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Employment Contract Do's and Don'ts (California Focus)

October 29, 2020

A wider lens on workplace law

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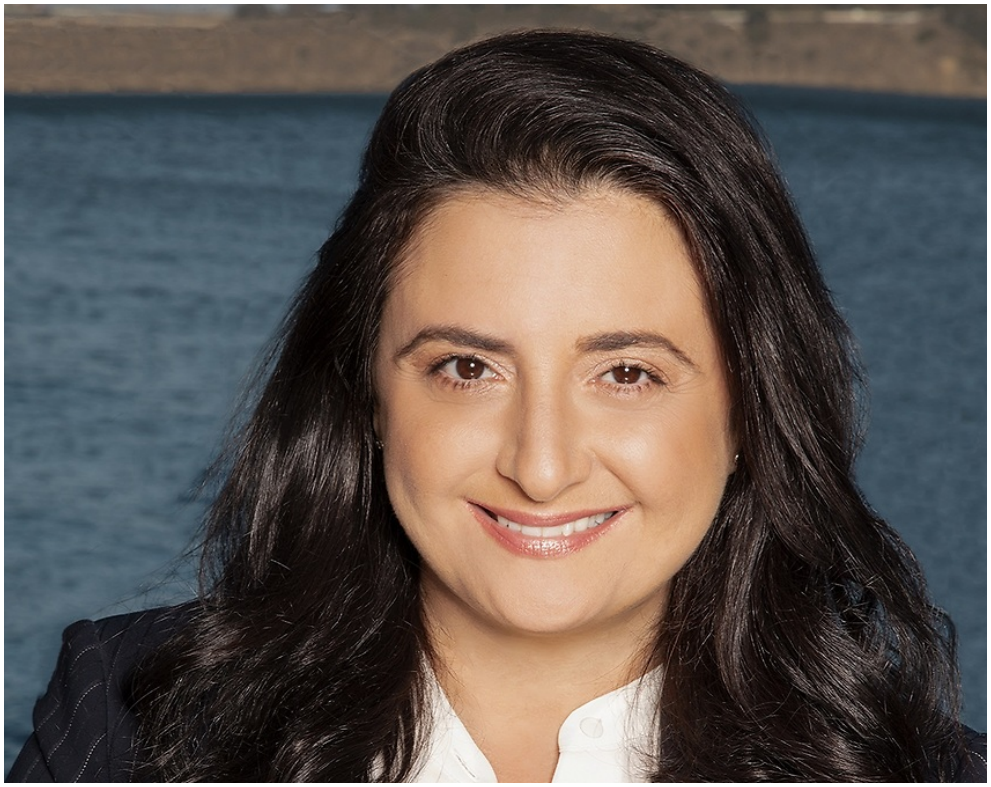

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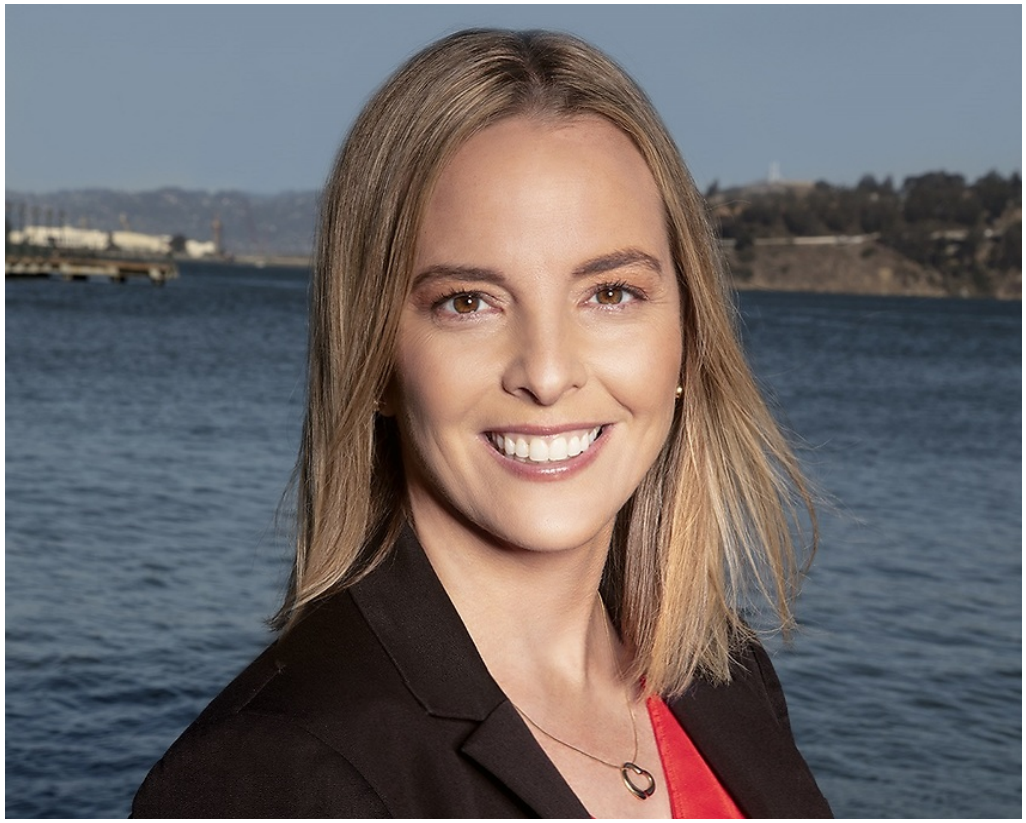

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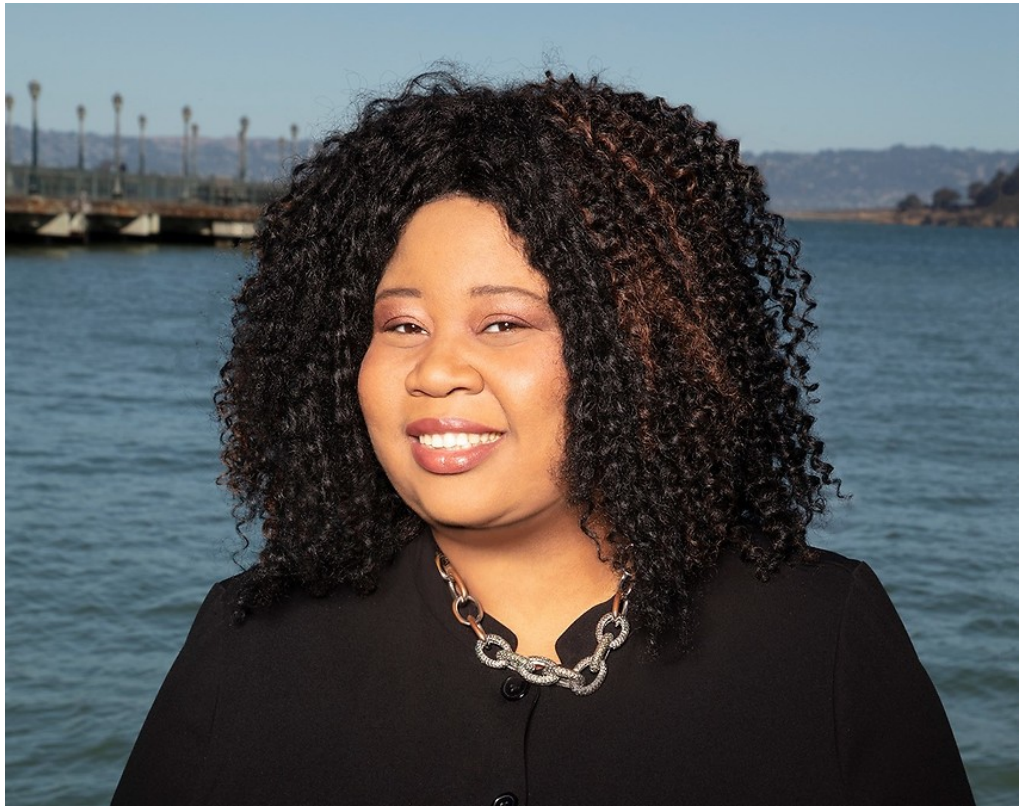
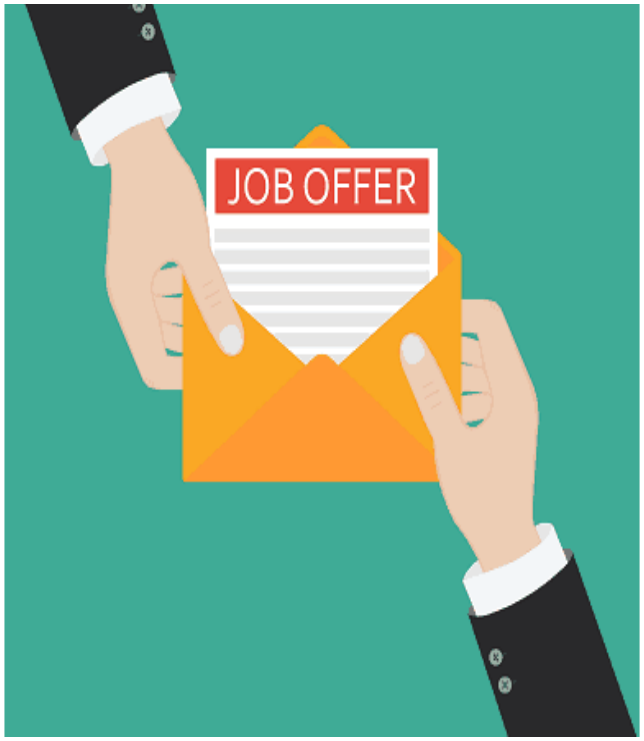


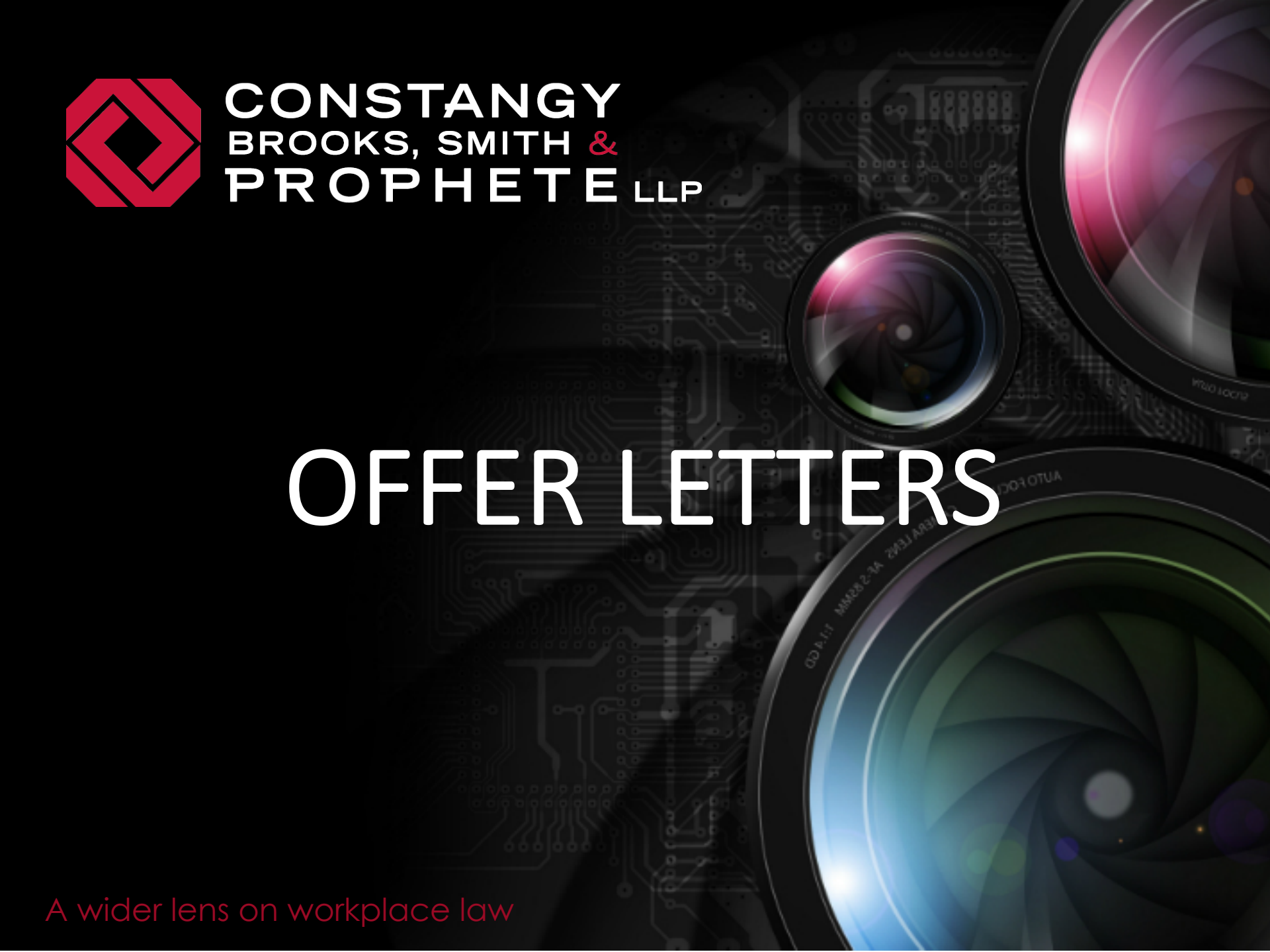
Presentation Topics

- Topics Addressed:
  - Offer Letters
  - Arbitration Agreements
  - Separation Agreements

- Not Discussed:
  - Executive Compensation
  - Proprietary Information Agreements
  - Commission Agreements
  - Stock Option Agreements



Contact us for advice and more information on these additional types of employment contracts.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OFFER LETTERS
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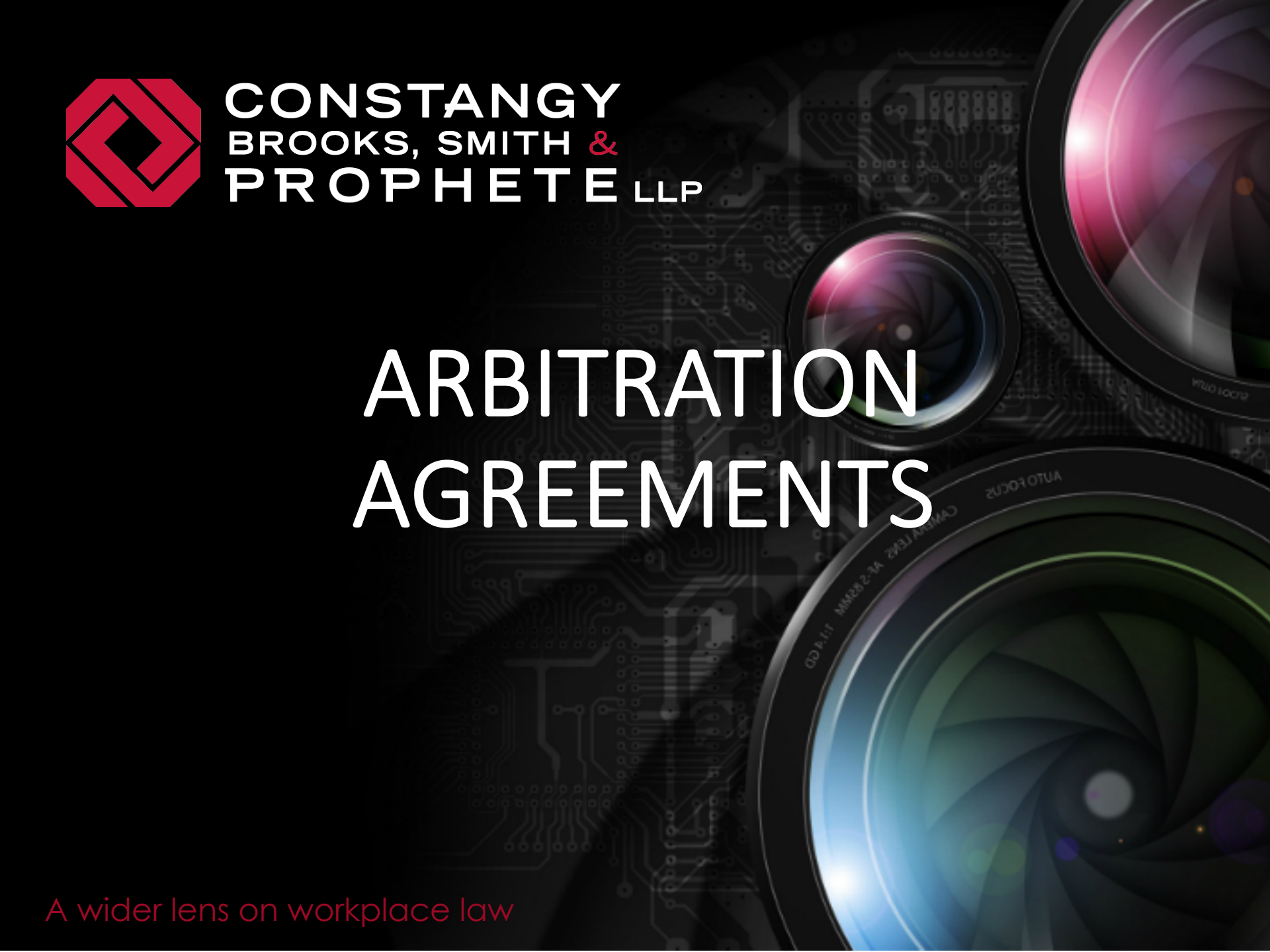
7 Critical Topics to Address In An Offer Letter

1. Position Title
2. At-Will Nature of Employment (unless executive or unionized)
3. Exempt vs. Non-Exempt Status
4. Compensation (Hourly, Salaried, Commissions, Bonuses, Stock)
   - Always refer to your plans and policies!
5. Benefits (Health, 401k, Vacation/PTO)
   - Again, always refer to your plans and policies!
6. Contingencies
   - Background Checks
   - Drug Tests
   - Eligibility to Work in US
7. Reference to Other Documents
   - Acknowledgment of Employee Handbook
   - Proprietary Information Agreement
   - Arbitration Agreement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ARBITRATION
AGREEMENTS
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Benefits of Employment Arbitration

Pros
Class Action Waivers
Faster (?) (hence manages fees)
Arbitrator vs. Jury (?) [no emotion fueled jury verdicts]
Finality
Less Formal/Streamlined
Certainty of Hearing Date
Less Discovery
Not Pubic/Confidential

Best Practices - Mutuality of Arbitration Agreements

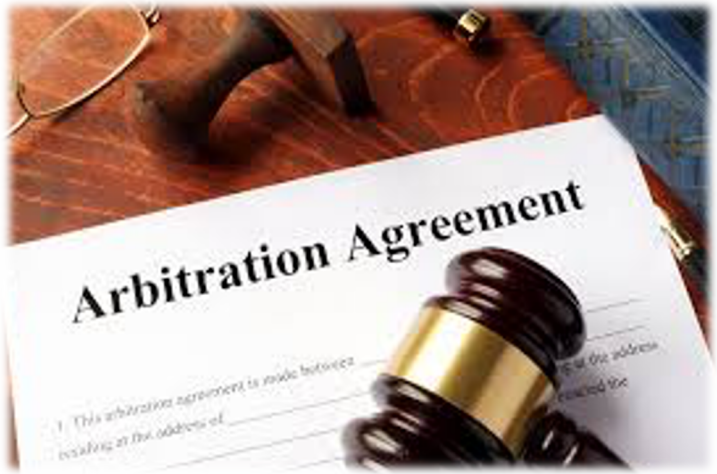
- *Armendariz* requires an arbitration agreement between employer and employee to be mutual

Strategy:

- Include mutuality language in the agreement
- Do not carve out any claims that only the employer (but not the employee) can bring in court
- Also review confidentiality and proprietary information agreements to ensure there are no contrary provisions that allow only the employer to bring claims in court
    - Injunctive relief is exempted

Arbitration Agreements – Recent Changes

- AB 51
  - Effective January 1, 2020, California Labor Code section 432.6 and California Government Code section 12953 (AB 51) apply to claims arising under FEHA and the California Labor Code
  - Mandatory arbitration agreements are prohibited
    - Opt out is not considered voluntary
    - AB 51 **does not** apply to agreements covered by the Federal Arbitration Act
- *OTO v. Kho*
  - Issues raised regarding arbitrability of CA Labor Commissioner hearings: Accessibility and affordability of arbitration proceeding, manner in which arbitration agreement is presented to employee, type of claim
  - Strategy: Review agreement and may carve out
- PAGA Claims
  - In case you missed the memo, PAGA claims are not arbitrable



What to Do After AB 51?

- AB 51 Does Not Apply to FAA Covered Agreements
- Expand FAA Language in Arbitration Agreements
- For Example:
  - Arbitration under this Agreement is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and evidences a transaction involving commerce.
  - This agreement involves a national employer engaged in interstate transactions involving products or services, and the performance of duties involving interstate commerce.

What to Do After AB 51 (cont'd)?

- Voluntary agreements are still permissible
  - Do not state agreement is mandatory
  - Need not expressly state that agreement is voluntary
  - Do not include in employment agreement
  - Do not utilize an opt-out procedure

Private Attorneys General Act (PAGA) Currently Not Arbitrable

- *Iskanian* holds that PAGA representative actions are not arbitrable
- Strategy:
  - Eliminate PAGA representative action waiver *OR*
  - Include PAGA representative action waiver as a completely separate provision, include language that it is only included "to the extent permissible under the law" and include severability language

Sample Language: There will be no right or authority for any dispute to be brought, heard, or arbitrated as a private attorney general representative action to the extent such a waiver is permitted by law ("Private Attorney General Waiver"). The Private Attorney General Waiver does not apply to any claim you bring in arbitration as a private attorney general solely on your own behalf and not on behalf of or regarding others. The Private Attorney General Waiver shall be severable from this Agreement in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction.

Current Trend . . .

- Can you carve out harassment/discrimination claims?
- Yes, because to carve these out would benefit the employee (not the employer)

CBS NEWS / *May 15, 2018, 6:11 AM*

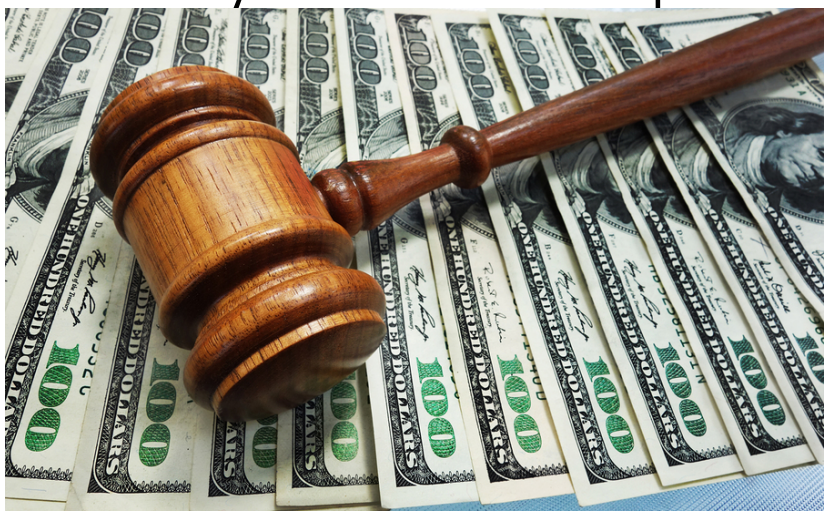
Uber ending mandatory arbitration, nondisclosure agreement policies for sex assault cases

"When it comes to sexual assault, sexual harassment, one of the things we learned is that it's very important to make sure that survivors have control and agency and we want to be able to give them their choice of forum"

Tony West, Chief Legal Officer at Uber

Beware! Employer Must Cover Arbitrator Fees

- Effective January 1, 2020, California Code of Civil Procedure section 1281.97 (SB 707) applies to employment agreements and requires that the drafting party pay any fees and costs within 30 days before the arbitration can proceed. Failure to pay these fees and costs will mean that the drafting party has waived its right to compel arbitration.
- So, if employee asks you to cover fees or counsel asks you to pay arbitrator bill, think carefully about how to respond!



Choice of Law/Venue Provisions

- Effective January 1, 2017, California Labor Code section 925 prohibits an employer from requiring that an employee who **primarily resides and works** in California, as a condition of employment, to agree to a provision that would either:
    1. Require the employee to adjudicate outside of California a claim arising in California.
    2. Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

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SEPARATION AGREEMENTS

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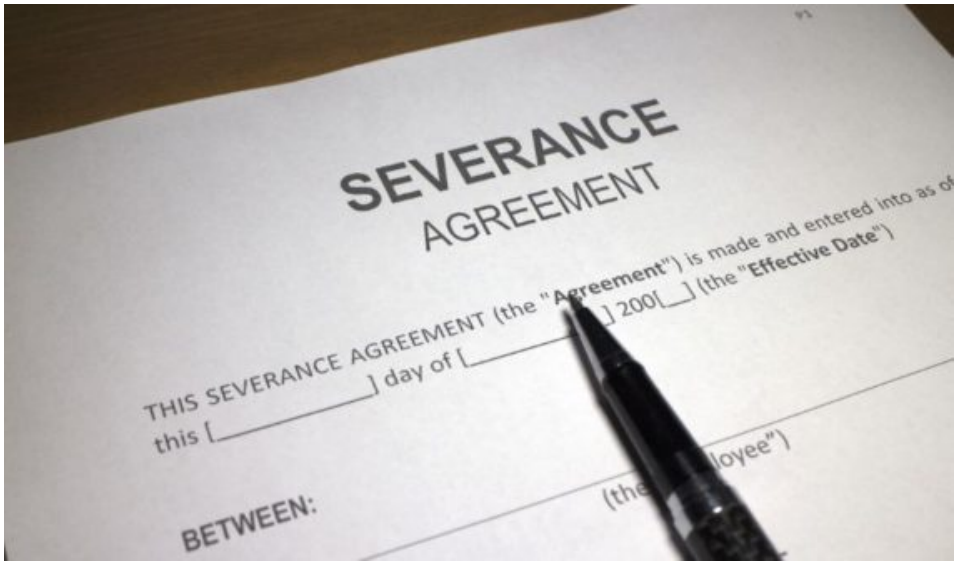
California Restrictions on Separation Agreements

- No Rehire Provisions
- Confidentiality
- Non-Disparagement



New California Limits on "No Rehire" Provisions

- Many separation agreements and most settlement agreements have traditionally included a "no rehire" provision in order to reduce the risk of a retaliation claim

- Effective January 1, 2020, Code of Civil Procedure section 1002.5 (AB 749) bans provisions in an "agreement to settle an employment dispute" that prohibit, prevent, or otherwise restrict a party from obtaining future employment with the employer

No Rehire Provisions (cont'd)

Does the ban on no rehire provisions apply to a separation agreement at all?

Only if the separating employee is an "aggrieved person" who has:

- Filed a lawsuit in court
- Filed a claim with an agency or ADR forum or
- Filed a claim "through the employer's internal complaint process"

No Rehire Provisions (cont'd)

- The prohibition does not apply if the employer makes a good faith determination that the individual signing the separation/settlement agreement "engaged in sexual harassment or sexual assault"

- In addition, the prohibition does not require an employer to employ or rehire a person "if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person"

Avoiding the Prohibition on No Rehire Provision

Some employers are using language like this:

> "EMPLOYEE agrees and warrants that she may apply for any open positions with EMPLOYER and both Parties agree and warrant that EMPLOYER may either hire or refuse to rehire EMPLOYEE. EMPLOYEE agrees, warrants, and acknowledges that, if she ever applies for a position with EMPLOYER, the reasons **that are stated in her personnel file for terminating her employment on [date]** are sufficient to constitute a legitimate business reason that is non-discriminatory and non-retaliatory under California Code of Civil Procedure Section 1002.5(b)(2) for EMPLOYER to refuse to rehire her for any position for which she applies."

No court has ruled on the permissibility of this language. Consult legal counsel before using this approach.

No Rehire Provisions – Practice Pointers

- Update your separation agreements to make sure comply with the law today
- If you want to have a no rehire provision in a standard separation agreement, train HR/management to recognize that the provision may not work for employees who have a dispute with the employer
- For employees who are separating but have filed no complaint or internal complaint, a no rehire provision is permitted
- Have legal counsel review your separation agreements

California Law on Confidentiality

- Effective January 1, 2019, California Code of Civil Procedure section 1001 (SB 820) prohibits confidentiality provisions in settlement agreements that prevent the "disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action" regarding:
    - An act of sexual assault
    - An act of sexual harassment
    - An act of workplace harassment or discrimination based on sex
    - The failure to prevent an act of workplace harassment or discrimination based on sex
    - An act of retaliation against a person for reporting harassment or discrimination based on sex

The Gray Areas of California Code of Civil Procedure Section 1001

- If there has been an internal complaint only, does this apply? Is it a settlement agreement?
- If there has been no complaint, does it apply? Is the prospect of a sexual harassment claim enough?
- Can you still protect the amount of the severance or settlement?
    - **The answer is YES!**
- Suggested Language:

Pursuant to California Code of Civil Procedure Section 1001, if applicable, this Agreement, does not prevent Employee from disclosing factual information related to a claim filed in a civil action or a complaint filed in an administrative action regarding Covered Claims. However, notwithstanding any such permitted disclosure of facts, Employee agrees not to disclose the amount of the Payment paid pursuant to this Agreement.

Non-Disparagement Clauses

Effective January 1, 2019, Government Code section 12964.5 was added to the Fair Employment and Housing Act (SB 1300)

It is unlawful for an employer, "in exchange for a raise or bonus, or as a condition of employment or continued employment," to do either of the following:

- 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.
- require an employee to sign a release of a claim or right under FEHA.

Exception: Does not apply to "a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process."

"Negotiated" = employee had the notice and opportunity to obtain counsel.

Non-Disparagement Clauses

- When is a *separation agreement* offered "in exchange for a raise or bonus, or as a condition of employment or continued employment," and therefore subject to this law?
  - Offered ahead of time
  - Offered as an incentive for the employee to stay until the separation date
- Legislative intent was to cover **preemptive** waivers of liability and non-disparagement clauses
- One N.D. Cal federal judge already invalidated non-disparagement clause and release where employee given prospective severance agreement containing bonus if she stayed to a future date when her options would vest
- A non-disparagement and release should pass muster if separation agreement is presented at time of termination (i.e. not preemptively) or if the separation agreement is a negotiated settlement agreement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