

CALIFORNIA LABOR LAW UPDATE



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Agenda

COVID-19

WAGE AND HOUR

LEAVES OF ABSENCE

HARASSMENT, DISCRIMINATION & RETALIATION

OTHER KEY CHANGES/CRYSTAL BALL

DISCUSSION/QUESTIONS



Did you know?

In 2022, Governor Newsom signed 997 bills into law.

90 were employment bills.



COVID-19



COVID-19

California Supplemental COVID-19 Sick Leave ended on
December 31, 2022.

Has not been renewed.

Oakland is the only locality to still have a local COVID-19 Supplemental Paid Sick Leave ordinance in effect. It will remain in effect until Oakland ends its local COVID-19 declaration of emergency.



COVID-19

Effective 2023, Cal/OSHA adopted
Non-Emergency COVID-19 Prevention
Regulations.



COVID-19

The non-emergency regulations include some of the same requirements found in the ETS, including:

- Employer provided face coverings when use required by CA Dept. of Public Health;
- Continued reporting to Cal/OSHA regarding work related deaths and serious injuries;
- No cost COVID-19 testing, paid time, following a close contact;
- Exclusion of COVID-19 cases from worksite until no longer an infection risk;
- Implement policies to prevent transmission after close contact;
- Development, implementation and maintenance of ventilation methods to prevent COVID-19.



COVID-19

The non-emergency regulations also have some changes:

- Exclusion pay no longer required;
- Health screening not required;
- No cost testing to symptomatic employees not required unless work exposure;
- No required reporting to health department of non-major outbreaks unless required by specific health department;
- Report major outbreaks and serious illnesses to Cal/OSHA;
- “Close contact” now defined by looking at size of workplace. Most indoor airspaces = sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during infectious period.



COVID-19

COVID-19 Exposure Notification

- Effective January 1, 2023, AB 2693 made key changes to the existing COVID-19 Notification requirements under Labor Code 6409.6
- Previously, Labor Code section 6409.6 required employers to provide employees with written notice of a potential COVID-19 workplace exposure within one business day after receiving notice of the potential exposure.
- Now employers are permitted to either provide written notification **or** to display a notice in all places where notices to employees concerning workplace rules/regulations are posted.



COVID-19

COVID-19 Exposure Notification

If employer chooses to comply with a single poster, requirements are:

- Must be posted in a conspicuous place (or online employee portal)
- Must be posted within one business day from when employer became aware of potential exposure
- Must remain posted for at least 15 calendar days
- Must include:
 - The dates the individual who tested positive for COVID-19 was on the worksite within the individual's "infectious period" (2 days before symptoms began, or if asymptomatic, then 2 days before the individual took the positive test);
 - The location of the exposure, including the department, floor, building, or other area (the location should not be so specific that it allows others to identify the individual who tested positive for COVID-19);
 - Contact information for employees to receive information regarding COVID-19-related benefits such as company or legally-mandated sick leave; and
 - Contact information for employees to receive the company's cleaning and disinfection plan.



COVID-19

COVID-19 Exposure Notification

Takeaway – for notice to employees that were at the same worksite as the positive employee, but not a close contact, posting via log makes sense.

However, individualized notice to “close contacts” still makes sense so you can advise employee of leave benefits, return-to-work criteria, etc.



WAGE AND HOUR



Wage and Hour

Time Keeping Basics

- All work by hourly employees must be on the clock.
- Hourly employees must clock in and out at the start and end of each shift.
- Hourly employees must clock in and out at the start and end of each meal period.
- Hourly employees have a right to a one-hour penalty paid at their regular rate if, as a result of work needs, they miss a meal or rest break, take a late meal or rest break, or take a short meal or rest break.



Wage and Hour

All work by hourly employees must be on the clock

- This is critical and is the basis for many lawsuits.
- Off the clock work conduct issues arise when employees perform work tasks before they clock in, during meal breaks, or after they are clocked out.
- Examples:
 - Employees are required to pass through a security check or a COVID screening before clocking in.
 - Employees are a minute or two early and look at medical records before clocking in.
 - Employees respond to pages while on lunch breaks.
 - Employees respond to work related messages on a day off.



Wage and Hour

Meal Periods

- In general, employees are entitled to take an unpaid, 30-minute meal period before the end of the 5th hour of work (4 hours and 59 minutes).
- Employees who work more than 10 hours in a day may take a second, unpaid, 30-minute meal period beginning before the 10th hour of work.
- The meal period must be duty free, and employees must be able to leave the premises.



Wage and Hour

Meal Period Waivers

- Employees who work between 5 and 6 hours in a day may waive their 1st meal period.
 - It is recommended that this waiver be written, particularly for employees regularly working these shifts.
 - Waiver may be revoked at any time.
 - HR has available forms for this.



Wage and Hour

Meal Period Waivers

- Healthcare employees also may waive either one of their two meal periods on longer shifts.
 - Waiver must be in writing.
 - Waiver may be revoked at any time.
 - HR has a recently updated available form for this.



Wage and Hour

Rest Breaks

- On shifts exceeding 3.5 hours, employees are entitled to take a paid, 10-minute rest break for every 4 hours worked, or major fraction thereof (meaning 2 hours).
- The rest break should be in the middle of the 4-hour work period.

Shift Length	Number of Rest Breaks
3.5 to 6 hours	1 rest break taking in the middle of the first 4 hours (at 2 hours).
6-10 hours	2nd rest break taken in the middle of the second four hours (at 6 hours)
10-14 hours	3 rd rest break taken in the middle of the third four hours (at 10 hours)



Wage and Hour

Rest Breaks

- Rest breaks are on the clock.
- The rest break must be duty free.
- Employees may not be on call.
- Employees should be free to leave the premises.
- Multiple rest breaks should not be combined.



Wage and Hour

Meal and Rest Break Takeaways:

- Frequent meal and rest break violations must be actively managed like any other conduct issue.
- Short, late, or missed meal periods reflected in time records create a legal presumption of a violation.
- Employees with patterns of taking short, late, or missed meal and rest breaks should be counseled.
- Counseling should be documented.
- Trainings should be conducted frequently and documented.



Wage and Hour

2023 Minimum Wage Rate for Non-Exempt Hourly Employees:

- \$15.50
- Applicable to all employers

2023 City and County Minimum Wage Rate Ordinances:

- 39 California Cities and Counties have adopted a local minimum wage ordinance

List of U.S. City and County Minimum Wage Ordinances:

- <https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2>
- Note that many local ordinances raise minimum wages effective July 1.

Proposed New Minimum Wage for CA Healthcare Workers

Proposed Increase in CA Sick Leave



Wage and Hour

2023 Minimum Wage Rate for Exempt Employees:

- Annual minimum salary: \$64,480

Unique Minimum Salary/Comp Requirements for Some Exempt Employees:

- PAs and NPs may qualify for the professional exemption, but they must be paid a qualifying minimum salary
- Physicians and surgeons qualify for professional exemption if paid by salary or hourly
 - For 2023, the minimum hourly rate to physicians must be \$97.99 per hour, and minimum hourly is CPI adjusted every year

What categories of employees in an urgent care clinic are generally not eligible to be exempt?



Wage & Hour

- Review of Overtime Rules
- Alternative Workweek Schedules (e.g., 4x10)
- Meal Break and Rest Break Rules
 - Meal Break Penalties (1-hour at “Regular Rate of Pay”)
 - Uninterrupted Meal Breaks (e.g., no work-related calls or texts)
 - Before 5th hour of work; meal break waiver if working 6 hours or less; must be at least 30 minutes (mere 29-minute meal break triggers penalty)
- Reimbursement for Business Use of Personal Cell Phone, Internet
- WFH
- Wait Time Penalties = \$\$\$\$\$\$\$\$\$



Wage & Hour

- What is “Regular Rate of Pay” and How is it Calculated?
 - Discretionary vs. Non-Discretionary Compensation
 - Examples:
 - COVID bonuses to all employees every pay period = Non-Discretionary
 - Non-guaranteed holiday/annual bonuses = Discretionary
 - Quality bonuses paid under an established program = Non-Discretionary
 - Employee Referral Bonus = Non-Discretionary
 - What does RRP apply to?
 - Overtime, Meal Break Penalties, PTO, Sick Leave
 - Some Payroll Systems can automate RRP calculations, but good luck
 - Consider using a special “Pay Code” in your payroll system to use when making non-discretionary comp payments



Wage & Hour

EXAMPLE #1

M	T	W	Th	F	S	S
8	8	8	8	9	0	0
\$160	\$160	\$160	\$160	\$180		

Earns \$20 per hour

Question: What does employee get paid as overtime premium?

Answer: \$10

Regular Rate = Total compensation earned ÷ total hours worked in workweek

Our example = \$820 (total compensation earned in workweek) ÷ 41 (total hours worked) = \$20

Overtime premium = .5 x \$20 = \$10



Wage & Hour

EXAMPLE #2

M	T	W	Th	F	S	S
8	8	8	8	9	0	0
\$160	\$160	\$160	\$160	\$180		

Non-discretionary bonus: \$100

Question: What does employee get paid as overtime premium?

Answer: \$11.22

Regular Rate = Total compensation earned ÷ Total hours worked

Our Example = \$920 (total compensation earned in workweek) ÷ 41 (total hours worked) = \$22.44

Overtime premium = .5 x \$22.44 = \$11.22



Wage & Hour

EXAMPLE #3 - QUARTERLY BONUS

Employee earns \$500 non-discretionary bonus in a 3 month period, during which the employee worked a total of 420 hours, 20 hours of which are overtime

Regular rate = Total compensation earned ÷ total hours worked over 3 month time period

Our Example = \$500 (total compensation earned) ÷ 420 (total hours worked) = \$1.19

Regular rate = \$1.19

Overtime premium = \$1.19 x .5 = .595 = .60

Amount owed: .60 x 20 (hours of overtime worked) = \$12.00



Wage & Hour

PENALTIES AND OVERTIME

Total damages: \$12.00 unpaid overtime

Waiting time penalties: \$4,800 (\$160 x 30)

Attorneys' Fees: (?)

PAGA: penalties per pay period (?)

Class action: (?)



Practice Point – Regular Rate Calculation

- Any time employees earn pay for work other than their hourly rate, this pay must be factored into the calculation used to determine overtime, meal/rest period premiums, and sick pay.
 - Think twice about any new pay types.
 - Run them past HR/payroll.
 - These calculations are complicated and there is room for error.
 - Small underpayments result in disproportionate penalties.



Wage and Hour

Pay Transparency

Pay Scale Posting and Disclosure & Pay Data Reporting (SB 1162)



Wage and Hour

Existing Law:

- **California's Equal Pay Act & California's Fair Pay Act**
 - General prohibition: Employers cannot pay any of its employees less than it pays employees of a different sex, race or ethnicity for substantially similar work.
- **Employers cannot:**
 - Inquire about an applicant's salary and benefit history.
 - Use salary history as basis for the salary offer to the applicant or offer of employment.
- **Employers are required to:**
 - Provide the pay scale to an applicant, *upon reasonable request*, for the position applied and interviewed for.



Wage and Hour

What's New?

Pay Scale Posting

Pay Scale Definition:

- “Salary or hourly wage range that the employer reasonably expects to pay for the position.”

Posting Requirements:

- Applies to employers with 15 or more employees.
- The open position's pay scale must be disclosed in all internal and external job postings.
- The open position's pay scale must be disclosed in job postings posted by a third party and posted at the employer's request.



Wage and Hour

What's New?

Pay Scale Disclosure

Disclosure Requirements:

- Applies to employers of any size.
- Upon request, disclose the pay scale to an applicant (even if not interviewed) for the position applied for.
- Upon request disclose to a current employee the pay scale for the employee's current position.



Wage and Hour

What's New?

Pay Scale Disclosure

Record Keeping Requirements:

- Applies to employers with 15 or more employees.
- Maintain job title and wage rate histories for each employee for the entire time they are employed and three years after they leave.
- \$100 to \$10,000 per violation

Enforcement

- Labor Commissioner
- Civil Lawsuit



LEAVES OF ABSENCE



Leaves of Absence

California Family Rights Act (“CFRA”) – Refresher

- Requires covered employers to permit eligible employees to take up to 12 weeks of job-protected, unpaid leave in a 12-month period, for a qualifying reason
- Covered employer = 5 or more employees (private) and all public employers
- Eligible employee = employed for at least 12 months, worked at least 1,250 hours during the prior 12-month period



Leaves of Absence

CFRA – Qualifying Reasons

- The birth of a son or daughter or to care for the employee's newborn son or daughter within the baby's first year of life;
- The placement of a son or daughter with the employee for adoption or foster care within 1 year of placement;
- Care of the employee's spouse, child, parent, grandparent, grandchild, sibling, parent-in-law, or domestic partner who has a serious health condition; or
- The employee's own serious health condition that renders the employee unable to perform one or more of the essential functions of the employee's position.
- A “qualifying exigency” arising out of the fact that the employee's son or daughter, parent, or spouse is on “covered active duty” in the U.S. Armed Forces, or has been notified of an impending call to “covered active duty” status



Leaves of Absence

CFRA – Amended Effective January 1, 2023

AB 1041 expands the CFRA to allow the employee to take CFRA to care for a *designated person's* serious medical condition.

“Designated Person” means any individual related by blood or whose association with the employee is the *equivalent of a family relationship*.

The designated person may be identified by the employee at the time the employee requests the leave.

An employer may limit an employee to one designated person per 12-month period for family care and medical leave.



Leaves of Absence

AB 1041 Also Amends The Healthy Workplaces, Healthy Families Act (“HWHFA”) Effective January 1, 2023

AB 1041 also expands the HWHFA to allow the employee to take HWHFA paid sick leave to care for a *designated person*.

Unlike the CFRA, “Designated Person” under the HWHFA means “a person identified by the employee at the time the employee requests paid sick days.”

Like the CFRA, an employer may limit an employee to one designated person per 12-month period for paid sick days.



Leaves of Absence

Bereavement Leave Effective January 1, 2023

AB 1949 amends the California Family Rights Act (“CFRA”) to require that covered employers provide eligible employees with up to five (5) days of bereavement leave per year for the death of a qualifying family member.

Bereavement leave is unpaid. However, employee may elect to use available sick leave/PTO/vacation.

Separate and apart from the 12 weeks of CFRA leave.

Can take leave intermittently, but leave must be completed within 3 months of the date of death.



Leaves of Absence

Bereavement Leave

Eligible employee – employed at least 30 days before the need for leave.

Qualifying family member =

- Spouse
- Domestic partner
- Child
- Parent/parent-in-law
- Sibling
- Grandparent
- Grandchild

Currently, unlike amended CFRA, does not include a designated person.



Leaves of Absence

Bereavement Leave

Employers are permitted to request documentation of the death of the family member, which can include:

- a death certificate
- a published obituary
- a written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution or government agency.

Recommended?



HARASSMENT, DISCRIMINATION & RETALIATION PREVENTION



Harassment, Discrimination, and Retaliation Prevention

Renaming of the Department of Fair Employment & Housing (DFEH)

New Name:

Civil Rights Department (CRD)

<https://calcivilrights.ca.gov/aboutdfeh/>

What does the CRD do?

- Enforce FEHA, Unruh Civil Rights Act, Disabled Persons Act, and Ralph Civil Rights Act in employment and housing by investigating complaints and prosecuting violations in civil court.



Leaves of Absence

Amendment to California Fair Employment and Housing Act – Effective January 1, 2023

SB 523 amends the FEHA by adding “reproductive health decision making” as a new protected classification.

Defines “reproductive health decisionmaking,” for purposes of the FEHA, to include, among other things, a decision to use or access a particular drug, device, product, or medical service for reproductive health

Makes it unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant’s or employee’s reproductive health decision-making.



Harassment, Discrimination, and Retaliation Prevention

Reminder:

Statute of Limitations for FEHA Claim is: 3 years from last FEHA violation. Then, one year after CRD issues a right-to-sue to file a civil lawsuit.

- The new SOL became effective on January 1, 2022 as result of SB 807
- SOL used to be one year from last FEHA violation
- So employees now have three times as long to file with the CRD a discrimination, harassment and/or retaliation complaint against their employers.



ADDITIONAL KEY CHANGES

CRYSTAL BALL



Other changes and what's next?

Arbitration Agreements

A lot of changes in past few years.

What is clear for time being?

- Arbitration can be mandatory as a condition of employment. (*Chamber of Commerce v. Bonta*)
- Arbitration agreement can include a class action waiver.
- Arbitration agreement can require employee to arbitrate individual PAGA claims (penalties for alleged labor code violations suffered by the plaintiff)
- Arbitration agreement cannot require employee to arbitrate representative PAGA claims (penalties for alleged labor code violations suffered by an employee other than the plaintiff)

What is unclear?

- Whether an employee who has been compelled to arbitrate individual PAGA claims loses standing thereafter to continue to pursue representative PAGA claims in court.
- Going to be decided by the California Supreme in *Adolph v. Uber Technologies, Inc.*



Other changes and what's next?

Looking Ahead – Sort of

SB 403 – Discrimination on the basis of caste

Add “Caste” as a legally protected category under the Unruh Civil Rights Act, the FEHA, and CA anti-discrimination policy in public schools.

Likely going to pass.

Effective date?

“The amendments in this act are declarative of and clarify existing law. This act shall not be construed to mean that caste discrimination is not already prohibited under existing law, including by protections for religion, ancestry, national origin, ethnicity, race, color, or any other protected characteristic under existing law.”



Other changes and what's next?

Looking Ahead – Sort of

SB 616 – Paid Sick Leave

Would raise the number of paid sick days that can be used by employees from **three** to **five** days per year and expand how sick days are accrued and used.

Likely going to pass.

Effective January 1, 2024.



Other changes and what's next?

Looking Ahead

SB 525 – Minimum Wage

Would raise the minimum wage for all healthcare workers in CA to \$25/hr by June 1, 2025.

2024 = \$21/hr

2025 = \$25/hr

Healthcare worker = All paid work performed on the premises of any covered health care facility, regardless of the identity of the employer.

or All paid work providing health care services performed for any person that owns, controls, or operates a covered health care facility, regardless of work location.

Urgent care clinics will be covered



Other changes and what's next?

Looking Ahead

No Discrimination for Off-Duty Cannabis Use – Effective January 1, 2024

AB 2188 amends the California Fair Employment and Housing Act to make it unlawful for an employer to discriminate against an employee in hiring, termination, or any term or condition of employment, if the adverse action taken is based on:

- The employee's use of cannabis off-duty and away from the workplace; or
- An employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.



Other changes and what's next?

Looking Ahead

No Discrimination for Off-Duty Cannabis Use – Effective January 1, 2024

AB 2188 does not prohibit testing employees for cannabis (including pre-employment, random, and reasonable suspicion)

However, the law does prohibit discrimination for off-duty cannabis use. Also, employers can still prohibit employees from possessing, using, or being impaired by cannabis on the job.

Drug tests: psychoactive cannabis metabolite vs. non-psychoactive cannabis metabolites.

- Psychoactive – proof of actual impairment
- Non-psychoactive – does not show impairment, only shows prior use

Beginning in 2024, drug tests should only test for psychoactive cannabis metabolites



Other changes and what's next?

Looking Ahead

No Discrimination for Off-Duty Cannabis Use – Effective January 1, 2024

Exceptions: AB 2188

- Does not prevent an employer from maintaining a drug- and alcohol-free workplace;
- Does not apply to an employee in the building and construction trades;
- Does not apply to employees hired for positions that require a federal government background investigation or security clearance;
- Does not preempt state or federal laws or regulations that require applicants or employees to be tested for controlled substances.



Other changes and what's next?

Looking Ahead

Laws related to AI in the workplace:

Although the use of AI in employment is relatively new, employers still must ensure that their use of this new technology does not violate long-standing federal and state anti-discrimination laws.

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued guidance on the use of AI systems in a range of HR-related tasks. The guidance is available here:

- <https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used>



Other changes and what's next?

Looking Ahead

Laws related to AI in the workplace:

Additionally, California lawmakers have introduced new proposed regulations and laws that address the use of AI in employment decision-making.

- The California Civil Rights Council (CRC) recently issued updated proposed modifications to employment regulations regarding automated-decision systems.
- California lawmakers have also introduced multiple bills on AI-related topics, including AB 331, WHICH proposes certain requirements and restrictions upon employer use of what it refers to as “automated decision tools” (ADT).
 - ADT is defined in the proposed legislation as “a system or service that uses artificial intelligence and has been specifically developed and marketed to, or specifically modified to, make, or be a controlling factor in making, consequential decisions.”



Questions/Discussion

