DOWNEYBRAND

2022 Employment Law Update

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Today's Topics

- COVID-19 (2/10/22 Edition)
- Wage and Hour Issues
- Discrimination, Harassment, and Retaliation
- Claims and Settlements

COVID-19 (2/10/22 Edition)

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SB 114: Supplemental Paid Sick Leave

- Signed: February 9, 2022
- Begin providing leave: February 19, 2022
- Retroactive to: January 1, 2022
- Expires: September 30, 2022

- AB 114 adds Labor Code section 248.6
- Applies to employers with 26+ employees
- Special provisions for Firefighters & In home support services

SB 114: Supplemental Paid Sick Leave

"Covered Employee" is an employee who is **unable to work or telework** because:

- **Employee subject to a quarantine or isolation** related to COVID-19 (per order or guidance of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer or per health care provider)
- Employee is ***caring for a family member**** subject to an order, guidance or advised to **isolate or quarantine**
- Employee is attending an appointment for themselves ***or a family member*** to receive a **vaccine or a booster** for protection against COVID-19,
- **Employee** experiencing symptoms, **or** caring for a ***family member*** **experiencing symptoms, from vaccine or booster** that prevent the employee from being able to work or telework.
- **Employee is experiencing symptoms** of COVID-19 and seeking a medical diagnosis.
- Employee is caring for a child whose **school or place of care is closed** or otherwise unavailable for reasons related to COVID-19 on the premises.

*Family member = child, grandchild, parent, grandparent, sibling, spouse

SB 114: Supplemental Paid Sick Leave

- Maximum hours: 80 total hours for full time employees
  - Up to 40 hours if employee tests positive or caring for family member who tested positive ("additional" SPSL)
  - Up to 40 hours for the other covered reasons (quarantine or isolation, vaccine* or recovery, experiencing symptoms and seeking diagnosis, school closure)
  - Stay tuned for guidance regarding how to characterize positive testing people vs. isolating people……..
- Maximum pay: Capped at $511 per day and no more than $5,110 total. Employees who max out may use other available paid leave to be compensated for the absence

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SB 114: Supplemental Paid Sick Leave

- Verification of need for leave
  - If for vaccine/ booster, need only give 24 hours/ 3 days for each event; employee may obtain more if health care provider certifies continuing symptoms
  - If COVID positive employee or family member, may require documentation of test result; if employee refuses to provide test result, employer may deny leave;
  - If COVID positive employee or family member, employer may require employee to take another diagnostic test on or after the fifth day after the first test and provide documentation of the result (at no cost to employee)

SB 114: Supplemental Paid Sick Leave

- Calculating leave (SPSL + "additional SPSL")
  - Full time employees: 40 hours (or on average the time they were scheduled to work in two weeks preceding date of leave)
  - Non-Full Time employees: Receive the total number of hours normally scheduled to work over one week
- Pay Rate
  - Non exempt:
    - Calculate in same manner as regular rate for workweek in which employee uses SPSL, excluding overtime OR
    - Divide employees total wages not including overtime by employees total non-overtime hours worked in the full pay period occurring within the prior 90 days of employment
    - Divide by all hours worked if piece rate, commission, or other method that uses all hours to determine regular rate.
  - Exempt: Same as other forms of paid leave

SB 114: Supplemental Paid Sick Leave

- Retroactivity to 1/1/22
  - Employee requests retroactive payment for covered leave
  - Employee not compensated in an amount equal to or greater than the SPSL, must true-up (increase retroactively)
  - If employer paid an amount equal to or greater than what SPSL requires, employer must credit 2022 SPSL to the absence rather than the benefit that was used
  - Employer may require documentation of a positive COVID-19 diagnostic test for the relevant period

SB 114: Supplemental Paid Sick Leave

Interaction with other leave

- SPSL is in addition to any paid sick leave that may be available;
- May not require employee to use any other paid or unpaid leave, paid time off or vacation before using COVID-19 SPSL
- Cal OSHA ETS: If the ETS requires employer to maintain earnings due to exclusion from the workplace (ie: they were exposed at work), employers cannot require employees to exhaust SPSL first

SB 114: Supplemental Paid Sick Leave

- Notices
  - New Poster should be available by February 17 – must be posted or emailed to employees
  - Must report only the hours that employee has used (not what is "available"):
    - provide notice showing amount of SPSL that employee has used through the pay period in which it was due to be paid, either on wage statement or a separate document provided on the pay date with the payment of wages
    - List "0" hours if worker has not used any leave

COVID-19 ETS Elements (1/22)

- Definitions
- Written COVID-19 Prevention Program
- Exclusion and Return
- Written Notifications

COVID-19 ETS Elements (1/22)

- Definitions
  - Close contact: Within 6 feet of a COVID-19 Case for 15 min+ during high risk exposure period.
  - Covid-19 Case: Positive test, diagnosis, isolation order, or has died from COVID
  - High risk exposure period:
    - 2 days before symptoms until 10 days since first symptoms + 24 hours with no fever + improved symptoms
    - 2 days prior to specimen for positive test was collected.

COVID-19 ETS Elements (1/22)

- Definitions
  - "Fully vaccinated" means employer has documented:
    - Status two weeks after completing primary vaccination with the minimum recommended interval between doses
    - Status two weeks after receiving 2nd dose of any combination of two doses of an FDA approved COVID-19 vaccine; 2nd dose must not be received earlier than 21 days after first dose

COVID-19 ETS Elements (1/22)

- Written COVID-19 Prevention Plan
  - System for communicating with employees
  - 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
  - Face Coverings
  - Engineering and administrative controls/ PPE
  - Reporting, Recordkeeping and access
  - Exclusion of COVID-19 Cases and close contacts
  - Return to work criteria

COVID-19 ETS Elements (1/22)

- Exclusion of COVID-19 Cases and Close Contacts
  - Exclude all COVID-19 Cases
  - Exclude all close contacts, except:
    - Fully vaccinated employees who do not develop symptoms
    - COVID-19 cases who returned to work and have remained free of symptoms (for 90 days after 1st close contact)
    - COVID-19 cases who never developed symptoms (for 90 days after 1st positive test)

    The above excepted categories of people must wear a face covering and maintain 6-feet of distance for 14 days following the date of contact

COVID-19 ETS Elements (1/22)

- Maintenance of Benefits for Excluded Employees
  - Employer must maintain earnings, wages, seniority and may use employer-provided sick leave for this purpose unless:
    - Employee received disability payments or workers' comp disability
    - Employer **can demonstrate** that the close contact is not work related
    - But see, SPSL: If the ETS requires employer to maintain earnings due to exclusion from the workplace (ie: they were exposed at work), employers cannot require employees to exhaust SPSL first

COVID-19 ETS Elements (1/22)

- Return to Work for COVID-19 Cases
  - COVID-19 cases with symptoms cannot return until:
    - 24 hours pass since fever of 100.4 (without drugs) AND
    - COVID-19 symptoms have improved AND
    - At least 10 days have passed since first symptoms
  - COVID-19 cases w/out symptoms cannot return until a minimum of 10 days after date of specimen for first positive test

COVID-19 ETS Elements (1/22)

- Return to Work for Close Contacts (w/ no symptoms)
  - 10 days have passed since last known close contact

  OR

  - 7 days have passed since last known close contact and person tested negative for COVID at least five days *after* last known close contact

  Both of the above must wear face covering and maintain 6 feet of distance for 14 days following date of last close contact

Notice of Exposure (ETS +SB 522)

- If an employer receives notice of potential exposure to COVID-19 at the worksite, must provide Written Notice of Potential Exposure to all employees at the "worksite" within the "infectious period"
- Worksite: The location where a worker worked during the infectious period. Does not apply to buildings, floors or other locations that the "qualified individual" did not enter, locations where the worker worked by themselves, or to a personal residence
- Infectious period: The time a qualified individual was infectious as defined by the CDPH
  - 2 days before they first develop symptoms until 10 days have passed since symptoms first appeared AND at least 24 hours have passed with no fever (without use of fever-reducing medications) AND other symptoms have improved.
  - For an individual who tests positive but never develops symptoms, the infectious period begins 2 days before the specimen for their first positive COVID-19 test was collected and ends 10 days after the specimen collection.

Notice of Exposure (ETS +SB 522)

- Content of Notice
  - That they may have been exposed to COVID-19
  - Benefits under law, including workers' compensation, COVID-19 related leave, company sick leave, state-mandated leave, supplemental sick leave, negotiated leave conditions
  - Anti-retaliation and anti-discrimination protections
  - Employer's cleaning and disinfection plan per CDC, CalOSHA guidelines
  - Employer must maintain earnings, wages, seniority and may use employer-provided sick leave for this purpose **unless**:
    - Employee received disability payments or workers' comp disability
    - Employer can demonstrate that the close contact is not work related
- Notice cannot reveal personal identifying information of Covid-19 Case
- Notice should be in English and the language understood by a majority of employees

Wage and Hour Issues

Wage & Hour Issues

- Minimum Wage Increases & Exemptions
- Expanded Wage and Hour Liability
- PAGA (Unmanageable Claims)
- Wages and Attorney Fee Agreements

Minimum Wage Updates

- **California State Minimum Wage Increase:**
  - Effective January 1, 2022:
    - Employers with 25 *or less* employees: $14.00/hour
    - Employers with 26 *or more* employees: $15.00/hour
  - Effective January 1, 2023:
    - ALL California Employers: $15.00/hour
- Local (county and city) minimum wage ordinances are on the rise throughout the state.

Min. Wage: Exempt Salary Threshold

- Higher State Minimum Wage = Higher Exempt Employee Salary Threshold
- New Exempt Salary Thresholds:
  - **Effective January 1, 2022**:
    - Employers with 25 *or less* employees: $4,853.33/month; $58,240/annually; $1,120/week
    - Employers with 26 *or more* employees: $5,200/month; $62,400/year; $1,200/week
  - **Effective January 1, 2023**:
    - ALL California Employers : $5,200/month; $62,400/year; $1,200/week

Exemption for Computer Professionals

- California law provides an *overtime* exemption for computer professionals who meet duty AND salary requirements.
- Minimum Salary Increase effective January 1, 2022:
  - $50.00/hour; $8,679.16/month; $104,149.81/annually
- The exemption only technically applies to *overtime*, e.g., not meal/rest breaks and other wage and hour laws.

Intentional Theft of Wages (AB 1003)

- AB 1003 provides that the "intentional theft of wages" is punishable as grand theft, if:
  - One employee: More than $950.00
  - Two or more employees in a 12-month period: More than $2,350.00
- Grand theft: Punishable as misdemeanor or felony by imprisonment for up to three (3) years.
- "Intentional Theft of Wages": "Intentional deprivation" of wages, gratuities, benefits and "other compensation" by "unlawful means, with the knowledge" that they are due to the employee.
- "Employee" definition includes independent contractors.

Expanded W&H Liability Re Subcontractors

- SB 727
- Currently, in wage and hour claims related to contractor-subcontractor relationships, the direct contractor is only liable for a subcontractor's employee's unpaid wages, fringe/other benefits, and interest.
- Under SB 727, for all private works contracts signed on or after January 1, 2022, direct contractors are *also* liable for penalties, liquidated damages, and interest owed by the subcontractor related to wage and hour liabilities.

Expanded W&H Liability Re Subcontractors

- Direct contractors are not liable for penalties and liquidated damages related to a subcontractor's wage and hour liabilities, unless:
  - 1) The direct contractor knew about the alleged wage and hour violations, or
  - 2) The direct contractor failed to comply with monitoring procedures implemented by SB 727:
    - A) Payroll monitoring,
    - B) Immediately correcting known wage and hour violations, and
    - C) Obtaining "an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the wage, fringe or other benefit payment or contribution due to the employees," before making final payment to the subcontractor.

Wesson v. Staples: Unmanageable PAGA Claims

- Facts:
  - Class action by nearly 350 current and former general managers of Staples, alleging wage and hour violations based on their alleged misclassification as exempt employees.
  - Trial court denied class certification of Plaintiff's class action claims.
  - Staples then moved to strike the remaining PAGA claim, alleging it was "unmanageable":
    - Variety of store sizes, sales volumes, staffing levels, store hours, budgets, products, and services offered.
    - **Trial was estimated to have taken 8 years to complete.**
  - Trial court granted Staples' motion to strike the PAGA claim as unmanageable.

Wesson v. Staples: Unmanageable PAGA Claims

- Ruling:
  - Trial courts have the "inherent authority to ensure that a PAGA claim will be manageable at trial—including the power to strike the claim, if necessary."
  - Defendants have Due Process Rights to litigate affirmative defenses.
  - The trial court's ruling, striking Plaintiff's PAGA claim as unmanageable, was not an abuse of discretion.
- Factors in Assessing PAGA Claim "Manageability":
  - Number of employees, nature of contested issues, "need for individualized proof pertaining to a very large number of employees," a defendant's affirmative defenses.

Missakian v. Amusement Industry, Inc.

- Bonuses/Contingent Fees
- Facts
  - ❖ Missakian is an in-house lawyer for AMI. AMI has active litigation (the "Stern Litigation")
  - ❖ AMI offers Missakian a salary, and for his participation in the litigation: (1) a $6250 bonus for each month he worked on the litigation and (2) 10% of the recovery
  - ❖ Agreement never reduced to writing
  - ❖ AMI hires attorney Missakian as in-house counsel
  - ❖ AMI is in the Stern Litigation
  - ❖ AMI promises Missakian a bonus: (1) $6250 for each month he works on the litigation, and (2) 10% of any recovery from the Stern Litigation
  - ❖ Agreement is not reduced to writing

Missakian v. Amusement Industry, Inc.

- Missakian argues that the bonus is a wage that needs to be paid
- AMI argues that the bonus is a contingency fee agreement that is required to be in writing
- Court agrees with AMI. Because the bonus agreement was not in writing, it is void

(Don't worry, Missakian has other options for recovery)

Discrimination, Harassment and Retaliation

Discrimination, Harassment, &…

- CFRA Expansion
- DFEH Record Retention Requirements
- Notice Posting for Telecommuting Employees

California Family Rights Act Expansion

- AB 1033
- CFRA leave now includes “parents-in-laws”
  - “Parent-in-law” means “the parent of a spouse or domestic partner”
- Employers should update their handbooks and practices

DFEH Record Retention Requirements

- **Then**: Employers were required to retain all applications, personnel, membership, and employment referral records and files for at least 2 years.
- **Now**: SB 807 expands the requirement to 4 years after the records and files are initially created or received, or 4 years after the date the employment action was taken.
- Also requires that upon notice that a verified complaint has been filed under this part, you must maintain and preserve records and files until the later of:
  - (1) First date after time for filing a civil action has expired.
  - (2) First date after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.

Notice Posting For Telecommuters

- SB 657 modifies Labor Code to provide that if an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached.
- **HOWEVER**, e-mail distribution shall not alter the employer's obligation to physically display the required posting.

Claims and Settlements

AMN Healthcare v. Aya Healthcare Servs., Inc.

- Non-Solicitation Clauses
- Facts:
  - AMN & Aya are competitors - provide travel nurses to medical care facilities.
  - Defendants (former AMN employees) signed agreements with AMN providing that they could not solicit any employee of AMN to leave AMN for at least one-year after termination of the employment relationship.
  - Important: a travel nurse recruited by AMN and placed at a facility was considered an employee of AMN.

AMN v. Aya (Cont'd)

- **2018**: Court holds provision unenforceable. Why?
  - Business & Professions Code 16600: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business *of any kind* is to that extent void."
  - In line with California public policy
  - Emphasis on free & competitive business interests for employees
  - Particularly unreasonable because the employees were recruiters – in order to do their job they needed to contact travel nurses

AMN v. Aya (Cont'd)

- **2021**: The Non-Solicitation Agreement is not *Per Se* Illegal, and in this case, survived Rule of Reason Scrutiny.
- Gives hope to enforcement of non-solicitation covenants between businesses.
- Consistent with recent CA decisions (this is federal)
- Limits use of 16600 in this context.

(More) Limits on Confidential Settlements

- Settlement agreements already may not prevent disclosure of factual information related to certain claims. (SB 820)
  - sexual harassment
  - sexual assault
  - workplace harassment or discrimination based on sex
  - failure to prevent such an act
  - retaliation for reporting
- SB 331 expands beyond "sex," encompasses any protected basis related to harassment or discrimination.
  - i.e. race, disability, etc.

Limits on Confidential Settlements (Cont.)

- Non-Disparagement Agreements
  - Any settlement or separation agreement that includes a "non-disparagement clause" should carve out the following: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful." (Gov. Code section 12964.5)
- Separation Agreements
  - Employers must 1) notify employee they may consult an attorney; and 2) provide the employee *at least* 5 business days to do so.
  - Employees can waive this requirement.

Chamber of Commerce v. Bonta

- AB 51 – Banned certain mandatory arbitration agreements, imposed criminal penalties.
- Was to take effect January 1, 2020.
- Lawsuit filed in EDCA to enjoin it on FAA grounds.
- December 30, 2019 - blocked via TRO. (Confirmed by PI in January 2020.)
- Stay of enforcement appealed to 9th Circuit.

Chamber of Commerce v. Bonta

- **September 16, 2021** – 2 to 1 decision says no conflict with FAA, and CA is free to prohibit mandatory arbitration.
- Odd Result: CA law may prohibit employers from seeking mandatory arbitration agreements with their employees *if the agreement is not made*.
- Dissent pointed out the absurdity of this holding, and split circuit issue (1st and 4th).
- **October 2021** – Chamber filed a petition for rehearing in the 9th Circuit. Briefing finished in December….
- Law remains enjoined in the meantime.

Labor Commissioner Enforcement (SB 572)

- Allows Labor Commissioner to place a real property lien against employer's real property for amounts due to Commission pursuant to "any citation, findings, or decision that has become final and may be entered as a judgment."
- Brings enforcement mechanisms in line with what was previously provided for employee recovery. (Labor Code section 98.2.)
- Takeaway: Timely pay all Labor Commissioner judgments!

Wasito v. Kazali

- What is a 998?
- Facts:
  - When former hotel employees were terminated, they were paid wages but not their bonuses.
  - Employees sued. Employer made 998 Offer for 300K. After making offer, employer paid employees 75K in bonuses, interest and penalties, which employees accepted.
  - At trial, jury ruled in favor of employees and awarded about $1,200. Both sides then sought costs, with employer trying to use the 998 Offer to seek post-offer costs.

Wasito v. Kazali

- **Trial Court:** The cost-shifting provision of section 998 did not apply. Labor Code sections 206 and 206.5 preclude a section 998 offer that resolves disputed wage claims if there are undisputed wages due at the time of the offer.
- Employees were awarded costs plus $66,700 in attorney fees as the "prevailing party," because they "were paid substantially more . . . after filing the case."
- **Court of Appeal**: Affirmed.

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