

The Workplace 2.0: Legal Challenges In A Changing Workplace

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Today's Presenters



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Workplace 2.0: The Future Of Work

Key Influences on the Workplace

- **The COVID-19 Pandemic**
- **Social Justice Movements:**
 - #BlackLivesMatter
 - #MeToo and #Times Up
 - #StopAsianHate

Remote Work Is Here To Stay

- Growing trends show that many companies will continue to allow employees to work from home even after the pandemic.
- Studies estimate that 37% of jobs in the US can be performed entirely at home.
- Many employees may request to continue working from home as reasonable accommodations or out of fear of infection.

“Our best estimate is that 25-30% of the workforce will be working from home multiple days a week by the end of 2021.”

- Kate Lister,
President of Global
Workplace Analytics

Exempt/Non-Exempt Issues

- **Exempt employees** are entitled to their full salary when they work any work during a week even if they do not work the entire week because *the employer* failed to provide work.
 - Reduction of hours: An employer can reduce an exempt employee's hours provided the reduction does not take the employee below the minimum salary level threshold for the exemption.
 - Warning: Be careful of changing an exempt employee's duties as work slows down or as other employees are furloughed – it may alter their exempt status.
- **Non-Exempt Employees** must be paid for all hours worked.
 - Reduction of hours: An employer can reduce a non-exempt employee's hours provided the employee is still paid for all hours worked.
 - Warning: A non-exempt employee who reports to work but is sent home before working a full shift will be owed reporting time pay.

Other Non-Exempt Issues

- Overtime pay
- Record Keeping: must accurately record all hours
- Meal and Rest Periods: uninterrupted and duty free
- Schedule: establish specific workday/set expectations
- No off-the-clock work
- Additional Costs incurred from working at home

Reimbursement of Expenses

- **Labor Code 2802** : “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”
- Types of Remote Work Expenses: Personal Cell phone? Home internet? Office furniture and Equipment? Utility Costs?
- Are Remote Work Expenses Reimbursable?
 - Pre-pandemic: Typically Not if WFH optional
 - During the pandemic: Yes, if WFH mandated
 - Post-Pandemic: Yes, if WFH is the only option

Remote Work: What Law Applies?

- FEHA laws may apply to out of state workers where there is a sufficient nexus to California
- No Nexus Found:
 - ***Campbell v. Arco Marine Inc.*** (1996) 42 Cal.App. 4h 1850 – No nexus where a Washington resident claimed FEHA applied simply because the company’s headquarters was in California.
 - ***Gonsalves v. Infosys Technologies Ltd. No. C09-04112*** (N.D. Cal. May 6, 2010) – No nexus where Ohio resident had traveled to California several times during employment and managed clients in California.
- Sufficient Nexus Found:
 - ***Roger-Vasselin v. Marriott International, No. C04-4027*** (N.D. Cal. July 19, 2006)- Sufficient nexus to survive summary judgment where out of state employee’s manager was based in California and testified that he had input into the decisions at issue in the case.
 - ***Sims v. Worldpac Inc., No. C12-05275*** (N.D. Cal. Feb. 22, 2013) (unpublished)- Federal court denied motion to dismiss where the decision to terminate was made in California.
- If employment decisions are being made by managers in California, FEHA likely applies.

Workplace 2.0: OSHA's Emergency Temporary Standard

What Will Be Required?

- Employers **must either**:
 - Implement a mandatory COVID-19 vaccination policy (allowing only legal exceptions);
or
 - Implement a “soft” COVID-19 vaccination policy, allowing employees to choose either vaccination or to provide a regular negative test result and wear a face covering
- Requires employers to provide up to 4 hours of **paid time off** to receive each primary dose and reasonable paid time off to recover for side effects.
- Unvaccinated workers must be tested regularly and wear masks in the workplace

What is the Process and Timeline?

- The ETS was to be effective immediately, but employers were not required to comply until:
 - December 4, 2021 Everything except testing
 - January 4, 2022 Employee testing
- Citing “grave statutory and constitutional issues with the” ETS, the Fifth Circuit Court of Appeals issued a brief order on November 6, 2021 staying the ETS until it can be fully reviewed by the Court.
- If it survives legal challenge, employers in State Plan States should anticipate that those State Plans will adopt their own ETS within 30 days of issuance but those State OSH plans will have to comply with the various state laws and regulations. Cal/OSHA’s ETS remains in effect.

Who is Covered?

- Covers “all employers with a total of 100 or more employees at any time this section is in effect.” Part time and remote workers are included in the count.
- Does not apply to workplaces covered by federal contractors and subcontractor rules
- Does not apply to healthcare settings subject to new CMS vaccine mandate
- Does not cover employees who: (1) do not report to a workplace where other customers or coworkers are present; (2) work from home; or (3) work exclusively outdoors.
- “Is intended to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employer’s authority to require vaccination, face covering, or testing ...”

Do Employees with Exceptions Still Have to Be Tested? Masked?

6.H. If an employee is entitled to a reasonable accommodation due to a disability or sincerely held religious belief that prevents them from being vaccinated, would the employee still need to be tested weekly? ▲

Yes. The ETS requires weekly COVID-19 testing of all un-vaccinated employees, including those entitled to a reasonable accommodation from vaccination requirements. However, if testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation. For more information about evaluating requests for reasonable accommodation, employers can consult the Equal Employment Opportunity Commission's website:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Who Pays for the Testing? Employee?

6.G. Does the ETS require employers to cover the costs associated with COVID-19 testing?

No. The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. OSHA notes that the ETS also does not prohibit the employer from paying for costs associated with testing required by the ETS. Otherwise, the agency leaves the decision regarding who pays for the testing to the employer.

OSHA expects that some workers and/or their representatives will negotiate the terms of payment. OSHA has also considered that some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market. Other employers may choose to put the full cost of testing on employees in recognition of the employee's decision not to become fully vaccinated. It is also possible that some employers may be required to cover the cost of testing for employees pursuant to other laws or regulations. The subject of payment for the costs associated with testing pursuant to other laws or regulations not associated with the OSH Act is beyond OSHA's authority and jurisdiction.

Requests for Reasonable Accommodation Under Vaccine Policies

Latest Guidance From the EEOC

- On October 25, 2021, the EEOC came out with new guidelines regarding religious exemptions from COVID vaccines
 - Clarifies that employers can ask employees to explain the religious nature of their belief, as well as how their religious belief conflicts with COVID-19 vaccination requirements.
 - States that employers also may ask for an explanation of how the employee's religious belief conflicts with the employer's COVID-19 vaccination requirement.
 - While the sincerity of a religious belief is not normally in dispute, the employee's sincerity in holding a religious belief is "largely a matter of individual credibility."
 - Provides that any "employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation."
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Religious Accommodation

- Title VII requires employers to accommodate an employee’s “sincerely held religious belief, observance or practice” unless the accommodation creates an “undue hardship”.
- According to the EEOC, “[t]he law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, *but also others who have sincerely held religious, ethical or moral beliefs.*”



Is a Religious Belief “Sincerely Held?”

- The sincerity of an employee’s stated religious belief is generally *presumed* or easily established by the employee.
- Factors that may undermine an employee’s credibility include:
 - Whether the employee has acted in a way that is inconsistent with the claimed belief (although employees need not be scrupulous in their observance);
 - Whether the employee is seeking a benefit or an exception that is likely to be sought for nonreligious reasons;
 - Whether the timing of the request is questionable (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
 - Whether the employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

Undue Hardship

- Per EEOC guidance, the following factors indicate whether a religious accommodation creates an undue hardship:
 - The accommodation is too costly;
 - It would decrease workplace efficiency;
 - The accommodation infringes on the rights of other employees;
 - The accommodation requires other employees to do more than their share of hazardous or burdensome work;
 - The proposed accommodation conflicts with another law or regulation; and
 - *It compromises workplace safety.*



Workplace 2.0: More Activist Government = More Worker Protections

Equal Pay

- President Biden has stated he believes improving pay transparency is an essential step to ending the gender pay gap.
- The EEOC will likely restore the pay data reporting requirements instituted during the Obama administration and refocus its attention on systemic pay discrimination litigation.
- Biden's White House General Policy Council
- Paycheck Fairness Act Failed to Pass Congress



Have No Fear, the States are Here

- **California Pay Data Reporting (SB 973):**
 - Annual pay data reports must be filed with the DFEH by March 31st each year for the Snapshot Period in each Reporting Year
 - The first annual pay data report covering year 2020 was due on March 31, 2021
 - Applies to private employers with 100 or more employees. Must report on the # of employees by (1) Race, Ethnicity, and Sex; (2) In each of the job categories on the federal EEO-1 Report (3) Whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics
- **Colorado's Equal Pay for Equal Work Act:**
 - Prohibits employers from paying one employee a wage rate less than the rate paid to an employee of a different sex; prohibits employers from asking about or relying on an applicant's salary history or restricting employees from discussing their compensation with other employees
 - Requires employers to keep records of job descriptions and wage rate history for each employee for duration of employment (plus two years post termination)

SB 331: The Silenced No More Act

- **SB 331 (the “Silenced No More Act”)** 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.
- 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.

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.

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.

Rescission of Joint-Employer Rule

- On July 29, 2021, 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.

Other Areas of Worker Protections

- More Training: Harassment
- Criminal Background Checks
- Predictive Scheduling
- Expansion of Recall Rights
- Quota Notices for Warehouse Workers

Thank You

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