SHRM TULARE/KINGS
2024 LABOR LAW UPDATE

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by Jared Hague, Esq.

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Calnevalaw.com Website

- **Wage and Hour:** Overview of major differences in NV and CA wage-and-hour laws.
- **Employee Leave:** Overview of major differences in NV and CA requirements for providing paid and unpaid leave.
- **Forms and Recordkeeping:** Overview of major differences in NV and CA employment forms and recordkeeping rules.
- **Additional Resources:** Dive deeper for a better understanding with available CA employment law recorded webinar presentations. Recorded presentations will soon be available for purchase and download.

Cal Neva Law Podcasts:

***Answers to Your Questions About Employee Law* on Apple Podcasts!**

1. What California Employers Need to Know about Wage and Hour Law Compliance.
2. Reductions in Force/Layoffs/Reduced Hours: What Employers Need to Know Now.
3. Important Decision for California Employers Impacting Mandatory Arbitration Agreement.
4. Important Action for a Proper Workplace Investigation.
5. Can California Employers Mitigate Wage and Hour Risks with an Arbitration Agreement?

https://podcasts.apple.com/us/podcast/calneva-law-podcast/id1506833154

Sutton Hague Blogs

Sutton Hague prides itself on staying up to date and posting any recent and relevant labor and employment related changes for both California and Nevada. Our blogs on these topics can be found at https://suttonhague.com/blog/.

The blogs help to simplify and clarify some of the lengthy materials that come out and also provide links and updates to previous blogs for the public at no charge.

You can also be notified of updates by following any of our social media accounts.

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Topics for Today

- Religious Accommodation
- Disability Discrimination
- Sexual Harassment / Discrimination
- California Legislative Updates
- California Minimum Wage Increase
- National Labor Relations Board Updates
- DOL Final Rule on I/C Status

Religious Accommodation

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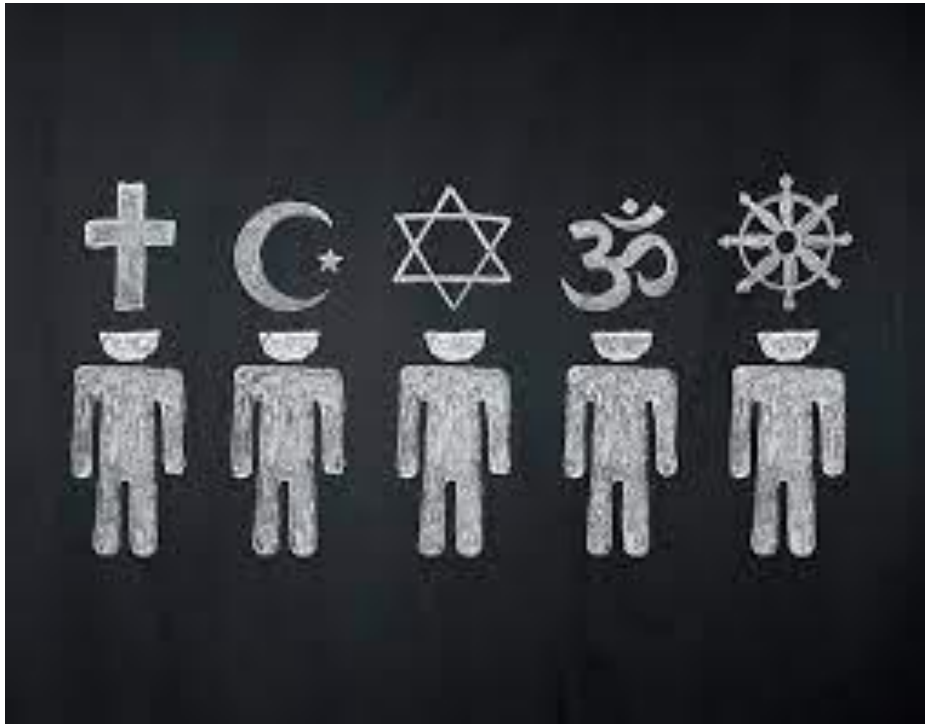

Religious Accommodation

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- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion.
- This includes refusing to accommodate an employee's sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship.
- Applies to employers with 15 or more employees.
- Defines "religion" very broadly.
- Different than ADA accommodation.
- EEOC Guidance:
  - https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation
  - https://www.eeoc.gov/employers/small-business/religious-accommodations-tips

Current Events:
Groff v. Dejoy (USSC, June 29, 2023)

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- Gerald Groff is an evangelical Christian.
- Employed by the United States Postal Service (USPS).
- USPS had a new policy requiring employees to deliver packages on Sundays.
- Groff requested a religious exemption from the new policy because he believes that Sundays should be devoted to worship and not "secular labor."

Current Events:
Groff v. Dejoy (USSC, June 29, 2023)

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- What does undue hardship mean for religious accommodation in the workplace?
- On July 29, 2023, the USSC unanimously clarified that a religious accommodation only results in "undue hardship" when "the burden of granting [the] accommodation would result in substantial increased costs in relation to the conduct of its particular business."
- Employers will now have to show a higher degree of hardship to deny employee requests for religious accommodation.
- The "substantial increased cost" standard is a departure from the lower "more than a de minimis cost" standard that has prevailed since 1975.
- Under the new standard employers must show that the requested religious accommodation would create an "excessive" or "unjustifiable" burden.

What Does this Mean for Employers?

- *Groff v. Dejoy* makes it easier for employees to obtain religious accommodations.
- Employers must be prepared to show that the requested religious accommodation would create an "excessive" or "unjustifiable" burden to the business if they plan on denying a religious accommodation.
  - Small financial burden not enough.
  - Must show "substantial increased costs."

Disability Discrimination

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The Americans with Disabilities Act (the "ADA")

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- Prohibits discrimination against people with disabilities.
- Applies to private employers with 15 or more employees.
- Employers must provide reasonable accommodations to qualified applicants or employees.
- A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application process or to perform essential job functions.
- Enforced and regulated by the U.S. Equal Employment Opportunity Commission ("EEOC").

USSC Petition for Cert. Denial: *Kincaid v. Williams* (June 30, 2023)

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- Kesha Williams ("Williams") is a transgender woman.
- Williams was sentenced to six months in a Virginia jail, originally assigned to female housing.
- Moved to male housing when her gender at birth was discovered during a medical examination.
- During this check-up, Williams told the nurse that she has gender dysphoria. Williams asked to be given her prescribed pills and injections.
- After being sent to male housing, Williams was denied access to her medications for gender dysphoria.
  - According to the World Professional Association for Transgender Health Standards of Care, gender dysphoria is "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth."
- While Williams was on the men's side of the prison, she faced harassment by prison deputies about her sex and gender identity. Male inmates also bullied Williams.
- Williams filed a civil action for deprivation of rights against the Sheriff of Fairfax County, a prison deputy, and a prison nurse, charging violations of the ADA, the Rehabilitation Act of 1973, the United States Constitution, and state common law.

USSC Petition for Cert. Denial: *Kincaid v. Williams* (June 30, 2023)

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- Does the ADA's exclusion for "gender identity disorders not resulting from physical impairments" apply to Williams' gender dysphoria and bar her ADA claim?
- Williams argued that gender dysphoria is not a gender identity disorder and that, even if it is, it is caused by a physical issue placing it under the protection of the ADA.
- The Fourth Circuit panel majority found that "gender dysphoria" does not constitute what the ADA calls a "gender identity disorder."
  - The term "gender identity disorders" in the ADA refers only to a so-named psychological condition that was used in the American Psychiatric Association's Diagnostic and Statistical Manual at the time of the ADA's enactment, and because leading organizations in that field no longer recognize that concept, the panel majority held that the term is now "obsolete."
- The majority also found that Williams had adequately pleaded an ADA claim by alleging gender dysphoria resulting from a physical impairment.
  - The ADA's definition of disability excludes "gender identity disorders not resulting from physical impairments," §12211(b)(1), and therefore, if a person's "gender dysphoria" results from a physical impairment, that condition may qualify as a disability.

USSC Petition for Cert. Denial: *Kincaid v. Williams* (June 30, 2023)

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- USSC denied the petition for writ of certiorari.
- Under the ruling, people with gender dysphoria are entitled under the ADA to receive reasonable accommodations and are protected from discrimination.
- A dissent written by Justice Alito predicts a flood of lawsuits will result.
  - Others disagree.

Implications for Employers

- 9th Circuit has not ruled on it.
- The ruling is binding only in the states covered by the 4th Circuit — Maryland, North Carolina, South Carolina, Virginia and West Virginia.
- *Williams* marks a change in the legal landscape, at the federal level, pertaining to transgender rights.
- All employers should expect requests from employees seeking to use gendered facilities and those that seek a leave of absence to pursue gender-affirming treatment.

California's laws on gender identity / expression

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- California Fair Employment and Housing Act (FEHA) makes it illegal for an employer to fire, demote, fail to hire, fail to promote, harass, or otherwise discriminate against an employee because of their sexual orientation, gender identity, and/or gender expression.
  - Requires employers to allow employees to use the restroom, locker room, dressing room, or dormitory (referred to collectively as "facilities") that corresponds to the employee's gender identity or gender expression, regardless of the employee's sex assigned at birth.
- The California Ralph Civil Rights Act prohibits acts of violence or threats of violence because of, among other traits, a person's actual or perceived sexual orientation, gender, gender identity, or gender expression.
- Many localities in California also have passed laws that prohibit sexual orientation and gender identity discrimination in employment.

https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/The-Rights-of-Employees-who-are-Transgender-or-Gender-Nonconforming-Fact-Sheet_ENG.pdf
https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf

Sexual Harassment / Discrimination

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Sharp v. S&S Activewear, L.L.C. (9th Cir. 2023) 69 F.4th 974

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- Former employees brought lawsuit alleging sexual harassment/discrimination in the workplace.
- Employees allege they were subjected to a hostile work environment in distribution center because rap music with misogynistic lyrics
  - Lyrics allegedly referred to women as "hoes" and other derogative terms.
  - Case of first impression
- Initially, NV District Court dismissed lawsuit in part on the grounds that the actions were offensive to both sexes.
- In June 2023, 9th Circuit Court of Appeals ruled that the suit could be reinstated saying that "offensiveness to multiple genders is not a certain bar" to a sexual discrimination in the workplace claim, and that harassment, "whether aural or visual, need not be directly targeted at a particular plaintiff to pollute a workplace."
- On Nov. 27, 2023, Judge approved a joint stipulation to dismiss the lawsuit.

California Legislative Updates

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- On October 14, 2023, California's 2023 legislative session ended.
- Gov. Newsom signed more than 30 employment related bills.

SB 616 – Paid Sick Leave

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Effective January 1, 2024

- Employers must increase the amount of sick leave provided to California employees from three days/24 hours to five days/40 hours.
  - Could be more than 40 hours if employes works 12-hour days.
- The law also increases the use limits each year to five days/40 hours and increases accrual and carryover cap to 10 days/80 hours.

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB616

SB 616 – Paid Sick Leave

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- Continues to exempt from the accrual requirement collective bargaining agreements that meet certain criteria.
- However, SB 616 does extend some provisions of California's paid sick leave law to non-construction industry collective bargaining agreement employees.
  - Amended California Labor Code Section 246.5 requires that employers allow nonconstruction industry collective bargaining agreement employees who otherwise are exempt from California's paid sick leave law to use paid sick leave for the same reasons as covered employees—for the "[d]iagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member" and, for certain purposes, for an employee who is a victim of domestic violence, sexual assault, or stalking.
  - Employers also may not require a collective bargaining employee who uses sick days to search for or find a replacement worker for those days.
  - Employers may not retaliate against collective bargaining agreement employees who use paid sick leave, and employees are entitled to a rebuttable presumption of retaliation if an employer takes adverse action within thirty days of certain protected activity.

https://www.dir.ca.gov/dlse/paid_sick_leave.htm

SB 848 – Reproductive Loss Leave

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- Requires employers with at least five employees to provide employees who have worked at least 30 days with up to five days of unpaid reproductive loss leave.
- As defined by SB 848, a "reproductive loss" includes a miscarriage, failed surrogacy, stillbirth, unsuccessful "assisted reproduction" (such as artificial insemination or embryo transfer), or failed adoption.
- In the event an employee suffers more than one reproductive loss within 12 months, the employer is not obligated to grant a total amount of leave in excess of 20 days within 12 months.
- The employee may take available and accrued sick leave or other compensatory time off (e.g. vacation, bereavement leave, personal necessity leave).
  - The paid leave may run concurrently with leave taken pursuant to S.B. 848.
  - If an employee does not have any available paid leave, then the employee may take unpaid leave pursuant to S.B. 848.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB848

SB 848 – Reproductive Loss Leave

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- What about California Family Rights Act (CFRA), California Pregnancy Disability Leave (PDL), and the Family and Medical Leave Act (FMLA), or Medical leaves of absence that involve consideration of disability leave under the California Fair Employment and Housing Act (FEHA)?
  - PDL runs concurrently with FMLA leave, but not with CFRA leave.
  - Pregnancy is not covered or considered a serious health condition under the CFRA, and women with difficult pregnancies are not entitled to protected leave under the CFRA.
  - CFRA leave can be used by an employee only following the birth of a child to care for or bond with a healthy newborn or to care for a newborn with a serious health condition.
- SBS 848 Reproductive Loss Leave must be taken within three months but need not be taken on consecutive days.
  - Eligible employees may choose to use any accrued and available sick leave, or other paid time off, for reproductive loss leave.
  - If the employee uses PDL or leave under CFRA, the leave can commence within three months from the end of that leave.

SB 700 – Applicant's Cannabis Use

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- In 2022, the California legislature passed AB 2188, making it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment based on (1) a person's use of cannabis off-the-job and away from the workplace or (2) an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.
- SB 700 expands the protections by prohibiting employers from requesting information from an applicant for employment relating to the applicant's prior use of cannabis.
- SB 700 also prohibits employers from using information obtained from a criminal history about an applicant or employee's prior cannabis use, unless the employer is permitted to consider or inquire about that information under the state's Fair Chance Act, or other state or federal law.

Both take effect on January 1, 2024.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB700

SB 700 – Applicant's Cannabis Use

- SB 700 does not preempt state or federal laws requiring an applicant to be tested for controlled substances.
  - Both laws exempt employers in the building and construction industry.
  - Both laws exempt employers with applicants and employees in positions that require a federal background investigation or clearance.
  - Does not preempt state or federal laws applicable to companies receiving federal funding or federal licensing-related benefits, or that have federal contracts.

SB 553 – Workplace Violence Prevention

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Starting July 1, 2024:

- CA employers must create, adopt, and implement a written Workplace Violence Prevention Plan.
- Must include "effective" procedures to: (1) investigate and respond to reports of workplace violence; (2) prohibit retaliation against reporters; (3) communicate with employees regarding workplace violence; (4) identify and evaluate workplace violence hazards; and (5) revise and review the plan as needed.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB553

SB 553 – Workplace Violence Prevention

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- Requires annual employee trainings for all California employers and their California employees.
- This law did not establish new reporting requirements.
  - Employers need to report only "serious" injuries or fatalities as required by Title 8 CCR §330(h) and §342.
- The law exempts worksites with less than 10 employees.
- Cal/OSHA has not yet issued a press release regarding a model program.
- Appears to be a heavy burden for employer.
  - Might consider a safety consultant to help with the process.

SB 428 – Temporary Restraining Orders

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Effective January 1, 2025:

- Employers may seek restraining orders on behalf of employees who have suffered harassment, and not just those with a "credible threat of violence."
- "Harassment" is defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person," "that serves no legitimate purpose," that "would cause a reasonable person to suffer substantial emotional distress," and actually does "cause substantial emotional distress" to the employee at issue.
- The employee need not be named.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB428

SB 497 – Protected Employee Conduct

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Effective January 1, 2024:

- SB 497 amends multiple provisions of the Cal. Labor Code prohibiting retaliation against employees who engage in specified protected conduct and creates a rebuttable presumption of retaliation if an employer engages in prohibited conduct within 90 days of specified protected activity.
- Amends Labor Code Section 1102.5 to expand the civil penalty of up to $10,000 to apply to all categories of employers and clarifies that the civil penalty is paid to the employee who was retaliated against (rather than, for example, to the state).
- Adds subsection 1102.5(f)(2), which sets forth new factors the Labor Commissioner shall consider in assessing this civil penalty.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB497

SB 699 – Broadens Restrictions on Employee Non-Competes

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Effective January 1, 2024:

- Employers may not enter into or enforce employment agreements, "no matter how narrowly tailored," that restrict an employee from "engaging in a lawful profession, trade, or business of any kind."
- Applies "regardless of where and when" such agreements are presented or were originally executed.
- Current, former, and prospective employees presented or threatened with such agreements may seek immediate injunctive relief or damages in California courts, as well as "reasonable attorney's fees and costs."

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB699

Happy Valentines Day 2024!

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AB 1076 – Non-Compete Clauses in Employment Contracts

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- By February 14, 2024, California employers and non-California employers with California employees must notify current and former employees (defined as those employed after January 1, 2022) in writing that previously executed agreements covered by the new law are now void.
  - Individualized communication delivered to last known address and email address.
  - Could include severance agreement, employment agreement, settlement agreement, etc.
- Codifies existing case law, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008), by prohibiting employers from including a noncompete clause in an employment contract that does not satisfy an exception to BPC Section 16000.
- The new Section 16600.1 provides that a violation of this law constitutes an act of unfair competition, which means employees may sue under BPC Section 17200 for restitution and/or injunctive relief.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1076

Arbitration Agreements

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For more information on arbitration agreements:

- https://suttonhague.com/california-supreme-court-rejects-viking-river/
- https://suttonhague.com/california-courts-maintain-standing-of-paga-claims-post-viking/
- https://podcasts.apple.com/ro/podcast/important-decision-for-california-employers-impacting/id1506833154?i=1000601273876
- https://suttonhague.com/important-new-developments-for-california-workplace-arbitration-agreements/
- https://suttonhague.com/can-california-employers-mitigate-wage-and-hour-risks-with-an-arbitration-agreement-discussed-on-calnevalaw-podcast/

AB 594- Increased Penalties for Independent Contractor Misclassification

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Effective January 1, 2024:

- Section 226.8 of the Labor Code will require courts and the Labor and Workforce Development Agency to impose $5,000 to $15,000 in civil penalties per violation starting on January 1, 2024 for: (1) willful misclassification, and/or (2) charging a willfully misclassified person a fee or making any deductions from compensation for any purpose arising from their employment that would otherwise be illegal if they were not misclassified (i.e. charges for necessary uniforms, tools, etc.)
- The penalties can be increased to $10,000-$25,000 per violation where there is, or has been, a pattern or practice of violations.
- A violator will be required to prominently display a notice on their website, for one year, stating that they have engaged in willful misclassification.
- Employees suing to enforce these rights have the option to recover damages or enforce a civil penalty under PAGA (not both).

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB594

Independent Contractors

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For more information on independent contractors:

- https://suttonhague.com/california-supreme-court-confirms-that-case-adopting-abc-test-for-independent-contractors-has-retroactive-effect/
- https://suttonhague.com/californias-new-independent-contractor-test-applies-retroactively/

Criminal Background Checks

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Effective January 1, 2018:

- "Ban the Box" law prohibited employers (5 or more employees) from including questions about an applicant's criminal convictions history or inquire into or consider an applicant's history before he or she received a conditional offer of employment. https://calcivilrights.ca.gov/fair-chance-act/

Effective October 1, 2023:

- California's Civil Rights Council issued new FEHA regulations governing an employer's use and consideration of a job applicant's criminal history in employment decisions.
  - If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first conduct an individualized assessment.
  - Damages for failure to consider the new criminal evaluation factors include such things as back pay, front pay, and hiring or reinstatement.
- Employers should update their criminal background check processes to comply with the new regulations and ensure their employee notices contain the required information.

Criminal Background Checks

- https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/07/Final-Text-of-Modifications-to-Employment-Regulations-Regarding-Criminal-History.pdf
- https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions

California's Minimum Wage

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California Minimum Wage Increases

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Effective January 1, 2024:

- General statewide minimum wage will increase by .50 cents, bringing the hourly rate from $15.50 to $16.00 (despite the business size, with some exceptions).
- Please also keep in mind that many cities and counties in California have local minimum wages that apply to all employees and/or certain employment sectors and are usually higher than the state minimum wage.
  - Check your local ordinances!
- The salary test floor (two times the state min. wage) for the California professional, administrative, and executive exemptions increases to $66,560 annually or $1,280 weekly.
- AB 1228 (FAST Recovery Act) sets $20 an hour min. wage for fast food workers.
  - Expect more industry committees.

National Labor Relations Board ("NLRB")

Federal Law Updates: National Labor Relations Board ("NLRB")

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- In *McLaren Macomb*, 372 NLRB No. 58 (February 21, 2023), the Board held that certain confidentiality and non-disparagement clauses in employee severance agreements violate employees' rights under the National Labor Relations Act and that the mere proffer of such provisions in a severance agreement is unlawful.
- Case involved a severance agreement that "broadly prohibited [employees] from making statements that could disparage or harm the image of the [employer] and further prohibited them from disclosing the terms of the [severance] agreement" to any third party.
- Case held that such clauses tend to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the NLRA.
- Section 7 of the NLRA permits employees, regardless of whether unionized, to engage in concerted activities for their mutual aid and protection.
- https://apps.nlrb.gov/link/document.aspx/09031d45839af64d

Federal Law Updates: National Labor Relations Board ("NLRB")

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- On March 22, 2023, NLRB General Counsel released a memo outlining the agency's enforcement priorities moving forward.
- While opposing confidentiality and non-disparagement provisions generally, the decision and GC memorandum indicate that those which are narrowly tailored may still be permissible.
- Confidentiality clauses must be "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications..."
- Non-disparagement clauses must be limited to "employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."
- https://apps.nlrb.gov/link/document.aspx/09031d45839f6ad1

Federal Law Updates: DOL Announces New Federal Rule to Determine Independent Contractor Status

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- On January 9, 2024, the U.S. Department of Labor issued a final rule for determining whether a worker is an employee or independent contractor under FLSA.
- The new rule is essentially a reversal of the 2021 rule issued during the prior administration, which was viewed as more favorable to employers.
- Under the new rule, the DOL will continue to use the multi-factor "economic reality" test, however, no single factor will be given more weight than any other factor, and the new rule opens the door to possible "additional factors."

Federal Law Updates: DOL Announces New Federal Rule to Determine Independent Contractor Status

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- Six factors:
  1. Opportunity for profit or loss depending on managerial skill;
  2. Investments by the worker and the potential employer;
  3. Degree of permanence of the work relationship;
  4. Nature and degree of control;
  5. Extent to which the work performed is an integral part of the employer's business; and
  6. Specialized skill and business initiative.
- Effect on employees in California will be minimal, since most employers must abide by the more stringent "ABC Test."
- https://suttonhague.com/dol-announces-new-federal-rule-to-determine-independent-contractor-status/
- https://suttonhague.com/california-supreme-court-confirms-that-case-adopting-abc-test-for-independent-contractors-has-retroactive-effect/

Questions and Answers

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