JacksonLewis

California

Midyear Employment Law Update

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Presenters

Sayaka Karitani

Of Counsel

Sayaka.Karitani@jacksonlewis.com

Susan Sinatra

Of Counsel

Susan.Sinatra@jacksonlewis.com

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Midyear Reminders

Local Minimum Wage Increases

Locality	Current Minimum Wage	New Minimum Wage
Alameda	$15.75	$16.52
Berkeley	$16.99	$18.07
Emeryville	$17.68	$18.67
Fremont	$16.00	$16.80
City of Los Angeles	$16.04	$16.78
County of Los Angeles (unincorporated areas only)	$15.96	$16.90
Malibu	$15.96	$16.90
Milpitas	$16.40	$17.20
Pasadena	$16.11	$16.93
San Francisco	$16.99	$18.07
Santa Monica	$15.96	$16.90
West Hollywood	$17.00 (fewer than 50 employees) $17.50 (50 or more employees) $18.35 (hotel employees)	$19.08 (all employees)

Harassment Prevention Training

- Employers with 5 or more employees must provide:
  - **1 hour** of harassment prevention training to nonsupervisory employees.
  - **2 hours** of training to supervisors.
- Training must be provided every two years.
- Within six months of hire or promotion for supervisors and managers.

Cal/OSHA Non-Emergency COVID-19 Standard

- **Effective** January 2023, replaces COVID-19 Emergency Temporary Standard
- Sunset two years after effective date
- Recordkeeping requirements sunset three years after effective date.

Changes from ETS

- **End of Exclusion Pay.** One of the biggest changes in the permanent standard is that exclusion pay will no longer be required to compensate employees who miss work due to an employer-caused COVID-19 exposure.
- **Modified Masking Requirements.** Certain mask requirements have been removed from the permanent standard. The definition of an "exposed group" still contains a "momentary pass-through" exception. This exception is being broadened to include individuals who are not masked. As re-defined, the momentary pass-through exception applies to a place where persons momentarily pass through without congregating, provided that it is not a work location, working area, or a common area at work.
- **Reduced Reporting Requirements.** Employers will no longer be required to report outbreaks to the local health department under the permanent standard. Moreover, a COVID-19 outbreak can be deemed over when "one or fewer" new cases are detected in the exposed group for a 14-day period. An investigation, review, and correction of hazards following an outbreak no longer will be required to be "immediate" following an outbreak.

Continuation from ETS

- **Testing and Notice Requirements Remain**. Under the proposed permanent standard, employers will be required to provide testing and employee notices after exposure. This is in line with recent legislation extending certain COVID-19 exposure requirements until 2024.
- **Recordkeeping Requirements**. Employers will still be required to maintain records of workers' infections, but they will not need to maintain records of employees deemed a close contact.
- **Updated Definition of "Close Contact."** The definition of "close contact," which is important for purposes of notice, also continues to be linked to the California Department of Public Health definition.

Case Law Updates

The People v. Kolla's, Inc.

- California Supreme Court
- Question Presented: Whether section Labor Code section 1102.5(b) protects employees from retaliation for disclosing unlawful activity when the information is **already known** to that person or agency.

Trial Court and Court of Appeal Rule No Disclosure

- Complainant alleged she was retaliated against after she complained to her employer about the non-payment of wages, and her employer threatened to call immigration authorities and terminated her.
- The California Labor Commissioner determined that the employer violated Labor Code section 1102.5, which prohibits retaliation for the “disclosure” of a violation of law.
- The trial court ruled there was no claim under Section 1102.5 because the reporting to the Labor Commissioner occurred after the termination.
- The Court of Appeal disagreed with the trial court’s reasoning but upheld the ruling because the disclosure to her employer did not qualify as a disclosure because the employer already knew of the violation.

What is a disclosure?

- The California Supreme reversed finding that the disclosure of the unlawful activities made to the employer even though already known was still a protected “disclosure” within the meaning of Labor Code section 1102.5 for retaliation purposes.

Kuciemba v. Victory Woodworks, Inc.

- California Supreme Court
- Question Certified from U.S. Court of Appeals for 9th Circuit.
- Questions Presented:
  - If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (WCA) bar the spouse's negligence claim against the employer?
  - Does an employer owe **a duty of care** under California law to prevent the spread of COVID-19 to employees' household members?

No Employer Liability for COVID-19 Take-Home Exposure

- As to the first question the Court ruled, that the WCA **did not bar a spouse's negligence claim**.
- As to the question of duty, to prevent take-home exposure of COVID-19, the Court ruled there was **no duty**.

Chamber of Commerce of the U.S., et al. v. Bonta, et al.

- U.S. Court of Appeals for the 9th Circuit
- Affirmed the district court's grant of a preliminary injunction barring enforcement of California's Assembly Bill (AB) 51 with respect to arbitration agreements governed by the Federal Arbitration Act (FAA).
- Held AB 51 seeks to impose criminal and civil penalties on employers that require individuals to sign, as a condition of employment or employment-related benefits, arbitration agreements affecting rights under the California Fair Employment and Housing Act or Labor Code. A majority of the Ninth Circuit panel concluded the FAA preempts AB 51.

Adolph v. Uber Technologies

- California Supreme Court
- **Question Presented:** Whether an aggrieved employee who has been compelled to arbitrate their individual claims under the California Private Attorneys General Act (PAGA) maintains statutory standing to pursue PAGA claims arising out events involving other employees in court or in any other forum the parties agree is suitable.

Employee Retains Standing for Non-Individual PAGA Claims in Court

- The California Supreme Court held that when a court compels an employee to arbitrate their "individual" Labor Code Private Attorneys General Act (PAGA) claims, the employee retains statutory standing to pursue "non-individual" PAGA claims on behalf of other allegedly aggrieved employees in court.
- The California Supreme Court relied heavily on its prior decision in *Kim v. Reins International California, Inc.*, which it held that a plaintiff need only be an "aggrieved employee" to have standing under PAGA.
- **"Aggrieved employee,"** in turn, is defined under PAGA as simply (1) someone who was employed by the alleged violator and (2) against whom one or more of the alleged violations was committed. The California Supreme Court concluded that, so long as these requirements are met, a plaintiff has standing to pursue the non-individual PAGA claims in court.

Iyere v. Wise Auto Group

- California Court of Appeal
- The plaintiffs were two sales consultants and a sales manager. After the plaintiffs filed suit against their former employer, Wise Auto Group (Wise) filed a motion to compel arbitration that included copies of the arbitration agreement with handwritten signatures of each plaintiff.
- To oppose the motion, the plaintiffs submitted declarations stating that they received a large stack of documents on their first day of work, they were told to sign the documents quickly, and they signed the documents as instructed without ever receiving a copy of the signed documents back.
- The plaintiffs also specifically asserted in their declarations that they "do not recall ever reading or signing any document entitled Binding Arbitration Agreement or Employment Acknowledgment, [they] do not know how [their] signature was placed on [either document]," and they would not have signed either document had they understood that the documents waived their right to sue Wise in court.

Court Rules Against Do Not Recall Defense

- The Court of Appeal concluded that absent evidence that their signatures were forged or otherwise inauthentic, the plaintiffs failed to show that the arbitration agreements were not authentic and unenforceable.
- The Court of Appeal disagreed with the comparison of the instant case with two cases involving electronic signatures, stating that "[w]hile handwritten and electronic signatures once authenticated have the same legal effect, there is a considerable difference between the evidence needed to authenticate the two."
- The Court of Appeal held that even if an employee's assertion that they do not recall signing the arbitration agreement can shift the burden back to the employer to authenticate the agreement, Wise satisfied its burden by producing a declaration from its custodian of records identifying the agreement.

Naranjo v. Spectrum Security Systems

- California Court of Appeal
- Issues before Court:
  - Whether the trial court erred in finding Spectrum Security had not acted "willfully" in failing to timely pay employees premium pay, which barred recovery of waiting time penalties.
  - Whether Spectrum Security's failure to report missed-break premium pay on wage statements was "knowing and intentional" to allow recovery of penalties for failure to provide accurate wage statements.

When Penalties Should Be Granted

- Additional Penalties for Waiting Time Penalties
  - When Failure is Willful
  - The regulations interpreting the California statute for waiting time penalties do not conflict with the statute but act to define terms not defined in the statute. The regulations specifically state that a "good faith dispute" that any wages are due occurs when an employer presents a defense, based on law or fact which if successful, would preclude any recovery on the part of the employee.

- Additional Penalties for Inaccurate Wage Statements
  - Knowing and Intentional = Willful

Castellanos v. State of California

- California Court of Appeal
- Constitutional challenges brought against the State for Proposition 22, the "Protect App-Based Drivers and Services Act."
- Proposition 22 went into effect in 2021 and was quickly challenged in California state court by various groups seeking a declaration that it violated California's Constitution. The trial court ruled that Proposition 22 was invalid in its entirety for several reasons including that the legislation intruded on the legislature's authority to create worker's compensation laws, limited the Legislature's authority to amend the legislation, and because it violated the single subject rule for initiative statutes.

Proposition 22, Mostly Constitutional

- The Court of Appeal held that the Proposition did not intrude on the legislature's authority pertaining to workers' compensation or violate the single-subject rule.
- The Court did hold that the Proposition's definition of an amendment violated the separation of powers principle in the State Constitution. However, the Court found that the unconstitutional provision could be severed from the rest of the Proposition such that Proposition 22 would still apply to covered entities.
- Based on the majority's decision Proposition 22 remains in effect for those who qualify under the law, with the exception of the amendment provision deemed invalid.

Legislation Passed in 2023

Senate Bill 41:
Exemption of Airline Cabin Crew from California Meal and Rest Period Requirements

- Signed **March 23, 2023**, took effect immediately as urgency ordinance.
- Provides that California's meal and rest period requirements do not apply to airline cabin crew employees if they are covered by a valid collective bargaining agreement under the Railway Labor Act.

Requirements for Exemption

- Under the new law, state meal and rest period requirements shall not apply to airline cabin crew employees if the employees meet the following:
  - The employee is covered by a valid collective bargaining agreement under the Railway Labor Act and that agreement contains any provision addressing meal and rest periods for airline cabin crew employees.
  - The employee is part of a craft or class of employees that is represented by a labor organization pursuant to the Railway Labor Act (but is not yet covered by a valid collective bargaining agreement)
- The second requirement shall apply for the first 12 months that the craft or class of employees is represented by a labor organization and may apply for longer than the first 12 months only if agreed upon in writing by the employer and the labor organization representing the employee's craft or class.

Assembly Bill 113: Amendments to Collective Bargaining for Agriculture

- Signed **May 15, 2023**, took effect immediately as a Budget Bill.
- The bill enacts changes to the collecting bargaining process for agricultural workers.
- Bill makes changes to a bill signed in 2022, Assembly Bill 2183, which established new ways for farmworkers to vote in a union election under the Agricultural Labor Relations Act (ALRA), including mail-in ballots.

Changes Made by AB 113

- AB 113 makes the following changes to the collective bargaining process:
  - Eliminates the option to conduct union elections using mail-in ballots.
  - Retains the option to conduct union elections via "card-check" system, also referred to as the "the Majority Support Petition."
  - Limits the number of card-check elections that result in the certification of labor organizations to 75 certifications.
- These changes sunset on **January 1, 2028**, and at that time the card-check elections will no longer be an available option for union elections.

Assembly Bill 102: Revives Industrial Wage Commission

- Signed **July 10, 2023**, takes effect immediately as a budget bill.
- Appropriates $3,000,000 to the Industrial Welfare Commission (IWC)
- The IWC is the administrative entity that was established to regulate wages, hours, and working conditions in California. The IWC developed the wage orders, which set forth many requirements that employers must comply with in addition to the California Labor Code. The IWC was previously defunded by the California Legislature effective July 1, 2004, but its 18 wage orders remain in effect. As a result of the defunding of the IWC, the wage orders have not been updated since 2001.
- Under AB 102, the IWC shall convene by **January 1, 2024**, with any final recommendations for wages, hours, and working conditions in new wage orders adopted by **October 31, 2024**.

Local Ordinances

Los Angeles Fair Workweek Ordinance

- **Effective Date:** April 1, 2023
- **Covered Employers:** Those businesses identified as a retail business under the NAICS and employ **300 employees globally**.
- **Covered Employees:** Anyone working for a covered employer and works in the City of Los Angeles **two hours or more per week**.

Obligations of Covered Employers

- Covered employers shall provide each new employee before hiring a written good faith estimate of the employee's work schedule.
- Covered employers shall provide a written good faith estimate of the employee's schedule within 10 days of an employee's request.
- Employees have a right to request a preference for certain hours, times, or locations of work. Covered employers may accept or decline requests, provided the employer notifies the employee in writing of the reason for any denial.
- Covered employers shall provide an employee with written notice of the employee's schedule at least 14 calendar days before the start of the work period.
- Before hiring a new employee, covered employers shall first offer the work to current employees.
- An employer shall not schedule an employee to work a shift that starts less than 10 hours from the employee's last shift without written consent. Covered employers shall pay an employee a premium of time and a half for each shift not separated by at least 10 hours.
- Covered employers shall post notice informing employees of their rights under the ordinance.

San Francisco Military Leave Pay Protection Act

- **Effective:** February 19, 2023
- **Covered Employers:** The ordinance applies to employers who employ 100 or more employees, regardless of location, but excludes the City of San Francisco as well as other governmental employers.
- **Covered Employees:** The ordinance applies to any employee of a covered employer who
  - works within the geographic boundaries of San Francisco, including part-time and temporary employees; and
  - is a member of the reserve corps of the United States Armed Forces, National Guard, or other uniformed service organization of the United States.

Supplemental Compensation

- Under the ordinance, while on covered military leave, employers must pay covered employees the difference between the amount of the employee's gross military pay and the gross pay the employer would have paid the employee had the employee worked their regular work schedule.
  - When calculating the employee's gross pay, covered employers are not required to include overtime unless the overtime is scheduled as part of the employee's regular work schedule.
- Covered employees may take the leave in daily increments for one or more days at a time, for up to 30 days in any calendar year.

Limits on Supplemental Compensation

- The ordinance does include limits on the leave taken, including the following:
  - The supplemental compensation the employer is required to pay the employee can be offset by amounts paid under any other law or employer military leave policy so that the employee does not receive excessive payments for the leave time taken.
  - If an employee is able to return to work but does not do so within 60 days of release from military duty, the employer may treat any supplemental compensation paid to the employee during the employee's military leave as a loan to the employee to be repaid, with interest, to the employer under the terms of the ordinance.

Legislation to Watch

Senate Bill 525: Minimum Wage for Health Care Workers

- This bill would create a new minimum wage for healthcare workers starting **June 1, 2024**.
- That minimum wage would be set at $21 per hour and then increase to $25 per hour on **June 1, 2025**.
- Additionally, this bill would make the violation of this new minimum wage a misdemeanor.
- Would require that, in order for an employee to qualify for an exemption from the minimum wage and overtime requirements, they must be paid a monthly salary equivalent to **150%** of the health care worker minimum wage for full-time employment.

Senate Bill 616: Paid Sick Days Accrual & Use

- Would require employers to provide at least **56 hours or 7 days** of accrued paid sick leave by the 280th calendar day of employment.
- And would require that time be allowed to be carried over into the following year.
- Also increases the amount of paid sick leave or paid time off an employer can accrue from 48 hours or 6 days to **112 hours or 14 days**.

Assembly Bill 518: Paid Family Leave & Designated Person

- This bill would expand the state disability insurance program in which workers pay contributions based on their wages to include a paid family leave program for up to 8 weeks to include care for a **designated person** who is related to the employee in some way.
- This would allow more people to be eligible to receive wage replacement benefits, and additional money would be taken from the Unemployment Compensation Disability Fund to cover the bill.
- The changes in this bill would not be operative until on or after July 1, 2024.

Assembly Bill 524: Discrimination for Family Caregiver Status

- This bill will expand upon protected classification under FEHA to include **"family caregiver status"** , meaning that employers cannot discriminate against someone because they have obligations to take care of family members such as elderly or disabled relatives.
- Similar bill failed to pass the legislature in 2022.

Senate Bill 848: Leave for Loss Related to Reproduction or Adoption

- This bill would require employers provide up to **5 days** off unpaid due to reproductive loss including miscarriage, unsuccessful assisted reproduction or failed adoption.
- The leave would be required to be taken within **3 months** of the even.
- If an employee experiences more than one loss within a 12 month period the total amount of time taken shall not exceed 20 days within a 12 month period.

Senate Bill 73: Voluntary Veterans’ Preference

- This bill, the Voluntary Veterans' Preference Employment Policy Act, which would give employers the choice **to hire veterans over another qualified applicant**.
- It also requires employers with a veterans' preference policy to report certain information to the Civil Rights Department.
- Additionally, it requires the Department of Veterans Affairs to help employers verify if an applicant is a veteran.
- This law will only remain effective until **2029**.

Senate Bill 403: Discrimination on the basis of ancestry

- This bill would revise the FEHA to prohibit prescribe discriminatory employment practices based on **ancestry**
- Ancestry under the bill is defined lineal descent, heritage, parentage, caste, or any inherited social status.
- Previously, the bill was specific to caste but was amended to be broader.

Senate Bill 723: Right of Recall

- Expands prior pandemic right of recall.
- The bill would revise the definition of employee to include lay offs that occurred on or after March 4, 2020, as a result of any non-disciplinary reason.
- The right of recall would still only apply to the following industries:
  - Hotels
  - Private clubs
  - Event Centers
  - Airport Hospitality Operations
  - Airport Service Providers
  - Building Services to office, retail, or other commercial buildings
- And it would remove the prior sunset date of the COVID-19 right of recall.
- A similar right of recall bill was vetoed in **2020**.

Senate Bill 553: Workplace Violence Prevention Plan

- Expands Workplace Violence Prevention Plan requirements to all employers.
- Employers would be required to develop a workplace violence prevention plan.
- Employers would need to provide training to employees that address workplace violence risks that the employees may reasonably anticipate in their jobs.
- The bill would also put in place an anti-retaliation prohibition for employees seeking assistance and intervention from local emergency services or law enforcement when a violent incident occurs.

Pending Cal/OSHA Regulations

Indoor Heat

- Will apply to all indoor work areas where the temperature equals or exceeds 87 degrees.
- These proposed measures include the following:
  - Opening cool-down areas, which are defined as an indoor or outdoor area that is blocked from direct sunlight and shielded from other high radiant heat sources and is either open to the air or provided with ventilation or cooling.
  - Providing each employee with one quart of drinking water per hour.
  - Allow employees to take breaks whenever a worker feels the need to rest to protect from overheating.
- Similar to the existing **outdoor heat illness and injury prevention standard**, employers would be required to establish emergency response procedures to treat employees who become ill as well as monitoring new employees for signs of heat stress during their first 14 days of work in hot conditions.
- The proposed standard would require both employees and supervisors to be trained on indoor heat illness prevention and safety.

Pending Cal/OSHA Regulations

Lead Exposure

- The proposed amendments to the regulations are designed to mitigate these harmful health issues from lower levels of exposure by maintaining employees’ blood lead levels below 10 µg/dl (micrograms per deciliter), whereas existing regulations were designed to maintain employees’ blood lead levels below 40 µg/dl, a level four times higher.
- To achieve this reduction in exposure the revisions would:
  - Reduce exposure to airborne lead
  - Reduce exposure to lead through the oral route of exposures, and
  - Expand requirements of blood lead testing of employees who work with lead, independent of measure levels of airborne lead.

Bills That Failed

- AB 1100 – Four Day Workweek
- SB 703 – Flexible Work Schedules

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Thank you.