LABOR AND EMPLOYMENT UPDATE 2024

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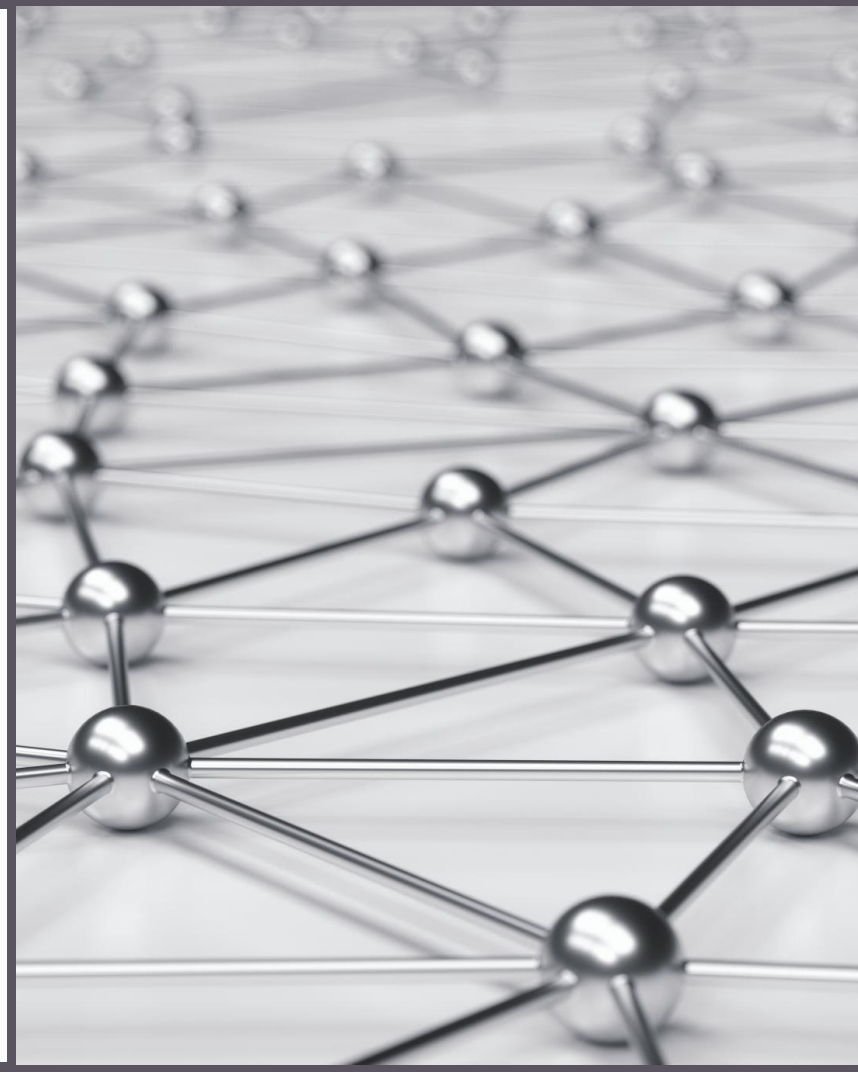
Agenda

- Wage & Hour
- Arbitration
- Private Attorneys General Act (PAGA)
- Prohibited Harassment and Discrimination
- Protected Activity
- Employee Classification
- Workplace Violence



Wage & Hour

SB 616: Paid Sick Leave

- Sick Leave has been increased to a minimum of 5 days/40 hours per 12-month period
- If the employer is providing sick leave on an upfront basis, no carryover is required, so long as the employee receives the “full amount of leave” at the beginning of each year of employment, calendar year, or 12-month period.
- If the employer is providing sick leave on an accrual basis, then the accrual rate must be no less than 1 hour per every 30 hours worked. However, employers may use a different accrual method so long as employees are able to accrue 3 days/24 hours by the 120th calendar day of employment, and 5 days/40 hours by the 200th day of employment.
- If the employer is providing sick leave on an accrual basis, employer must allow for the carryover of the sick leave up to 5 days/40 hours.
- If the employer is providing sick leave on an accrual basis, employers have no obligation to allow for the accrual to exceed 10 days/80 hours.

SB 848: Leave for Reproductive Loss

- SB 848 requires employers with at least 5 employees to grant eligible employees up to 5 days as reproductive loss leave following a “reproductive loss event.”
- A “reproductive loss event” includes a failed adoption, unsuccessful assisted reproduction, stillbirth, miscarriage, and failed surrogacy.
- To be eligible, the employee requesting leave must have been employed for at least 30 days.
- The 5 days of leave do not have to be consecutive but must be taken within 3 months of the loss event.
- Leave is unpaid, but the employee may choose to use other leave balances (such as paid sick leave, or vacation).
- Employers are not obligated to provide more than 20 days of reproductive loss leave per employee in a 12-month period.

SB 723: COVID-19 Lay-Offs

- This bill creates a responsibility for employers to notify its laid-off employees of certain information regarding job positions that become available, for which laid-off employees are qualified.
- Under this bill “laid-off employee” means someone who was employed for at least 6 months and who was laid-off after March 4, 2020, due to a COVID-19 related reason (such as due to a public health directive, a government shutdown, downturn in business, reduction in force, or other non-disciplinary reason related to COVID-19).
- This bill creates a rebuttable presumption that downturn in business, a reduction in force, and other similar economic reasons are COVID-19 related.
- This bill extends this responsibility through December 31, 2025.

AB 1156: Workers Compensation for Hospital Workers

- This bill expands on a Workers Comp. injury for hospital employees who provide direct patient care in an acute care hospital will now include infectious diseases, cancer, musculoskeletal injuries, PTSD, and other respiratory diseases (including COVID-19).

- If a hospital employee who provides direct patient care in an acute care hospital develops such an injury, then the injury is presumed to have arisen in the course of employment.

- This presumption extends past the employee's termination. Three months for every full-year of employment, not to exceed 120 months. The time period starts from the last date the employee actually worked in the specified capacity

SB 525: Health Care Workers Minimum Wage

- This bill establishes new minimum wage requirements for covered health care employees of a covered health care facility. The new minimum wage would also affect salary requirements for employees paid on a salary basis.
- This bill sets out several minimum wage steps, and the specific requirements depend on the type of covered health care facility.
- The term “covered health care employee” includes nurse, physicians, caregivers, medical residents, but would also include janitors, guards, housekeeping staff, and other administrative workers that are part of a covered health care facility. Covered health care employees may also include contracted or subcontracted employees.
- The term “covered health care facility” includes urgent care clinic, psychiatric health facilities, community clinics, rural health clinics, licensed home health agency, etc.

AB 1228: Minimum Wage for Fast Food Workers

- This bill increases the hourly minimum wage for fast food employees to $20, effective April 1, 2024.
- There's possibility for yearly increase, starting on January 1, 2025 and decided by the Fast Food Council within the Department of Industrial Relations.
- Minimum wage may be set by region, or on a state-wide basis.
- Employers may not discharge, discriminate, or retaliate against any employee who participates in or gives testimony to any proceeding of the Council.
- A "fast food restaurant" for purposes of these standards means a limited-service restaurant in the state that is part of a national fast food chain.
    - "National fast food chain" means a set of limited-service restaurants consisting of more than 60 establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service.
    - A "fast food restaurant" does not include restaurants that have an operating bakery, and which sell the bread on the premises.

SB 476: Food Safety

- The Labor Code requires employers to reimburse employees for all necessary expenses. Cal. Lab. Code § 2802.
- Existing law states employers must reimburse employees for their food handler cards and certification.
- This bill would now require employers to pay their employees as “hours worked” for the time it took them to complete the training and examination.
- Employer must also relieve employees of all work duties while completing the training and examination.
- Further, hiring cannot be conditioned on the potential employee having a food handler card.

Woodworth v. Loma Linda University Medical Center, 93 Cal.App.5th 1038 (2023).

Timekeeping

- The Court stated that when an employer has captured the exact amount of time an employee has worked, then the employer must pay for all time worked as captured. Courts have moved away from neutral rounding standards found in federal regulations.

- The Supreme Court has granted review on this matter and matters with related issues (*Estrada v. Royalty Carpet Mills* and *Camp v. Home Depot*.)

Harstein v. Hyatt Corp., 82 F.4th 825 (9th Cir. 2023).

Temporary Layoff and Final Wages

- California Labor Code provides that employees who are discharged must be paid earned and unpaid wages at termination, at the time of such separation. Cal. Lab. Code § 201.

- The Ninth Circuit recently stated that where an employer conducts temporary layoffs, but with no specific return date within the same pay period, then the temporary layoff is considered a "discharge" and thus, employees must be paid all earned and unpaid wages.

Thai v. Int'l. Bus. Machines Corp., 93 Cal.App.5th (2023).

Expense Reimbursement

- California Labor Code requires employers to reimburse employees for all "necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties [...]." Cal. Lab. Code § 2802.
- In this matter, the Plaintiff brought a PAGA action for reimbursement of expenses. The Plaintiff in the matter, and other aggrieved employees, had worked from home during the COVID-19 closures. The employees had been directed to perform their regular job duties while working from home. As part of their duties, they would need internet access, telephone services, a telephone headset, and other similar equipment which they would have normally been provided working in-person.
- The Court held that for employees working from home, an employer must reimburse expenses when those expenses were as a direct consequence of the employee's job duties.
- This was true even if employees had to work from home because of the government mandate during the pandemic.

Helix Energy Sols. Grp., Inc. v. Hewitt, 598 U.S. 39 (2023).

Overtime: Highly Compensated Employees

- The Fair Labor Standards Act, creates an overtime exemption for highly compensated employees.
- The FLSA sets out three requirements to meet the overtime exemption:

  (1) the salary basis test, which means the employee receives a pre-determined and fixed salary independent of the amount of time worked;
  (2) the salary level test, which requires the salary to exceed a specified amount; and
  (3) the job duties test, which considers the duties of the employee.

- The U.S. Supreme Court discussed whether an employee who was paid a daily rate, but made over $200,000 annually would be considered a highly compensated employee such that the FLSA exemption applies.
- The Court held that no, the employee did not fall within the exemption because the employee was being paid a daily rate and was not paid on a salary basis.

Espinoza v. Warehouse Demo Servs., Inc., 86 Cal.App.5th 1184 (2022).

Outside Sales Exemption

- An outside salesperson may be exempted from certain wage and hour laws, including overtime and rest and meal breaks.
- The Court considered whether an employee, who performed product demonstrations at Costco and outside of the employer's place of business was properly classified as an outside salesperson.
- The Court explained the exemption does not apply to employees who, like the Plaintiff, were provided a specific hours, the exact location, and whose hours worked were completely controlled by their employer–even if they were working outside of the employer's place of business.
- The Court recognized that an employer can still control its employees' hours and working conditions even if the employee worked outside of the employer's premises.

Arbitration and Other Employment Agreements

AB 594: Alternative Enforcement

- A “public prosecutor” is now able to prosecute Labor Code violations.
- As used in this section, a “public prosecutor” includes the Attorney General, a district, city, or county attorney, or any other city or county prosecutor.
- Damages recovered by a public prosecutor would be payable to affected employees. While the civil penalties recovered pursuant to this provision would be payable to the General Fund of the State.
- Arbitration Agreements have no effect on whether public prosecutor can pursue such actions.
- This has been seen in recent cases in various matters regarding misclassification of rideshare drivers. The Court of Appeals has found that the public prosecutors of the state and the Labor Commissioner are not bound by the arbitration agreements the rideshare companies have with their drivers, since they are not signatories to the agreement. *In re Uber Technologies Wage and Hour Cases* (CA1, 2023).

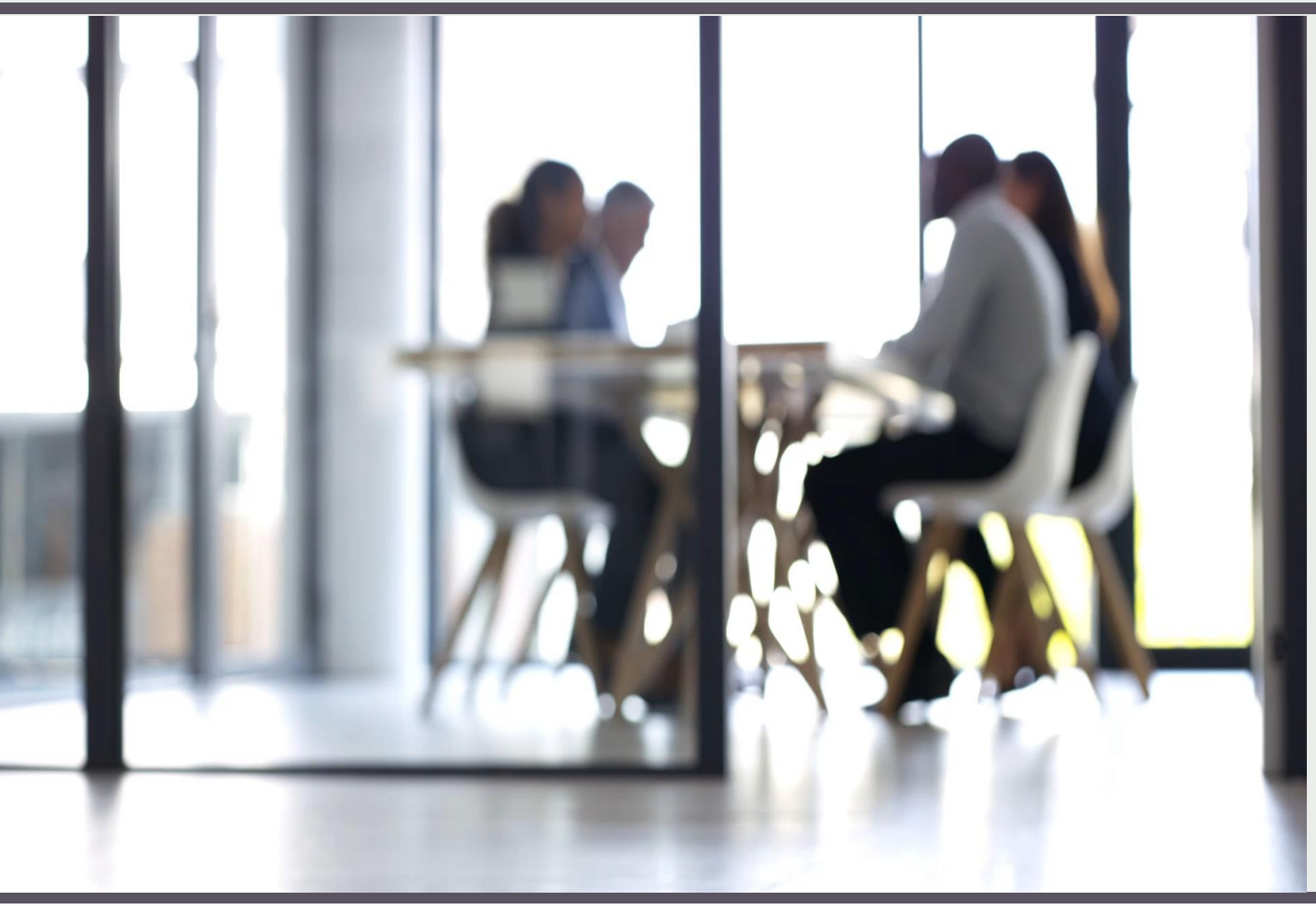
Carmona v. Domino's Pizza, LLC, 73 F.4th 1135 (9th Cir. 2023).

The Federal Arbitration Act

- This case stems from a class action involving delivery drivers claiming various wage and hour violations. The employer attempted to compel the plaintiffs to arbitration. However, the drivers argued that they fell under the transportation workers exemption of the FAA, and thus, the arbitration agreements they had signed were unenforceable.
- The Ninth Circuit considered whether delivery drivers are engaged in interstate commerce such that they are exempt from the FAA.
- The Ninth Circuit considered that the delivery drivers were exempt from the FAA because they were part of a class of workers engaged in interstate commerce. The drivers in this matter are considered the "last-mile" of a continuous chain of interstate commerce, as such the drivers were exempt from the FAA.
- Petition for Certiorari has been filed on this matter.

AB 1076 and SB 699: Non-Compete Agreements

- AB 1076 voids employment non-compete agreements and non-compete clauses in employment contracts unless an exception applies.
- Employers who have included non-compete clauses in employment agreements, or have non-compete agreements with its employees, where no exception applies must notify their current and former employees that the clause or agreement is void.
- The notice must be sent in writing by February 14, 2024.
- SB 699 prohibits an employer from attempting to enforce a non-compete agreement or clause that is void regardless of whether the contract was signed, and the employment was maintained outside of California.



Private Attorneys General Act

Adolph v. Uber Techs., Inc., 14 Cal.5th 1104 (2023).

PAGA/ Arbitration

- Following the *Viking River* Supreme Court case in 2022, PAGA claims can be divided into individual and non-individual claims.
- The California Supreme Court ruled that when a Plaintiff's individual PAGA claims are compelled to arbitration, the Plaintiff does not lose standing to pursue the non-individual representative PAGA actions in court.
- However, if a Plaintiff's individual PAGA claims are compelled to arbitration, the trial court at their own discretion and stay the representative, non-individual PAGA claim in court pending the arbitrator's decision. If the arbitrator finds that the Plaintiff did not personally suffer any violations, the Plaintiff would then lose standing to pursue the representative, non-individual PAGA claims.

Duran v. EmployBridge Holding Co., 92 Cal.App.5th 59 (2023).

Arbitration Agreements

- The Court considered whether an arbitration agreement that specifically excluded PAGA claims from arbitration applied to both non-individual and individual PAGA claims.
- At issue was an arbitration agreement that stated:
  - "Except as prohibited under applicable law, . . . neither [Plaintiff] nor the Company will assert any class action, collective action, or representative action claims against each other in arbitration, in any court, or otherwise; and [Plaintiff] and the Company shall only submit their own respective, individual claims in arbitration and will not seek to represent the interests of any other person."
  - And the Agreement also included a carve-out provision, stating, "claims under PAGA . . . are not arbitrable under this Agreement."
- The Court found that based on the agreement, both the individual and representative PAGA claims are "claims under PAGA" and were excluded.

LaCour v. Marshalls of California, LLC., 94 Cal.App.5th 1172 (2023).

PAGA Settlements

- The Court considered the preclusive effect of a previous settlement, and whether the previous settlement exceeded the scope of what the Plaintiff was authorized to pursue on behalf of the Labor Workforce Development Agency (LWDA).
- The Court stated that because the Plaintiff for the previous settlement had failed to provide factual basis and notice to the LWDA, it denied the LWDA from the opportunity to investigate, and thus the Plaintiff was not authorized to pursue or settle such claims.
- Further, the Court explained that the other PAGA claimants, including the *LaCour* Plaintiff, would not have had reasonable notice that they would be bound by the previous settlement as to the unlisted claims because the previous Plaintiff failed to give any indication of such violations in the LWDA notice.

Arce v. Ensign Grp., Inc., 96 Cal.App.5th (2023).

PAGA Statute of Limitations

- Employees have one year to file a PAGA notice with the LWDA.
- In this matter, the Plaintiff's last day of employment was November 8, 2018, and she received her last wage statement on November 21, 2018. The Plaintiff filed her notice with the LWDA on November 15, 2019, for alleged meal and rest break premiums.
- The Appellate Court found she was within the statute of limitations, because her last wage statement was within the year, and the premiums would have been paid on the day of her last wage statement.

Prohibited Harassment and Discrimination

SB 700: Employment Discrimination, Cannabis Use

- This bill makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based on: (1) the person's use of cannabis off the job and away from the workplace; or (2) drug screening test that found the person to have non-psychoactive cannabis metabolites.
- Further, employers cannot ask an applicant about cannabis use during the hiring process.
- This bill makes it so that in a background check, information regarding cannabis use may not be used unless otherwise permitted through state or federal law.
- This section does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances.

Groff v. DeJoy, 600 U.S. 447 (2023).

Religious Accommodation and Undue Hardship

- The U.S. Supreme Court considered the case of a U.S.P.S. worker who refused to work Sundays due to his religious belief. U.S.P.S. offered employees to swap shifts, but there were occasions where the Plaintiff was unable to switch. As a result of Plaintiff refusing to work Sundays, U.S.P.S. fired him.
- Plaintiff alleged that U.S.P.S. violated the Title VII of the Civil Rights Act because U.S.P.S. failed to provide a reasonable accommodation for his religious belief.
- In turn, the Supreme Court considered whether the accommodation would constitute undue burden under Title VII.
- Previously, courts have taken a "more than de minimis" interpretation to determine an undue hardship that would justify denying a religious accommodation. However, the court now considers a "substantial increased costs" standard.
- The U.S. Supreme Court emphasized that an undue hardship analysis is still fact-specific, and should consider various relevant factors, including the specific accommodation requested, the size of the employer, and the cost to the employer.

Sharp v. S&S Activewear, LLC., 69 F.4th 974 (9th Cir. 2023).

Hostile Work Environment

- The Ninth Circuit found that harassment does not need to be directly targeted at a particular employee in order to give rise to a Title VII claim.
- In this case, the Court found that the graphic and misogynistic music that was played throughout the worksite as permitted by the employer created a hostile work environment in violation of Title VII.
- Further, the Ninth Circuit stated that the employer couldn't "evade liability by cultivating a workplace that is broadly hostile and offensive."
- The Ninth Circuit considered that "female employees allegedly experienced the content in a unique and especially offensive way."

Atalla v. Rite Aid Corp., 89 Cal.App.5th 294 (2023).

Sexual Harassment

- The Court considered a sexual harassment claim between a supervisor and an employee that had a personal relationship outside of work.
- The employee brought a claim against the employer for the sexual harassment by the supervisor.
- The Court of Appeals found that the supervisor was not acting within his supervisory capacity and dismissed the case. In arriving at this decision, the Court considered the nature of the relationship between the employee and the supervisor, that their relationship pre-dated the employee's employment, that the exchange occurred outside the workplace and outside of work hours, and that the exchange arose from their personal relationship rather than their professional relationship.

Raines v. U.S. Healthworks Med. Grp., 15 Cal.5th 268 (2023).

FEHA Protections

- The Fair Employment and Housing Act (FEHA) allows for employers to ask for a medical examination by a job applicant following an employment offer. However, the examination must be "job related and consistent with business necessity." Cal. Govt. Code § 12940(e)(3).
- Plaintiff submitted to a medical examination conducted by a third-party health care provider. However, she refused to answer some questions regarding her menstrual period in the medical screening. Plaintiff sued claiming the questions were intrusive and a violation of FEHA.
- The California Supreme Court considered whether a third-party acting as an agent of an employer can be held directly liable under FEHA. The Supreme Court determined that yes, a business with at least five employees who were acting as agents and carrying out FEHA-regulated activities on behalf of an employer, such as the medical examination, can be held directly liable under FEHA.

Kava Holdings, LLC v. NLRB, 85 F.4th 479 (9th Cir. 2023).

Union Employees

- The Court found that the employer had committed unfair labor practices by refusing to hire its previous employees who were union members following a reopening after a renovation.

- The Court considered that in the employer's hiring conduct, the employer generally disfavored former employee applicants and their reasons for rejecting the applicants were pretextual. The Court also considered comments from their Human Resources manager that were made prior to the re-opening, as well as previous unlawful conduct by the employer.

Protected Activity

SB 497: Protected Activity

- Employees who are discharged, threatened with discharged, demoted, suspended, retaliated against, or subject to any other adverse employment action, or is otherwise discriminated against in the terms and conditions of his or her employment for engaging in protected activity may be entitled to damages.

- SB 497 creates a rebuttable presumption in favor of the employee's claim for damages, if the employee is discharged, terminated, or otherwise suffers an adverse employment action within ninety days of such protected activity.

People ex rel. Garcia-Brower v. Kolla's, Inc., 14 Cal.5th 719 (2023).

Whistleblower Protection

- California Labor Code section 1102.5 provides protection for employees who disclose information, either to a government or law enforcement agency, or as part of an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that such information discloses a violation of statute, federal rule, or regulation.

- The California Supreme Court stated employees who disclose information regarding an activity that is already known about by the entity receiving the disclosure is still considered protected whistleblowing activity under the Labor Code.

Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771 (2023).

Strike Liability

- The matter resulted from a strike that occurred during negotiations for a collective bargaining agreement. The employer is a ready-mix concrete business, and as a result of the strike lost some of its concrete.
- NLRA does not preempt the employer's state tort claims related to damages resulting from the destruction of company property during a strike. The U.S. Supreme Court found that the union failed to take reasonable precautions to avoid foreseeable and imminent danger to the employer's property.
- Although the NLRA protects workers rights to strike, it does not prevent them from liability when the workers don't take reasonable precautions to protect the employer's property from foreseeable harm caused by the strike.

Miller Plastic Products, Inc. 372 NLRB No. 134.

Protected Activity: Totality of the Circumstances

The NLRB adopted the totality of the circumstances test to assess whether employee conduct is protected concerted activity. This new standard is likely to broaden protection for employees, as more employee conduct may be deemed to be protected concerted activity under this test.

American Federation for Children, Inc. 372 NLRB No. 137.

Protected Activity: Non-Employees

The NLRB has expanded Section 7 protections to include employee's actions to advocate for those that aren't employees (such as independent contractors, volunteers, and interns. Such actions are protected if in helping the non-employee, the employee protects his or herself by either improving the terms and conditions of employment, or by increasing the likelihood of future support for better terms and conditions of employment.

Stericycle, Inc. 37 NLRB No. 113.

Reasonably Interpreted Coercive Meaning

The NLRB adopts a new burden shifting standard to determine whether an employer's rules and policies infringe upon Section 7 rights. Under this new approach, the Board considers whether the employer rule or policy could reasonably be interpreted to have a coercive meaning. The Board considers the rule or policy from the perspective of the employee. If a coercive meaning could be reasonably interpreted, then there is a rebuttable presumption that the rule or policy is unlawful.

Harbor Freight Tools USA, Inc. 373 NLRB No. 2.

Solicitation

- The NLRB ruled that the employer's Solicitation and Distribution rule violated NLRA Section 8 rights.
- The NLRB stated that the employer's solicitation ban was too broad, as it prohibited solicitation to working areas during nonworking time.
- The employer attempted to show that the solicitation ban was lawful since it was meant for its "selling areas" in its retail stores. However, the Board emphasized that the solicitation rule was general and did not specify any such limitations.

Memorandum of Understanding, NLRB and OSHA.

Anti-Retaliation and Whistleblower Protections

- In late November 2023, the Occupational Safety Health Administration ("OSHA") and the NLRB issued a Memorandum of Understanding ("MOU") to strengthen the anti-retaliation and whistleblower provisions in the NLRA.
- The MOU is an agreement between the two agencies to exchange information with one another.
- The MOU will remain in effect for 5 years.

Employee Classifications

Whitlach v. Premier Valley, Inc., 86 Cal.App.5th 673 (2022).

Real Estate Agents as Independent Contractors

- Plaintiff claimed he had been misclassified as an independent contractor and used the "ABC" test.
- However, as a real estate agent, Plaintiff is subject to the three-part test included in the Business and Professions Code. Under the three-part test, a real estate agent is properly classified as an independent contractor if:
  (1) The agent is licensed;
  (2) The agent's payment is directly related to sales or output rather than the number of hours worked;
  (3) The agent has signed an independent contractor agreement.

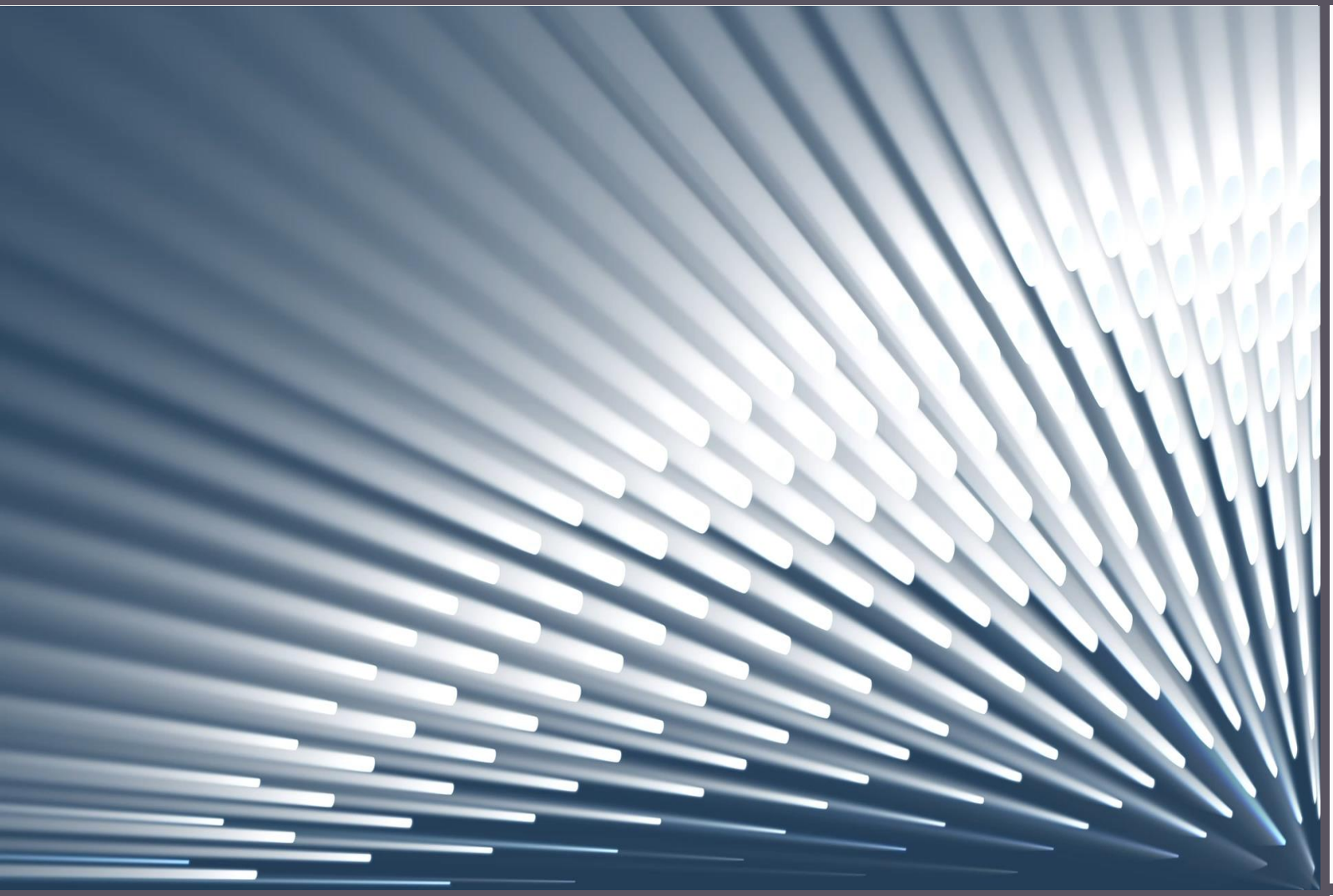
The Atlanta Opera 372 NLRB No. 95.

- In this decision, the NLRB used the independent-business analysis to determine whether a worker was an independent contractor.
- The independent-business analysis considers various factors including:
  - The extent of control the employer can exercise over the work
  - Whether or not the worker is engaged in a distinct occupation or business
  - Whether this kind of work is usually done under the direction or supervision of the employer, or by a specialist without supervision
  - The skill required in the work
  - Whether the employer or worker supplies the "instrumentalities", tools, and place of work
  - The length of time the worker is employed
  - The method of payment—whether by time or by job
  - Whether or not the work is part of the regular business of the employer
  - Whether or not the parties believe they are creating an independent contractor relationship
  - Whether the evidence tends to show that the worker is, in fact, rendering services an independent business

NLRB Joint-Employer Standard Final Rule.

Joint Employment

- In October 2023, the NLRB issued a final rule regarding Joint Employer status under the NLRA.
- To determine joint employment, the NLRB considered the potential joint employers' authority to control the essential terms and conditions of employment.
- The joint employment analysis does not consider whether any such exercise of control is direct or indirect, or whether such control is exercised.
- The "terms and conditions" of employment is also construed broadly, but would consider wages, benefits, hours of work, duties, supervision, and work rules and policies.



Workplace Violence

SB 553: Workplace Violence and Restraining Orders

- Effective July 1, 2024, employers need to create a workplace violence prevention plan that meets the requirements of the statute. This workplace violence prevention plan can be part of the Injury and Illness Prevention Program, or a stand-alone policy.
- Further, the plan requires a violent incident log to be kept by the employer, as well as investigation records. Investigation records must be maintained for a minimum of 5 years and must be provided to employees upon request within 15 days of the request.
- The bill also requires employer to provide its employees with workplace violence training, when changes are made to the workplace violence prevention plan, when new hazards are identified, and annually.

SB 428: Temporary Restraining Orders

- An employer is now able to seek a temporary restraining order on behalf of its employees by showing clear and convincing evidence that an employee has suffered harassment, that great or irreparable harm would result to an employee, and that the respondent's course of conduct served no legitimate purpose.
- Further, an employee who suffered harassment, may now decline to be named in the order before the filing of the petition. The employer who is seeking the temporary restraining order is able to provide the opportunity to confirm with the employee whether they want to be named in the order.
- An employer is still able to seek a restraining order even if the harmed employee declines to be named.


QUESTIONS?

THANK YOU

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