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Traversing the Legal Jungle: Common  
Compliance Pitfalls for Employers

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# WHY ARE WE HERE?

# Common Employer Pitfalls

- Overtime Regular Rate Calculation
- Meal / Rest Break Premiums
- Wage Statements
- Social Media Regulation
- Arbitration Agreements
- Employment Law Update

# OVERTIME PAY





# OVERTIME PAY

## The Basics

Most employees must be paid at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 hours in a week.

California overtime laws are more expansive:

- Daily overtime - any time in excess of 8 hours a day
- Daily doubletime - all time in excess of 12 hours in one day

Both federal and California law require overtime compensation at 1.5 times the employee's "regular rate" of pay.

# OVERTIME PAY

## What is the “Regular Rate”?

- “Total remuneration divided by the total hours worked.” Calculated per workweek.
- Includes all wages, plus other forms of regular compensation, including commissions, non-discretionary bonuses, piece-rate payments, etc...
- During COVID, many employers instituted bonus programs that affect the calculation

# OVERTIME PAY

## Sample 1: Typical Calculation

- \$15/hour base rate
- No commissions/bonuses/incentives
- 4 hours of overtime in a workweek

# OVERTIME PAY

## Sample 1: Typical Calculation

- Overtime rate: \$15 (base rate) x 1.5 (overtime multiplier) = \$22.50
- Overtime Wages: \$22.50 (overtime rate) x 4 overtime hours = \$90



# OVERTIME PAY

## **Sample 2: “Flat Amount” Bonus Calculation**

- \$15/hour base rate
- Non-discretionary bonus of \$100 in weekly pay period
- 4 hours of overtime in the same workweek

# OVERTIME PAY

## Sample 2: “Flat Amount” Bonus Calculation

- Overtime rate:  $\$15$  (base rate)  $\times$  1.5 (overtime multiplier) =  $\$22.50$
- Overtime Wages:  $\$22.50$  (overtime rate)  $\times$  4 overtime hours =  $\$90$

# OVERTIME PAY

## **Sample 2: “Flat Amount” Bonus Calculation**

- ADDITIONAL OVERTIME based on increase in “regular rate”
- Calculation for “flat amount” bonus based on non-overtime hours in pay period (40 hrs)

# OVERTIME PAY

## Sample 2: “Flat Amount” Bonus Calculation

- FORMULA:

$$\text{Bonus} / \text{Non-OT hrs} \times .5 \times \text{OT hrs}$$

- Here:

$$(100 / 40) \times .5 \times 4 \text{ hours} = \underline{\$5}$$

- Total OT Comp: \$95 (not \$90)

# OVERTIME PAY

## **Sample 3: “Production” Bonus Calculation**

### **DLSE Policies and Interpretations Manual**

#### Section 49.2.4

“When a bonus is based on a percentage of production or some formula other than a flat amount ... [t]he regular bonus rate is found by dividing the bonus by the total hours worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours.”



# OVERTIME PAY

## **Sample 3: “Production” Bonus Calculation**

- \$15/hour base rate
- Non-discretionary bonus of \$100 in weekly pay period for every 10 widgets sold
- 13 widgets sold
- 4 hours of overtime in the same workweek

# OVERTIME PAY

## Sample 3: “Production” Bonus Calculation

- Overtime rate: \$15 (base rate) x 1.5 (overtime multiplier) = \$22.50
- Overtime Wages: \$22.50 (overtime rate) x 4 overtime hours = \$90

# OVERTIME PAY

## Sample 3: “Production” Bonus Calculation

- FORMULA for OT Premium on “production” bonus:

$$\text{Bonus} / \text{Total Hrs} \times .5 \times \text{OT hrs}$$

- Here:

$$(100/44) \times .5 \times 4 \text{ hours} = \underline{\$4.54}$$

- Total OT Comp: \$94.54 (not \$90 or \$95)

# OVERTIME PAY

## CONSEQUENCES



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Consider Hypo 2 v. Hypo 3

- Difference of only \$0.46 (\$5 v. \$4.54)
- Small “Liability” can lead to LARGE exposure
  - Labor Code 226 penalties
  - Labor Code 203 penalties
  - Individual PAGA penalties
  - Attorney’s fees
  - Pre-judgment interest



# OVERTIME PAY

## CONSEQUENCES

Unpaid OT (1 week)	\$0.46
Unpaid OT (3 yrs)	\$71.76
LC 226 Penalties	\$4,000.00
LC 203 Penalties	\$3,600.00
<u>PAGA Penalties</u>	<u>\$780.00</u>
TOTAL for 3 yrs	\$7,671.76

+ attorneys' fees, 10% prejudgment interest

**ALSO CONSIDER: Class/PAGA Exposure**

# OVERTIME PAY

## Best Practices:

- Audit your payroll practices
- Identify types of bonuses
- Double check calculations

# MEAL AND REST BREAKS



# MEAL AND REST BREAKS

California employees are entitled to:

- 10-minute uninterrupted rest period for every 4 hours (or major fraction thereof) of work
- 30-minute meal period for any shift over 5 hours
- A second 30-minute meal period for any shift over 12 hours

Employers are not required to *force* employees to take breaks

# MEAL AND REST BREAKS

If an employee is not provided a meal/rest break, or the break is otherwise interrupted, the employee is entitled to one hour of pay at their “regular rate” of pay.

- This has been an area of intensive litigation in recent years, and the law is constantly changing.



# MEAL AND REST BREAKS

## Best Practices:

- Documentation
- Scheduling
- Auto payment as default
- Policies

# MEAL AND REST PREMIUMS

- *United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57
  - Two penalties—i.e., two hours of pay—if rest break *and* meal period missed in same day
- *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858
  - “Regular rate” is calculated same as for overtime, not base hourly rate
  - **Many** employers still not doing this right!

# MEAL AND REST PREMIUMS

- *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93
  - Meal/rest period premiums constitute wages for the purposes of waiting time penalties and wage statement claims.
- *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685
- *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257
  - On-premises/on-call meal/rest period is **not** a compliant meal/rest period

# MEAL AND REST PREMIUMS

## Takeaways

- Even payroll companies are getting this wrong. Do not rely on them to get it right.
- Audit your pay records to ensure compliance and do any “true ups” necessary to minimize liability (the ruling in *Ferra* is retroactive)
- Reconsider non-discretionary bonus programs



# WAGE STATEMENTS

Normal Gross	4,389.30	
Deductions	0.00	
Contributions	0.00	
Overtime	0.00	
<b>EARNINGS TOTAL</b>	<b>4,389.30</b>	<b>5,277.30</b>
Pre-Taxable Gross	351.14	418.18
Post-Taxable Gross	3,971.12	4,859.12

	Current	Year to Date
Statutory & Other Deductions		
Federal Withholding	311.17	311.17
Additional Federal Withholding	0.00	*****
State Withholding	135.96	135.96
Additional State Withholding	0.00	*****
SDI	0.00	55.06
Medicare	0.00	75.55
Medicare Buyout	62.67	0.00
Health Insurance	0.00	0.00
	0.00	351.14



# WAGE STATEMENTS

Labor Code 226(a) - all employers must furnish “accurate itemized statement in writing” each pay period containing:

- Gross wages
- Total hours worked
- Number of piece-rate units and rate
- All deductions
- Net Wages
- Inclusive dates of pay period
- Name of employee and last four of SSN
- Name and address of employer
- All applicable hourly rates in effect during pay period

# WAGE STATEMENTS

Penalties for noncompliant wage statements:

- \$50 for first pay period when violation occurs
- \$100 for each subsequent pay period wherein violation occurs
- Max \$4,000 per employee

These can add up fast. A business of 50 employees exposes itself to potential liability of \$5,000 per pay period for an easy-to-fix clerical error.

- Do not rely on your payroll provider to know the law.
- Audit your wage statements regularly and cure the issue if you find one.

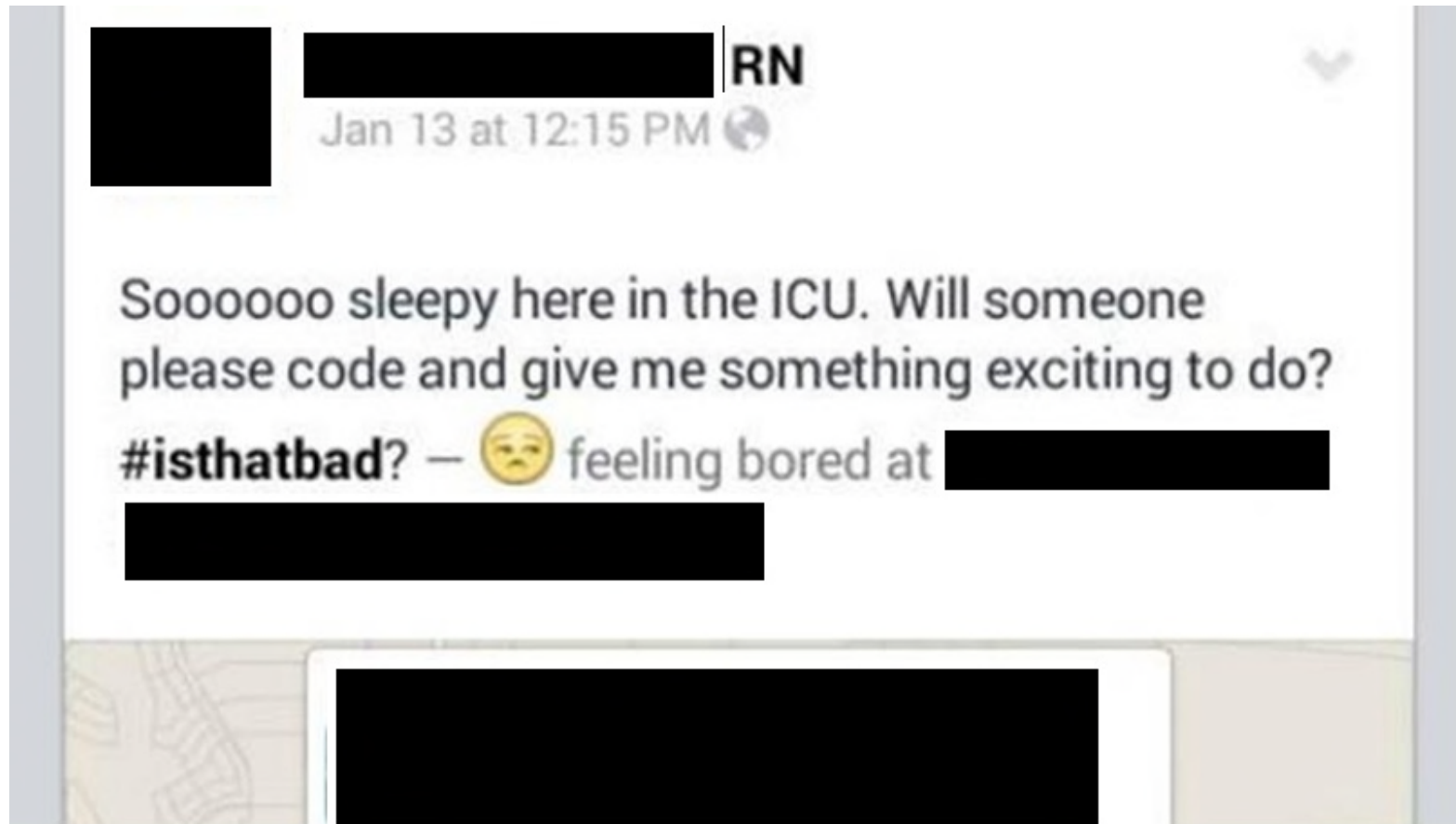
# REGULATING SOCIAL MEDIA



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# REGULATING SOCIAL MEDIA

- Employers can be held responsible for any liability arising out of their employee's social media use.
- Employers can be found liable for an employee's defamatory, discriminatory, or harassing social media post or if an employee leaks sensitive customer information or consumer health information online.



# REGULATING SOCIAL MEDIA

## PITFALL: Protected Activity

- Generally speaking, an employer may institute social media policies
- Some social media use by employees is protected by federal law
- Firing an employee or instituting social media policies or work rules that interfere with those rights can result in liability to the company

# REGULATING SOCIAL MEDIA

## National Labor Relations Act (“NLRA”)

- Most private-sector employees are covered by the NLRA
- Protects certain rights of employees by prohibiting labor and management practices that can harm the general welfare of workers, business, and the economy

# REGULATING SOCIAL MEDIA

## National Labor Relations Act (“NLRA”)

- Section 7 affords employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection...”
- The nature of protected activity does not change if the employee’s statements are communicated on the internet or through social media

# REGULATING SOCIAL MEDIA

## Concerted Social Media Activity

- Two or more employees taking action for their mutual aid or protection regarding terms and conditions of employment
- Test = Whether the activity engaged in is for the benefit of a group of employees, and not solely for the benefit of an individual employee

# REGULATING SOCIAL MEDIA

## Concerted Social Media Activity

- Examples:
  - Two or more employees discussing seeking an increase in their pay
  - Two or more employees discussing shared concerns about terms and conditions of employment

# REGULATING SOCIAL MEDIA

## Unprotected Social Media Activity

- Activities are not protected if they do not seek to involve other employees, or do not relate to shared terms or conditions of employment
  - “Personal gripes” not protected
- Even if it is concerted activity, Section 7 does not protect actions that are carried out in a reckless or malicious manner



# REGULATING SOCIAL MEDIA

## Real-World Hypo No. 1

- Employee in dispute with co-worker about job performance, staffing levels, and how well the employer was servicing its clients
- One of the employees, off-duty and on a personal computer, posts on Facebook: “[Co-Worker] feels that we don’t help our clients enough at [Company]. I about had it! My fellow coworkers how do u feel?”
- Four other off-duty co-workers respond by posting “comments” defending their work performance
- All five employees (the poster and the four commenters) were fired

## ***PROTECTED ACTIVITY***

- NLRB found employer violated NLRA by discharging the five employees because there was “no question that the activity engaged in by the five employees was concerted for the ‘purpose of mutual aid or protection.’”

Hispanics United of Buffalo, Inc. & Carlos Ortiz, NLRB Case No. 03-CA-027872, Dec. 14, 2012

# REGULATING SOCIAL MEDIA

## Real-World Hypo No. 2

- Employee, a salesman at BMW dealership, observes an accident at the Land Rover dealership next door (owned by the same person who owned the BMW dealership)
- Employee posts pics and comment on Facebook:  
“This is what happens when a sales person sitting in the front passenger seat (Former Sales Person, actually), allows a 13 year old boy to get behind the wheel of a 6000 lb truck built and designed to pretty much drive over anything. The kid drives over his father’s foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOPS!”

# REGULATING SOCIAL MEDIA

## Real-World Hypo No. 2

- Co-workers post comments about incident:
  - “How did I miss all the fun stuff?”
  - “Finally, some action at our Land Rover store”
  - “I love this one ... The kids pulling his hair out... Dude, what did I do? Oh no, is Mom gonna give me a time out?”
- Owner gets calls from other Land Rover dealers (who had seen the pictures / comments), fires employee who posted the picture / comments

# REGULATING SOCIAL MEDIA

## ***NOT PROTECTED ACTIVITY***

- NLRB found that the termination decision was lawful because the employee was *NOT* engaged in concerted, protected activity
- Employee's "posting of the Land Rover accident on his Facebook account was neither protected nor concerted activities... It was posted solely by [employee], apparently as a lark, without any discussion with any other employee of the [dealership], and had no connection to any of the employees' terms and conditions of employment."

Karl Knauz Motors, Inc. d/b/a Knauz BMW & Robert Becker, NLRB Case No. 13-CA-046452, Sept. 28, 2012.

# REGULATING SOCIAL MEDIA

## Real-World Hypo No. 3

- Employee worked for full-service catering company. In January 2011, employees expressed interest in union representation (Union ultimately adopted in October 2011 election)
- In March 2011, employees complained about managers who take “job frustration [out on] the staff” and “don’t treat the staff with respect.”
- On October 25, 2011, 2 days before the election, one of the managers about whom the employees had complained was harsh to a banquet server
- Employee (server) complained to the head of the employee’s organizing efforts about treatment by manager, was told to take a break to calm down and “stay strong” until the election
- During a rest break, the employee used his phone to post on Facebook:  
“Bob is such a NASTY MOTHER F\*\*\*\*\* don’t know how to talk to people!!!!!! F\*\*\* his mother and his entire f\*\*\*\*\* family!!!! What a LOSER!!!!!! Vote YES for the UNION!!!!!!”
- Employee fired because his Facebook comments “violated company policy”



# REGULATING SOCIAL MEDIA

## ***PROTECTED ACTIVITY***

- NLRB found that the employer violated the NLRA by terminating the employee because the post was concerted protected activity
  - The comments were “part of a sequence of events involving the employees’ attempts to protest and ameliorate what they saw as rude and demeaning treatment on behalf of [manager].”
  - Employee’s “impulsive relation ... reflected his exasperated frustration and stress after months of concertedly protesting disrespectful treatment by managers”
  - Use of profanity did not strip his post of protection because there was evidence of widespread use of profanity on the job - “we do not view [employee’s] use of this profanity to be qualitatively different from profanity regularly tolerated by the [company].”

PIER SIXTY, LLC & Herman Perez and Evelyn Gonzalez, NLRB Case Nos. 02-CA-068612 and 02-CA-070797, March 31, 2014.

# REGULATING SOCIAL MEDIA

## Takeaway

- Employees will be protected if they are discussing employment policies or practices that apply or affect more than one employee
- Protection is more likely if employees are having an online discussion that is consistent with complaints to management
- The more personal and severe the post, the less likely the action will be considered “protected”
  - Even if the post contains expletives and name-calling, it can still be protected if it involves more than one employee

# ARBITRATION AGREEMENTS



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*Viking River Cruises, Inc. v. Moriana* (2022)  
142 S.Ct 1906

- Brought law on PAGA waivers in line with law on class action waivers
- However, an employee must still be allowed to bring the individual PAGA claim in arbitration

# ARBITRATION AGREEMENTS

*Viking River Cruises, Inc. v. Moriana* (2022)  
142 S.Ct 1906

- Arbitration agreements cannot blanket waive PAGA claims
- Instead, the agreement must allow the employee to bring its “individual” component of a PAGA claim in arbitration

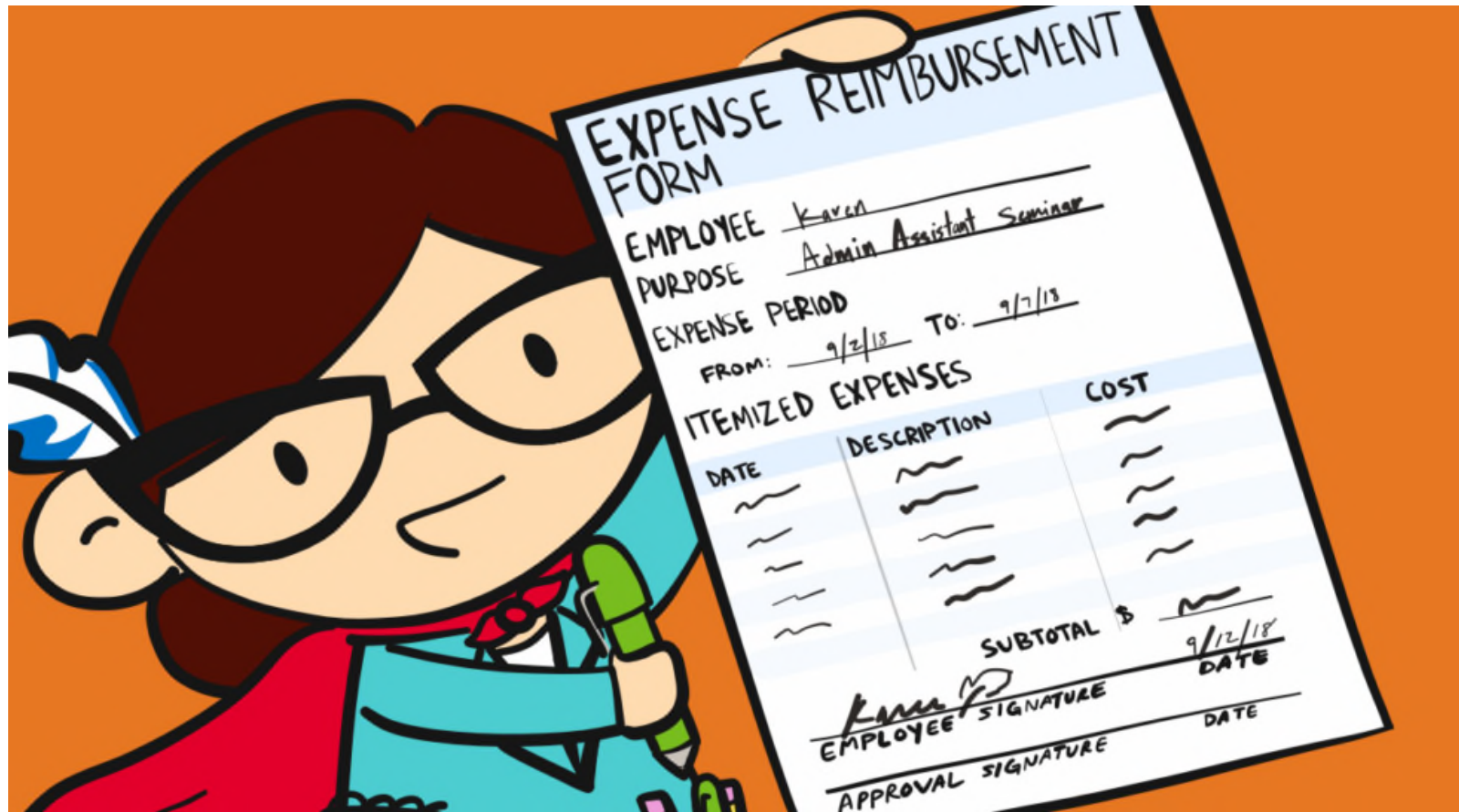
# ARBITRATION AGREEMENTS

## Takeaways:

- Many arbitration agreements written pre-*Viking River* contain blanket waivers
- Have an attorney well-versed in PAGA litigation review the arbitration agreement to ensure it complies with *Viking River*
- Also note: *Viking River* may be short-lived



# EXPENSE REIMBURSEMENT



# WORKER CLASSIFICATION

Under Labor Code 2802, must reimburse expenses if:

- (1) the employee incurred an expense;
- (2) the expense was incurred in direct consequence of the discharge of the employee's duties; and
- (3) that the expenditure or losses were reasonable and necessary

# UPDATE RE NEW LAWS



# EMPLOYMENT LAW UPDATE

- SB1162 - Pay Data on job listings
- SB114, AB1751 - COVID pay extension
- Fast Food and Accountability Act
- CASC - Unmanageable PAGA claims





*That's all Folks!*



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THANK YOU!! Questions?