BUSINESS BRIEF: CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 4 , APRIL 13th 2020

RAINESFELDMAN

THIS EDITION

Please visit our COVID-19 resource center at www.raineslaw.com

For additional information on this business brief, please contact:

Phillip Maltin at pmaltin@raineslaw.com **or Ricardo Rozen at** rrozen@raineslaw.com

KEY CONTRIBUTORS

PHILLIP MALTIN
EDITOR-IN-CHIEF

RICARDO ROZEN
ASSOCIATE EDITOR

SPECIAL THANKS TO:

MATTHEW GARRET-PATE

REPORTING ALSO BY:

BETH SCHROEDER
ELAINE CHANG
MATTHEW GARRET-PATE
DAVID SCHWARTZ
ALLISON WALLIN
LETICIA KIMBLE

Common Questions Prompted By New Federal Laws and COVID-19

BY: PHILLIP R. MALTIN

COVID-19 related employment laws create a patch-work of overlapping requirements. Managing the workplace requires reconciling recent federal legislation with existing state and federal labor and employment laws. Below are some common questions employers are asking. The general answers to the questions below do not fit every situation. We design the answers to inspire employers to consider their unique circumstances and how the interplay between COVID-19 related legislation and existing employment laws affects them.

In addition, the pandemic is generating, not reducing, lawsuits. The courts have closed, but lawyers continue to file complaints, with disability discrimination and wage and hour actions related to COVID-19 appearing with the greatest frequency. With all this in mind, please call us after you review the information below to discuss how it applies to your individual situation.

Can I take employees' temperature?

Yes, in some circumstances. (See for example the EEOC's Pandemic Preparedness in the Workplace and Americans with Disabilities Act publication). The business should, however, circulate a policy describing when it will take an employee's temperature, how it will take it, and what it will do if the employee refuses to cooperate.

What kind of notice must I give employees when planning a temporary or permanent lay-off?

Ordinarily, the federal Worker Adjustment and Retraining Notification Act ("WARN Act") and California's "mini-WARN" laws apply to certain kinds of mass layoffs that are permanent or temporary. If these WARN Acts apply, the business must give the workers it intends to layoff 60 days' advanced notice of their impending job-loss. A business may provide less than 60 days' notice under the federal WARN Act if unforeseen business circumstances (e.g., COVID-19) cause the need for the layoff, but must give notice soon as practicable. California's WARN Act has no similar exception; however, Governor Gavin Newsom suspended the notice required under California's WARN if COVID-19 related problems prompt the need to lay off the workers. However, a business must give as much advance notice as possible, and it must supply certain other information in writing to employees and government officials. If it does not do these things, the business must give the employees the full 60-days' notice required by California law or face potential liability.

What should I do after I agree to allow my employees to work from home?

An employer has many more responsibilities than just consenting to an employee working from home. Employers must accurately track hours worked and the meal and rest breaks of non-exempt employees. They must also reimburse employees working from home for their expenses (for the use of things like tools, computers, cell phones, and the internet). If you allow employees to work from home, ensure your polices governing the use of electronic equipment and protection of confidential personnel and customer information are current. See David R. Schwartz's article below. (Note that workers' compensation laws protect employees working from home.)

What if the at-home employee is not working, but is on-call?

Being "on-call" can mean different things. If the worker, at home, is on "controlled standby," meaning under the employer's "control," the business will have to pay him or her, even if the employee is sitting at home watching television. In contrast, the business need not pay the employee for time on-call if the employee can use the time primarily for his or her benefit, meaning, with little restrictions. The circumstances dictate whether the business must pay the employee while on-call. California may require the business to pay the employee reporting time pay, if, for example, he or she must call in to learn about daily scheduling.

May I reduce my employees' hours, salaries or hourly pay?

Yes, a business may reduce its employees' hours or pay, subject to a swarm of restrictions. These include whether the reduction (i) will drop the hourly rate of a worker not exempt from overtime below the minimum wage, (ii) will drop the monthly pay rate of a worker exempt from overtime to below the minimum salary required to preserve the exemption (double California's minimum wage), or (iii) is inconsistently applied (inviting the claim that it is discriminatory, violates California's Fair Pay Act, or both). Most employees receiving insurance benefits must work a minimum number of hours per week, or per month, to preserve coverage. Check your plan documents to see what minimum hours requirements are included. Also, if you have applied for a PPP loan under new federal legislation, reducing pay may result in a loss of loan forgiveness.

May I require an employee with flu-like (or COVID-19-like) symptoms to leave the workplace?

Yes, a business may require an employee who appears ill (with COVID-19-like symptoms, for example) to go home. Before doing this, an employer should circulate a written policy describing its options when an employee reports to work with symptoms. When enforcing the policy, the business should consider whether it owes the employee reporting time pay, and should ensure it applies the policy uniformly. The business should also sanitize and disinfect the employee's work area and other areas he or she may have used following CDC/OSHA guidelines.

May I require an employee who has tested positive for COVID-19 to get a doctor's note before returning to work?

The answer requires legal and practical analyses. Legal: Does the business have a written policy requiring employees who return to work after a medical leave to supply doctor's fitness for duty certification? Is the policy uniformly applied? Is the business in the City of Los Angeles? Practical: With the pressure COVID-19 has placed on the health care system, a doctor's note may not be available to certify the employee's return. Consider the request by the Los Angeles County Department of Public Health that asks employers not to "require a doctor's note for staff returning to work after being sick, when possible. This will reduce the strain on the healthcare system." This question has no easy answer and you should consult with legal counsel prior to making a decision.

May I require workers to wear protective gear like masks?

Yes, a business may require its workers to wear protective face covering. Some jurisdictions mandate facial coverings for employees and customers. The business should circulate a written policy and enforce it uniformly.

Must I allow an employee on furlough to use accrued but unused vacation time or paid sick leave?

If the business has a written policy about the use of vacation time, or paid time off, it must follow it. If the business has no such policy, it may prohibit the employees from using vacation time, but only in certain circumstances. According to the Division of Labor Standards Enforcement, "If an employee is laid off without a specific return date within the normal pay period, the wages earned up to and including the layoff date are due and payable. . . ." The area is nuanced. You do not have to give federal emergency paid sick leave to a furloughed employee, though.

Is there a theme running through these answers?

Yes, the theme is that every situation invites a unique analysis to avoid claims the business is applying policies inconsistently. Call us with your questions.

Los Angeles Gives Supplemental Paid Sick Leave Due to COVID-19

BY: PHILLIP R. MALTIN AND RICARDO ROZEN

SUMMARY: The Mayor of the City of Los Angeles signed an ordinance requiring businesses with 500 employees in the city or more than 2000 nationally to give Supplemental Paid Sick Leave ("SPSL") for COVID-19 related reasons.

RULE: Covered employers must offer 80 hours of SPSL to full-time employees who worked within the city for the employer between February 3, 2020, and March 4, 2020, and a pro-rated number of hours to part-time employees. An employee may receive SPSL for time off work because: (i) a "public health official or health provider requires or recommends the Employee isolate or self-quarantine to prevent the spread of COVID-19;" (ii) the person is at least 65 years old or has a health condition that puts them at greater risk if he or she were to catch the disease; (iii) the employee is a caregiver for a family member "whose senior care provider or whose school or child care provider caring for a child under the age of 18 temporarily ceases operations in response to a public health or other public official's recommendation." The employer may not require a doctor's note. The ordinance caps SPSL at $511 per day, $5,110 in the aggregate. The ordinance excludes first responders and healthcare providers. An employer may subtract from the 80 hours of leave any paid sick time above that already required by law that was used by an employee after March 4, 2020. It expires on December 31, 2020.

TAKEAWAY: Remember, this ordinance only applies to employers with 500 employees or more in the city or 2,000 or more within the United States. Contact us to discuss the interplay between this ordinance, the Families First Coronavirus Response Act, and other state and local laws.

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COVID-19 Related Legislation Protects Commercial and Residential Tenants; Creates Challenges for Landlords

BY: RAINES FELDMAN REAL ESTATE DEPARTMENT

COVID-19 has shut down businesses, reduced income and caused financial strain for tenants, landlords and their lenders. To combat a slew of evictions, states, counties and cities throughout the country, including Los Angeles, have enacted moratoria that prohibit landlords from evicting their tenants for non-payment of rent, and give tenants the right to pause rent payments and make them later when they are more financially capable. These evolving government and court orders seeking to protect tenants have also created a tremendous amount of uncertainty for all participants in the commercial real estate industry.

To understand this patchwork of eviction moratoria in the current market requires sound judgment and legal analysis. To learn more about how to enforce or respond to the COVID-19 related real estate laws, whether a landlord, tenant or lender, please contact Raines Feldman's real estate department.

Contact Andrew Raines here.

Families First Coronavirus Response Act: Expanded FMLA and Paid Sick Leave

BY: MATTHEW GARRETT-PATE AND PHILLIP R. MALTIN

The Families First Coronavirus Response Act ("FFCRA" or "Act") requires employers with less than 500 employees to give eligible employees expanded family and medical leave as well as paid sick leave related to COVID-19. The Wage and Hour Division (WHD) of the Department of Labor enforces the new law's paid leave requirements. The new leave requirements apply from April 1, 2020, through December 31, 2020.

EXPANDED FAMILY AND MEDICAL LEAVE/PUBLIC HEALTH EMERGENCY LEAVE ("PHEL")

Employees are eligible for these benefits if they have worked for the employer for at least 30 calendar days before requesting PHEL. To qualify for PHEL, employees must be unable to work (or telework) because they need to take time off work to care for a child under 18 whose school or childcare establishment is closed, or whose normal childcare provider is unavailable, due to COVID-19.

Employees who qualify are entitled to receive up to 12 weeks of job protected leave. The first two weeks of PHEL are unpaid. However, an employee may use available paid sick leave ("PSL," described below), or other paid leave that is available, during the first two weeks of PHEL.

The remaining 10 weeks of PHEL are paid at 2/3rds of the employee's regular rate of pay or the minimum wage, whichever is higher. Employees who do not work full-time may receive payments adjusted to their normally scheduled weekly hours. PHEL payments are capped at $200 per day, per employee, with a maximum of $10,000 in aggregate payments per employee. An employee who chooses to use PSL to receive payments during the first two weeks of unpaid PHEL is eligible to receive up to $12,000 during the leave.

EMEREGENCY PAID SICK LEAVE ("PSL")

Under the FFCRA, employees are eligible for the equivalent of two weeks of paid sick leave (max of 80 hours for full-time employees) if they meet the requirements. Part-time employees are eligible for PSL in proportion to their normally scheduled hours. The amount of the paid benefit depends on the reason for the leave.

Unlike PHEL, an employee may receive PSL immediately upon hire. If an employee takes leave for one of the following reasons, the employee will receive 100% of their regular rate of pay, up to $511 per day, and a maximum of $5,110 during the leave. The employee will receive the benefit if unable to work (or telework) and is:

1. subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. directed by a health care provider to self-quarantine because of COVID-19 (including increased susceptibility to infection due to underlying health conditions); or
3. experiencing COVID-19 related symptoms and is seeking a medical diagnosis.

If an employee takes leave for one of the following reasons, the employee will receive 2/3rds of their regular rate of pay, up to $200 per day, and a maximum of $2,000 during the leave. This benefit amount applies if the employee is unable to work because he/she is:

4. caring for an individual subject to an order described in 1, above, or is self-quarantined, as described in 2;
5. taking time off work to care for a child under 18 years of age whose school or childcare establishment is closed, or whose normal childcare provider is unavailable, due to the impacts of COVID-19; or
6. experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

TAX CREDITS FOR EMPLOYERS
Under both PHEL and PSL, employers may use leave payments to employees as refundable tax credits against certain employment tax liability.

REQUIRED NOTICES
Covered employers must post a notice created by the DOL in the workplace informing employees of the new entitlements.

ENFORCEMENT
WHD has the authority to investigate and enforce the FFCRA. Employers may not discharge, discipline, or discriminate against an employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, or who, for example, files a complaint under or related to the Act. The WHD may penalize employers that violate the FFCRA.

TAKEAWAYS: One or more of the provisions of the FFCRA apply to just under half of California's employers. Raines Feldman assists businesses subject to the FFCRA. These businesses often need help coordinating FFCRA compliance with adjustments to their employees' hours, furloughs, workforce reorganizations, layoffs, and finding creative ways to protect their workers and their businesses impacted by the crisis.

Caution: Do Not Use COVID-19 As a Hall Pass to Recklessly Fire Unwanted Employees

BY: BETH SCHROEDER

SUMMARY: The EEOC has issued new pandemic guidelines allowing employers to implement otherwise extraordinary measures, like taking employees' temperatures. Employers can even ask job applicants limited pre-hire health questions. Restaurants in California can now sell their leftover produce and alcohol "off premises" without a special liquor license. California's governor has even relaxed the usual 60-day plant closing/layoff rules under California's version of the WARN Act. Employers should not, however, conclude the state is going to relax all laws of the workplace or forego enforcement.

In this crisis, when many companies have furloughed or laid off some or all of their workers, they may find it irresistible to get "lean and mean" and make those "big changes" they have long considered. This crisis will end, and when it does employers will have to justify the controversial reorganizations, force reductions, and single-employee terminations they make now.

TAKEAWAY: State and federal non-discrimination rules, anti-retaliation wage and hour laws, and the tools lawyers use to enforce them, including PAGA and class action lawsuits, are still available. If your business has laid off 500 employees, no one will question why. But if you only rehire 475 of the 500, you may have to explain how you chose the 25 not rehired. The state has given some businesses the flexibility to adept to rapidly evolving circumstances and expand into new commercial areas. It has not suspended workers' protections.

Protecting Confidential and Proprietary Information During a Pandemic

BY: DAVID R. SCHWARTZ

SUMMARY: With so many sheltering in place and working remotely to limit the impact of COVID-19, businesses need to ensure they protect company proprietary information, customer information, employee information, and trade secrets. Whether the organization has established protocols for telecommuting, or, due to the extraordinary circumstances of recent days, told its workforce to stay home, businesses must ensure their employees protect the company's confidential information.

RULES: Here is a quick guide on steps companies should require employees take to ensure a productive, secure transition to working from home:

1. *Secure Networks*. Employees should ensure their home wi-fi network is secure. If feasible, companies should provide employees with virtual private networks (VPNs) to log into company systems remotely, and companies should establish reliably secure systems to protect information. Employees should only use their own secured wi-fi while conducting company business.
2. *Updated Software*. When accessing software programs used for work purposes, companies should ensure that employees have installed the most up-to-date versions. Equally important, all devices should have anti-virus software to guard against malware.
3. *Robust Passwords*. If possible, all devices, and company-utilized software, should be password protected, and should require 2-factor authentication when logging in. Remind employees not to share their passwords.

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4. *Prudent Communications*. Work-related written communications should be conducted via company email systems and authorized collaboration tools with reputable providers (e.g., Microsoft Teams). All work emails should be sent through company accounts. Company information should not be sent via personal emails or kept in individual cloud storage accounts.
5. *Safe Computing*. Remind employees not to click on links or files from unknown senders, and not to respond to requests for sensitive company information before verifying the request (e.g. a phone call to the requestor). A dispersed workforce is particularly vulnerable to phishing. Employees should be directed: Do not equate quick responses with productivity; better to be deliberate than inadvertently cause data loss.

To enable an effective transition to a virtual work environment, companies should evaluate their existing infrastructure to ensure they have these policies and procedures in place:

1. *Encrypt Company Data*. Utilize data loss prevention software on company systems to protect data sent, received, and stored by the company.
2. *Confidential Information and Privacy Policies*. Companies should circulate confidential information policies that obligate employees to maintain confidentiality. Companies have heightened obligations to protect individuals' information under the California Consumer Privacy Act, which apply to employees working remotely. Employers should take extra precautions about access, usage, disclosure and storage of confidential information.
3. *Proprietary Invention Agreements*. Companies should establish, or update, proprietary invention agreements with their employees.
4. *Disaster Recovery Plan (DRP)*. Companies should establish a business continuity and disaster recovery plan, including system back-ups, redundant facilities, cloud storage, and key points of contact within the organization.
5. *Security Incident Policy*. Companies should inform employees about "data hygiene" to minimize breaches. They should also create a procedure for handling a breach and get comprehensive cyber insurance coverage.

TAKEAWAY: With employees dispersed, businesses must ensure that "social distancing" does not lead to information displacement. Please contact us to discuss this.

Workers Under 18 Can Sign Arbitration Agreements But Later Refuse To Arbitrate

BY: MATTHEW GARRETT-PATE AND PHILLIP R. MALTIN

SUMMARY: Many businesses require their employees to agree to resolve disputes through binding arbitration. Most well-written "arbitration agreements" also require the employee to waive the right to participate in class action lawsuits. What if a worker is under 18-years old? Can the business enforce the arbitration agreement? The answer is: only if the minor agrees to remain bound by the agreement. Minors enjoy broad protection under California contract law and they can escape contractual obligations if they wish. In one case, a musician under 18-years old hired an agent to help her music career. The agent got the child a contract with a music label, but soon after the minor cancelled her contract with the agent. The agent sued for the commissions that she earned from the child's record label deal. The minor, however, disaffirmed the contract with the agent; the agent lost the lawsuit. In California, minors may cancel most contracts at any time and escape any obligation the contract created. This means a minor employee may sign an arbitration agreement, and later reject it.

RULE: With exceptions, a minor (or an adult within a reasonable time after turning 18) may cancel a contract entered before reaching 18-years old without consequence. The minor does not, in other words, breach the contract by canceling it. The minor does not have to expressly repudiate the contract. Courts have held that filing a lawsuit reveals a minor's intent to repudiate the arbitration agreement they signed with their employer.

TAKEAWAY: Minors may agree to sign agreements with the employer, but the company cannot enforce the agreement if the minor wishes to repudiate it. Companies have no recourse if a minor chooses to void an employment agreement. Do not rely on arbitration agreements with employees under 18 years old. If an employee turns 18 while employed, employers should require the employee to sign a new agreement. We have ideas about how to preserve arbitration agreements with employees who are under 18 when they sign them. Contact us.

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Settling A Lawsuit Does Not Strip An Employee's Right To Pursue A Claim Under "PAGA"

BY: ELAINE CHANG AND PHILLIP R. MALTIN

SUMMARY: On March 12, 2020, the California Supreme Court in *Kim v. Reins International California Inc.* ruled that a plaintiff employee who released his individual claims through settlement may pursue claims under California's Private Attorneys General Act ("PAGA"). In that lawsuit, the employer compelled the employee's individual claims for Labor Code violations into arbitration. The Court stayed the PAGA claims pending arbitration. In ruling that even after settling his individual claims the plaintiff preserved the right to pursue a PAGA case, the Court reasoned that the civil penalties in a PAGA claim belong to the state. The intent is to "remediate present [wage and hour] violations and deter future ones," not to redress employees' injuries.

RULE: The Court enunciated the expansive rights created by PAGA: employees subjected to at least one alleged violation may pursue claims under PAGA even if they did not personally experience each violation alleged in the lawsuit, and even if they released their individual claims. A plaintiff remains an "aggrieved employee" with standing under PAGA even after settling his or her individual claims.

TAKEAWAY: This ruling is troubling for California employers. They may no longer rely on individual settlements to resolve PAGA actions. This ruling is certain to increase defense costs with PAGA claims, and settlement amounts to resolve them. Businesses should: (i) ensure their wage and hour policies track California law; (ii) train their supervisors to understand and apply wage and hour policies; (iii) review time records and manual time adjustments to ensure proper treatment of penalties at the end of each pay period; (iv) review staffing-agency policies to ensure they comply with wage and hour laws; and (v) evaluate whether agreements with staffing agencies require one business to indemnify the other.

Federal Agency Makes it Harder to Prove Joint Employer Liability Under Federal Law

BY: ALLISON WALLIN

SUMMARY: The joint employer standard under the federal National Labor Relations Act determines whether a business is an employer of employees directly employed by another business, requires joint employers to bargain with representative unions, and makes both employers liable for unfair labor practices committed by the other. Effective April 27, 2020, the standard for joint employer status reverts to the pre-2015 test, making joint employment harder to prove.

RULE: Under the National Labor Relations Board's current rule, a court could deem a business to be a joint employer if it exhibits "indirect control" over the workers of a contractor or franchisee. Under the soon-to-be implemented test, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of the employees of the other business. The new rule defines key terms, including the "essential terms and conditions of employment," and what does and does not constitute "direct and immediate control." It also makes clear that control exercised on a sporadic, isolated, or de minimis basis is not "substantial." The rule further clarifies that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer.

TAKEAWAY: The new rule makes it harder to prove, under federal law, that an employer is a "joint employer" of another business's workers. California state employment law, however, applies a more relaxed standard for finding joint employment than the new federal rule. An entity may be considered a joint employer and therefore liable for another employer's acts under California law if the entity (1) exercised control over the hours, wages, or working conditions of the employees, (2) could "suffer or permit" the employees to work, or (3) engaged the employees.

Mandatory Implicit Bias Training for Attorneys

BY: LETICIA M. KIMBLE

SUMMARY: On January 1, 2020, California's AB 242 went it to effect. It amends the Business and Professions Code to require implicit bias training as part of the mandatory continuing education curriculum for attorneys. It also amends the Government Code to require two hours of training for all clerks and court personnel every two years and authorizes the Judicial Council to develop training for judges.

RULE: Although California attorneys are already required to complete one hour of education in the area of Elimination of Bias, AB 242 specifies that attorneys must receive training on the impact of implicit bias and mandates that the training provide actionable steps and strategies to reduce an attorney's bias. The State Bar has until January 31, 2023 to adopt specific regulations.

TAKEAWAYS: Implicit bias training was always important, but now it is mandatory. Contact our office to discuss how we can help you complete the training requirements or if you have any questions about the new law.

Law Banning Mandatory Arbitration in the Workplace on Hold

BY: RICARDO ROZEN AND PHILLIP MALTIN

SUMMARY: In our last issue we discussed California's new law preventing employers from requiring an employee, as a condition of employment, continued employment, or the receipt of any employment-related benefit, to pursue claims in arbitration rather than in court. That law was set to go into effect January 1, 2020. However, as predicted, a business-industry group challenged the law, and a federal court blocked its enforcement.

RULE: Almost as early as the law was passed, the U.S. Chamber of Commerce and the National Retail Federation launched legal attacks on the law claiming federal law (the Federal Arbitration Act, or "FAA") preempts it. A U.S. District judge issued a temporary restraining order, and weeks later a preliminary injunction finding business groups raised "serious questions" about whether the FAA preempts this California law.

TAKEAWAY: The injunction will remain in place pending a final judgment. However, the State of California has already appealed this ruling to the 9th Circuit Court of Appeals.

Employers should continue to require their workforce in California to sign mandatory arbitration agreements as a condition of employment. The FAA must govern those agreements. Contact us, we'll review your agreement to ensure it's current.

Please note: The changes to California employment laws in 2020 are numerous and significant. Please closely review the articles above and contact us with any questions or concerns.

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https://www.raineslaw.com/quarterly-employment-law-update