2022: The Year in Review
And Looking Forward to 2023

ASSOCIATION OF CORPORATE COUNSEL

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Presented by

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Changes to Pay Transparency and Reporting Requirements

Pay Transparency

Salary History Bans: Labor Code § 432.3:

- California employers cannot:
  - seek an applicant’s salary history information personally or through an agent, including compensation and benefits
  - rely on an applicant’s salary history information as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant
- Exceptions:
  - Employers may consider or rely on voluntarily disclosed salary history information
  - Employers may inquire about the applicant’s expected salary in determining the applicant’s salary

Pay Transparency

California Fair Pay Act (Cal Labor Code 1197.5):

- Employees cannot be retaliated against for:
  - Disclosing their own wages
  - Discussing the wages of others
  - Inquiring about another employee's wages
- Employers are prohibited from forbidding employees from discussing or disclosing wages.

Pay Transparency: Affirmative Disclosure

SB 1162, effective January 1, 2023, amends Labor Code 432.2 (the Salary History Ban Law) as follows:

- Private or public-sector employers with 15 or more employees must include a pay scale in all job postings (and must provide that information to third parties who post those jobs)
- **Pay scale:** "The salary or hourly wage range that the employer reasonably excepts to pay for the position."
- All employers, regardless of size, must provide a pay scale for a current employee's position at the employee's request
- All employers, regardless of size, must disclose the pay scale for the position to applicants upon reasonable request (including those not actually given a job interview)
- **Question:** Does SB 1162 require pay scale information for remote job postings?

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Pay Transparency Amendments

SB 1162 (Labor Code 432.3):

- Employers must maintain records of the job title and wage rate history for each employee for the duration of employment plus three years
- Labor Commissioner can inspect the records and in the absence of such records, the new law creates a rebuttable presumption in favor of an employee's claim
- 1 year statute of limitations—starts the date the employee learned of the violation
- Penalties of $100-$10,000 per violation
- Right to cure---no penalty for first violation if all job postings for open positions updated
- Private right of action

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California Pay Data Reporting Requirements

SB 973 (current requirements):

- Applies to private California employers with 100 or more employees
- Must submit to DFEH a "pay data report" no later than March 31, 2021 and annually thereafter that includes:
  - A breakdown of employees by race, ethnicity, and sex in 10 job categories
  - A breakdown by 12 Bureau of Labor Standard Statistics "pay bands"
  - A breakdown of hours worked by employees in those pay bands
- "Snapshot" period: a single period between October 1 and December 31 of the reporting year
- https://calcivilrights.ca.gov/paydatareporting/faqs/

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California Pay Data Reporting Requirements

SB 1162, effective January 1, 2023:

- Revises reporting deadline to the second Wednesday of May 2023, and annually thereafter
- Within each job category, requires employers to also report the median and mean hourly rate by each combination of race, ethnicity and sex
- Applies to all private employers with 100 or more employees (even those not required to file EEO-1 report), AND now requires a separate pay data report from employers w/ 100 or more employees hired through labor contractors (submit 2 reports if meet both criteria)
- For employers with multiple establishments, must submit a report covering each establishment

California Pay Data Reporting Requirements

SB 1162, effective January 1, 2023:

- The Civil Rights Department ("CRD") can seek an order requiring compliance and can recover costs
- Empowers the EDD to provide the names of employers at the request of the CRD
- Penalties of $100 per employee for 1st violation and $200 per employee for subsequent failure to file
- Apportionment of penalties if labor contractors do not provide pay data to employers

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New Protections for California Employees

New Protections/Policy Requirements

- **SB 523: Contraceptive Equity Act of 2022, effective January 1, 2023:**
  - Adds “reproductive health decisionmaking” as a new protected category under the California Fair Employment and Housing Act (FEHA)
  - Makes it an unlawful employment practice to discriminate against applicants or employees based on their reproductive health decision-making
  - Prohibits employers from requiring applicants or employees to disclose information relating to reproductive health decisionmaking as a condition of employment or receiving an employment benefit
  - Reproductive health decisionmaking is defined as including (but is not limited to): “a decision to use or access a particular drug, devise, productive or medical service for reproductive health”
  - Healthcare plans must cover over-the-counter contraceptives (effective 1-1-24).
- **Cal. Code Regs. Tit. 2, § 11023 (b)(6) & b(11): Harassment Prevention and Correction**
  - Instructs supervisors to report complaints of misconduct to designated company representatives, and employers with 5 or more employees must include this as a topic of mandatory sexual harassment training.
  - Written policies must include a link to, or the CRD’s website address, for sexual harassment online training.

New Policy/Leave Requirements

- **AB 1041: Leave to Care for a Designated Person, Effective January 1, 2023**
  - Amends the California Healthy Workplaces, Healthy Families Act of 2014 ("California Paid Sick Leave" law) and the California Family Rights Act ("CFRA") to require employers to permit employees to take protected leave for the care of a "designated person"
  - Defines a **"designated person"** for **California Paid Sick Leave** purposes as: "a person identified by the employee at the time the employee requests paid sick days"
  - Defines a **"designated person"** for **CFRA** purposes as: "any individual related by blood or whose association with the employee is the equivalent of a family relationship"
    - Employees are not required to identify the designated person in advance but can designate that person at the time sick leave or CFRA leave is requested
    - Employers may limit employees to one designated person per 12-month period

New Policy/Leave Requirements

AB 1949: Bereavement Leave, Effective January 1, 2023

- Employers with 5 or more employees and all public sector employers are required to provide up to 5 days of unpaid bereavement leave for the death of an employee's family member
  - Leave is unpaid, but employees must to permitted to use available accrued leave or compensatory time off
  - Leave may be taken intermittently
  - Leave must be used within 3 months of death
- Eligible employees must have at least 30 days of service
- Qualifying family members: spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent in law [note: AB 1949 does not require bereavement leave for a "designated person"]
- Employers may request confirming documentation of death within 30 days of first day of leave: e.g., death certificate, published obituary, written verification of death, burial, or memorial service from a funeral home, mortuary, crematorium, religious institution or governmental agency
- Codified under Section 12945.7 of the California Government Code (not the Labor Code): prohibits discrimination, interference or retaliation against employees who request or take protected bereavement leave

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New Policy/Leave Requirements

SB 1044: Leave for Emergency Conditions, effective January 1, 2023

- Prohibits an employer in the event of an "emergency condition" from taking or threatening adverse action against an employee for refusing to report to, or for leaving, a workplace or affected worksite because the employee has a reasonable belief that the workplace/worksite is "unsafe"
- Also prohibits employers from preventing an employee from accessing their mobile or other communication device to seek emergency assistance, assess safety, or to communicate with a person to verify their safety.
- Defines "emergency condition" as:
  - (i) conditions of disaster or extreme peril …caused by natural forces or a criminal act; or
  - (ii) an order to evacuate a workplace, worksite, an employee's home or the school of an employee's child as a result of a natural disaster or criminal act
  - Expressly excludes "health pandemics" and several categories of emergency employees

New Policy/Leave Requirements

AB 2188: Discrimination in Employment: Use of Cannabis, effective January 1, 2024

- Will amend the California FEHA to make it unlawful to discriminate against an applicant or employee in hiring, termination or in any term or condition of employment:
  - Based on the use of cannabis off the job and away from the workplace
  - Based solely on drug screen test that shows the person has "nonpsychoactive cannabis metabolites" in their urine, hair, or bodily fluids
- Employers may still prohibit and discipline on-the-job usage or impairment
- Employers who use a scientifically valid test to measure "active THC" are not barred from making employment decisions based on those test results

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California Consumer Privacy Act (CCPA) and California Privacy Rights Act (CPRA)

The California Consumer Privacy Act (CCPA):

- January 1, 2020: certain California employers required to comply with portions of the California Consumer Privacy Act (CCPA) regarding the collection of "consumers'" personal information.
  - Applies to companies doing business in California that collect personal information, and satisfy at least one of the following:
    - Annual gross revenue in excess of $25 million
    - Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, the personal information of at least 50,000 consumers, households or devices; or
    - Derives at least 50% of its annual revenues from selling consumers' personal information
- Notice at Collection: California employers subject to the CCPA are required to distribute to applicants and employees a Notice at Collection before or at the point of collection of personal information detailing the categories of personal information to be collected by the company and the purposes of use for each category of personal information

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California Consumer Privacy Act (CCPA) and California Privacy Rights Act (CPRA)

The California Privacy Rights Act of 2020, effective January 1, 2023:

- November 3, 2020: Proposition 24 passed, the California Privacy Rights Act of 2020 (CPRA) which strengthened and expanded the CCPA
  - Eliminates the "employee" exception to the CCPA which means employees who reside in California now have the same rights as other consumers
  - The CPRA now will make job applicants, employees, and independent contractors "consumers" under the CCPA, which means employers must now comply with its requirements with regard to these individuals
- Adds obligation to also disclose "sensitive personal information" that businesses collect
  - **But** employers don't need to designate this information as "sensitive personal information" within the Notice at Collection unless the information is collected or processed for the purpose of "inferring characteristics" about the workforce member
- Employers must now provide notice of employees' rights under the CPRA and provide employees with a method to exercise those rights. Employers must respond within limited timeframes and must document all responses.
  - Right to Know, Right To Delete, Right to Correct, Right to Limitation, Right to Opt-Out

Continuing COVID Requirements

COVID-19 Supplemental Paid Sick Leave Extended (AB 152)

- 2022 COVID-19 Supplemental Paid Sick Leave was set to expire September 30, 2022; AB 152 extends availability through December 31, 2022
  - Employees taking leave as of December 31, 2022 can finish taking the amount of leave the employee is entitled to
  - Not a new grant of leave!
  - Permits employers to require an additional COVID test after the 5th day from the first positive test. If that Day 5 test is positive, it permits the employer to require a 2nd test within no less than 24 hours; additional paid leave may be denied if employees don't take the Day 5 test or additional test, or if they do not provide documentation of their test results
- Covered Employer: all public and private employers with 26 or more employees.
- Covered Employees: full or part-time, or variable-hour employees who cannot work or telework for a covered reason.
- How Much Leave? Potentially up to 80 hours for full-time employees (2 40-hour banks)
- Subject to a daily cap of $511, and aggregate cap of $5,111 per employee
- AB 152 establishes a grant program for qualifying small businesses with 26-49 employees to offset the costs of leave

Clarification of Employer AB 685 Notification Requirements [AB 654, AB 2693]

- Under AB 685 and AB 644, California employers are required, through December 31, 2022, to provide:
  - Written notice of COVID-19 exposure to all employees on the premises at the same worksite as the qualifying individual (as opposed to only those who may have been exposed) within 24 hours of such exposure
  - In outbreak situations, notice to the local public health agencies within 48 hours or one business day, whichever is later
- AB 2693: Notice obligations now extended through January 1, 2024 and permits employers to post a notice of potential COVID-19 exposure at the worksite and on employee portals rather than providing written notice to employees
  - Also eliminates the requirement to provide notice to a local public health agency in the event of an outbreak (but still required by Cal/OSHA ETS)

Cal/OSHA Emergency Temporary Standard (ETS)

- **Cal/OSHA Emergency Temporary Standard (ETS)** first, second and third adoptions
  - **November 2020**: Physical distancing & face coverings required for all employees; exclusion pay for work-related quarantine or isolation.
  - **June 17, 2021**: Distinguished between fully vaccinated and unvaccinated employees in terms of masking and quarantine requirements after close contact and required documentation of vaccination status; exclusion pay.
  - **December 16, 2021**: Quarantine and face covering requirements based on vaccinated, boosted, and unvaccinated status. Later modified by changes in face covering and quarantine rules at the state level; exclusion pay.
  - **April 21, 2022:** Third and current adoption, in effect through December 31, 2022. Eliminates distinctions on the basis of vaccination or booster status. No face covering requirements except when returning from isolation or quarantine, or in outbreak situations; exclusion pay.

- **Proposed "Permanent" ETS effective January 1, 2023-December 31, 2024** [recordkeeping obligations to extend through December 31, 2025]
  - Permits employers to address COVID-19 through their Injury & Illness Prevention Plan ("IIPP")
  - Eliminates exclusion pay requirement for work-related quarantine or isolation
  - Employers will need to retain records not only of COVID-19 cases but also close contacts

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AB 1751: Workers Compensation Presumption

- SB 1159, effective September 17, 2020, created a rebuttable presumption that an employee's COVID-19 illness is an occupational injury eligible for workers compensation benefits:
  - For employees whose employers have 5 or more employees and who test positive during an "outbreak" for COVID-19 at their specific workplace
  - Outbreak" exists if within 14 days one of the following occurs: (1) four employees test positive if the employer has 100 employees or fewer; (2) 4% of the number of employees who reported to the specific place of employment test positive if the employer has 100 or more employees; or (3) a specific place of employment is ordered to close by a local public health department.
- Positive test must have occurred between July 6, 2020 and January 1, 2023
- AB 1751: now extends the presumption to January 1, 2024

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Employment Agreements

AB 51: Arbitration Agreements

- AB 51 applies to agreements “entered into, modified, or extended on or after January 1, 2020”
- Reversed case law that allows employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment
- Prohibits employers:
  - From requiring applicants or employees “as a condition of employment, continued employment, or the receipt of any employment-related benefit” to waive “any right, forum or procedure” for a violation of any provision under the Fair Employment and Housing Act” or the California Labor Code, “including the right to file and pursue a civil action or complaint with … any court”
  - From “threatening, retaliating or discriminating” against employees who refuse to enter into such mandatory agreements
  - Prohibits arbitration agreements that are not entered into voluntarily— no coercion
  - But, not intended to invalidate written arbitration agreements that are otherwise enforceable under the FAA

Current Status of AB 51

- ***Chamber of Commerce of the United States, et al. v. Becerra, et al.*, No. 2:19-cv-2456 (E.D. Cal. 2019):** On 1/31/2020, the U.S. District Court for the Eastern District Court of California issued a preliminary injunction enjoining the state from enforcing AB 51 agreements covered by the FAA.
- ***Chamber of Commerce v. Bonta*, No. 20-15291 (9/15/2021)**: The Ninth Circuit in a 2-1 decision reversed in part the District Court's decision and held that the FAA does not fully preempt AB 51.
- Concluded that because AB 51 was focused on the conduct of the employer **prior to** entering into an arbitration agreement, the statute did not conflict with the FAA.
- AB 51 does **not** void any arbitration agreements previously entered into under the FAA, and does **not** prohibit employers from offering arbitration on a voluntary basis.
- AB 51 does **not** void or render unenforceable an arbitration agreement signed by any person going forward under the FAA, even if the agreement had been required as a condition of employment.
- Following the US Supreme Court's decision in ***Viking River Cruises***, on August 22, 2022, the Ninth Circuit withdrew its 9/15/21 decision and granted a rehearing by the same 3-judge panel.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Signed into law by President Biden on March 3, 2022:

- Amends Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or sexual harassment to invalidate a pre-dispute arbitration agreement or collective action waiver
- "Sexual assault" is defined as a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 (the U.S. criminal code) or similar applicable tribal or state law, including when the victim lacks capacity to consent
- "Sexual harassment" is defined as "conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law"—meaning that it covers anything that would qualify as sexual harassment under Title VII or FEHA
- Requires courts, rather than arbitrators, to determine whether the Act applies to a claim regardless of whether the underlying agreement delegates the authority to an arbitrator
- The Act only applies to disputes or claims that arise or accrue on or after March 3, 2022.

The Silenced No More Act [SB 331]

- FEHA makes it unlawful for an employer to require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about "unlawful acts in the workplace," including, but not limited to, *sexual harassment* or discrimination
- SB 331: Effective January 1, 2022, the term "unlawful acts" was expanded to include not only sexual harassment, but *any harassment or discrimination* in the workplace
- If an employer requires employees to sign a non-disclosure agreement during employment, the agreement must contain the following language:

  "**Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.**"
- SB 331 also expands existing law by (i) making it unlawful for an employer to include *in any separation/severance agreement* a provision that prohibits the disclosure of information about unlawful acts in the workplace, and (ii) requiring employers to provide employees with a reasonable time period of not less than five business days to consider the agreement and to consult with an attorney

The Speak Out Act (SB 4524)

- Covers a narrow scope of nondisclosure agreements signed *before* misconduct takes place
- Does not invalidate NDAs signed after the employee and the company reach an agreement over harassment or assault charges

NOT YET LAW!

Passed the Senate by unanimous consent in September

Cleared the House in November

Heads to President Biden for signature

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Wage and Hour Developments

PAGA 2022 Updates

- ***Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (2022):** Trial courts do not have authority to strike PAGA claims based on manageability, but can limit the evidence plaintiffs can introduce at trial to prove alleged violations to other unrepresented employees; possible conflict with 2011 decision *Wesson v. Staples*
- ***LaFace v. Ralphs Grocery Co.*, 75 Cal.App.5th 388 (2022):** a PAGA action is equitable in nature so is not triable to a jury; cashiers were expected to stay busy when not checking out customers so "suitable seating" was not required
- ***Reyes v. Kellermeyer Bergensons Servs., LLC*** (Los Angeles Superior Court, January 11, 2022): No authority for "stacking" penalties under PAGA; the "subsequent violation" rate only applies after the Labor Commissioner has previously cited the employer for the violation; courts have discretion to award any amount of penalty up to the maximum

PAGA – *Viking River Cruises* And Its Aftermath

- ***Viking River Cruises v. Moriana,* 142 S. Ct. 1906 (June 15, 2022):** the FAA preempts the California rule that PAGA actions cannot be forced into arbitration "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."
  - Once the plaintiff's individual claim is sent to arbitration, SCOTUS held that California law does not provide standing for that person's representative claims to continue in court or arbitration, so they must be dismissed
- ***Gavriiloglou v. Prime Healthcare Management,* 83 Cal.App.5th 595 (2022):** Gavriiloglou lost in arbitration on her individual Labor Code claims and the trial court granted judgment for the employer on the PAGA claims, finding that she lacked standing because she was not an "aggrieved employee," but the Court of Appeal reversed, concluding that because a representative PAGA action asserts the state's rights, not the individual's, Gavriiloglou was still an "aggrieved employee" under Labor Code section 2699(a) even despite her loss in arbitration

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Goodbye Rounding Policies

- ***Camp v. Home Depot U.S.A., Inc.*, 84 Cal.App.5th 638 (2022):**
  - California law requires employers to pay employees for "all worked performed" and to maintain accurate records of time worked by nonexempt employees
  - Recognizing the administrative and practical difficulties in recording small amounts of time for payroll purposes, facially neutral rounding policies that do not ultimately benefit the employer have been legal under California law
  - In *Camp*, the Court held that if an employer has the ability to capture (and did capture) the exact amount of time worked by an employee, the employer is required to pay the employee for "all time worked," down to the minute
  - Even a facially neutral rounding policy may not be a viable defense for employers with electronic timekeeping systems

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Thank You

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