Labor & Employment Law Year in Review

January 11, 2023

Welcome, Logistics, Overview, Trends & Insights

New Laws & Regulations: Part I

PRESENTED BY:
Celia L. Guzman, Esq.
310.312.3766
CLG@msk.com

California Family Rights Act ("CFRA")

- ***As of January 1, 2023***, an employee must be allowed to take CFRA leave for *the diagnosis, treatment or care of a* ***designated person*** *with a serious health condition*.
- **Designated person:** Any individual related by blood or whose association with the employee is equivalent of a family relationship.
- Next Step: Update Handbook and Leave Policy.

Paid Sick Leave ("PSL")

- ***As of January 1, 2023***, an employee must be allowed to take PSL for the diagnosis, treatment or care of a **designated person** with a health condition.
- **Designated person:** A person identified by the employee at the time the employee requests paid sick days.
  - Now a PSL "family member"
- ***PSL "designated person" has a broader definition than CFRA "designated person."***
- Next Step: Update Handbook and Leave Policy.

San Francisco Family Friendly Workplace Ordinance ("FFWO")

- FFWO significantly expanded, ***as of July 12, 2022***.
- **Biggest Change:** FFWO now *guarantees* flexible work arrangements for covered employees with **qualifying caregiver responsibilities**, unless undue hardship for employer.
  - **Qualifying caregiver responsibilities**: A child or children for whom the employee has assumed parental responsibility; a person(s) with serious health condition in a family relationship with the caregiver; a person who is age 65 or older in a family relationship with the caregiver.
- New process and time frames for responding to employee's written request.

FFWO Cont.

- Applies to employers with 20+ employees *globally*.
- FFWO covered employees:
  - Employees in SF; and
  - Employees who telework *outside* SF, if employer has a worksite within SF where employees may work or could have worked before COVID-19.
  - Minimum 6 months employment required and 8 hours/week of work.

Fair Employment and Housing Act ("FEHA")

- **Effective January 1, 2023: New Category: Reproductive health decision-making**
- **Reproductive health decision-making** includes, but is not limited to, a decision to use or access a particular drug, device, product or medical service for reproductive health.
- Next Step: Update Handbook and Anti-Discrimination and Harassment Policy.

New Reproductive Health Decision-Making Laws

- CA employers cannot release medical info. relating to abortion care in response to a **subpoena or out-of-state request** that will interfere with employee rights under the CA Reproductive Privacy Act.
- CA employers cannot share info. or assist in an **out-of-state investigation** related to an abortion legally allowed in CA.

Bereavement Leave

- ***Effective January 1, 2023***, Employers with 5+ employees must provide **qualified employees** with *5 days of unpaid bereavement leave* for the death a **qualifying family member**.
  - **Qualified employee**: An employee who has been employed for at least 30 days before going on leave.
  - **Qualifying family member**: An employee's spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.

Bereavement Leave (cont.)

- Employer can require appropriate proof/documentation within 30 days of first day of bereavement leave.
- *No limit on how many times a qualified employee can be eligible for bereavement leave in a given year*.
- Employer cannot take adverse action against a qualified employee for taking leave.
- Next Step: Update Handbook and Leave Policy.

“Emergency Condition” Employee Protections

- ***Effective January 1, 2023***, Employees must be allowed to leave or refuse to go to work during an **emergency condition**, and must be allowed to access their cellphones for safety purposes.
- **Emergency condition**: A disaster or extreme peril to safety at the workplace caused by natural forces or a crime, or an evacuation order due to a natural disaster or crime at the workplace, employee’s home or their child’s school.
  - ***Definition explicitly excludes health pandemics***.
- Next Step: Update Handbooks.

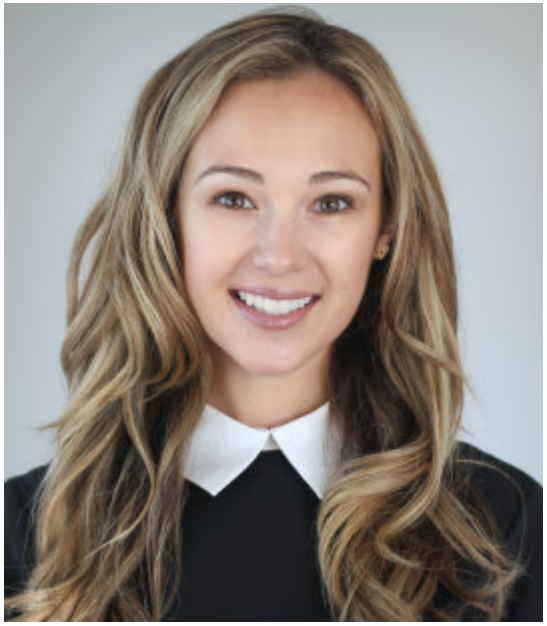
Employee Off-Duty Cannabis Use Protections

- ***Effective January 1, 2024***, CA employers cannot discriminate against an individual in hiring/termination/any term or condition of employment based on their use of marijuana *off the job and away from the workplace*.
  - And no adverse action if an individual tests positive for "nonpsychoactive cannabis metabolites" during a drug screening test.
- Next Step: Update Handbook, Drug-Free Workplace Policy and Employment Application/Onboarding Documents (by 2024).

Paid Family Leave ("PFL") Benefits

- ***Effective January 1, 2025***, PFL benefits will increase to 90% of weekly income for low-wage workers.
- Other workers will receive PFL benefits of 70% of weekly income, up to a cap.
  - Current cap: $1,539/weekly, but adjusted each year.
- No additional business contributions will be required.

New Laws & Regulations: Part II



PRESENTED BY:
Thea Rogers, Esq.
310.312.3182
txr@msk.com

California Consumer Privacy Act

- The CCPA was amended by the California Privacy Rights Act ("CPRA").
- CA employees, contractors and job applicants of CCPA-covered companies are now "consumers" guaranteed CCPA consumer privacy rights.
- Effective January 1, 2023, but not enforceable until July 1, 2023.

What Privacy Rights Must Be Provided?

1. Right to Know.
2. Right to Delete.
3. Right to Correct.
4. Right to Opt-out.
5. Right to Limit.
6. Right to Non-Discriminatory Treatment.

These six rights must be provided to all employees, contractors and job applicants.

CCPA Enforcement

- Applies to violations on or after July 1, 2023.
- Civil penalties: $2,500/unintentional violation; $7,500/intentional violation. No cure period.
- Data breach statutory damages: $100-$750 per consumer, per incident, or actual damages (whichever is greater).

COVID-19 Prevention Non-Emergency Regulations

- Cal-OSHA's Standards Board voted to adopt non-emergency COVID-19 prevention regulations (the "Non-Emergency Standard").
- Awaiting approval from the Office of Administrative Law.
- The Non-Emergency Standard will make it easier for employers to comply with COVID-19 obligations and provide consistent protections to workers.

Non-Emergency Standard Changes

1. Removal of daily symptom screening.
2. Removal of exclusion pay requirements.
3. Revised notice requirements.
4. New outbreak protocols.
5. New ventilation requirements.
6. New definitions for “close contact” and “exposed group.”

California COVID-19 Supplemental Paid Sick Leave Ends

- As of December 31, 2022, California employers are not required to provide supplemental COVID-19 paid sick leave to employees.
- Local ordinances remain in effect.
- The City of Los Angeles' COVID-19 supplemental paid sick leave ordinance is likely to expire on February 15, 2023.

Navigating Confidentiality and Non-Disparagement Provisions

PRESENTED BY:
Gary M. McLaughlin, Esq.
310.312.2005
gmm@msk.com

Key California and Federal Laws

California Government Code § 12964.5 – Restricts non-disparagement provisions (expanded in 2022)

California Code of Civil Procedure § 1001 – Restricts confidentiality in settlements of harassment, discrimination, and retaliation claims (expanded in 2022)

Federal Speak Out Act – Restricts pre-dispute non-disclosure and non-disparagement provisions regarding sexual harassment/assault (new since December 2022)

Cal. Gov't Code § 12964.5

It is unlawful to require an employee to sign a non-disparagement agreement/provision that denies employee the right to disclose information about "unlawful acts in the workplace":

- In exchange for a raise or bonus;
- As a condition of employment; or
- In a separation agreement (**new in 2022**)

Agreement, document, or provision in violation is contrary to public policy and unenforceable.

Does **not** apply to negotiated settlement agreements to resolve a claim filed by an employee with court, administrative agency, alternative dispute resolution forum, or employer's internal complaint process.

"Information about unlawful acts in the workplace" includes, but is not limited to, information about harassment or discrimination or "any other conduct that the employee has reasonable cause to believe is unlawful."

Cal. Code of Civ. Proc. § 1001

Prohibits and voids any provision in a settlement agreement that prevents or restricts the disclosure of factual information related to a **claim filed in a civil or administrative action** regarding sexual assault, sexual harassment, or sex discrimination, and (**new in 2022**) other forms of harassment/discrimination/retaliation.

Does **not** prohibit provision precluding disclosure of the amount paid in settlement.

Does **not**, at the request of the claimant, prohibit a provision that shields the identity of claimant and facts that could lead to the discovery of claimant's identity.

Does **not** apply if no civil or administrative claim has been filed yet.

Federal Speak Out Act

Prohibits judicial enforcement of pre-dispute non-disclosure and non-disparagement provisions with respect to sexual harassment and sexual assault disputes.

Does not preempt state or local laws governing non-disclosure or non-disparagement clauses that are at least as protective as federal law.

Appears to apply to pre-existing agreements.

Does **not** apply to settlement agreements entered into **after** a dispute arises.

Employment Agreements

Incentive Compensation Agreements

NDAs

Confidential Information and Inventions Agreements (CIIA)

Restrictive Covenant Agreements

Severance Agreements

- NO **non-disparagement** or **non-disclosure** regarding sexual harassment/assault – PERIOD!
- NO **non-disparagement** regarding other unlawful acts in the workplace <u>if condition of employment, continued employment, or raise/bonus</u>
- NO non-disparagement regarding other unlawful acts in the workplace <u>in separation agreement</u>

Pre-Suit Demand Letter

Internal Employee Complaint

Settlement Agreement

Severance Agreement (?)

- CAN get **non-disclosure** and **non-disparagement** if settling a dispute
- CANNOT get **non-disparagement** regarding unlawful acts in the workplace in separation/severance agreement if not settling a dispute
- CANNOT get **non-disparagement** regarding unlawful acts in the workplace in other required employment-related agreements, apart from a settlement

Civil Lawsuit

Administrative Complaint

Settlement Agreement

- NO **confidentiality (non-disclosure)** regarding harassment, discrimination, retaliation, or the existence of a settlement
- CAN keep settlement <u>amount</u> confidential
- CAN get **non-disparagement** regarding other matters

Other Considerations

Notice for Non-Disparagement Provisions

(CAL. GOV'T CODE § 12964.5)

Notice: Any contractual provision restricting an employee's ability to disclose information related to conditions in the workplace must include the following language in substantial form: **"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." (new in 2022)**

Applies to any types of agreements, including separation/severance agreements, except for negotiated settlement agreements to resolve a claim filed by an employee with court, administrative agency, alternative dispute resolution forum, or employer's internal complaint process.

Release of FEHA Claims

(CAL. GOV'T CODE § 12964.5)

Unlawful to require an employee to sign a release of FEHA claims:

- In exchange for a raise or bonus; or
- As a condition of employment or continued employment.

Any agreement or document in violation is contrary to public policy and unenforceable.

"Release" includes a statement that the individual does not possess any claim or injury.

Consultation Period for Separation Agreements
(CAL. GOV'T CODE § 12964.5)

An employer offering a separation agreement must (i) notify the employee of the right to consult an attorney, and (ii) provide at least 5 business days to do so. (**new in 2022**)

Applies regardless of the age of the employee (unlike ADEA consideration period).

Employee may voluntarily sign earlier (cannot coerce, or offer incentives, for employee to sign earlier).

Applies to any separation agreement (at least one containing a release of FEHA claims).

No-Rehire Provisions

(CAL. CODE OF CIV. PROC. § 1002.5)

Prohibits and voids any provision in a settlement agreement for an employment dispute that prohibits an aggrieved person from obtaining future employment with the employer.

Does not:

- Preclude an employer and aggrieved person from making an agreement to end a current employment relationship;
- Prohibit a no-rehire provision if the employer has made and documented a good faith determination, before the aggrieved person filed the claim that the aggrieved person engaged in sexual harassment, sexual assault, or any criminal conduct; or
- Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

"Aggrieved person" means a "person who, in good faith, has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process."

Waiver of Right to Testify

(CAL. CIV. CODE § 1670.11)

Prohibits a provision in a contract or settlement agreement that waives the party's right to testify in an administrative, legislative, or judicial proceeding:

- Concerning alleged criminal conduct or alleged sexual harassment by the other party (or agents or employees of the other party); and

- When the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or legislature.

Notable New Harassment/Discrimination Cases

PRESENTED BY:
Te'Aira L. Law, Esq.
310.312.3161
tla@msk.com

Martinez v. Cot'n Wash, Inc.

81 Cal. App. 5th 1026 (2022)

- *Big Question*: Are website-only businesses places of public accommodation under Title III of the Americans with Disabilities Act of 1990 ("ADA")?
- ***Case Facts***: Permanently blind plaintiff attempted to enforce website accessibility requirements under California's Unruh Act.
  - Plaintiff alleged defendant intentionally maintained a website with barriers that prevented him from fully enjoying and accessing the website using screen reading software.

Martinez v. Cot'n Wash, Inc.

81 Cal. App. 5th 1026 (2022)

- ***Trial Court***: There was no violation of Unruh Act nor the ADA.
- ***Court of Appeal:*** Agreed with trial court decision.
  1. The discriminatory effect of a facially neutral policy or action alone does not satisfy the "intentional discrimination" requirement under the Unruh Act; and
  2. Purely online businesses are not covered by the ADA
- *Reminder*: Businesses with both an online and physical presence can still be subject to website accessibility claims.

Roman v. Hertz

(2022 WL 1541865 (SD Cal. 2022))

- *Big Question*: Is an employee protected by the ADA from adverse employment actions (i.e. termination) while sick with mild Covid-19?
- ***Case Facts***: Roman began exhibiting Covid-19 symptoms, so she scheduled a Covid-19 exam.
  - In the days leading up to the exam and the days following the exam she continued to appear at work despite feeling sick and in direct violation of the Company's Covid-19 procedures.
  - She was not permitted to return to work after testing negative because the employer's investigation concluded that she violated Covid-19 procedures.

Roman v. Hertz Local Edition Corp.

(2022 WL 1541865 (SD Cal. 2022))

- ***Trial Court***: The court granted summary judgment in favor of Hertz on all claims because:
  - Covid-19, particularly with minor symptoms, is not recognized as a disability
  - Hertz did not think of Roman as disabled, given they required her and all other employees to do Covid-19 testing and they did not request her medical information

Crest, et al v. Alex Padilla

(Cal. Super. Ct, 2022)

Senate Bills 826 & 979

- *Big Question*:
  - Does Senate Bill 826 (a.k.a. "Women on Boards" law) violate the Equal Protection Clause's prohibition on discrimination based on sex?
  - Does Senate Bill 979 violate the Equal Protection Clause's prohibition on discrimination based on minority or lgbt?

- ***Case Facts***: D.C. based nonprofit Judicial Watch claimed SB 826 and 979 violated the Equal Protection Clause of the California Constitution because:
  - Judicial Watch argued the bills use taxpayer funds to enforce quotas based on gender, race, ethnicity, sexual preference, and transgender status.
  - California argued the bills were necessary to reverse a culture of discrimination and that studies show that more women on corporate boards improves corporate performance and boosts the state economy.
  - California also pointed out that no companies had been fined and no tax dollars had been used to enforce the measure.

Robin Crest, et al v. Alex Padilla

(Cal. Super. Ct, 2022)

Senate Bills 826 and 979

- ***Trial Court***:
  - In the SB 826 action, a trial was conducted and the court found SB 826 was unconstitutional because it treated people differently and State could meet its goal by taking steps that did not differentiate based on sex. The court enjoined SB 826.
  - In the SB 979 action, the court granted summary judgment in favor of Judicial Watch by finding SB 979 violates the Equal Protection Clause.

Allen v. Staples, Inc.

84 Cal. App. 5th 188 (2022)

- ***Big Question***: Did Staples violate the Equal Pay Act by paying a female employee tens of thousands of dollars less than a comparable male employee?
- ***Case Facts:*** Employee was paid $22,000 less than a comparable male employee when she was an Area Sales Manager and $48,000 less than the same male employee when they were both in the Field Sales Director position.

Allen v. Staples, Inc.

84 Cal. App. 5th 188 (2022)

- ***Trial Court***: Granted summary judgment in favor of employer.
- ***Court of Appeal:*** Denied summary judgment on the Equal pay claim because there was a factual issue as to whether there was a pay disparity between the female employee's starting salary, as both an area sales manager and a field sales director.

Price v. Victor Valley Union High Sch. Dist.

85 Cal.App.5th 231 (2022)

- ***Big Question***: Did the employee offer enough evidence to show disability discrimination?
- ***Case Facts:*** Applicant for special needs instructional assistant position sued school district for retaliation and various disability discrimination.
  - Applicant received contingent offer of employment, but it was revoked after she failed the physical examination.
  - Employer determined she was not "medically suitable" for the position due to an increased risk of falling and commented multiple times that she was "liability."
  - Employer also terminated her part-time position and disqualified her from any future employment with the district.

Price v. Victor Valley Union High Sch. Dist.

85 Cal.App.5th 231 (2022)

- ***Trial Court***: Granted summary judgment in favor of employer.
- ***Court of Appeal:*** Price presented sufficient circumstantial evidence that:
  - district considered her disabled;
  - she could perform the essential functions of the job; and
  - her disability was a substantial motivating reason for the District rescinding the offer.

Joseph J. MUNGER, Sr., v. Cascade Steel Rolling Mills, Inc.

(9th Cir., Jan. 9, 2023, No. 21-35573) 2023 WL 128616

- ***Big Question***: Is an employee protected from adverse action for leave taken, if they fail to submit FMLA documentation to the employer?
- ***Case Facts:***. Employee sued employer for interfering with his receipt of FMLA benefits and for terminating him.
  - Employer sent multiple written and verbal requests to employee for medical documentation to support employee's request for FMLA in order to determine if employee's condition qualified for FMLA and in conformity with their policy.
  - Employee failed to respond to the requests for information from the employer.
  - Employee was terminated for violating the attendance policy.

Joseph J. MUNGER, Sr., v. Cascade Steel Rolling Mills, Inc.

(9th Cir., Jan. 9, 2023, No. 21-35573) 2023 WL 128616

- ***Dist. Court***: Granted summary judgment in favor of the employer.
- ***9th Circuit*:** Affirmed trial court ruling because:

  1) employee could not prove employer interfered with receipt of FMLA benefits because he failed to submit documentation showing the leave qualified under FMLA, and

  2) Employee lost on FMLA retaliation claim because he did not take FMLA protected leave, given he failed to provide the documentation mentioned above.

Discrimination & Harassment Notice Updates

- Family Care and Medical Leave and Pregnancy Disability Leave
- Your Rights and Obligations as a Pregnant Employee
- California Law Prohibits Workplace Discrimination and Harassment
- Transgender Rights

Discrimination & Harassment Notice & Pamphlet Updates

- Know Your Rights: Workplace Discrimination is Illegal in the Workplace
- Your Rights Under USERRA
- Safety and Health Protection on the Job (Cal-OSHA)
- Sexual Harassment Pamphlet

Query: Where does the employer post these updates?

***Reach out to MSK if you need help locating these updated notices and pamphlet ***

Employee Trainings

- Discrimination & Harassment
- Diversity & Implicit Bias

Reach out to MSK if you would like to schedule a training

*** Note some of these trainings are mandatory for employers***

Wage and Hour Developments

PRESENTED BY:
Jeremy Mittman, Esq.
310.312.3283
j2m@msk.com

New IRS Mileage Rate

- On January 1, 2023, the IRS mileage rate increased to **65.5** cents per mile for driving done for business purposes.
  - This is a three (3) cent increase from the rate set for the second half of 2022.
  - According to the IRS, this rate applies “to electric and hybrid-electric automobiles, as well as gasoline and diesel-powered vehicles”

2023 Minimum Wage and Salary Increase

- ***On January 1, 2023***, California's minimum wage increased to **$15.50 per hour** for ALL employers, regardless of number of employees.
  - REMEMBER: Because the minimum salary threshold for exempt employees is defined as a multiple of the state minimum wage, this increase means that **the 2023 minimum salary threshold** that must be paid to an *exempt employee* is **$64,480 per year**.
  - Many cities and counties have higher minimum wage rates (e.g., WeHo), but the minimum salary threshold is based exclusively on *state* law.

WeHo Minimum Wage and Time Off Ordinance

- ***As of July 1, 2022*, WeHo employers are** required to provide up to 96 hours of compensated time off ("CTO") per year AND up to 80 hours of uncompensated sick time off per year to **WeHo** covered employees.
  - **WeHo covered employer**: An employer with **any** employees in the city of WeHo
  - **WeHo covered employee**: A ***non-exempt*** employee who works at least 2 hours/week within the city of WeHo.

WeHo Minimum Wage and Time Off Ordinance (cont.)

- Unused accrued CTO can be capped at 192 hours/year.
- *Full-time* employees must also receive at least 80 additional hours of *uncompensated* time off per year for their own sick leave or to care for a family member
- Penalties include attorney's fees, treble damages, and penalty of up to $100 per employee per day!

PAGA Repeal Coming? (Please?!?!)

The California Fair Pay and Employer Accountability Act ("FPEAA")

- On July 22, 2022, the CA Secretary of State announced that the FPEAA – a measure to repeal PAGA – has qualified for the Nov 2024 CA general election ballot.
- The Act would change PAGA in a number of important ways:
  - Employees could no longer sue in civil court on behalf of the State. Instead, they would file a complaint with the LWDA, which would have the sole right to enforce the Labor Code and impose penalties for PAGA violations.
  - Attorneys' fees would no longer be recoverable. Employees would recover 100% of any penalties, assessed (as opposed to 25% currently).
  - Allow employers to cure violations without penalties.

Camp v. Home Depot U.S.A., Inc. 84 Cal.App.5th 638 (2022)

When is rounding of employee time permissible?

- Rounding generally, if neutral on face and as applied? *See See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889 (2012)
- Meal periods? *See Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021)
- *Camp* Facts: Employer had a rounding time policy of 15 minute increments that resulted in overpayment approx. half the time.
  - So why did the employer *lose* here??? Answer: N.G.D.G.U.!!!

Naranjo v. Spectrum Sec. Servs., Inc. 13 Cal. 5th 93 (2022)

***Question*: What is the significance of unpaid meal break penalties?**

Answer: A lot, unfortunately!

- *Naranjo* facts: *"Facts do not cease to exist because they are ignored."* –Aldous Huxley
  - Waiting time penalties. [Yuck!]
  - Inaccurate wage statement penalties. [Double Yuck!]

Johnson v. WinCo Foods, LLC 37 F.4th 604 (2022)

Do you have to compensate for an applicant for undergoing a pre-employment drug test?

- Answer: (next slide, please)

Johnson v. WinCo Foods, LLC 37 F.4th 604 (2022)

Do you have to compensate for an applicant for undergoing a pre-employment drug test?

- Answer: Nope!
- Why?
  - "There are many ways in which employers exercise some degree of control over job applicants. They may require that applicants appear at a certain time and place for an interview; that they undergo a writing or skills test; that they interview in a certain fashion—such as on a panel with other applicants; that they pass a background check; and so on. The fact that employers control the 'manner' in which these activities take place does not magically convert applicants into employees."

Pay Transparency & New York

PRESENTED BY:
Christie Del Rey-Cone, Esq.
917.546.7693
cdr@msk.com

Pay Data Transparency

- **What exactly is a "pay scale"?**
  - ***The salary or hourly range that the employer reasonably expects to pay for the position***.
  - If an employer intends to pay ***a set hourly amount or set piece rate***, and not a pay range, they may provide that set hourly rate or piece rate.
  - If a position's hourly or salary wage is based on ***a piece rate or commission***, the employer must post the piece rate or commission range.
  - ***Tangible benefits*** provided in addition to a salary or hourly wage are not required to be posted.
- **Employers *must* also make pay scale information for a *current* employee's position available upon request.**

Pay Data Transparency (cont.)

- Employers with 100+ employees are *required* to provide a detailed pay data report of employees and contractors to CA's Civil Rights Department ***every May (due May 10, 2023)***.
- There are also new record retention requirements (re: job title and wage history records).
- Next Step: Update all job postings with pay scales, now and going forward. Evaluate whether reporting requirements apply to your company.

NY Pay Transparency Law

- Effective November 1, 2022
- Enforced by the NYC Commission on Human Rights
- Job postings must include “good faith salary range for every job, promotion , and transfer opportunity advertised.”
- Applies to all employers with four or more employees advertising a job that “can or will be performed, in whole or in part, in NYC.”
- Postings seeking any category of worker protected by the NYC Human Rights Law including independent contractors.

msk

NY Pay Transparency Law (cont'd)

- What does "good faith" mean?
  - "The salary range the employer honestly believes at the time they are listing the job advertisement that they are willing to pay the successful applicant."
  - *Must* include a minimum and maximum salary – the range cannot be open ended but the maximum and minimum may be identical if there is no flexibility in range.
  - Salary does not include other forms of compensation or benefits.
- What is an advertisement?
  - Any "written description of an available job, promotion, or transfer opportunity that is publicized to a pool of applicants."

msk

NY Pay Transparency Law (cont'd)

- Enforcement
  - Currently only a private right of action for current employees – not applicants.
  - *However,* anyone can go to the NYCCHR to file a complaint and request an investigation alleging violations of the salary transparency protection.
  - Employers will be given the opportunity to "cure" – *i.e.,* demonstrate that the violation has been fixed within 30 days of receiving the NYCCHR's notice of violation.

msk

Additional Noteworthy Changes to NY Law in 2022

- Amendments to the New York Paid Family Leave Law
  - Effective January 1, 2022
  - Provided clarification that PFL intermittent leave is based on average number of days employee works per week
  - Siblings added to definition of family member for purposes of PFL as of 1/1/2023

- Electronic Monitoring Notice Requirements
  - Effective May 7, 2022
  - Requires NYS employers to provide notice to employees upon hiring where the employer "monitors or otherwise intercepts" telephone calls, emails, or internet usage or access using "any electronic device or system."
  - Notice must be in writing or sent electronically. Should also be posted in a place readily available for viewing by employees.
  - Employees must acknowledge notice in writing.

msk

Additional Noteworthy Changes to NY Law in 2022 (cont'd)

- Enhanced Whistleblower Protections
  - Effective January 26, 2022
  - Expands whistleblower protections from just prohibiting retaliation against employees who complain of policies or practices that "create[ ] and present[ ] a substantial and specific danger to public health or safety" to include:
    - Now includes former employees and independent contractors;
    - The policy or practice of which employee complains need not actually constitute a danger to public health or safety – employee must just have a reasonable belief of the same;
    - With limited exception, employee need only make a "good faith effort" to notify their employer in order to receive the protection;

msk

Additional Noteworthy Changes to NY Law in 2022 (cont'd)

- Enhanced Whistleblower Protections (cont'd)
  - Retaliation now includes:
    - Discriminating against someone for exercising their rights under the law.
    - Taking actions or threatening to take actions affecting current or future employment.
    - Contacting U.S. immigration authorities.
    - Threatening to report the suspected immigration or citizenship status of a whistleblower or a whistleblower's family or household member.
- Artificial Intelligence and Robotics
  - Effective January 1, 2023
  - Employers using an automated employment decision tool to screen a candidate must inform each such candidate regarding use of the tool.

msk

Pregnant Workers Fairness Act

- Included in the Omnibus Spending Bill signed by President Biden in December 2022.
- Effective on **June 27, 2023** (i.e., 180 days after enactment).
- Expands the ADA to include employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions regardless of whether the condition meets the definition of a disability specified in the ADA (a "qualified employee").
- Employers that receive accommodation requests must engage in the interactive process and offer a reasonable accommodation if it does not result in an undue hardship to the employer.
- PWFA makes it an unlawful employment practice to deny employment opportunities to qualified employees if the denial is based on the need for a reasonable accommodation.
- Employers may not force an employee to take a leave if another reasonable accommodation can be provided.
- PWFA prohibits retaliating against an employee for requesting or using a reasonable accommodation.

msk

Immigration

PRESENTED BY:
Howard D. Shapiro, Esq.
310.312.3252
hds@msk.com

Immigration Related Effects of Work From Home

- H-1B, H-1B1, E-3 visas
  - LCA must list worksite addresses
  - LCA posting and notice
  - Address changes
- PERM Applications for Labor Certification
  - Older PERM applications – WFH indicated?
  - New PERM applications

Immigration Effects of Wage Transparency Laws

- Current wage ranges
- Future wage ranges

Facebook Settlement

- Recruitment methods
- Resume receipt

Benefits: Effect of Dobbs on Group Health Plans Highlights of SECURE Act 2.0

PRESENTED BY:
Robert J. Lowe, Esq.
310.312.3180
rlo@msk.com

Supreme Court Decision in Dobbs

- On June 24, 2022, the Supreme Court issued its decision in Dobbs v. Jackson Women's Health Organization which reversed its earlier decision in Roe v. Wade. The decision in Dobbs specifically held that there is no protected right under the U.S. Constitution to obtain an abortion.
- This means that state laws that limit or outlaw abortion rights may be upheld depending on the law in the particular state.
- Decision resulted in state laws, referenda and court actions related to abortion and reproductive rights with rules differing from state to state and changes occurring frequently.

msk

Group Health Plan Provisions Applicable to Reproductive Rights

- Many group health plans provided benefits for abortion and other methods of pregnancy termination.
- Few group health plans provided travel benefits.
- Can plans continue to provide benefits for abortion and pregnancy termination after Dobbs even in states where there are prohibitions on providing abortions?
- Can plans provide benefits for participants to travel to a state where abortion is legal if they currently reside or work in a state where abortion is illegal?

msk

State Laws Affecting Abortion

- Most state laws concerning abortion provide restrictions on performing abortions, not reimbursing the provider or participant for expenses incurred in providing the abortion.
- Example: the Mississippi law upheld in Dobbs provides:

  "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."

msk

State Laws Affecting Abortion

- State laws in Texas and Oklahoma impose civil liability for "aiding or abetting."
- Example: Section 171.208 of the Texas Health and Safety Code provides:

  "Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

  (1) Performs or induces an abortion in violation of this chapter;

  (2) Knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this chapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this chapter."

msk

ERISA Pre-emption

- State laws that “relate to” employee benefit plans are pre-empted by ERISA.
- State laws are pre-empted if, among other reasons, they preclude uniform administration. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).
- Under current legal interpretations, it appears reasonable for self-insured health plans to take the position that application of the Texas and Oklahoma laws is pre-empted by ERISA.

msk

Exceptions to ERISA Pre-emption

- There are exceptions to ERISA pre-emption for:
  - State regulation of insurance; and
  - "Generally applicable criminal law."
- A state law that prohibited an insured plan from providing benefits for abortions probably would not be pre-empted by ERISA.
- There do not appear to be any state laws that make reimbursing the expense of an abortion a criminal offense (as opposed to some state laws that make performance of an abortion a criminal offense).
- Even if such a state law were enacted, it may not satisfy the tests established by the courts for determining if the state criminal laws are "generally applicable" like laws against larceny and embezzlement.

msk

Pregnancy Discrimination Act

- The federal Pregnancy Discrimination Act (PDA) forbids discrimination in health benefits on account of pregnancy, childbirth or medical conditions related to pregnancy and childbirth.
- The EEOC enforcement guidance provides:

  "The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications."
- This means that a plan cannot deny coverage for an abortion where the life of the mother would be endangered by the pregnancy or for complications that may arise during the course of an abortion regardless of any state law.

msk

Travel Expenses

- Most health plan did not provide for reimbursement of travel expenses prior to Dobbs.
- Self-insured plans can be amended to add this benefit. (Insured plans would require action of the insurer or HMO.)
- Under IRC rules, plans can provide reimbursement on a tax-free basis for "medical care" as defined in IRC Section 213(d) including:
  - Transportation that is "primarily for and essential to" medical care.
  - Lodging (up to $50 per night) while away from home that is primarily for and essential to medical care if:
    - The medical care is provided by a physician in a licensed hospital or a related or equivalent facility, and
    - There is no significant element of personal pleasure, recreation, or vacation in the travel away from home.

msk

Travel Expenses

- If the presence of another individual is essential for medical care, the lodging reimbursement that is treated as medical care may increase to $100 per night.
- Meal expenses are not treated as expenses for medical care unless they are provided at a hospital or similar institution at which the participant is receiving medical care.
- Reimbursements for lodging in excess of $50 (or $100 if applicable) a night and meals not provided in a hospital or similar institution may be provided, but would be taxable to the participant.

msk

Mental Health Parity Concerns

- There is a concern that providing a travel benefit exclusively for abortion could be found to violate federal mental health parity law since no similar benefit is provided for mental health benefits.
- To avoid this concern, it may be useful to provide that the travel benefit is available with respect to any plan benefit that is legally permissible in one or more states but not legally permissible in the state where the individual resides or is working.
- This could also apply, for example, if states enact limitations on treatment for gender dysphoria.

msk

EEOC Commissioner's Charge

- US Equal Employment Opportunity Commission (EEOC) Commissioner Andrea Lucas recently filed a Commissioner's Charge against at least three companies alleging that travel benefits for abortion violate Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.
- This same position was taken in a letter that Sharon Fast Gustafson, the former EEOC General Counsel, recently sent to employers around the country also alleging such travel programs violate federal antidiscrimination laws.
- The EEOC has since issued a statement that Gustafson's views are her own and do not necessarily reflect those of the EEOC.

msk

EEOC Commissioner's Charge

- Lucas asserts that providing travel benefits for those seeking abortions results in:
  - Preferential treatment for women, thus constituting gender discrimination,
  - Religious discrimination by favoring those who terminate pregnancies over those who, for religious reasons, carry a child to term; and
  - Violation of the ADA, which she claims requires parity of benefits for those with physical disabilities.
- Although the EEOC must investigate a Commissioner's Charge, it seems unlikely it will take further action.

msk

Highlights of SECURE Act 2.0

- Enacted at the end of December 2022.
- Includes 90 provisions aimed at encouraging retirement savings and easing plan administration.
- Some provisions effective immediately in 2023 and some have delayed effective dates.
- Focus on provisions applicable to employers and multiemployer plans effective immediately in 2023.

msk

Highlights of SECURE Act 2.0

- Increase in age to begin required minimum distributions (RMDs) to:
  - Age 73 for persons who attain age 72 after 12/31/22; and
  - Age 75 for persons who attain age 74 after 12/31/32.

  Effective for distributions made after 12/31/2022 for individuals who attain age 72 after that date.
- Reduction in excise tax for failure to take RMDs from 50% to 25% and, if corrected within 2 years, to 10%.
- Fiduciary and IRS relief for plan failing to recover "inadvertent benefit overpayments."
- Self-correction permitted for any "inadvertent" failures to satisfy plan qualification rules.

msk

Highlights of SECURE Act 2.0

- Self-certification by participants that they qualify for 401(k) hardship distributions.
- Annual notice of eligibility for unenrolled participants in lieu of other required notices.
- Exception to 10% early distribution penalty for individuals with terminal illness.
- Penalty free early distributions up to $22,000 for individuals affected by federally declared disasters.
- Larger pay credits for older, long-term employees under cash balance plans

msk

Highlights of SECURE Act 2.0

- End of indexing of variable rate PBGC premium rates.
- Employer matching and non-elective contributions may be designated as taxable Roth contributions.

msk

Arbitration Agreements: Current Status and Strategies

PRESENTED BY:
Stephen A. Rossi, Esq.
310.312.3240
sar@msk.com

Benefits of Arbitration

- Faster, cheaper (maybe), less formal.
- Less discovery (usually).
- No jury.
  - No “run away” decision from Los Angeles jury.
  - “More” impartial arbitrator.
- Less public.
- *NO CLASS ACTIONS, <u>including</u> for PAGA claims!**

**maybe*

2022 in Review

- The Year of MAYBE:
  - Maybe AB-51 will finally be struck down.
  - Maybe PAGA claims can be defeated with arbitration, like class actions.
  - Maybe the new Federal limit on arbitration of sexual harassment claims are limited to those claims.

AB-51: The Backstory

- CA's AB-51 (2020) prohibits mandatory arbitration agreements and provides penalties.
- A U.S. District Court enjoined AB-51 on Federal Arbitration Act ("FAA") preemption grounds.

Lewis v. Simplified Lab. Staffing Sols., Inc.

AB-51: The Backstory

- Sept. 2021, Ninth Circuit partially reversed in *Chamber of Commerce v. Bonta*.
- Strange mixed decision:
  - Mandatory arbitration agreements illegal.
  - But if agreement entered into, it was valid and no penalties.
  - Risk of trying and failing to force employees to agree?

AB-51 is enjoined again*

- Oct. 2021, petition for rehearing *en banc.*
- Ninth Circuit deferred pending SCOTUS *Viking River Cruises v. Moriana* decision.
- Aug. 22, 2022, the original three-judge panel *sua sponte* withdrew its Sept. 2021 decision.
- Now, the original trial court injunction against AB-51 enforcement remains in effect.

*for now

AB-51 is enjoined again (for now)

- **Employers may continue to require employees to sign arbitration agreements as a condition of employment for the time being**.
  - Ninth Circuit *could* still uphold AB-51 (less likely now).
  - It *could* be retroactive.
  - Later U.S. Supreme Court review possible (likely?).

Arbitration Beats PAGA! …?

- *Iskanian* (CA S. Ct., 2014): PAGA claims cannot be arbitrated because state did not agree.
- *Viking River Cruises v. Moriana* (S. Ct., June 2022):
  - FAA preempts California's prohibition on pre-dispute agreements to arbitrate *individual* PAGA claims because individuals *can* agree and CA's prohibition on claim splitting preempted.
  - As a result, Plaintiff lacks standing to pursue *representative* PAGA claims (maybe).

Arbitration Beats PAGA! …?

- *Viking River Cruises* effectively allows employers to avoid representative PAGA actions through the use of arbitration agreements (maybe).
- ***Arbitration agreements can now require employees to arbitrate their PAGA claims on an individual basis.***
  - Recently followed in *Lewis v. Simplified Lab. Staffing Sols., Inc.* (CA COA, Dec. 2022).

Arbitration Beats PAGA!

- *"[A]s we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding … As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims."*
  - SCOTUS (4 Votes)

Arbitration Beats PAGA?

- *"**Of course**, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. With this understanding, I join the Court's opinion."*
  - J. Sotomayor, Concurring

Does Arbitration Beat PAGA?

- Case to Watch: *Adolph v. Uber Technologies, Inc.* (CA S. Ct.)
- Likely to address whether arbitration of an "individual" PAGA claim divests a plaintiff of standing to pursue the "representative" PAGA claim.

Stay tuned!

Other Potential Benefits of Arbitration

- An arbitrator's award denying an employee's non-PAGA claims did not preclude employee from bringing her PAGA claims. *Eleni Gavriiloglou v. Prime Healthcare Management, Inc*. (CA COA, Sept. 2022):
  - Plaintiff was acting in different capacities, asserting different rights.
  - All the more reason to have an agreement to arbitrate PAGA claims individually!

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA")

- Took effect on March 3, 2022.
- Amends the Federal Arbitration Act ("FAA").
- Allows employees to **elect** to invalidate pre-dispute arbitration agreements and class and collective waivers for:
  - Sexual assault and/or sexual harassment claims that arise on or after effective date (Mar. 3, 2022).
  - Does NOT apply to other claims (maybe).

EFAA (cont.)

- No preemption defense for employers.
- No full retroactive application.
  - Claims must arise on or after Mar. 3, 2022.
- Enforcement in court no matter what agreement says.
- Does not explain how to handle “mixed” cases.

General Practical Tips

- Do include a provision that employee waives class actions and agrees to arbitrate PAGA on an individual basis.
- Do include a severability clause.
- Do be careful with electronic signatures.
- Do make sure arbitration fees are timely paid.

General Practical Tips

- Don’t include in employee handbooks.
- Don’t limit attorney fees.
- Don’t limit remedies (e.g., punitive damages).
- Don’t carve out employer claims without expressing a very good reason.
- Don’t use too much legalese.

Thank You