The Road Ahead: Recent Changes to Employment Laws & Their Impact

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Today's Presenters

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Topics

1. Limitations On Agreements
2. COVID-Related Regulations
3. Agency and Court Updates
4. Looking Ahead to 2022

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Limitations On Agreements

Prohibitions on Mandatory Arbitration [AB 51]

- Went into effect in California on **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."
  - Prohibits employers from "threatening, retaliating or discriminating against employees who refuse to enter into such mandatory arbitration agreement.
  - Prohibits arbitration agreements that are not entered into voluntarily – no coercion.

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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.
  - The state of California appealed the decision to the Ninth Circuit.

- ***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.

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B2B Non-Competition Agreements

- ***Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130 (2020)**
  - What is the proper standard for determining whether California Business and Professions Code section 16600 (Section 16600) voids a non-competition agreement between two businesses?
  - Section 16600 holds that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."
  - The court conclusively held that Section 16600 applies to contracts between businesses as well. The court found that "a **rule of reason** applies to determine the validity of a contractual provision by which a business is restrained from engaging in a lawful trade or business with another business."
    - "The Rule of Reason … asks whether an agreement harms competition more than it helps by considering the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."
  - The court expressly declined to hold that non-competition agreements between businesses were *per se* unenforceable under Section 16600 (as with non-competition agreements in the employment context).

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COVID-Related Regulations

The White House's Vaccine Mandates

- On September 9, 2021, President Biden announced an executive order (EO) that requires both federal employees and contractors and subcontractors working in connection with federal contracts to receive a vaccine against COVID-19.
- The EO eliminates the testing option and expands the vaccine requirement to **all** federal contractors regardless of whether they have employees working on federal property.
- On September 24, 2021, the Safer Federal Workforce Task Force (task force) issued a guidance for federal contractors and subcontractors pursuant to the EO. The task force imposed a deadline of **December 8, 2021**, for all "covered employees" of federal contractors to be fully vaccinated.
- The task force also requires:
  - Compliance with CDC masking and physical distancing requirements by covered contractor employees and visitors at covered contractor workplaces.
  - Designating a person(s) to coordinate COVID-19 safety efforts at covered contractor workplaces.

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Vaccine Mandates Under OSHA ETS

- On September 9, 2021, President Biden also announced an impending Emergency Temporary Standard (ETS) from the Occupational Safety and Health Administration (OSHA) that will require **all employers with 100 or more employees** to ensure their workforce is fully vaccinated or require any unvaccinated workers to be tested weekly.
  - President Biden also asked for the rule to provide paid time off for workers to get vaccinated and to recover from any side effects.
- The administration acknowledged that this proposed ETS is likely to be challenged in court, but, it hopes that employers will institute these mandates *before* the rule is either upheld or invalidated by the federal courts
- On October 12, 2021, OSHA submitted the initial text of the ETS to the Office of Management and Budget for review.

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Court Rulings On Vaccine Mandates

- ***Foley v. Biden*, No. 4:21-cv-01098 (N.D. Tex. Sept. 29, 2021):** Plaintiff, a federal government employee, challenges the federal government's COVID-19 vaccination mandate applicable to federal employees, arguing that it violates the First Amendment, the due process clause of the Fifth Amendment, the Administrative Procedures Act, and the Ninth Amendment. The court denied the plaintiff's motion for preliminary injunction.
- ***Harsman, et al. v. Cincinnati Children's Hospital Medical Center, et al.,*** No. 1:21-cv-00597 (S.D. Ohio Sept. 17, 2021): Plaintiff employees challenged the hospital's employee COVID-19 vaccine mandate, arguing it violates Ohio anti-discrimination laws and constitutes an "illegal antipoaching agreement." The court denied the plaintiffs' motion for a temporary restraining order.
- ***The New York City Municipal Labor Committee, et al. v. The City of New York, et al.,* No. 158368/2021 (N.Y. Sup. Ct. Sept. 9, 2021):** Plaintiffs challenge New York's requirement for vaccination of Department of Education employees, arguing it violates federal and state law. The court declined to block the vaccination mandate.
- ***Bridges et al. v. The Methodist Hospital et al.*, No. 4:21-CV-01774, 2021 WL 2221293 (Dist. Ct. S.D. Tex. June 1, 2021):** 117 former and current employees of The Methodist Hospital system in Houston, Texas, allege they have been, or are in danger of being, terminated for refusing the COVID-19 vaccine after defendants required it. Non-vaccinated employees subsequently were suspended, and the hospital set a June 21 deadline for either vaccination or termination. On June 12, 2021, the case was dismissed; the court reasoned in part that language in the Food, Drug, and Cosmetic Act did not prevent employer mandates. Plaintiffs filed a notice of appeal to the Fifth Circuit. The Fifth Circuit has not yet issued a decision.

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CAL/OSHA Emergency Temporary Standard

- November 2020: Cal/OSHA Emergency Temporary Standard (ETS) adopted
  - Physical distancing requirements; face coverings required for all employees
- June 3, 2021: Proposed revisions to ETS adopted by Cal/OSHA Standards Board with reservations
  - Face coverings for all if both vaccinated and unvaccinated employees in the same "room" in workplace
  - Physical distancing requirements would sunset on July 31
  - Provide all unvaccinated employees with N95 masks after July 31
- June 9, 2021: the Standards Board votes to withdraw the proposed revisions
  - Pressure from the Governor's office to align with CDC and CDPH guidance
- June 17, 2021: the Standards Board votes to update the Cal/OSHA ETS and the new standards become effective that day via Executive Order N-09-21. The ETS are set to expire on January 14, 2022.
- On October 20, 2021, Cal/OSHA issued proposed language for the second readoption of ETS for COVID-19 Prevention. The readoption would provide for the proposed regulation to be in place from January 14, 2022, to April 14, 2022.
- https://www.dir.ca.gov/oshsb/documents/Jun172021-COVID-19-Prevention-Emergency-txtbrdconsider-Readoption.pdf

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Expansion of Recall Rights [SB 93]

- Effective April 16, 2021 – December 31, 2024
- Requires that employers in certain industries make written job offers to employees whom they laid off because of COVID-19.
  - Employees have five business days to respond and, if more than one employee responds, the employer must award the job based on seniority.
- **Covered employers** include: hotels with 50 or more guest rooms, event centers of more than 50,000 square feet, airport hospitality operations, airport service providers, employers that provide "janitorial, building maintenance, or security services" to office, retail, or other commercial buildings, etc.
- **Covered Employees** must have:
  - Worked two hours or more per week for a covered employer;
  - been employed by a covered employer for "6 months or more in the 12 months preceding January 1, 2020"; and
  - been "separat[ed] from active service … due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason related to the COVID-19 pandemic."

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Clarification of Employer Notification Requirements [AB 654]

- Went into effect on October 5, 2021
- Amended last year's COVID-19 notice and reporting bill (AB 685) revising the time frame in which employers must give notice of outbreaks to local public health agencies from "within 48 hours" to "within 48 hours or one business day, whichever is later"
- Now requires employers to send notice of outbreak all employees who were "on the premises at the same worksite as the qualifying individual within the infectious period"
- Exempts certain licensed health facilities from the requirement to report outbreaks to local health agencies since those facilities already have other legal reporting obligations

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Agency and Court Updates

Rescission of Joint-Employer Rule

- On July 29, 2021, the US Department of Labor (DOL) filed a final rule rescinding a final rule issued under the Trump administration that narrowed the definition of a joint employer under the Fair Labor Standards Act (FLSA).
- Under the rescinded rule, the DOL would consider the following when determining if a company is a joint employer:
  - Whether a business hires and fires employees;
  - Whether a business supervises and controls employees' work schedules or conditions of employment to a substantial degree;
  - Whether a business determines employees' rate and method of payment;
  - Whether a business maintains employment records.
- The rescission took effect on October 5, 2021. The DOL reverted back to using the **economic realities test** to determine joint employment status, which examines whether the worker is economically dependent on the potential joint employer by looking at the totality of the circumstances.

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No Rounding of Time for Meal Periods

- ***Donohue v. AMN Services, LLC,* 11 Cal.5th 58 (2021)**
  - The California Supreme Court ruled that the rounding of time to the nearest time increment is impermissible for meal periods.
  - The Court noted that the meal period regulations were enacted due to concern about working conditions, and the health and welfare of employees, and that the practice of rounding time punches for meal periods is inconsistent with these purposes "given that they set precise time requirements for meal periods, which is at odds with the imprecise calculations that rounding involves."
  - The Court also held that if time records show noncompliant meal periods, then a rebuttable presumption of liability arises, and "the employer may rebut the presumption with evidence of bona fide relief from duty or proper compensation."
  - **Takeaway:** Employers who use rounding practices at the meal period should review their policies and practices to ensure compliance with the Supreme Court's decision.

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The Regular Rate of Pay

***Ferra v. Loews Hollywood Hotel, LLC,* 489 P.3d 1166 (Cal. 2021)**

- The California Supreme Court held that "regular rate of pay" under Labor Code Section 510 (a) and regular rate of compensation" under Labor Code Section 226.7(c) mean the same thing. Therefore, meal and rest premiums must factor in all non-discretionary payments, not just hourly wages.
  - "Regular rate" [is] the operative term in [the] phrase "regular rate of pay."
  - "[T]he terms are synonymous: "regular rate of compensation" . . . like "regular rate of pay" . . . encompasses all nondiscretionary payments, not just hourly wages.
- The decision is expressly retroactive: "no considerations of fairness or public policy" warrant only applying this decision prospectively.
- **Takeaway:** Employers must pay meal, rest and recovery period premiums using the employee's overtime regular rate of pay, not the employee's standard hourly rate of pay. Employers should review and update all payroll policies and procedures pertaining to meal, rest and recovery period premiums and consider auditing to ensure that any previous premiums were paid at the correct regular rate of pay.

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PAGA Claims Cannot Be Arbitrated

- ***Contreras v. Superior Court,* 61 Cal.App.5th 461 (2021)**
  - Defendant attempted to compel a PAGA claim to arbitration based on the theory that the parties were entitled to arbitrate the preliminary question of whether the plaintiffs were aggrieved employees under PAGA.
  - The Second District Court of Appeal held that the Federal Arbitration Act does not apply to PAGA claims and that state consent is required to arbitrate PAGA claims.
  - The court concluded that even the preliminary question of whether the plaintiffs are aggrieved employees under PAGA may not be decided in arbitration, rejecting the argument by the defendant that the trial court did not compel arbitration of a PAGA claim because whether or not the employees are independent contractors is an "antecedent" fact to be arbitrated in order to determine if PAGA applies.
  - **Takeway:** The state is the real party in interest in a PAGA suit and cannot be forced to arbitrate any portion of its claim–including whether the individual plaintiff is an employee with standing to bring the claim–without the state's consent.

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Looking Ahead to 2022

Laws Going Into Effect On Jan. 1, 2022

- **SB 331 (the ("Silenced No More Act")** FEHA makes it an 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.
- Effective January 1, 2022, the term "unlawful acts" is 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 making it unlawful for an employer to include *in any separation agreement* a provision that prohibits the disclosure of information about unlawful acts in the workplace.

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Laws Going Into Effect On Jan. 1, 2022

- **AB 1003**: Makes the intentional theft of wages by an employer punishable as grand theft if the wages equal more than $950 for one employee or $2,350 for two or more employees in any consecutive 12-month timeframe. Wages include gratuities, benefits and other compensation. The law applies to both employees and independent contractors.
- **SB 807**: Extends the current personnel record retention requirements for employers pursuant to Government Code Section 12946 from 2 years to **4 years** from the date that the records were created, after an employee is terminated, or when an applicant is not hired by a company.
- **AB 1033**: Amends the California Family Rights Act to include parents-in-law in the list of family members for which an employee can take leave. This follows the passage of SB 1383 last year, which expanded CFRA to cover any employer with 5 or more employees.
- **SB 762**: Requires arbitration fees to be paid upon receipt of invoice unless the arbitration agreement expressly establishes a payment schedule.

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