



ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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#IHCC22

EMPLOYMENT AND LABOR LAW DEVELOPMENTS

Presented by:

Heather Anderson, Esq., Best Buy

Jonathan Andrews, Esq., Signature Resolution

David Phillips, Esq., Signature Resolution

Moderated by:

Hon. Tricia Bigelow (Ret.), Signature Resolution

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ACC Association of
Corporate Counsel

BUT FIRST, THANK YOU

A special thank you to Atkinson, Andelson, Loya, Ruud & Romo
for their assistance with this presentation.

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Heather Anderson, Esq.

Senior Corporate Counsel, Best Buy

Heather Anderson is in-house employment counsel with Best Buy, a fortune 100 company with more than 100,000 employees in the U.S. and Canada. In her work, Ms. Anderson counsels and trains human resources and management on federal, state and local employment laws, handled administrative claims and attorney demands, as well as manages litigation and claims throughout the U.S. Ms. Anderson places a high value on proactively identifying and strategically mitigating employment law risks. Ms. Anderson began her career with Best Buy at its corporate headquarters in Minneapolis, MN in 1998 and relocated to San Diego in 2005, allowing for a unique focus on California law and representation of Best Buy's West Coast operations.



Jonathan Andrews, Esq.

Mediator, Signature Resolution

Jonathan Andrews, Esq. became a mediator because he believes in the process of resolution, and he believes he can make it better for everyone. As a strong advocate with an authentic presence, Mr. Andrews provides value for all sides with his empathy, experience, creativity, and tenacity for resolution.

Mr. Andrews received his L.L.M in Dispute Resolution with a concentration in mediation from the Straus Institute for Dispute Resolution at Pepperdine University School of Law—one of the world's leading educational programs in the field of dispute resolution. The combination of his L.L.M, 24 years of trial experience, entrepreneurial spirit of running a firm, and subject matter expertise proves his undeniable track record and commitment to mediation.

Jonathan D. Andrews is a Partner at Atkinson, Andelson, Loya, Ruud & Romo advising and representing employers in all aspects of labor and employment law. Mr. Andrews represents clients in state and federal court as well as matters before administrative agencies, such as the California Labor Commissioner, the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. Prior to that, Mr. Andrews was a Founding Partner at Andrews Lagasse Branch + Bell LLP, Partner at Gordon Rees Scully Mansukhani, LLP, and Associate at Brobeck, Phleger & Harrison.

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David Phillips, Esq.

Mediator, Signature Resolution

David Phillips, Esq. joined Signature Resolution as a mediator after more than 25 years of representing both plaintiffs and defendants. His background has taught him to carefully evaluate the legal risks and rewards faced by parties. He understands the challenges and opportunities motivating plaintiffs and defendants, as well as their respective counsel.

With 10 years in employment litigation, Mr. Phillips has resolved emotionally charged disputes like gender, race, age, disability, and sexual orientation discrimination, as well as harassment, retaliation, and wrongful termination. He is also fully versed in all aspects of wage-and-hour class action. Mr. Phillips has handled complex business and commercial disputes, high profile casualty loss and insurance bad faith claims, as well as a wide variety of privacy, intellectual property and malpractice lawsuits.

He brings the full spectrum of evaluative and facilitative skills to his role as mediator and helps the parties identify their core interests and evaluate their legal risks and opportunities as a catalyst to create a positive resolution. His experience and expertise empower him to assist clients in managing risk and optimizing results.

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Hon. Tricia Bigelow (Ret.)

Mediator, Arbitrator, and Appellate Consultant,
Signature Resolution

The Hon. Tricia Bigelow (Ret.) has led a distinguished career defined by a caring approach and a commitment to justice. From her tenure as a deputy attorney general, Municipal Court Judge and Superior Court Judge to her appointment as a Presiding Justice of the Court of Appeal, she's gained a reputation throughout California for her ability to authentically connect with people. She serves as a neutral mediator, arbitrator and appellate consultant to help parties resolve any type of legal dispute.

Presiding Justice Bigelow was recently named the first Senior Fellow of Dispute Resolution at the Strauss Institute for Dispute Resolution at Pepperdine University School of Law. She has and has been honored with numerous accolades for her work on the bench, including the California Judicial Council Bernard S. Jefferson "Judge of the Year" award in 2014, the Bernard S. Jefferson Award for distinguished service to judicial education from the California Judge's Association in 2015 and was the Dean of the California Judicial College, where she oversaw the education of all new judges in the state.

During her time on the bench, Justice Bigelow presided over complex cases involving high-profile companies and public figures. She has authored three books on California law and procedure and lectured extensively on judicial ethics and fairness, civil motions and trials, and other topics.

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2022 Information - Agenda

- Employment Litigation Trends
- Court Decisions
 - Notable cases from 2021
 - Cases to watch in 2022
- New Laws
- Continuing COVID-19 Concerns
- Labor Hotspots

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Employment Litigation Trends

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Employment Litigation Trends in California

- Wage and hour claims (class action and PAGA)
- Disability claims
 - Failure to accommodate
 - Failure to engage in the interactive process
 - Associational discrimination
- COVID-19 related claims
- FCRA, ICRAA, CCRAA (background check) litigation

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Court Cases

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Notable Court Cases from 2021

- *Chamber of Commerce v. Bonta* (9th Circuit Court of Appeals)
 - Partial enforcement of AB 51; ban on mandatory arbitration agreements
 - Petition for rehearing is pending
- *Ferra v. Loews Hollywood Hotel, LLC* (CA Supreme Court)
 - “Regular rate of compensation” under Labor Code section 226.7 is synonymous with the term “regular rate of pay” used for calculating overtime premium pay
- *Pollack v. Tri-Modal Distribution Services, Inc.* (CA Supreme Court)
 - FEHA statute of limitations begins when employee knew or reasonably should have known of adverse employment action

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Notable Court Cases from 2021 (cont'd)

- *Herrera v. Doctors Medical Center of Modesto* (CA Court of Appeal)
 - Reaffirms PAGA claims are not subject to arbitration pursuant to pre-dispute arbitration agreements
- *Medina v. Equilon Enterprises, LLC* (CA Court of Appeal)
 - Broadens test for joint employer liability
- *Johnson v. Maxim Healthcare Services, Inc.* (CA Court of Appeal)
 - Permitted plaintiff whose one-year statute of limitations had run to maintain PAGA action on behalf of others

Court Cases to Watch in 2022 (cont'd)

- *Grande v. Eisenhower Medical Center* (California Supreme Court)
 - Potential impact on staffing agency employers who enter into releases of litigation where their clients are not named; potential for paying twice through indemnity clauses
- *People ex rel. Garcia-Brower v. Kolla's Inc.* (California Supreme Court)
 - Whether Labor Code section 1102.5(b) protects employee from retaliation for disclosing unlawful activity when the information is already known to that person or agency
- *Naranjo v. Spectrum Security Services, Inc.* (California Supreme Court)
 - Whether Labor Code section 203 waiting time penalties are recoverable for meal and rest period violations

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A photograph of the California State Capitol building, a large white neoclassical structure with a prominent dome and columns, set against a clear blue sky and surrounded by green trees. The image is semi-transparent, serving as a background for the text.

New Laws

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AB 654 (COVID-19 Exposure Reporting)

- AB 654 builds on and clarifies AB 685, which was passed in 2020
 - Expansive COVID-19 exposure guidelines and reporting requirements
 - Important amendments include:
 - Adjusts the Cal/OSHA exposure reporting time frame articulated by AB 685 from 48 hours to 48 hours or one business day, whichever is later
 - Adds renewable natural gas to the list of critical governmental functions which cannot be materially interrupted by Cal/OSHA
 - Clarifies that Cal/OSHA's COVID-19 exposure requirements do not apply to health care facilities
- These new amendments will remain in effect along with the reporting requirements until January 1, 2023

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AB 701 (Warehouse Quota Requirements)

- Targets warehouse distribution centers and the quotas placed on employees
- Seeks to address the rise in on-site injuries allegedly caused by employee quotas
- Applies to employers who directly or indirectly, employ or exercises control over the wages, hours, or working conditions of 100 or more employees
 - Must be a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in California

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AB 701 (cont'd)

- Important aspects of AB 701 include:
 - Requires employers to provide to a written description of each quota to which the employee is subject, and any potential adverse employment action that could result from failure to meet the quota
 - Prohibits quotas that prevent compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws
 - Provides employees the ability to request a written description of each quota and a copy of the most recent 90 days of the employee's own work speed data
 - Prohibits employers from taking adverse action against an employee for failing to meet a quota that has not been disclosed
 - Creates a rebuttable presumption of unlawful retaliation if employer takes adverse action against an employee within 90 days of the employee requesting information or lodging a complaint

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AB 701 (cont'd)

- Authorizes current or former employees to bring an action for injunctive relief
 - Allows for the recovery of costs and reasonable attorneys' fees
- Authorizes several new enforcement mechanisms for divisions within the Department of Industrial Relations (DIR), including the Division of Occupational Safety and Health and the Division of Workers' Compensation

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AB 1003 (Wage Theft)

- Establishes that intentional theft of wages by employers is punishable as grand theft
 - Amounts greater than \$950 for one employee or \$2,350 for two or more employees, in 12 consecutive month period is punishable as grand theft
- Defines grand theft as the “intentional deprivation of wages, gratuities, benefits, or other compensation”
- Applies to California employers of all sizes, and covers independent contractors as well as employees

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AB 1033 (California Family Rights Act (“CFRA”) Amendments)

- Expands CFRA to include employee leave to care for parents-in-law
- Makes several procedural modifications to the DFEH mediation pilot program
 - Only applies to employers that employ between 5 and 19 employees at the time any alleged violation occurred

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SB 331 (Silenced No More Act)

- Makes it unlawful for employer or former employer to include an agreement provision that prohibits the disclosure of information about unlawful acts in the workplace related to an employee's separation
- Prohibits the use of non-disclosure agreements to settle workplace-related legal claims involving (harassment, discrimination, retaliation, or any other conduct that the employee has reasonable cause to believe is unlawful), except for limited circumstances
- Prohibits non-disparagement or similar agreements required as a condition of employment that deny an employee's right to disclose information about unlawful acts in the workplace
 - Unless agreement includes language that provides employee's right to discuss such unlawful workplace conduct

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SB 62 (Joint Liability in Garment Industry)

- Expands joint and several liability for employers in the garment manufacturing supply chain with respect to wage and hour violations
- Makes manufacturers and/or retailers within the manufacturing supply chain liable for wage and hour violations of their contactors (and potentially subcontractors) up and down the supply chain
- Prohibits piece-rate compensation

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SB 657 (Electronic Document Transmission)

- Gives employers the right to distribute information to employees by email in any instance in which an employer is required to physically post the information
- Does not alter the employer's **obligation to continue to physically** display any required postings

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SB 807 (Procedural Amendments to the Fair Employment and Housing Act (“FEHA”))

- Makes procedural changes to how the DFEH enforces California’s civil rights and anti-discrimination laws under the FEHA
- Extends an employer’s record retention requirements for employees and applicants from two (2) years to **four (4) years** from the date the records were created, or the date the employment action was taken

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SB 807 (cont'd)

- Amends several other procedural deadlines including:
 - Extending the period for which an individual can file a complaint alleging violations of several statutes by tolling the time period to file while the DFEH investigates
 - Extending the period the DFEH has to issue a right-to-sue letter to two (2) years for class-wide employment claims
 - Modifying and granting the DFEH specified enforcement powers, including the power to petition the superior courts to compel compliance with investigations of the DFEH pursuant to certain employment or housing discrimination complaints
 - Tolling the deadline for the DFEH to file a civil action pursuant to the FEHA while a mandatory or voluntary dispute resolution is pending

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SB 606 (Cal/OSHA Enforcement Expansion)

- Extends potential penalties for employers.
- Creates two new categories of violations: (1) enterprise-wide, and (2) egregious
- “Enterprise-wide” violations could greatly impact employers with multiple worksites
- Provides liability if:
 - The employer has a **written** policy or procedure that violates section 25910 of the Health and Safety Code, any standard, rule, order or regulation; **OR**
 - Cal/OSHA has evidence of a pattern or practice of the same violation or multiple violations committed by that employer at more than one of the employer’s worksites

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SB 606 (cont'd)

- For “egregious” violations, Cal/OSHA identifies violations if:
 1. Employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation;
 2. Violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;
 - “Catastrophe” means inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
 3. Violations resulted in persistently high rates of worker injuries or illnesses;
 4. Employer has an extensive history of prior violations;
 5. Employer has intentionally disregarded its health and safety responsibilities;
 6. Employer’s conduct (taken as a whole) amounts to clear bad faith in performance of duties; **OR**
 7. Employer committed a large number of violations to undermine significantly the effectiveness of any safety and health program in place

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SB 606 (cont'd)

- Conduct determined to be “egregious” will remain in effect for **five years**
- After five-year period, additional evidence will be required to support any subsequent citation for an egregious violation
- Provides Cal/OSHA with the authority to “issue a subpoena if the employer or related entity fails to promptly provide requested information”

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The background of the slide features a light blue-grey gradient with several stylized, glowing blue virus particles. These particles have a spherical core and are covered in numerous thin, radiating spikes, resembling the structure of coronaviruses. One large, detailed virus particle is positioned on the left side, while several smaller, more ethereal ones are scattered across the upper and right portions of the frame.

COVID-19 Concerns

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Continuing COVID-19 Concerns

- Vaccine, testing, and masking requirements
- Ever-changing local mandates / orders / ordinances
 - Los Angeles County surgical mask mandate effective January 17, 2022
- Other safety requirements
- Remote work and return to work issues
 - Wage and hour claims
 - Religious accommodation claims
 - Disability accommodation claims
- Potential for additional paid time off

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Labor Hotspots

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The Great Resignation

- As the Pandemic lingers on; retention and turnover experts continue to focus on voluntary job-leaving.
- No doubt that the pandemic has been an alarming wake-up call.
- Many employees are expected to increase their job searches that they have put off due to the holidays.
- Some employees have already found their way out your door.
- **Remember**: People behave conservatively and stay put in order to avoid risk.
- **The Great Resignation** is what economists call the current situation.

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Three Factors

“The great resignation” appears to be propelled by three forces:

1. The changing generation,
2. The economic crisis, and
3. The realization that a different social contract exists, spending more time with family when working remote and skipping the commute.

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Some recommendations to stem employee turnover and reengage employees

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Recommendation Number One

WORKFORCE PLANNING - Strategies and Planning will look Different Post-Pandemic

- Embrace the change-what is the current culture of your workforce?
- Identify the skills and roles necessary for the organization to prosper
- Cultivate new skills identified over the past year
- Upskill or reskill some current talent
- Avoid backfilling roles with the same old skills

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Recommendation Number Two

ENGAGEMENT - Keep your Top Performers Engaged

- Fewer interactions; quality is diminished
- No genuine feeling of connection
- These employees may be the most susceptible to burnout
- Make employees feel valued
- Focus on career growth
- Offer stretch, executive or special skill-set training
- Be transparent with career progression and compensation

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Recommendation Number Three

COMMUNICATION, COMMUNICATION, COMMUNICATION

- *Remember:* Employees have had more than a year to reconsider work-life balance or career paths
- Employees want more recognition
 - Train managers on effective employee recognition
- Stop talking and start listening
 - Encourage open-door exchanges; surveys; counseling and mentorship opportunities
- Create a supportive environment
- Conduct 1:1 meetings between staff & managers to ensure you understand anything you may not have considered before

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Recommendation Number Four

FLEXIBILITY - *As you Move Back to On-site Work*

- Some positions can stay remote
 - Identify positions that may have benefited from the remote environment
- Offer hybrid work accommodations
 - Combination of remote & in-person hours
- Create collaboration hours
 - Identify times when the entire team (remote & in-person) are available for check-ins or focus sessions
- Insurance needs may have changed
 - Look for opportunities to create a richer or more diverse offering
 - Focus on mental health

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Recommendation Number Five

BE PATIENT - New Habits may take a Bit to Take Hold

- Don't forget the chaos of March 2020 when many employees had to find another way to work effectively
- Remote habits will need time to translate back into in-person habits
- Adopted changes that worked remotely may need overhaul back in the office

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THANK YOU!

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