HINDSIGHT 2020: Surveying the Legal Landscape for Employers in 2021

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- Information is current as of December 17, 2020

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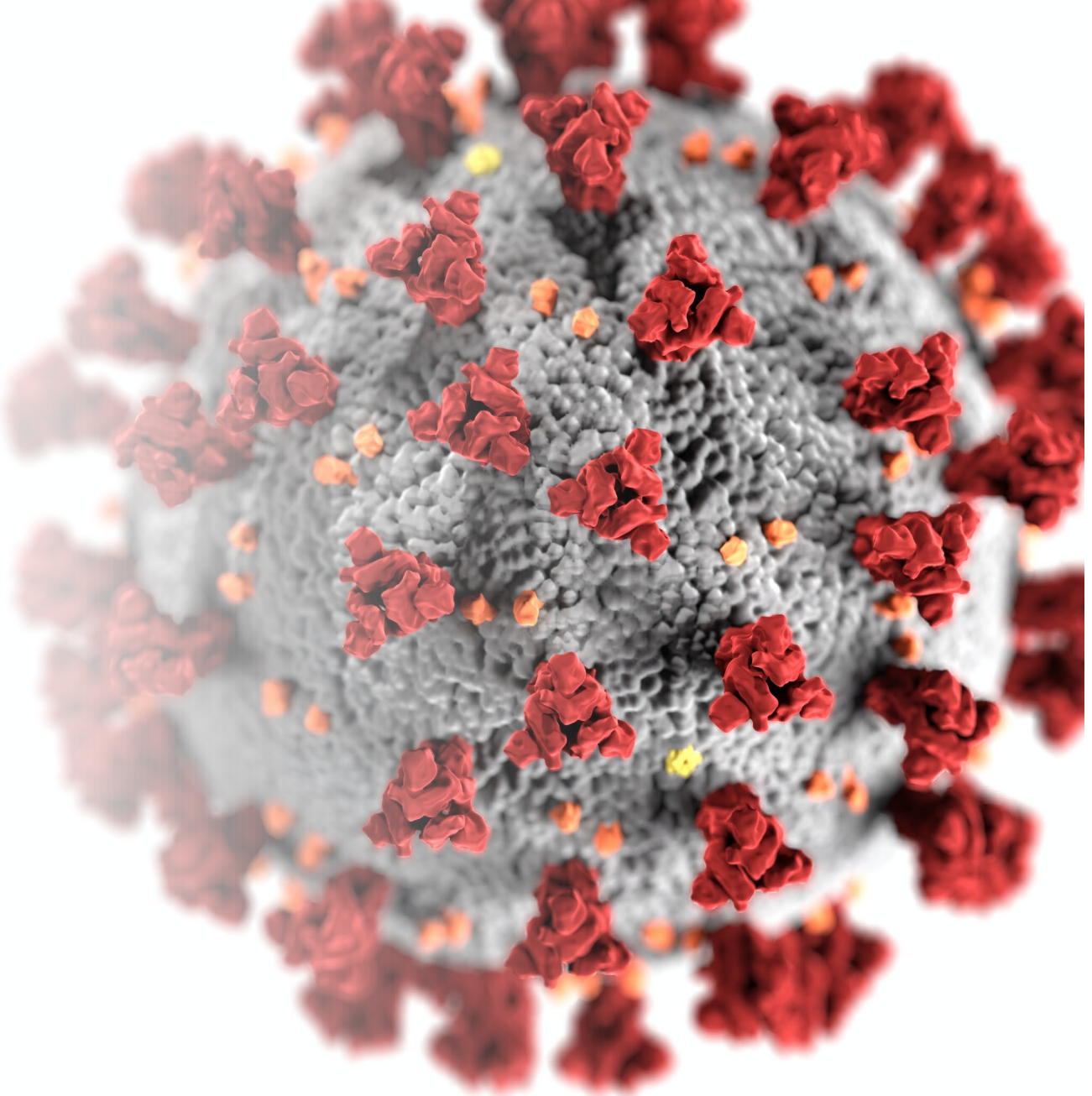
Road Map Ahead

- COVID-19 laws and regulations for 2021
- Recent developments on wage & hour cases, including PAGA
- Worker classification updates, including the latest on AB5
- New policies re leaves of absence and accommodations
- Our crystal ball for the Biden Administration
- Recent developments on diversity, equity, and inclusion requirements
- Key takeaways

COVID-19 IN THE WORKPLACE



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Relevant Health and Safety Considerations

- **Public Health Guidance and Orders**
  - Centers for Disease Control (CDC)
  - State and local public health authorities, e.g., CDPH, LADPH, etc.
    - Generally tracks CDC but not always
- **Restrictions on Activities and Business Operations**
  - State and local stay-at-home orders
  - Assembly Bill (AB) 685
  - OSHA and Cal/OSHA

Relevant State and Federal Pay Considerations

- Families First Coronavirus Response Act ("FFCRA") (fewer than 500 employees)
  - Emergency Paid Sick Leave ("EPSL") – 10 days
  - Expanded Family and Medical Leave ("EFMLA") – up to 10 weeks
  - Sunsets December 31, 2020 unless extended
- COVID-19 Supplemental Paid Sick Leave ("COVID-19 SPSL") (over 500 employees)
  - 10 days of leave
  - Sunsets with FFCRA
- City of Los Angeles Supplemental Paid Sick Leave ("LA SPSL") (over 500 employees in City of LA or 2,000+ nationwide)
  - 10 days of leave
  - In effect until two weeks after the expiration of the COVID-19 emergency
- Cal/OSHA (see below)

Isolation and Quarantine Considerations

- Quarantine vs. Isolation
  - Isolation separates sick people with a contagious disease from others who are not sick
  - Quarantine separates and restricts the movement of exposed people who are not sick
- Isolation = 10 days of self-isolation
  - Same standard across CDC, CDPH, LADPH, Cal/OSHA, etc.
  - Taking and receiving a negative test does not reduce isolation period
- CDC and CDPH reduced quarantine period from 14 days down to:
  - 10-day quarantine without testing if no symptoms appear; or
  - 7-day quarantine if no symptoms and a negative test is received, but test must be taken no earlier than 48 hours before last day of quarantine
- NOTE: Cal/OSHA and LADPH still require 14-day quarantine

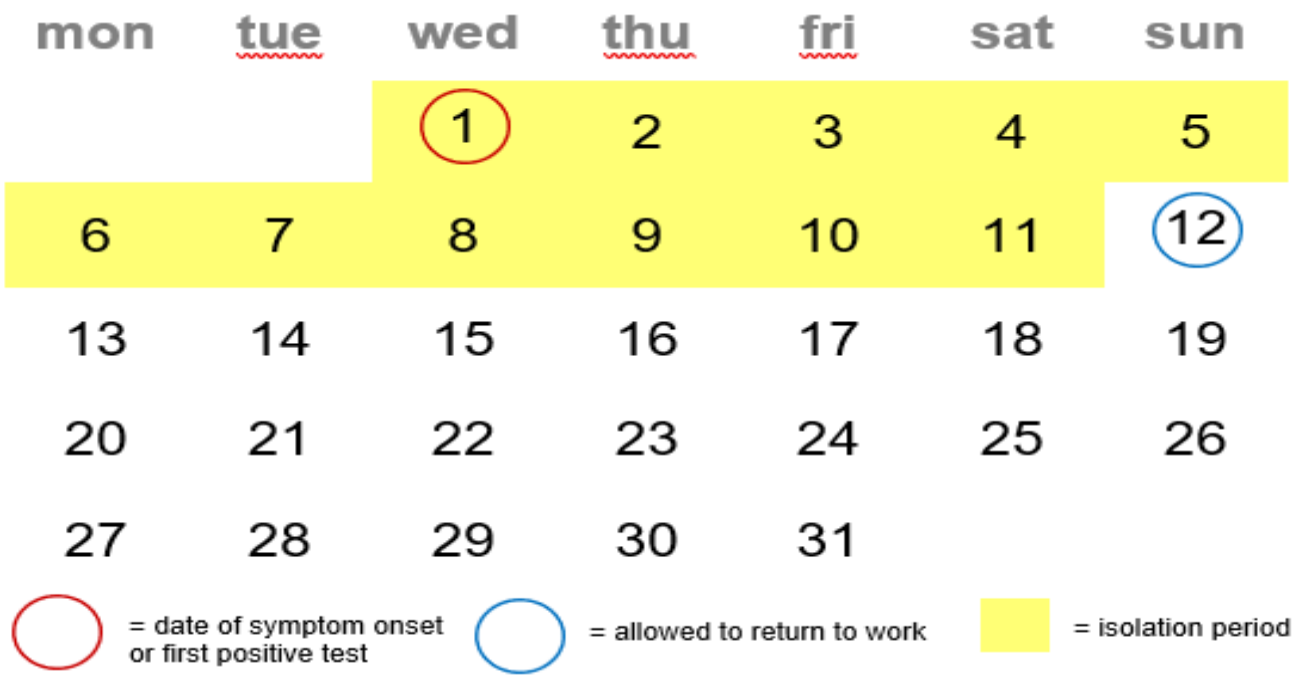
When Must an Employee Quarantine?

- Quarantine required when there is an "exposure," which determination is made in reference to a "close contact":
  - "Close contact" is defined as someone who (1) was within six feet of an infected person for a cumulative total of 15 minutes or more (e.g., three exposures of five minutes each) over a 24-hour period, or (2) had unprotected contact with an ill individual's bodily fluids (e.g., being coughed on or sharing utensils), starting from two days before illness onset (or, for asymptomatic individuals, two days prior to test specimen collection) until the time the ill individual is isolated

- What is an "exposed workplace"?
  - A work location, working area, or common area used or accessed by a COVID-19 case during the high risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. If, within 14 days, three COVID-19 cases share the same "exposed workplace," then "outbreak" standard applies and additional testing will be required
  - Areas where masked workers momentarily pass through the same space without interacting or congregating is **not** an "exposed workplace"
  - Does not apply to buildings, floors, or other locations of the employer that the positive individual did not enter

Isolation Hypothetical

John tests positive for COVID-19 (i.e., confirmed positive) or has symptoms of COVID-19 (i.e., presumed positive). He took the test and/or started having symptoms on the first of the month.



Quarantine Hypothetical: Repeat Exposures

Janice, an employee, lives with James. James develops symptoms on the first of the month and is diagnosed with COVID-19. Janice must begin self-quarantine due to their close contact. On the fifth day, a different family member in the household, Mary, also gets sick and receives a COVID-19 diagnosis and begins self-isolation. Janice had close contact with Mary the day Mary developed symptoms. James and Mary recover and leave self-isolation ten days after they respectively developed symptoms. As of the time James and Mary leave self-isolation, Janice does not have any symptoms and does not test positive.

14-Day Quarantine (Cal/OSHA)

mon	tue	wed	thu	fri	sat	sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

= first contact w/ John; = last contact w/ Mary; = allowed to return to work; = quarantine period

10-Day Quarantine (CDC/CDPH)

mon	tue	wed	thu	fri	sat	sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

= first contact w/ James; = last contact w/ Mary; = allowed to return to work; = quarantine period

AB 685: New Notice and Reporting Obligations for COVID-19 Workplace Exposure

- Passed September 17, 2020; takes effect January 1, 2021
- Expands Cal/OSHA's authority to issue Orders Prohibiting Use (OPU), otherwise known as Stop Work Orders, for workplaces that pose a risk of an "imminent hazard" relating to COVID-19, i.e., hazards threatening immediate and serious physical harm
  - "Serious violation" = Cal/OSHA determines there is a realistic possibility of death or serious physical harm from exposure
  - Cal/OSHA can issue citations for serious violations without providing 15-day notice
- Prescribes exhaustive notice requirements in the event of a COVID-19 exposure in the workplace, which includes providing written notice to "all employees" who were at the worksite within the infectious period who may have been exposed to the virus
- Adds reporting requirements to local health authorities in the event of a COVID-19 outbreak in the worksite
- Companion to the Emergency Temporary Cal/OSHA Standards, adopted November 30

Cal/OSHA: COVID-19 Emergency Temporary Standards

- Date effective: November 30, 2020
- Applies to all California employees and employers, except:
  - Employees who work from home
  - Worksite where employee has no contact with other people
  - Covered by Section 5199 of Cal/OSHA Title 8 Regulations, i.e., health care facilities, services, or operations such as hospitals, skilled nursing facilities, clinics, medical offices, and other outpatient medical facilities, home health care, etc.

Cal/OSHA: COVID-19 Emergency Temporary Standards (Cont'd)

- Employers must have ***written*** COVID-19 prevention program which, among other things, addresses:
  - System for communicating
  - Identification and evaluation of COVID-19 hazards
  - Investigating and responding to COVID-19 cases in the workplace
  - Correction of COVID-19 hazards
  - Training and instruction
  - Physical distancing
  - Face coverings
  - Other engineering controls (e.g., partitions), administrative controls (e.g., cleaning protocols), and personal protective equipment (e.g., evaluate need for PPE)
  - Reporting, recordkeeping, and access
  - Exclusion of COVID-19 cases
  - Return to work criteria

Cal/OSHA: COVID-19 Emergency Temporary Standards (Cont'd)

- Testing requirements for *non-"o*utbreak" situations
  - Inform all employees of how they can obtain testing, e.g., private testing, local health department, a health plan, or community testing center
- Additional testing requirements for "outbreak" or "major outbreak"
  - "Outbreak": three or more positive cases within an "exposed workplace" within a 14-day period
  - "Major Outbreak": 20 more cases within an "exposed workplace" within a 30-day period
  - Outbreak requirements apply until no new COVID-19 cases are detected in a workplace for a 14-day period
  - Testing must be provided immediately after employer falls within definition of outbreak and again a week later. Testing must be provided at least once a week until employer no longer meets definition of outbreak
  - Major outbreak requires twice weekly testing (at least)
- Must provide testing at no cost to all employees during working hours
- Must maintain employee confidentiality

Cal/OSHA: COVID-19 Emergency Temporary Standards (CONT'D)

- Exposed employees must be excluded from workplace, i.e., quarantine
- Employees excluded from work and otherwise able and available to work shall continue to receive earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job
  - Salary and benefit continuation not required if the lack of work is not due to an exposure in the workplace but is instead due to slow down in business, etc.
  - Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation
- Cal/OSHA has promised more guidance – uncertain as to when

SB 1159: Workers' Compensation

- Notification requirements (see below)
- Creates a disputable presumption that a COVID-19 case is work related in certain circumstances:
  - The presumption applies to first responders and healthcare workers as well as all employees who: (1) test positive during an "outbreak" at the employee's specific place of employment, and (2) whose employer has five or more employees
  - An outbreak for purposes of this law exists if within 14 calendar days one of the following occurs:
    - Employers of 100 employees or fewer at the location: Four employees test positive for COVID-19
    - Employers of 100 employees or more at the location: Four percent of the employees who worked at the specific place of employment tested positive for COVID-19

COVID-19+ Notification Requirements

	Cal/OSHA	Workers' Comp Carrier	Local Public Health Department	Close Contacts of Infected Individual	Entire Workforce
Do I need to Notify?	-Must record work-related illness. -Must report illness resulting in in-patient hospitalization if employee develops symptoms while at work. -Must report illness resulting in in-patient hospitalization even if symptoms develop outside of work if there is cause to believe the illness may be work-related. -For employers outside of California and subject to OSHA regulations, employer must report in-patient hospitalization if the hospitalization occurs within 24 hours of the work-related incident. -For cases of COVID-19, the term "incident" means an exposure to COVID-19 in the workplace.	Yes. Employer must notify claims administrator with the following information: -An employee has tested positive; -The date the employee tested positive, which is the date the specimen was collected for testing; -The address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test; -The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.	Employers in Los Angeles County must report to County Health Department if a workplace has at least three reported or confirmed COVID-19 cases in the workplace within 14 days. For worksites outside of Los Angeles County, similar requirements apply. The California Department of Public Health states employers must notify the local health department in the jurisdiction where the workplace is located if there is a known or suspected outbreak in the workplace. An outbreak is defined as three (3) or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period.	All employees who were in close contact with the infected individual during the infectious period be notified and asked to quarantine. Close contact is defined as a cumulative 15+ minutes within six-feet over a 24-hour period, or unprotected direct contact to body fluids starting from 48 hours of symptom onset or, if no symptoms within 48 hours of specimen collection, from positive COVID-19 test.	Employers having notice of a potential COVID-19 exposure provide a written notice to: -Employees and subcontractor employees who were at the worksite when a potentially infected individual was there and may have been exposed to COVID-19 as a result. The notice should be drafted to protect employee privacy. The notice should also include information on COVID-19 benefits. the employee may be entitled to and the disinfection and safety plan the employer has implemented or plans to implement in accordance with guidance from the Centers for Disease Control and Prevention ("CDC").

COVID-19+ Notification Requirements

	Cal/OSHA	Workers' Comp Carrier	Local Public Health Department	Close Contacts of Infected Individual	Entire Workforce
When do I need to notify?	Reports to Cal/OSHA must be made immediately, but not **longer than eight (8) hours** after the employer knows or with diligent inquiry would have known of the serious illness. Reports to OSHA must be made **within 24 hours** of knowing both that an employee has been hospitalized and that the reason for hospitalization was a work-related case of COVID-19.	Reports must be made in writing via electronic mail or facsimile **within three (3) business days** of learning of the exposure.	**Immediately** upon learning of a potential outbreak as defined above.	**Immediately** upon learning of possible exposure.	This notice must be provided **within one (1) business day** of the employer being notified of a potential exposure.
Where/how to notify?	Report by email to caloshaaccidentreport@tel-us.com. Or find local reporting office here: https://www.dir.ca.gov/dosh/report-accident-or-injury.html	Direct to carrier or inquire with your broker	For Los Angeles only: call (888) 397-3993 or (213) 240-7821 to report an outbreak	Contact tracing	Notification may be done in "a manner that the employer normally uses to communicate employment-related information," such as personal service, mail, or text message.

Contact Tracing Confidentiality Concerns

- Disclosures to third-parties or to those outside of workforce
  - Employer may disclose names to public health agency
  - Staffing agency or contractor may notify the employer and disclose the name of the employee because of need to do contact tracing
- Disclosures within the workplace
  - Need-to-know basis
  - Use generic descriptors where possible
  - Avoid the “guessing game”

A Vaccine is Coming, But Can Employers Mandate It?

- EEOC guidance provided on December 16, 2020
- Lack of confidence in vaccine now, but by time available to masses, may have an easier sell
- Employers can generally mandate a COVID-19 vaccine ("individual shall not pose a direct threat to the health or safety of individuals in the workplace") but…context matters…and the exceptions *may* swallow the rule!

A Vaccine is Coming, But Can Employers Mandate It? (Cont'd)

- Vaccinations themselves are not "medical examinations" under the ADA
  - "If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination"
- Necessary health inquiries are subject to ADA standards for disability-related inquiries. Therefore:
  - Must establish that the inquiry is job-related and consistent with a business necessity
    - Employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive vaccination, will pose a "direct threat to the health or safety of her or himself or others"
  - Alternatively, disability-related screening questions can be asked without showing of job related and business necessity IF:
    - Voluntary (but if they refuse to answer, can deny the vaccine)
    - **If employee receives employer-required vaccine from a third party that does not have a contract with the employer, such as a pharmacy or healthcare provider
- Requiring proof of receipt of a COVID-19 vaccination is not disability-related inquiry
  - Warn employee not to provide medical information as part of the proof

A Vaccine is Coming, But Can Employers Mandate It? (Cont'd)

- What if they refuse on grounds of disability?
  - Employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
    - Duration of risk
    - Nature and severity of potential harm
    - The likelihood that harm would occur
    - Imminence of potential harm
  - Must consider *reasonable* accommodations
  - If reasonable accommodations not available:
    - May exclude employee from workplace, i.e., remote work
    - If remote work not available, consider all applicable leaves of absence

A Vaccine is Coming, But Can Employers Mandate It? (Cont'd)

- What if they refuse on grounds of religious practice or belief?
  - An employee's sincerely held religious belief, practice, or observance may prevent employer from mandating vaccine
  - What is a sincerely held belief?
    - Religion addresses fundamental and ultimate questions having to do with deep and imponderable matters
    - A religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching
    - A religion can often be recognized by the presence of certain formal and external signs
    - Should generally assume it is based on sincerely held religious belief
    - If objective basis for questioning the religious nature of sincerity of the belief, may ask for additional supporting information
  - Must consider *reasonable* accommodations
  - If reasonable accommodations not available:
    - May exclude employee from workplace, i.e., remote work
    - If remote work not available, consider all applicable leaves of absence

Regulating Risky Off-Duty Conduct During COVID-19

- Labor Code § 96(k) prohibits employers from taking action against employees for their lawful off-duty conduct away from the premises
- Labor Code § 98.6 provides an exception allowing employment contracts to protect an employer against conduct that is:
  - Actually in direct conflict with the employer's essential enterprise-related interests; **and**
  - That would constitute a material and substantial disruption of the employer's operations
- During COVID-19, employers have more leeway to demand safe practices from employees during nonworking hours because of:
  - Public health orders, i.e., stay-at-home Orders; and
  - Business disruptions caused by employee having to quarantine
- BUT… is it practical? Enforcement will be difficult

Anticipated COVID-19 Litigation

- Likely areas of litigation surrounding COVID-19
  - Discrimination in layoff decisions
  - Wage & Hour (discussed below), including breach of contract claims
  - Increase in workers' compensation claims
  - Tort and premises liability
  - Increased number of bankruptcies
- Key action items
  - Compliant, written policies
  - Stay up-to-date on recent health and safety guidance
  - Arbitration agreements

WAGE & HOUR HOT TOPICS: LOOKING INTO 2021

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Issues Related to Remote Work

- Track hours and breaks carefully
- Monitor “off-the-clock” work
- Reimburse for out-of-pocket expenses (Labor Code § 2802), e.g., internet, cell phone, possible equipment costs
- Check telecommuting and data privacy policies
- Watch for employees relocating out of state: new laws, policies, taxes, etc.

Other COVID-19 Related Wage and Hour Issues

- Pre-work employee health screenings - remember to compensate
- Converting salaried employees to hourly during the pandemic
- Layoff v. furlough v. termination

The Evolution of the Independent Contractor in California

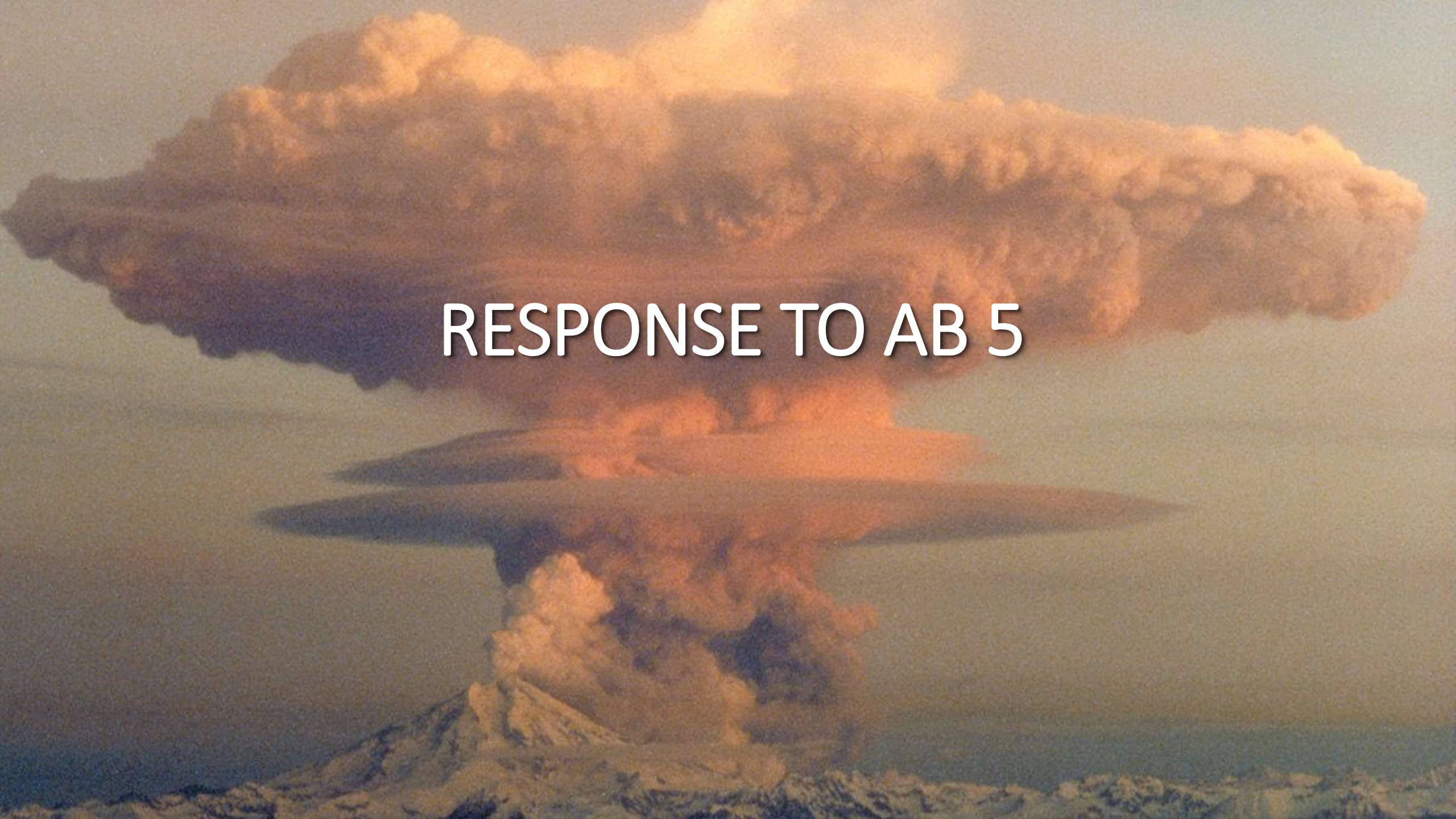
From *Dynamex* to AB 5 to AB 2257

California Supreme Court Reinvents Definition of Independent Contractor - History

- On April 30, 2018, California Supreme Court turned the definition of independent contractor ('IC") on its head with its decision in *Dynamex Operations West v. Superior Court*
  - Court abandoned previous "economic realities" test in favor of new "ABC" test
  - New "B" prong requires that worker performs services "outside the usual course" of employer's business
  - This, in addition to "A," being free from control AND "C," worker has his or her own business
  - *Dynamex* hailed as the apocalyptic end to the "gig economy" in California

Enter AB 5: California Legislature's Response To *Dynamex*

- AB 5 was effective January 1, 2020, and was intended to "codify and clarify" *Dynamex*
- Specifically applied to Labor Code, Unemployment Insurance Code and Wage Orders
- Created an assumption of employment status when a person is providing labor for remuneration (Labor Code § 2750.3(a))
- Officially adopted the ABC test of *Dynamex* as default (set out in (a)(1))
- Created several "exceptions" or "exemptions" from A,B,C test, but then, the traditional *Borello* test still applied (Labor Code § 2750.3(a)(3))


RESPONSE TO AB 5

Judicial and Political Response to AB 5

- *California Trucking Association* – preliminary injunction based on FAA pre-emption in mid January, for truckers ONLY
- *Am Society of Journalists & Authors* – filed case challenging in January
- *Uber Technologies & Postmates* – filed case challenging, litigation still ongoing pending results of "Protect App-Based Drivers & Services Act" Ballot Initiative, otherwise known as Prop 22 (which passed in November 2020)
- Negotiations began to amend AB 5 as pandemic hit and California legislature officially shut down . . .

And Then Came AB 2257– September 4, 2020

- Following push back after AB 5, AB 2257 was passed to amend AB 5
- Created new exemptions for work resulting from "Referral Agency Contracts," (for various industries such as youth coaches and dog walkers)
- Expanded the exemptions for photographers, adding exemptions for roles like tv promoters and film editors, and adding more exemptions for people in the music and entertainment industry
- Other changes include:
  - Bona-fide business to business contracting relationships
  - Single engagement business to business exemption (provided certain factors are met)
- This issue is STILL evolving, so tread carefully!

WAGE & HOUR LEGAL DEVELOPMENTS

California Statewide Minimum Wage

- **Effective January 1, 2021, statewide minimum wage increases to:**
  - $14.00 per hour for employers with 26 employees or more ($13.00 per hour for employers with 25 employees or fewer)
  - 37 localities throughout California have unique local minimum wage requirements greater than state – implementation dates vary, make sure to check your locale AND what city you are in!
- With increased state minimum wage, test for exempt salaried employees increased to $58,240 (salary threshold tied to state not local minimum wage)
- Ensure that any employees classified as salaried exempt employees are paid at least the minimum salary required under state law
- ALWAYS confirm exempt employees also meet the DUTIES test

Frlekin v. Apple - Cal. Supreme Court (May 2020)

- Time employees spent on employer's premises waiting for, and undergoing, mandatory exit search was employer-controlled activity, constituting compensable "hours worked" within meaning of control clause of minimum wage order
- We are seeing growing number of these cases involving time "waiting"
- Remember, no time is too small for these cases to succeed (*see Troester v. Starbucks* in 2018)

Pending Before The Cal Supreme Court – Naranjo v. Spectrum Security Services

- Court of Appeal held:
  - Labor Code § 226.7 actions do not entitle employees to pursue the derivative penalties in § 203 (waiting time penalties) and § 226 (wage statement penalties). Court also found appellants were not entitled to attorney fees
  - Court changed prejudgment interest from 10% to 7%

**Companion case of *Betancourt v. Bloomin' Brands* also up on review with Supreme Court along with Naranjo, handled by the Employment and Litigation teams of RF

More Cases to Watch

***Magadia v. Wal-Mart (N.D. Cal 2018)*, on appeal to 9th Cir:**

- Wal-Mart correctly recalculated OT to include bonus, and reflected OT recalculation on wage statement, but lump sump OT recalculation, without specific backup detail, failed to comply with Labor Code § 226. Also failed to include start and end dates of payroll periods on wage statements
- Approximately $48 million in statutory damages and $54 million in penalties under the Private Attorneys General Act ("PAGA") (5.8 million was for final wage statements)

***Powell, et al v. Wal-mart, et al. (S. D. Cal 2020)* – just filed December 11, 2020:**

- Claim that Wal-mart regularly failed to pay sick pay at correct "regular rate" by failing to include bonuses in the calculation of sick pay. California law requires "sick pay" to be paid out at "regular rate"
- Impact on using PTO, especially dangerous issue because of requirement for payment upon termination and waiting time penalties if failure to pay properly

What Is PAGA, Again?

- PAGA stands for Private Attorneys General Act, Labor Code § 2699
- Allows one employee to bring a "representative action" on behalf of "all other aggrieved employees" for violations of various Labor Code sections that previously only the Labor Commissioner could enforce
- Penalties are awarded on a "per payroll" basis for such conduct as inaccurate paystubs, break violations, record keeping violations, but calculated on a per employee basis. Penalties can be stacked and can add up to millions of dollars
- Portion of award (75%) paid to the State, (25%) split amongst all "aggrieved" or harmed employees, even if they did not do same work as representative employee, and even if rep did not suffer same harm. And attorneys get their fees!

Cal. Supreme Court Greatly Restricts Ability to Settle PAGA Claims: *Kim v. Reins Int'l* (2020)

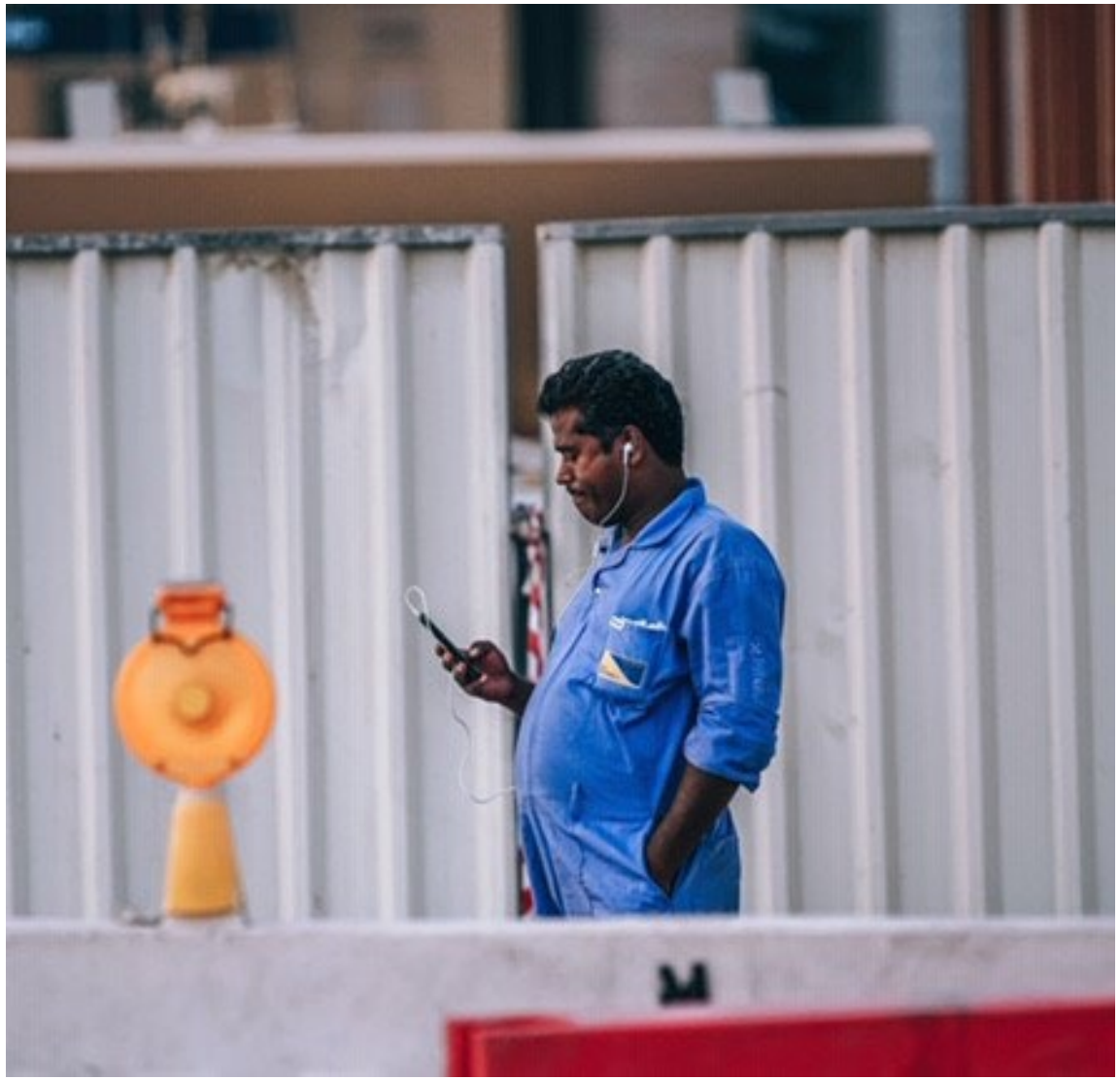
- March 16, 2020 – *Kim v. Reins International*, the California Supreme Court held that even though the lead Plaintiff Kim had settled his claims, the PAGA case could continue
- The Court reasoned that the PAGA claim depends on whether the employer violated the Labor Code, making the employee an "aggrieved" employee, not whether the plaintiff still can seek compensation
- As a result, the *Kim* holding essentially removes the individual settlement agreement from employers' defense strategy in fighting PAGA cases. This had been a valuable weapon in defeating these expensive and prolific lawsuits

PAGA Cases Post *Kim v. Reins*

- The state courts are now plagued with the difficult challenges of how to manage the settlement of these PAGA cases, as the Supreme Court has made it clear that these interests partially belong to the State
- Just underscores why compliance and employee morale will be so much more important in the coming months and years

Refresher Course On The Law: Meal Breaks

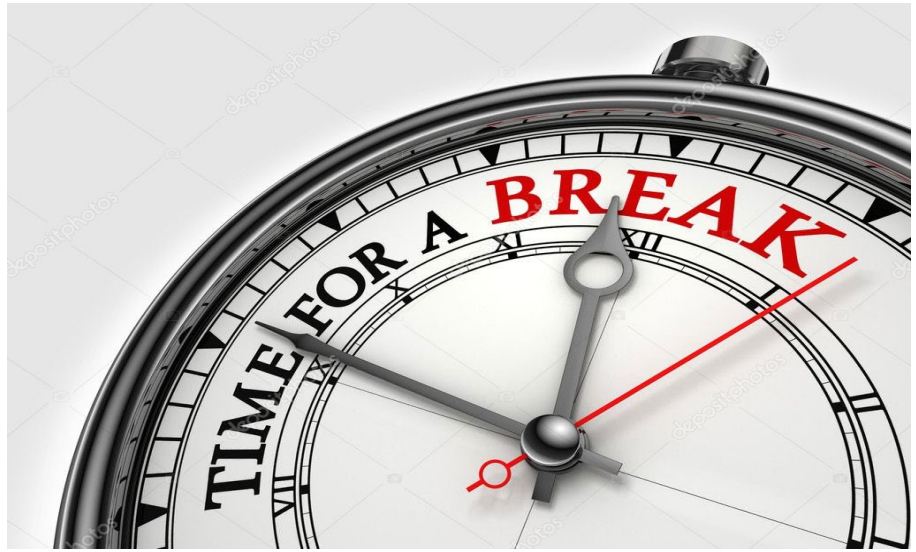
- Meal breaks need not be paid so long as completely relieved of duty
- Don’t confuse the five- and six-hour marks!!
- Failure to timely provide fully compliant, uninterrupted, meal breaks results in one hour of premium pay
- No, more likely than not, you do not qualify for an “on duty meal break waiver”



More On Rest Breaks...

- Do your employees know their rights? And managers?
- How do you remind your employees?
- How can we be better?
- What can we do to document our efforts?

WHEN IS THE LAST TIME YOU PAID A REST BREAK PREMIUM???



Refresher Course on the Law: Rest Breaks

- 10-minute paid rest break for every four hours worked "or major fraction thereof"
- 3.5 to 6 hours = 1 rest break; 6.1 to 10 hours = 2 rest breaks; 10+ hours = 3+ rest breaks
- The *Augustus v. ABM* effect: Employees must be completely relieved of all duties and permitted to leave the premises
- Failure to provide rest break, leave the premises or have compliant policy ALSO results in one hour of premium pay

The Key to 2021: Compliance

Policies	• Create, implement, and distribute legally compliant handbook policies, with CLASS ACTION WAIVERS
Communicate	• Frequently remind employees of their right to meal and rest breaks
Review	• Have employees review time records on daily/weekly basis to ensure accuracy and make sure they approve any changes to time records
Pay	• Put systematic plan in place to investigate break violations when they occur and PAY BOTH MEAL AND REST BREAK VIOLATIONS
Train	• Train managers and have policies and memos that reinforce the rights of employees to take meal AND rest breaks

LEAVES OF ABSENCE AND ACCOMMODATIONS

SB 1383: CHANGES TO CALIFORNIA FAMILY RIGHTS ACT (CFRA)

	Existing	Starting January 1, 2021
No. of Employees	50 or more; 20 to 49 for baby bonding under Parental Leave Act	Five (5) or more
Pregnancy	Not covered; separate Pregnancy Disability Leave ("PDL") of 16 weeks	Up to 12 weeks of CFRA leave in addition to 16 weeks PDL
Child Bonding	Bond with or care for a new child (born, adopted, foster); One employee eligible for up to 12 workweeks	Each parent eligible for up to 12 workweeks, a combined 24 weeks
Child	Under 18 years old, an adult dependent child, adopted child, foster child, stepchild, or legal ward	Any age (no dependency required), or child of domestic partner

SB 1383: CHANGES TO CFRA (Cont'd)

	Existing	Starting January 1, 2021
Family member	Minor or dependent child Parent Spouse With a serious health condition (Includes the employee)	Add to list: Grandparent Grandchild Sibling Domestic partner (Up to 24 weeks--12 CFRA + 12 FMLA)
Military Exigency Leave	None (Compare with FMLA)	Military activity of armed forces member: Spouse Domestic partner Child Parent

SB 1383: CHANGES TO CFRA (Cont'd)

	Existing	Starting January 1, 2021
Employer obligation—to return employee to comparable position	Covered employer may refuse to reinstate an employee returning from leave to the same or a comparable position only if: 1. Employee is a salaried + highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite 2. Employer shows that refusal is necessary 3. Employer satisfies notice requirements	No such refusal allowed
Employer's obligation—to preserve insurance coverage	Continue insurance premium payments Return to same or similar position	No change

SB 1383: CHANGES TO CFRA (Cont'd)

	Existing	Starting January 1, 2021
Mandatory Mediation	Not required	Required for "small" employers, five to 19 employees, if: Employer demands within 30 days of DFEH right-to-sue letter; Employee demands within 30 days of obtaining DFEH right-to-sue letter An empty exercise?

AB 2017 Paid Sick Leave: Care for Family Members Expands

- Currently: Under Labor Code § 233, employee may use up to one-half of accrued sick leave to care for family member, i.e., "kin care" law
  - Where the greater of either 24 hours of sick leave, or the first one-half of an employee's annual sick leave accruals (e.g., first 48 hours of sick leave where 96 hours are accrued annually) used were protected under § 233 if such protected sick leave was used for the employee's own need for sick leave, any additional sick leave used later in the calendar year to care for a covered family member would be technically unprotected
- Beginning January 1, 2021: Allow employees the sole discretion to specify whether to designate used sick leave as being taken for one of these protected reasons under the law
  - E.g., an employee can now indicate that sick leave taken for their own illness not count towards the amount of sick leave protected under Labor Code § 233, so the employee can then have such protected sick leave available later for other purposes
  - No effect if employer only providing minimum amount of sick leave since all leave is protected

AB 2992: Expands Protections for Employee Victims of Violence/Stalking

- Currently: Law prohibits discriminating or retaliating against employee-victims of domestic violence, sexual assault or stalking taking time off to ensure health, safety, welfare of victim or victim's child

- **Beginning January 1, 2021:** Expands protections under Labor Code §§ 230 and 230.1 to victims of violent crime or abuse; includes employees whose immediate family members are deceased as direct result of crime

DIVERSITY, EQUITY, AND INCLUSION UPDATES

The Wage Gap

- According to the National Women's Law Center, women make $.80 on the dollar of their male counterparts
- The gap is more pronounced with women of color
- There is a gender wage gap in 97 percent of occupations

Source: https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/The-Wage-Gap-Who-How-Why-and-What-to-Do-2018.pdf

Equal Pay Act of 1963

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

29 U.S.C. § 206

Employers' Affirmative Defenses to EPA Claim

- Defenses include:
  - a seniority system;
  - a merit system;
  - a system which measures earnings by quantity or quality of production; or
  - a differential based on any other factor other than sex
- The burden on the employer in establishing an affirmative defense is "heavy"
- Employers may not lower a higher-paid employee to rectify a wage differential

Ninth Circuit Law re the Fourth Affirmative Defense

- Only *job-related factors* will excuse pay disparity between comparable employees under federal Equal Pay Act, and
- Prior salary, alone or in consideration with other factors, *is not job-related* and cannot serve as an affirmative defense to EPA claim

Notable Decisions

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AILEEN RIZO,
Plaintiff-Appellee,

v.

JIM YOVINO, Fresno County Superintendent of Schools, Erroneously Sued Herein as Fresno County Office of Education,
Defendant-Appellant.

No. 16-15372

D.C. No. 1:14-cv-00423-MJS

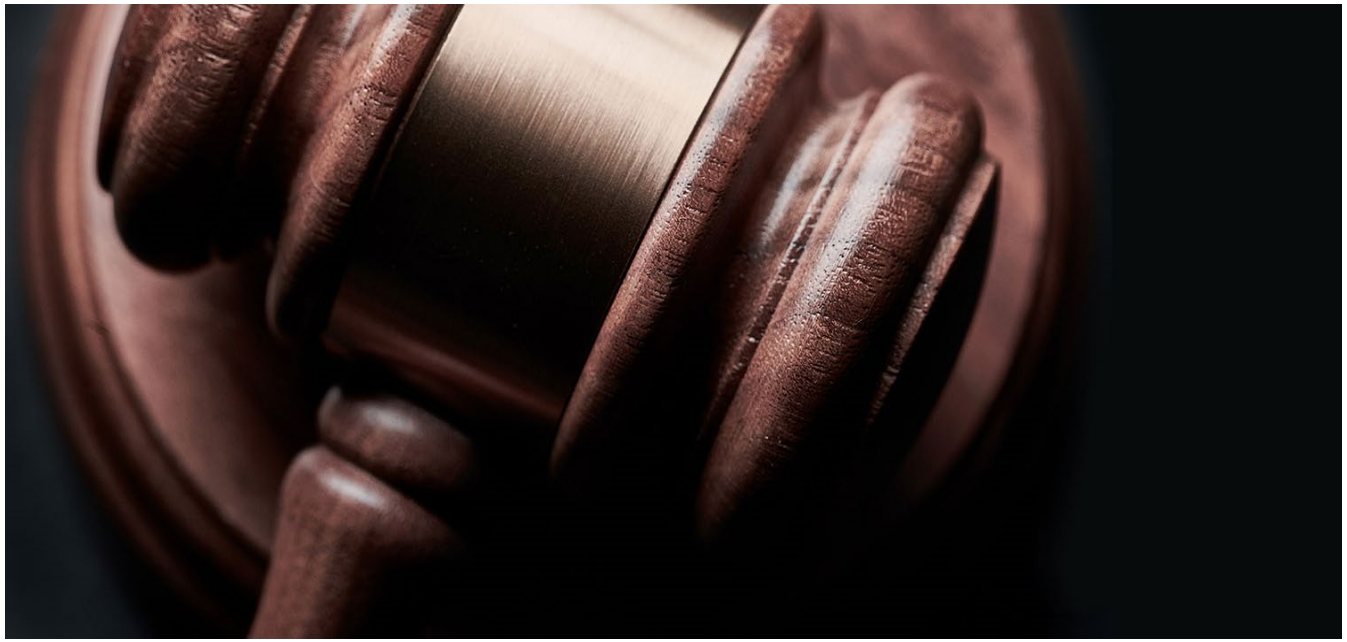
OPINION

On Remand from the United States Supreme Court

Resubmitted En Banc September 24, 2019*
San Francisco, California

Filed February 27, 2020

Employer cannot rely on an individual's prior salary to justify a wage disparity between a male and female employee



California Equal Pay Act and Fair Pay Act Labor Code §§ 1197.5 & 432.3 (2018)

- Requires fair pay based on
  - Gender
  - Race
  - Ethnicity
- For employees who perform
  - “Substantially similar work, when viewed as a composite of skill, effort, and responsibility"

California Labor Code § 1197.5 (2018)

Eliminates the requirement that a plaintiff's wages be compared with the wages of employees in "the same establishment"

Possible defenses –
Pay differences *may* be permitted:

- Based on "a seniority system, a methodology measuring earnings by quantity or quality, or a bona fide reason other than the individual's membership in a protected class,"
- Are job-related, and
- Arise from business necessity (defined as a factor that bears a manifest relationship to the employment)

SB 973: Employers Annual Report: Pay Data

- **Effective: Annual Report Deadline** - March 31, 2021 and March 31 each year thereafter
- **Purpose:** California wishes to aggregate and compile pay data to highlight pay inequities based on race, gender, and national origin in order to lessen the pay gap
- **Employers who must give pay data:**
  - Private employers with 100 or more employees
  - Required to file an annual Employer Information Report (EEO-1) pursuant to federal law
- **Compliance:** May submit EEO-1 Report containing the same or substantially similar pay data information required under the amendment to be compliant
- **Multiple establishments means multiple reports**

SB 973: Pay Data Reporting

- Annual Report Deadline: March 31
- Required if:
  - 100+ Employees
  - Federal law requires employers to file EEO-1
- Employers must choose a “snapshot period” — a single pay period between October 1st and December 31st
- Must include number of employees by race, ethnicity, and sex in each job category and within each pay band

SB 973: Pay Data Reporting (Cont'd)

JOB CATEGORIES

- Executive/Senior Level Officials and Managers
- First/Mid Level Officials and Managers
- Professionals
- Technicians
- Sales Workers
- Administrative Support Workers
- Craft Workers
- Operatives
- Laborers and Helpers
- Service Workers

PAY BANDS

- $19,239 and under
- $19,240 – $24,439
- $24,440 – $30,679
- $30,680 – $38,999
- $39,000 – $49,919
- $49,920 – $62,919
- $62,920 – $80,079
- $80,080 – $101,919
- $101,920 – $128,959
- $128,960 – $163,799
- $163,800 – $207,999
- $208,000 and over

SB 973: Pay Data Reporting (Cont'd)

- Multi-establishment employers must file multiple reports
  - One consolidated report and one for each establishment
- 100 employee threshold includes:
  - Employees outside of California
  - Temporary employees
  - Snapshot period or reporting year
- ***Example:*** Employer has 1 establishment in California with 50 employees (with 3 workers telecommuting from Nevada) and 1 establishment in Nevada with 50 employees (with 3 workers telecommuting from California)

SB 973: Pay Data Reporting (Cont'd)

- Employer would submit:
  - an establishment report for their California establishment that covers all 50 employees, including those teleworking from Nevada
  - an establishment report for their Nevada establishment that covers either only the employees teleworking from California or all 50 employees assigned to the Nevada establishment; and
  - a consolidated report that includes either all 53 employees in/assigned to California or all 100 employees

SB 973: Pay Data Reporting (Cont'd)

- DFEH anticipates option to report non-binary employees
- DFEH is contemplating reporting in a manner that permits California employers to report females, males, and non-binary employees separately
- Additional guidance from DFEH coming soon
- Reports will be subject to FOIA requests

Pay Equity Audits

- Protect communications - Attorney-client privilege
- Determine scope
- Gather data
- Analyze data
- Take remedial action
- Repeat frequency

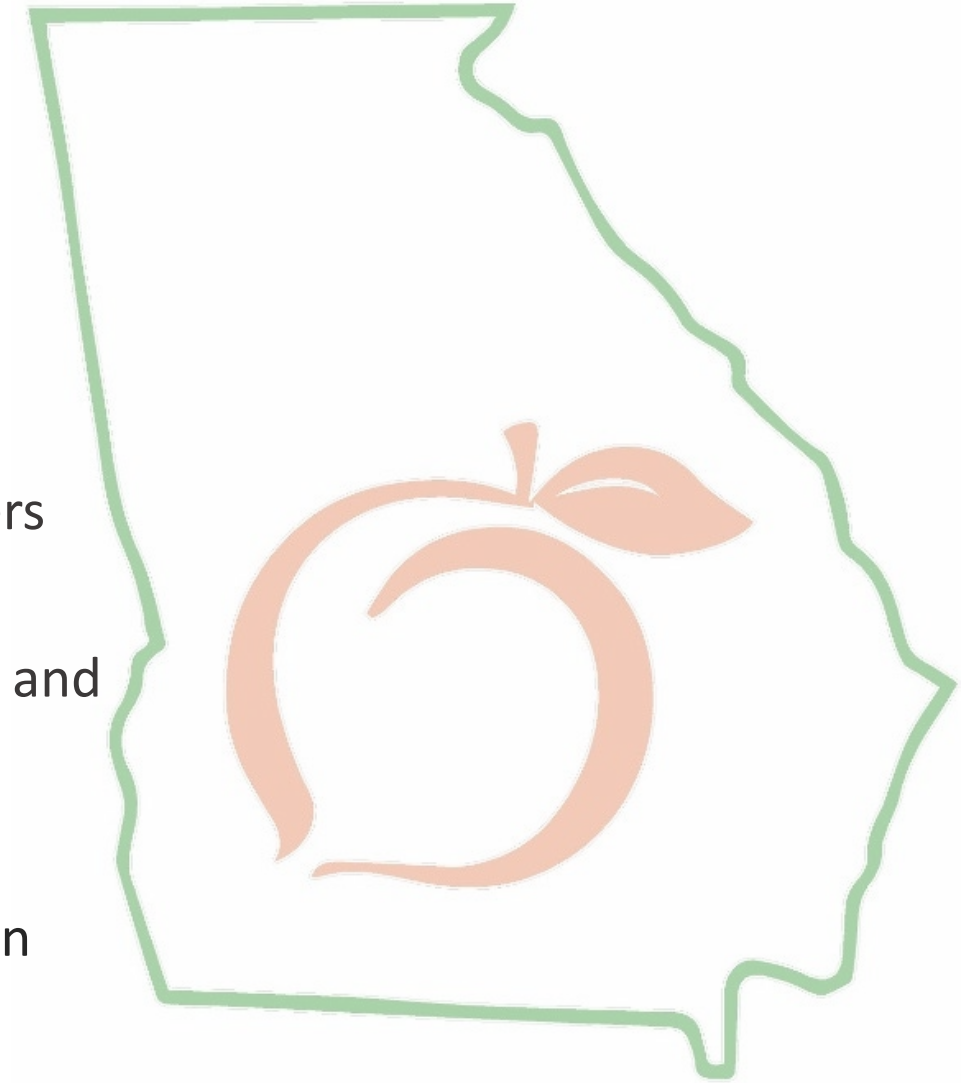
AB 1947: Extension Of Statute Of Limitations for DLSE Complaints (WhistleblowerProtections)

- **Effective: January 1, 2021**
- Statute of limitations to file a complaint with California's Division of Labor Standards Enforcement (DLSE) will be expanded from six months after the occurrence of the alleged violation to one year
- Applies to claims of discharge or discrimination in violation of any law under the jurisdiction of the DLSE (48 separate statutes and regulations)
- Allows a court to award attorneys' fees – which provides an incentive for civil claims

WHAT TO EXPECT WITH THE BIDEN ADMINISTRATION

What to Expect

- Impact of Georgia Senate Election
  - The Protecting the Right to Organize Act (PRO Act):
    - Introduced in 2018 by Democrats
    - Changes law to be more favorable to employees and labor unions
    - Creates civil monetary penalties against employers for unfair labor practices
    - Creates individual liability for corporate directors and officers of offending employers
  - Forced Arbitration Injustice Repeal Act (Fair Act)
    - Introduced in 2019 by Georgia Rep. Hank Johnson
    - Prohibits pre-dispute arbitration agreements



What to Expect

- Rescind Trump Executive Order on Combating Sex Stereotyping
- Strengthen Affordable Care Act
- OSHA
  - Beefed up compliance and tougher standards on COVID-19 prevention
- Wage and Hour
  - Raise federal minimum wage to $15/hour by 2026
  - Change in the employer-friendly regulations pertaining to joint employers under FLSA
- Equal Employment Opportunity Commission
  - Republican majority until July 2022 so unlikely any changes right away
  - Likely renewed emphasis on systemic discrimination, workplace harassment, and equal pay
- National Labor Relations Board
  - Republican majority until at least August 2021 so unlikely any changes right away
  - Likely will roll back some employer-friendly decisions, but not until 2022

KEY TAKEAWAYS

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Thank You For Attending

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