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California Seminar

Everything Employers Need to Know About California's New Warehouse Quota Law (AB 701)

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January 25, 2021

AB 701 in a Nutshell

- On September 22, 2021, California Governor Gavin Newsom signed Assembly Bill 701 (AB 701) which regulates the use of quotas at California warehouse distribution centers.

- Requires employers with large warehouse distribution centers to disclose quotas and pace-of-work standards to each employee upon hire or within 30 days of the law going into effect.

AB 701 in a Nutshell

- Employers must:
  - Provide a written description of each quota to which the employee is subject to,
  - Including the quantified number of tasks to be performed or materials to be produced or handled, within a defined period of time,
  - And any adverse employment action that may result from failure to meet the quotas.

Legislative History

The bill was read for the first time in February 2021 and was approved by Governor Newsom on September 2021. Bill was authored by Assemblywoman Lorena Gonzalez, D-San Diego

- Arguments in support of the bill
  - With the increased demand for low cost fast deliver, dangerous conditions have been created in these warehouses. By raising the standards of the biggest companies (like Amazon and Walmart) good jobs can be created throughout the industries
- Arguments in opposition of the bill
  - The bill will create a new private right of action based on vague standards, increase PAGA litigation, create a never-ending presumption of retaliation, and is based on fundamental misunderstandings of performance metrics

Legislative History

Prior Legislation

- AB 3056 of 2020 proposed to prohibit warehouse distribution employers, as defined, from imposing a quotas which counts reasonable amounts of time spent on legally mandated breaks and similar activities towards the quota or results in the employee having less time to complete the quota
- This bill failed passage on the Senate Floor

AB 701

What is a quota? (Lab. Code § 2100, subd. (h).)

- "[A] work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard."
- This would include:
  - processing a required number of packages in a specific amount of time, such as 200 packages per hour.
  - having to clear all packages from a conveyor belt based on belt speed,
  - clearing all incoming or outgoing inventory within a single shift, or
  - filling a certain number of containers in a specific time or in one work shift.

What is a Warehouse Distribution Center?

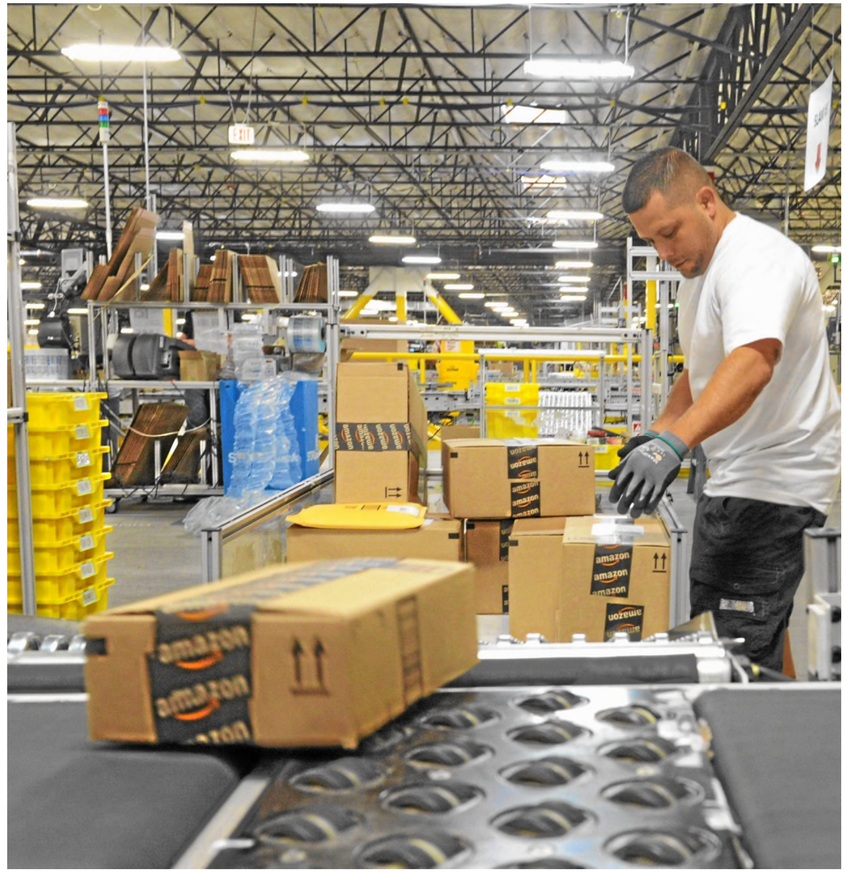
- AB 701 broadly applies to establishments that:
  - are primarily engaged in operating merchandise warehousing and storage facilities,
  - that sell durable and/or nondurable goods to other businesses, or
  - that are primarily engaged in selling merchandise using non-store means, such as through the Internet or catalogs.

What is a Warehouse Distribution Center?

- Rather than provide a clear definition, AB 701 cites four North American Industry Classification System ("NAICS") Codes to define a "warehouse distribution center":
- 493110 – General Warehousing and Storage;
- 423 – Merchant Wholesalers, Durable Goods;
- 424 – Merchant Wholesalers, Nondurable Goods; and
- 454110 – Electronic Shopping and Mail-Order Houses.

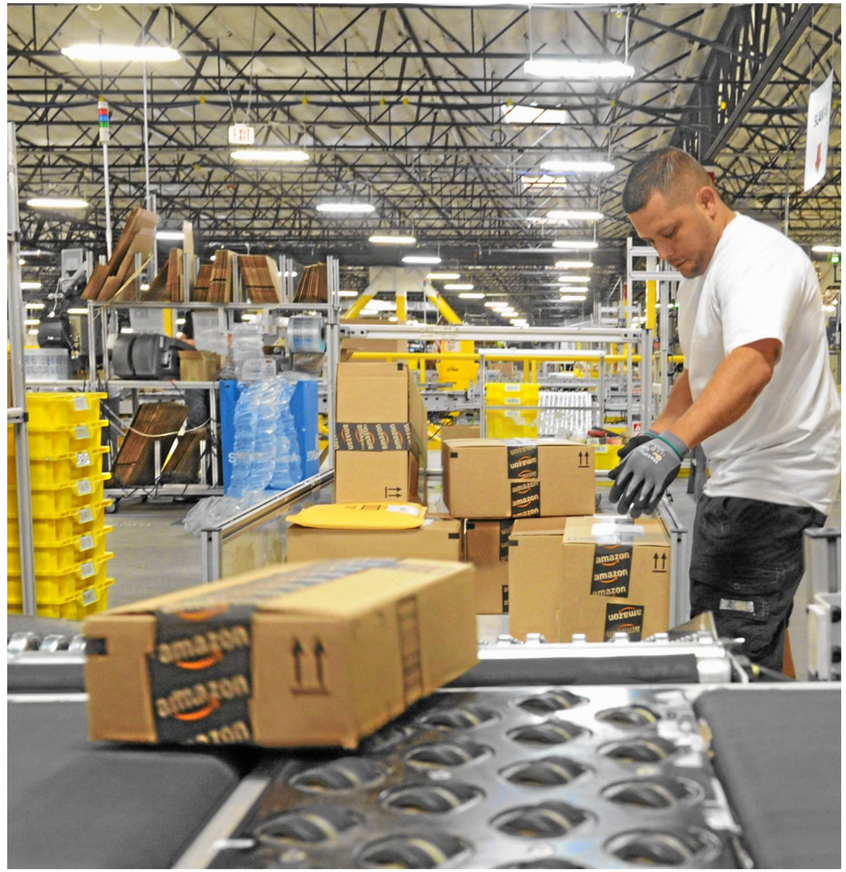
Which Warehouses are Covered?

- Employers who directly or indirectly control 100 or more employees at a single warehouse distribution center or
- Employers with 1,000 or more employees at one or more warehouse distribution centers in California.
- Workers provided by outside staffing agencies may also be included where the employer controls the terms and conditions of employment for those employees. (Lab. Code § 2100, subd. (f).)



Which Warehouses are Covered?

- Employers should carefully review each applicable NAICS Code definition to determine if AB 701 applies.
- The law specifically exempts establishments that qualify as Farm Product Warehousing and Storage under NAICS Code 493130.
- Under AB 701, it is irrelevant which NAICS Code the company has assigned to itself or another entity has assigned to it.



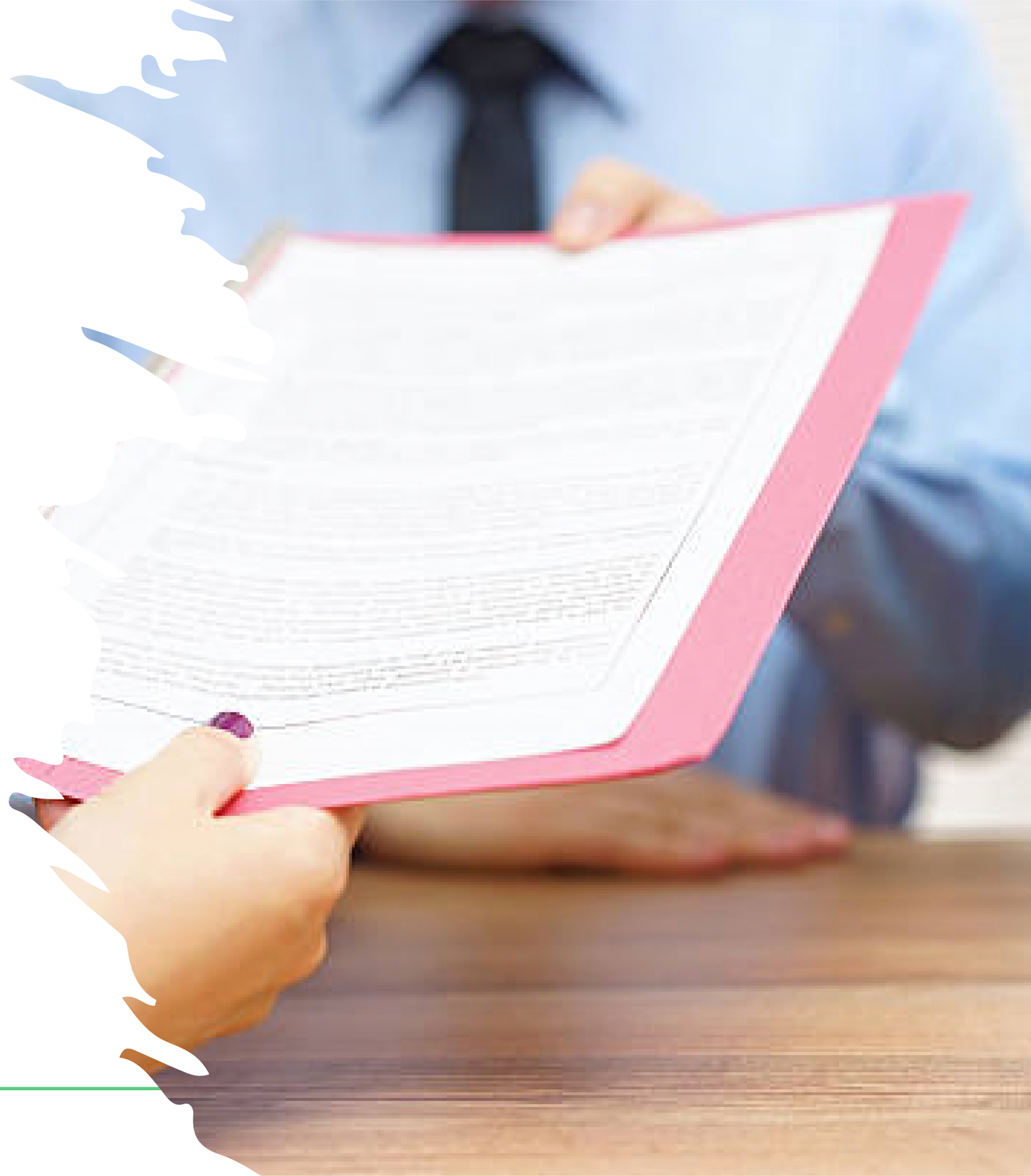
When Must Employers Provide Information About Quotas?

- By January 31, 2022, employers must provide to each employee a written description of each quota the employee works under. This includes the number of tasks to be performed or materials that must be produced or handled within a time period, and any potential adverse employment action that could result from failing to meet the quota.

- Employers must provide new employees with written description of each quota upon hire. (Lab. Code § 2101.)

- What is an “Adverse Employment Action?”

    - An “adverse employment action” is any action taken by an employer that materially and negatively affects employment. Some examples of adverse employment actions include a negative performance review, a reduction in pay or hours, or termination



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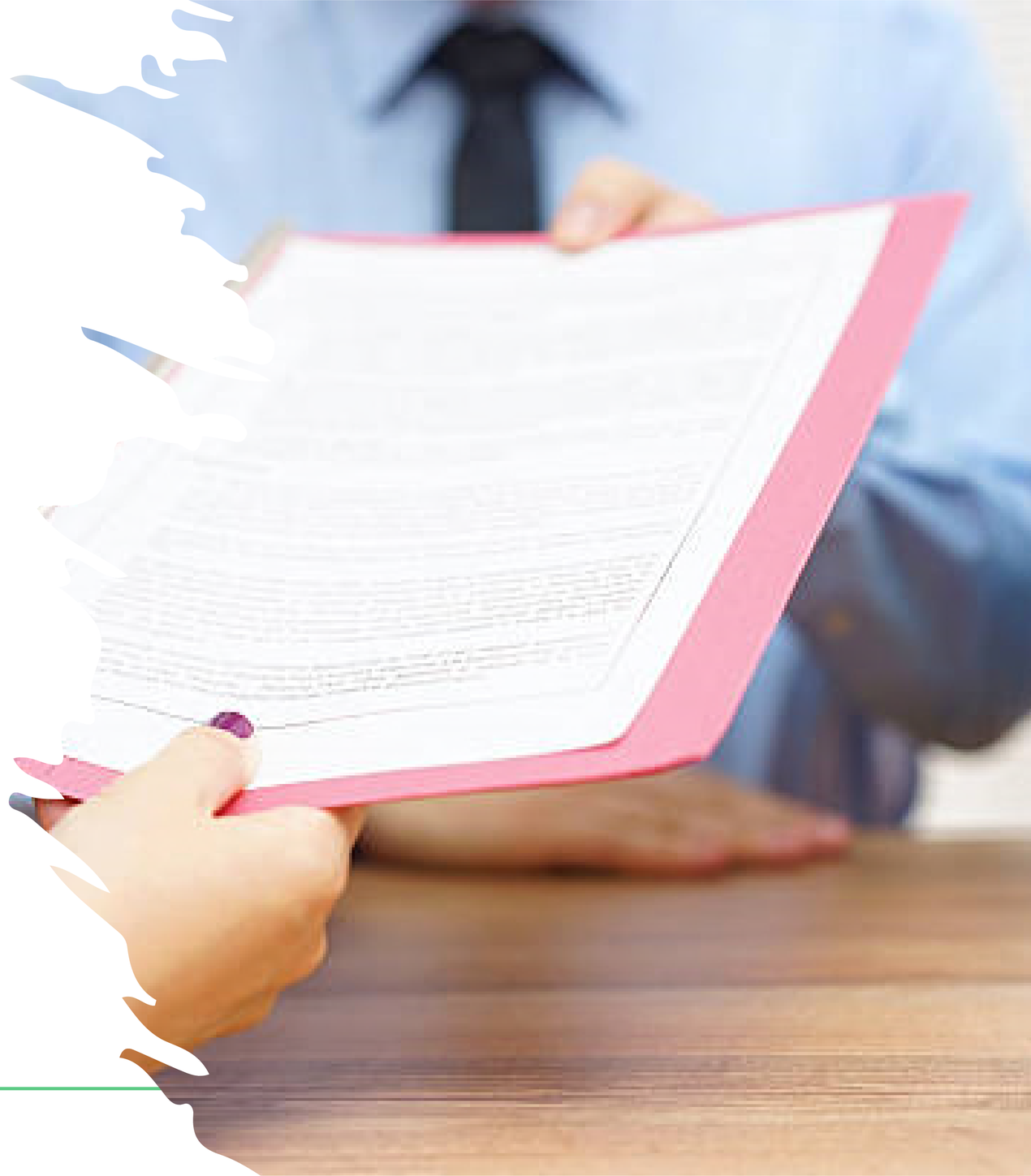
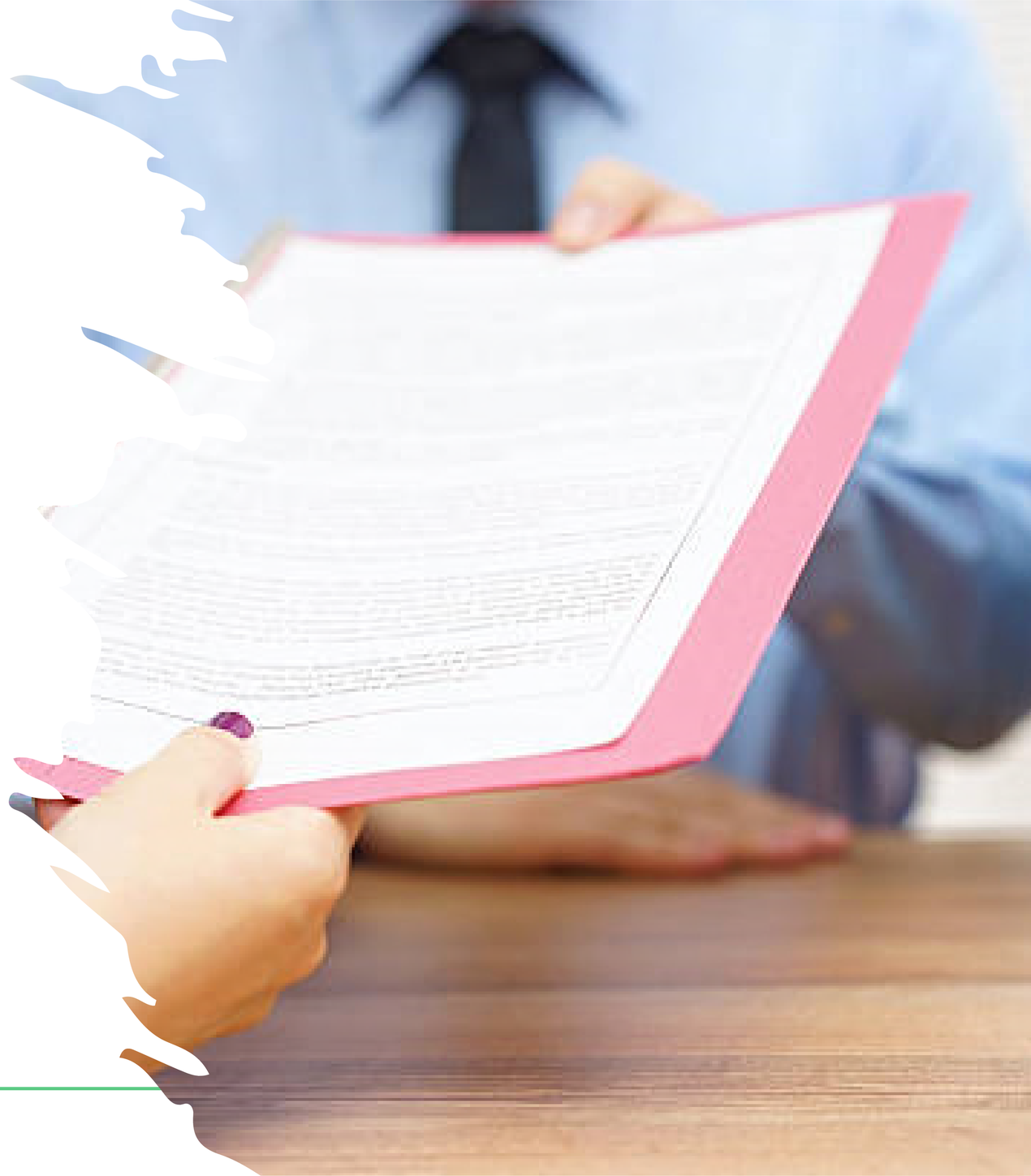


What is an Adverse Employment Action?

- Any action taken by an employer that materially and negatively affects employment.
- Examples of adverse employment actions include:
  - negative performance review,
  - reduction in pay
  - reduction in hours,
  - Demotion
  - or termination



May Employers Use Quotas?

- Yes, but AB 701 places limits.
  - An employee cannot be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities (including reasonable travel time to and from bathrooms),
  - or compliance with occupational health and safety standards.
- An employer cannot take adverse employment action against an employee for failing to meet an unlawful quota or a quota that has not been disclosed to the employee. (Lab. Code § 2102; *see* Lab. Code § 2103.)

May Employers Use Quotas?

- A quota is likely unlawful if it prevents compliance with
  - meal or rest periods,
  - use of bathroom facilities (including reasonable travel time to and from bathroom facilities)
  - or occupational health and safety laws in the Labor Code or division standards
- A quota may be unlawful if it directly or indirectly precludes employees from exercising these statutory rights.
- For example, a quota that requires that employees always be engaged in productive activity during work hours would likely be unlawful as it would directly prevent employees from taking mandated meal and rest periods, and prevent them from using bathroom facilities during work hours.

May Employers Use Quotas?

- A quota may not be so high that:
  - if an employee takes meal and rest breaks,
  - goes to the bathroom,
  - or attempts to exercise their rights under occupational health and safety standards, they will fail to meet the quota.
- Such a quota indirectly precludes an employee from exercising these statutory rights and is also likely unlawful.
- An employer cannot take adverse employment action against an employee for failing to meet an unlawful quota or a quota that has not been disclosed to the employee. (Lab. Code § 2102; *see* Lab. Code § 2103.)

Information That Must Be Provided to Employees

Current Employees

- If a current employee believes that meeting a quota prevented them from exercising their rights to a meal period or rest period, or from exercising their rights regarding occupational health and safety standards, they may:
  - request a written description of the quotas they are subject to and a copy of their most recent 90 days of their personal-work-speed data.
  - The employer must provide the information within 21 days. An employer that does not monitor work-speed data need not provide it. (Lab. Code § 2104.)

Information That Must Be Provided to Employees

Former Employees

- If a former employee believes that meeting a quota prevented them from exercising their rights to a meal period or rest period, or from complying with occupational health and safety standards, they may request:
  - a written description of the quotas they were subject to and a copy of the most recent 90 days of their personal-work-speed data before separation.
  - The employer must provide the information within 21 days. An employer that does not monitor work-speed data need not provide it. A former employee is limited to one request. (Lab. Code § 2104.)

Enforcing AB 701

- Current *and* former employees may bring an action for injunctive relief for any alleged violations of AB 701.
- It also allows those employees to recover costs and attorneys' fees if they prevail.
- Plaintiffs may also include AB 701 violations in PAGA actions.
- However, employers may be able to cure alleged violations before plaintiffs file a lawsuit.
- Local district attorneys and city attorneys may enforce the provisions of the new law.

AB 701's Additional Features

- AB 701 requires the labor commissioner issue a report to the Legislature by January 1, 2023, disclosing:
  - the number of claims filed under the new law,
  - data on warehouse production quotas in warehouses in which the Division of Workers' Compensation has indicated that annual employee injury rates are above the industry average, and
  - the number of investigations undertaken and enforcement actions initiated, per employer.

AB 701's Additional Features

- AB 701 provides that:
  - if a particular worksite or employer is found to have an annual employee injury rate of at least 1.5 times higher than the warehousing industry's average annual injury rate,
  - the Division of Occupational Safety and Health or the Division of Workers' Compensation shall notify the labor commissioner, and
  - the labor commissioner must determine whether an investigation of violations is appropriate.

Common Questions

- Does AB 701 law protect employees from retaliation for requesting information, complaining about quotas, or failing to meet undisclosed quotas?
  - Yes.
    - The new law prohibits employers from retaliating against employees for requesting information about quotas, complaining about the impact of a quota on their ability to take meal or rest breaks or bathroom breaks, or from exercising their rights regarding health and safety standards. Employers cannot retaliate against employees for failing to meet an undisclosed quota. (Lab. Code § 2102.)
    - If an employer takes any adverse employment action against an employee within 90 days of the employee making their first request of the year for information about a quota or personal-work-speed data or making a complaint related to a quota to the Labor Commissioner, other agency, or the employer, there is a rebuttable presumption of unlawful retaliation. (Lab. Code § 2105.)

Common Questions

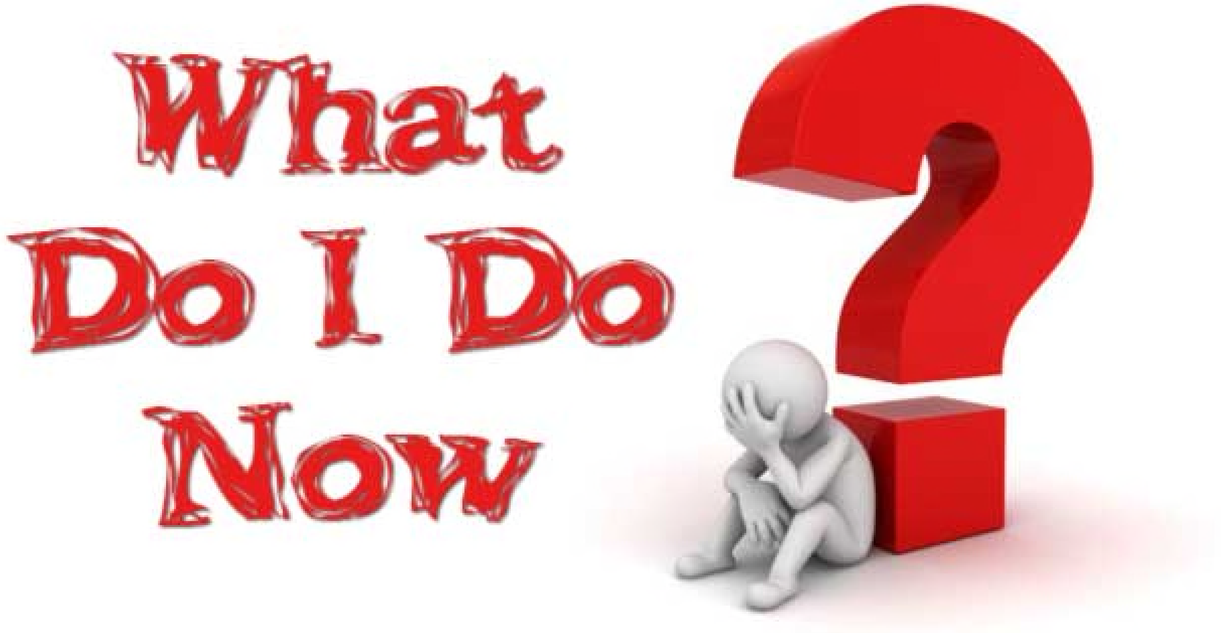
- What are the penalties for noncompliance?
  - If an employer does not comply with an employee's *written* request for written descriptions of quotas and their personal-work-speed record, an employee can file an individual wage claim for penalties under Labor Code section 1198.5.
  - The employee's request must be in writing and the employer must provide the records within 30 days per Labor Code section 1198.5. A violation will subject the employer to a $750 penalty.
  - If an employee cannot take a meal period or rest period because they must comply with a quota or for other reasons, the employee may seek premium wages. The employee can file an individual wage claim for premium wages.

What Should Employers do Now

- Evaluate any current quotas in place:
  - Ensure quotas do not prevent employees from exercising their rights to meal period/rest periods,
  - or from exercising their rights regarding occupational health and safety standards

What Should Employers do Now

- Provide current employees with compliant written descriptions of quotas (this is due by January 31, 2022)
- Provide new employees with compliant written descriptions of quotas upon hire



Questions?

Thank You

Legal Disclaimer
This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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Case Updates: Discrimination, Harassment, Retaliation, Wrongful Termination, and Wage & Hour

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January 25, 2021

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Session 2's Road Map

1) Equal Pay Act, Title VII Disparate Impact & Treatment
2) Hostile Work Environment
3) Employment Discrimination & Stray Remarks
4) Pretext & Wrongful Termination
5) Meal Periods & Rounding
6) Wage Statements & Preemption
7) Joint Employer
8) Wrongful Termination & Compensatory Damages
9) Regular Rate of Pay Encompasses Nondiscretionary Payments

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Retention Raises May Be Unlawful

Freyd v. Univ. of Oregon, 990 F.3d 1211 (9th Cir. 2021)

Equal Pay Act

- To make a showing, a plaintiff must show that the jobs being compared (not the individuals holding the jobs) are substantially equal.
  - "Substantially equal" does not necessarily mean "*identical*."
  - The jobs to be compared must have a "common core" of tasks.

Title VII Disparate Impact

- The Ninth Circuit held that to make a prima facie case of disparate impact, a plaintiff must show that a facially neutral employment practice has a significantly discriminatory impact on a group protected by Title VII.
- The plaintiff must also establish that the challenged practice is not job related nor a business necessity.
- Even if the practice is job related and consistent with business necessity, though, the plaintiff may still prevail by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs.
- Plaintiffs generally cannot attack an overall decisionmaking process in the disparate impact context, but must instead identify the particular element or practice within the process that causes an adverse impact.

Title VII Disparate Impact

- Freyd challenged a specific employment practice of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority.
- Freyd pointed out that when a competing offer is made to a faculty colleague to lure Oregon's faculty elsewhere it demonstrates that Oregon is out of step with respect to salary, and a retention raise should be offered to all comparable faculty members.
- Freyd argued, backed by statistics and studies, that female faculty members, for a variety of reasons related to gender, are less willing to move and thus less likely to entertain overtures from another institution. That puts them at a disadvantage vis-a-vis their male colleagues.

Title VII Disparate Impact

- The Ninth Circuit found Freyd put forth evidence that the University's retention raises caused a significant discriminatory impact and a reasonable jury could find that her statistical analysis showed a prima facie case of disparate impact, even where a sample is small.

Title VII Disparate Impact

- University did not show a business necessity
- Even if the University's policy represented a business necessity, Freyd may show that there is a viable alternative practice that would serve the University's needs.
- Freyd's Proposal: "when [the University] gives a retention raise to a Psychology professor, it should evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority, and give affected individuals a raise."

Title VII Disparate Treatment

- A plaintiff "must offer evidence that 'gives rise to an inference of unlawful discrimination,' either through the framework set forth in *McDonnell Douglas Corp. v. Green* or with direct or circumstantial evidence of discriminatory intent."
  - A plaintiff must show: "(1) [s]he is a member of a protected class; (2) [s]he was qualified for h[er] position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside h[er] protected class were treated more favorably."
- Once a prima facie case has been shown, the burden then shifts to the defendant to show a legitimate, nondiscriminatory reason for the challenged actions. The burden then returns to the plaintiff, who must show that the proffered nondiscriminatory reason is pretextual.

Employers Should Be Mindful of Retention Raises

- Starting pay, annual salary increases, and retention raises are often used to recruit and retain top talent.
- Be mindful when possible who receives it and if there is a disparate impact on employees based on a protected class (i.e. gender).

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Hostile Work Environment

Fried v. Wynn Las Vegas, LLC, 18 F.4th 643 (9th Cir. 2021)

Employer's Inaction to Harassment Complaint May Create a Hostile Work Environment

Fried v. Wynn Las Vegas, LLC, 18 F.4th 643 (9th Cir. 2021)

Fried claimed :

(1) his manager suggested he seek employment in a field that is not a predominantly female;

(2) his coworkers' suggestions that he and another male manicurists should wear a wig to get more clients;

(3) his manager failed to respond to his complaint that a customer had sexually propositioned him; and

(4) Fried's coworkers' comments that he should take the customer's proposition as a compliment and that Fried actually wanted to have sex with the customer.

Hostile Work Environment

- To establish that he was subjected to a hostile work environment, Fried was required to show:
  1) he was subjected to verbal or physical conduct of a sexual nature,
  2) that the conduct was unwelcome, and
  3) that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Hostile Work Environment

- To determine whether an environment is sufficiently hostile or abusive to violate Title VII, a court must consider all the circumstances, including:
  - the frequency of the discriminatory conduct;
  - its severity;
  - whether it is physically threatening or humiliating, or a mere offensive utterance;
  - and whether it unreasonably interferes with an employee's work performance.

Actions by a Third Party

- An employer can create a hostile work environment by failing to take immediate and corrective action in response to a coworker's or third party's harassment or discrimination that the employer *knew or should have known* about.

Hostile Work Environment

- The Ninth Circuit held the manager's inaction in response to Fried's complaint about the customer, was sufficient to create a hostile work environment because of the manager's failure to take immediate corrective action and directed Fried to return to the customer and complete his pedicure.

- The panel also reversed the district court's ruling that coworkers' breakroom comments on the customer's sexual proposition were insufficiently severe or pervasive to support Fried's claim. The panel instructed the district court on remand to reconsider the *cumulative effect* of the coworkers' comments.

Practice Pointer

- *Fried* highlights the importance of investigating an employee's complaint about discrimination or harassment, even when committed by a third-party.

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Employment Discrimination & Stray Remarks

Jorgensen v. Loyola Marymount Univ., (2021) 68 Cal. App. 5th 882

Wanting ‘Someone Younger’ is Relevant to Age-Bias Suit, Even if it’s for Different Job

- In opposition to LMU’s motion, Jorgensen provided a declaration from a former employee who swore that the assistant dean told her that she “wanted someone younger” for another position *that was not being sought by Jorgensen*.
- The Court held the trial court erroneously excluded this evidence, finding that a “stray remark” may have relevance in this case because it may influence the decision maker on issues, including hiring and promotion.

Practice Pointer

- This decision highlights the dangers of making comments, including stray remarks, related to an employee's age or any other protected characteristic, even if the comment was made by a non-decision-maker.

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Pretext & Wrongful Termination

Wilkin v. Community Hospital of the Monterey Peninsula, Calif. Ct. App., No. G060420 (Nov. 18, 2021)

Pretext

- To allege discriminatory termination, the plaintiff must first show that she was terminated even though she was performing the job competently and that circumstances point to a discriminatory motive.
- The employer must then produce evidence showing that it took its actions for a legitimate, nondiscriminatory reason.
- When a legitimate reason for the discharge exists, the burden shifts back to the employee to demonstrate that the employer's reasons are a pretext for discrimination.

Practice Pointer

- *Wilkin* highlights the importance of documenting and clearly articulating the bases for adverse employment actions

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Meal Periods & Rounding

Donohue v. AMN Servs., LLC (2021) 1 Cal. 5th 58, 481 P.3d 661

Meal Periods & Rounding

- Employers must generally provide employees with one 30-minute meal period that begins no later than the end of the 5th hour of work and another 30-minute meal period that begins no later than the end of the 10th hour of work. (Lab. Code, § 512, subd. (a); Industrial Welfare Commission (IWC) wage order No. 4-2001, § 11(A) (Wage Order No. 4).)

Timekeeping System Rounded Time Punches

- AMN's timekeeping system rounded the time punches to the nearest 10-minute increment.
  - For example, if an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:25 a.m., Team Time would have recorded the time punches as 11:00 a.m. and 11:30 a.m. Although the actual meal period was 23 minutes, Team Time would have recorded the meal period as 30 minutes.
- Similarly, if an employee clocked in for work at 6:59 a.m. and clocked out for lunch at 12:04 p.m., Team Time would have rounded the time punches to 7:00 a.m. and 12:00 p.m. In that case, the actual meal period started after five hours and five minutes of work, but Team Time would have recorded the meal period as starting after exactly five hours of work.

Meal Period Timing is Central to Worker Welfare

- First, employers cannot round time punches (i.e. adjusting the hours that an employee has actually worked to the nearest preset time increment) — in the meal period context.

Rebuttable Presumption of Noncompliant Meal Periods

- Second, time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.

Recommendation for Employers

- Assess your meal period policies and practices, including those that relate to recording meal periods.
- Consider timekeeping systems that track the amount of time employees spend taking meal periods and automatically prompt employees to confirm they voluntarily chose to take a short or late meal period, or to skip the meal period entirely.

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Regular Rate of Pay Encompasses Nondiscretionary Payments

Ferra v. Loews Hollywood Hotel, LLC, 11 Cal. 5th 858, 489 P.3d 1166 (2021)

Overtime, Double Time, and Premium Pay

- Under California law, employers must provide employees with overtime pay when employees work more than a certain amount of time. (Lab. Code, § 510, subd. (a) (section 510(a).
  - To calculate overtime pay, section 510(a) requires an employer to compensate an employee by a multiple of the employee's "regular rate of pay."
- If an employer does not provide an employee with a compliant meal, rest, or recovery period, section 226.7, subdivision (c) (section 226.7(c)) requires the employer to "pay the employee one additional hour of pay at the employee's regular rate of compensation."

What is Regular Rate of Pay?

- The Sup. Court of CA held that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages.
- The decision applied retroactively.

Potential Next Steps

- Audit Records
- Update Premium Pay Calculations
- Consider Meal Period Waivers

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Wage Statements & Preemption

Ward v. United Airlines, Inc., 986 F.3d 1234 (9th Cir. 2021)

The "*Ward* Test"

- Labor Code section 226 applies to wage statements provided by an employer if the employee's principal place of work is in California.
- Here, the Supreme Court set forth a set of principles defining § 226's permissible reach – the "*Ward* test".
- This test is satisfied if the employee works a majority of the time in California or, for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California.

Practice Pointers

- *Ward* has ramifications for all California employers that employ interstate transportation workers or employees who work a majority of the time in California.
- Employers should carefully review their wage statements for compliance with California law, as they will be unable to rely on the federal preemption arguments that were raised in *Ward* as defenses to wage statement claims.

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Joint Employer

Medina v. Equilon Enterprises, LLC, 68 Cal. App. 5th 868, (2021)

Joint Employer

- Shell moved for summary judgment, arguing Shell was not plaintiff's employer as a matter of law.
- The Court found that Shell indirectly controlled plaintiff's wages and working conditions and suffered or permitted plaintiff to work at Shell's stations---either of which was enough to make Shell plaintiff's joint employer.

What’s Next

- The appellate court's ruling in this case differs from other courts' rulings in similar cases. California's appeals courts are divided into 6 appellate districts based on geography.
- A decision of the appeals court in one district is not binding on the appellate courts in the other 5 districts.
- In the event of conflicting appellate court opinions, the California Supreme Court, the state's highest court, may step in to settle the dispute.

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Wrongful Termination & Compensatory Damages

Martinez v. Rite Aid Corp. (2021) 63 Cal. App. 5th 958 *reh'g denied* (May 18, 2021), *review denied* (July 21, 2021)

Damages

- At the 2018 retrial, the jury awarded Martinez $2,012,258 on her wrongful termination claim against Rite Aid, consisting of:
  - $464,258 in past economic loss,
  - $574,000 in future economic loss,
  - $374,000 in past noneconomic loss, and
  - $600,000 in future noneconomic loss.
- The jury awarded Martinez $4M in past noneconomic damages on her intentional infliction of emotional distress causes of action against Rite Aid and her former supervisor.
- Rite Aid appealed.

Damages Reduced

- The Court of Appeal mostly affirmed the verdict in favor of Martinez.
- The Court reduced Martinez's past economic damages award by $140,840—the amount of wages Martinez earned from post-termination employment.
- Actual earnings from substitute employment *must be offset* from lost earnings awards.

Questions?

Thank You

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New California Labor and Employment Laws for 2022

What you need to know to ensure you keep pace with the changes.

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January 24, 2022

The California Legislature has enacted several new laws that will impact the workplace in 2022.

AB 1033 (CFRA Leave Expanded to Employee's Care for Parent-In-Law)

- This bill expands the definition of "parent" under the California Family Rights Act (CFRA) to now include "parent-in-law."
- The new law also clarifies requirements for the pilot program that provides for mediation of disputed CFRA claims involving small employers, defined as those with five to 19 employees. If an employee of a small employer files a CFRA claim with the California Department of Fair Employment and Housing (DFEH) and requests a right to sue, the DFEH will notify the employee of the requirement to mediate if requested by any party prior to filing a lawsuit. The employee must then contact the DFEH's dispute resolution division, which will in turn notify the employer of the right to request mediation before a lawsuit is filed.
- If the employer does not receive the required notification because the employee failed to contact the dispute resolution division before suing, the employer may get a stay of the lawsuit until the mediation is complete or deemed unsuccessful. The statute of limitations is tolled during the pendency of a mediation.

SB 657 (Employers Can Email Required Employee Postings)

- This bill provides that, in any instance in which 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.
- The bill specifies that this does not alter the employer's obligation to physically display the required posting.

SB 331 (New Restrictions on Employee Nondisclosure/Nondisparagement Clauses)

“Silenced No More Act”

- California law previously prohibited confidentiality clauses relating to sex-based discrimination and harassment. SB 331 now amends that Act and imposes further restrictions for employers with respect to severance and settlement agreements.
- Previously: Previously, California Code of Civil Procedure section 1001, enacted as part of SB 820, prohibited confidentiality and non-disparagement agreements that would prevent the disclosure of claims relating to harassment or discrimination based on sex.
- This bill expands this prohibition to extend to all discrimination and harassment (not just sexual harassment).

SB 331 (New Restrictions on Employee Nondisclosure/Nondisparagement Clauses)

"Silenced No More Act" – Litigation Settlement Agreements

- Litigation Settlement Agreements: Effective January 2022, the settlement of litigation or administrative agency actions **may not** include language preventing the disclosure of factual information relating to any type of workplace harassment, discrimination, or retaliation (i.e., claims based on any protected characteristic under the Fair Employment and Housing Act) and not just those based on sex.
  - The amount of the settlement may still be kept confidential and the employee may still request that facts which could lead to the discovery of the employee's identity remain confidential, as previously provided under SB 820.

SB 331 (New Restrictions on Employee Nondisclosure/Nondisparagement Clauses)

"Silenced No More Act" – Severance Agreements

- Separation and Severance Agreements: In addition to expanding the existing protections with respect to sex-based claims to now cover claims on any protected basis under the FEHA, SB 331 also adds Government Code section 12964.5, which applies to employers offering severance agreements, non-disparagement provisions, and separation agreements. Provisions need to be added to include language for the employee's right to disclose unlawful acts in the workplace, whether in a settlement agreement or in a separation or severance agreement. Below is the language that needs to be included:
  - ***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.***

SB 331 (New Restrictions on Employee Nondisclosure/Nondisparagement Clauses)

"Silenced No More Act" – Severance Agreements

- SB 331 now requires that all employees - **even those under 40 years of age** - must be provided with at **least five days** to consider a severance agreement and to be advised that they have the right to consult an attorney regarding the agreement. An employee can sign prior to the five-day period as long as the shortened period is "knowing and voluntary," and not induced by the employer's "fraud, misrepresentation, or threat to withdraw or alter the offer."

- SB 331 **does not** apply to negotiated settlements to resolve a pre-litigation claims under the Fair Employment and Housing Act (FEHA) if (1) the separation agreement is voluntary, deliberate, and informed; (2) the agreement provides consideration of value to the employee; and (3) the employee is given notice and the opportunity to retain an attorney or is represented by an attorney.

- It is important to note that SB 331 **does not prohibit the inclusion of a general release or waiver of all claims** in an agreement related to an employee's separation from employment, provided the release of waiver is otherwise lawful and valid.

AB 1003 (International Wage Theft Punishable as Grand Theft)

- Starting January 1, 2022, AB 1003 adds section 487m to the California Penal Code, which specifically provides for criminal penalties for wage theft by an employer.
- This new law defines the “theft of wages” as “intentional deprivation of wages” as defined in Labor Code section 200. Under this provision of the penal code, an independent contractor is included within the definition of an “employee.”
- This bill makes the intentional theft of wages, including gratuities, in an amount greater than $950 from any one employee, or $2,350 in the aggregate from two or more employees, by an employer in any consecutive 12-month period punishable as grand theft.

SB 807 (Required to Maintain Personnel Records for Four Years)

- SB 807 requires employers to now maintain personnel records for four years from the date of creation, instead of the prior two years, and also four years from the date of termination of an employee or non-hire of an applicant.
- This bill tolls the deadline for the California Department of Fair Employment and Housing (DFEH) to file a civil action pursuant to the FEHA while a mandatory or voluntary dispute resolution is pending.
- Further, when a complaint is filed with DFEH for an alleged violation of certain laws, the time for complainants to file their own civil actions under those provisions would be tolled until either the DFEH files a civil action or one year after the DFEH issues written notice to the complainant that it has closed its investigation and elected not to file a civil action.

SB 762 (New Invoicing Requirements for Employment Arbitration Providers)

- Under the previous California law, for employers with mandatory arbitration agreements, if an employer does not timely pay arbitration fees within 30 days of the due date, the employer waives the right to stay in arbitration, and the employee can proceed in court.
- This bill will now require the arbitration provider to invoice fees/costs to all parties, and to make the invoice due upon receipt unless the arbitration agreement provides otherwise.

SB 606 (Increased Cal-OSHA Enforcement Authority)

- For purposes of California Occupational Safety and Health Act (Cal-OSHA) penalties and citations, this bill creates a rebuttable presumption that a violation committed by an employer that has multiple worksites is enterprise-wide if 1) the employer has a written policy or procedure that violates these provisions, except as specified, or 2) Cal-OSHA has evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer's worksites.

- The bill authorizes Cal-OSHA to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut such a presumption.

- The bill also imposes specified requirements for a stay of abatement pending appeal of an enterprise-wide citation. The bill subjects an enterprise-wide violation to the same penalty provision as willful or repeated violations.

- This bill requires Cal-OSHA to issue a citation for an egregious violation, as defined, for each willful and egregious violation determined by the division, as provided. The bill, except as specified, would require each instance of an employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties. The bill also increases Cal-OSHA’s subpoena authority in investigations.

SB 3 - Minimum Wage Increase

- As of Jan. 1, 2022, for employers of 26 or more employees, the California state minimum wage is $15 per hour; for employers of 25 or fewer employees, minimum wage is $14 per hour.
- This means that as of Jan. 1, 2022, exempt employees in California must be paid a minimum of $62,400 annually for employers of 26 or more employees; and $58,240 annually for employers of 25 or fewer employees.
- "Living wage ordinances" in various locales within the state have been enacted, so local standards should be confirmed to ensure compliance with all governing wage requirements.
- Additionally, "Learners" – those working in occupations in which they have no previous similar or related experience – may be paid at 85 percent of minimum wage during the first 160 hours of employment. Employers will have the burden to establish the "Learner" status of the employee.
- Covered exempt computer professional employees must be paid a minimum of $50 per hour, or $104,149.81 in annual salary.

AB 1561 and AB 1506 – Exemptions from AB 5

- AB 1561 and AB 1506 create further exemptions from AB 5 for certain companies.
- AB 1561 exempts insurance claims adjusters, insurance third-party administrators, construction industry subcontractors, and manicurists from the more strict ABC test for determining whether a worker is an independent contractor.
- AB 1506 adds an exemption for newspaper carriers from the ABC test. These employees are instead governed by the multifactor test previously adopted in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341. These exemptions are set to expire on January 1, 2025.
- AB 1561 also clarifies the relationship between data aggregators and their research subjects. Importantly, this law removes the previous requirement that research subjects are to be paid the minimum wage for the research task in which they have willingly engaged.

SB 93 – COVID-19 Recall Obligations

- SB 93 requires certain employers to rehire employees that were laid off due to COVID-19.
  - SB 93 applies to the following employers: (1) hotels with 50 or more guest rooms, (2) private clubs that contain at least 50 guest rooms that they offer to members for overnight lodging, (3) event centers with more than 50,000 square feet or 1,000 seats used for events, (4) airport hospitality operations, (5) airport service providers, and (6) office services that include janitorial, building or security services.
  - SB 93 does not impose any obligations on employers who are not engaged in these specific industries.
- This law applies to employees if they had been employed by the company for at least six months and were laid off due to COVID-19. Open positions must be offered to laid-off employees within five business days of establishing the position. The offer must be made in writing, by hand, or to the employees' last known physical address, and by email and text if known. The offers must be made to "qualified" laid-off employees, meaning those who held the same or a similar position.

SB 93 – COVID-19 Recall Obligations

- The employee must be given at least five business days from receipt of the offer to respond. If there is more than one employee who is qualified, the employee with the most seniority must be offered the position. Multiple offers can be made to multiple laid-off employees for the same position at the same time, with employment conditioned upon seniority of those who accept. If the company hires a new employee and does not rehire a laid-off employee, then the company must provide written notice to the laid-off employee within 30 days, including the reasons for the decision and the seniority of the employee(s) hired instead.

- Employers who do not comply are subject to a $100 penalty per employee, plus $500 for each day the employee's rights are violated until the violation is cured. This law is enforced by the Division of Labor Standards Enforcement, and can seek reinstatement, front pay, back pay, payment on the value of any of the benefits the employee would have received, and interest on any such amounts, in addition to fines.

Thank You

Legal Disclaimer
This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

Clark Hill