to five days or 40 hours for eligible employees and raises the accrual cap from 48 hours to 80 hours.
- It also extends the anti-retaliation and procedural provisions in California's sick pay law to include those covered by a valid collective bargaining agreement ("CBA"), and expressly excludes railroad carrier employers and their employees.

SB 616 (cont.) - Paid Sick Leave

- The new law preempts certain procedural, notice, and use provisions in local ordinances that contradict California's law. Specifically, on January 1, 2024, several key changes to California's existing paid sick leave law will take effect:
  - Increased Annual Paid Sick Leave Usage Cap
    - Increases annual paid sick leave usage cap from 24 hours or three days per year to 40 hours or five days per year (whichever is greater).
  - Increased Alternative Accrual Rate
    - The current law permits employers to use a different accrual method if the employee receives no less than 24 hours of accrued paid sick leave by their 120th calendar day of employment and in each calendar year.
    - Specifically, in addition to ensuring that employees accrue at least 24 hours of paid sick leave by their 120th calendar day of employment, employees must also accrue at least 40 hours of paid sick leave by their 200th calendar day of employment.
    - For each benefit year after the first year of employment, employees must accrue at least 40 hours of paid sick leave per year.

SB 616 (cont.) - Paid Sick Leave

- Increased Rolling Accrual Cap
  - The new law also increases the current California paid sick leave rolling accrual cap to a year-end carryover cap from 48 hours (six days) to 80 hours (10 days). Employers can avoid the accrual and carryover requirements by providing a frontload of paid sick leave at the start of each benefit year.
- Increased Frontload Grant to Avoid Accrual and Carryover
  - Under the amended law, employers who want to avoid accrual and carryover of paid sick leave will need to grant new hires the greater of 40 hours or five days, at a minimum, of paid sick leave upon hire that is available to use by their 90th calendar day of employment, and then at the beginning of each subsequent benefit year.

SB 616 (cont.) - Paid Sick Leave

- Partial Preemption
  - The new law contains a new section which partially preempts local California paid sick leave ordinances that have different substantive standards on the following topics: (a) advances on paid sick leave before it accrues; (b) reinstatement of earned, unused paid sick leave upon rehire; (c) balance notification each pay period; (d) rate of pay for sick leave and the timing of such pay; and (e) employee notice to employers for planned and unplanned paid sick leave use.
- Expanded Application to Employees Covered by Collective Bargaining Agreement
  - The amendments change the application of California's paid sick leave law to employees covered by CBAs where the CBA qualifies for exemption.
  - Specifically, employers that rely on the CBA exemption must satisfy certain aspects of the paid sick leave law including reasons for use, no requirement to find a replacement worker, and no retaliation for use of paid sick leave (which would appear to include counting use of paid sick leave as an instance of absence for disciplinary purposes).

SB 699 and AB 1076 – Non-Compete Clause or Agreement

- SB 699 and AB 1076 amend section 16600 of, and add sections 16600.1 and 16600.5 to, the Business and Professions Code.
- SB 699 makes any contract that is void under California law unenforceable regardless of where and when the employee signed the contract.
- AB 1076 codifies *Edwards v. Arthur Andersen LLP* to void a non-compete clause or agreement in an employment context, no matter how narrowly tailored, with limited exception.
- The new law also adds additional protections including a notification requirement for California employers and makes a violation of these provisions a violation of California's unfair competition law (found in Business and Professions code sections 17200 et seq.).

SB 700 – Off-Work Cannabis Use

- SB 700 amends section 12954 of the Government Code and expands existing law.
- It makes it unlawful for an employer to discriminate against a candidate or employee because of the person's use of cannabis off the job and away from the workplace.
- The new law also makes it unlawful to request information from an applicant relating to the applicant's prior use of cannabis, with certain exceptions.

SB 848 – Time Off for Reproductive Loss

- SB 848 adds section 12945.6 to the Government Code and requires employers to provide eligible employees up to five days of (unpaid, unless the employer has an existing policy stating otherwise) reproductive loss leave.
  - Reproductive loss includes a failed adoption or surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction.
- The law also prohibits retaliation against an individual who uses this leave or shares information about it.

AB 594 – Public Prosecution of Labor Code Violations

- AB 594 amends sections 218 and 226.8 of, and adds chapter 8 and repeals section 181 of, the Labor Code.
- The new law authorizes public prosecutors, including the Attorney General, a district attorney, a city attorney, a county counsel, or any other city or county prosecutor, to independently prosecute specified violations of the Labor Code that occur within their geographic jurisdictions.
- The law also provides that any individual agreement that requires arbitration of a dispute or limits representative actions does not affect the prosecutor or Labor Commissioner's ability to enforce the Labor Code.

AB 933 – Defamation Privilege

- AB 933 adds section 47.1 to the Civil Code, extending the defamation privilege to expressly include:
  - an individual's communications made, without malice, regarding factual information related to incidents of sexual assault, harassment, or discrimination experienced by that person, provided the individual had a reasonable basis to file a complaint (regardless of whether it was filed or not).
- The law also authorizes a defendant who prevails in an action related to making such a privileged communication to recover its reasonable attorney's fees and costs, treble damages, and punitive damages.

State Minimum Wage

- Effective January 1, 2024, the minimum wage rate state-wide will increase to $16.00 per hour for all employers.
- This increases the minimum salary for exempt employees to $1,280 weekly/$66,560 annually.
- Minimum total annual compensation for employees who qualify for the inside sales exemption from overtime will increase to $49,920.
- Similarly, split-shift premiums, meal period premiums, rest period premiums, paid sick leave, and other related wages will increase.

City of San Diego – Minimum Wage

- Effective January 1, 2024, employees who perform at least two hours of work in one or more calendar weeks of the year within the geographic boundaries of the City of San Diego will receive a minimum wage increase from $16.30 to $16.85 an hour.
  - Tips and gratuities do not count toward payment of minimum wage.
- If a work location is not within the geographic boundaries of the City of San Diego, but within the County of San Diego, the California state minimum wage and earned sick leave laws apply.

SB 525 – Minimum Wage for Health Care Workers

- SB 525, effective June 1, 2024, will raise the minimum wage for health care workers.
- The law includes five separate minimum wage schedules for covered health care employees depending on the nature, size, and structure of the employer's business, which establish three separate minimum wage schedules (setting minimum wages at a rising scale over time from $18-$25) for covered health care employees.
- SB 525 adds sections 1182.14 and 1182.15 to the Labor Code.

AB 1228 – Fast Food Council and Fast Worker Minimum Wage

- AB 1228 repeals existing law, presently suspended due to a referendum petition, which established the Fast Food Council within the Department of Industrial Relations, *only if* the referendum is withdrawn by January 1, 2024.
- If withdrawn by that date, the bill will, until January 1, 2029, re-establish the Fast Food Council, deem the council to be a governmental agency, and re-establish its duties to include setting minimum wage as well as requirements and review procedures for health, safety, and employment standards.
- AB 1228 also increases minimum wage for fast food workers to $20 an hour, effective April 1, 2024.

Bills to Watch - Vetoed By Governor

- SB 403: "Caste" as protected class under FEHA.
- SB 627: Chain businesses (100 or more nationwide) to provide a 60-day displacement for location closure.
- SB 725: Successor grocery employer to provide a dislocated worker a one-week allowance of pay for each year of employment .
- SB 731: Employer to provide 30 days' written notice to an employee working remotely to let them know they can request to continue to work remotely as a reasonable accommodation before requiring that employee to return to work in person.
- SB 799: Striking workers would be eligible for unemployment benefits after two weeks.
- AB 524: "Family caregiver" as a protected class under the FEHA.
- AB 575: Add "an individual's assumption of responsibilities for a child in loco parentis" to the reasons for which an employee taking leave may receive family temporary disability insurance benefits to bond with a minor child.
- AB 1356: Amend California's Worker Adjustment and Retraining Act (Cal-WARN) to expand its application beyond industrial or commercial facilities to all places of employment that have employed 75 or more persons in the preceding 12 months and included non-temporary employees of labor contractors.

Questions?

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