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2024

EMPLOYERS LAW COURT HEALTH ISSUES TIME WAGES FAMILY LEAVE CANNABIS MEDICAL
POLICIES PAY EMPLOYMENT COMPENSATION CLAIMS ACCOMMODATION EXEMPTIONS DISPUTE
ARBITRATION CONDUCT HARASSMENT HOURS DAYS VACCINE AGREEMENTS SICK LEAVE DISCLOSURE
VIOLENCE COVENANTS PREMIUMS INFORMATION CALIFORNIA CONFIDENTIALITY RETALIATION

UPDATE

Employment Law

Introduction

Every year brings new legislation, regulations, and new court decisions that affect employers, and this year is no exception. As we prepare for 2024, many of the developments that are most relevant to employers in California involve new legislation, and some require immediate action by employers who want to remain current and compliant with the law.

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Seminars

2024 Schedule of Seminars

Hopkins & Carley's Employment Law Department offers periodic seminars on topics of interest to employers. Our attorneys discuss issues and present information in a practical, interactive manner, providing attendees with knowledge they can apply in their daily work. You are invited to attend any or all of the seminars that we will host in 2024.

Date	Topic
February 2024	Alphabet Soup of Leave Laws
March 2024	Investigations
April 2024	The Dirty Dozen
May 2024	Trade Secrets and Privacy
September 2024	Class Action, PAGA and Arbitration
October 2024	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
December 2024	2025 Annual Update

Visit www.hopkinscarley.com for date, cost and location details. Dates are subject to change.

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Minimum Wage and Minimum Salary Level Increases to Watch Out For

California's minimum wage for non-exempt employees is increasing to $16.00 per hour on January 1, 2024.

Although the state minimum wage is set at $16.00 for 2024, employers should remember that cities and counties have the ability to set their own minimum wages higher than the state minimum and many have chosen to do so. For example, the following cities and counties have established these local minimum wages that will be effective as of January 1, 2024:

Jurisdiction	Minimum Wage as of January 1, 2024
San Francisco	$18.07 per hour
Oakland	$16.50 per hour
San Jose	$17.55 per hour
Santa Clara	$17.75 per hour
City of Los Angeles	$16.78 per hour
County of Los Angeles	$16.90 per hour

If the city or county where employees perform work requires a higher minimum wage rate than the state, employers must pay their employees in those locations the higher rate. Each local law also has its own provisions that define which employees are entitled to the local minimum wage, and many local laws apply to employees who work as little as two hours per week within the jurisdiction.

The increase in the state minimum wage increase also proportionally increases the minimum salary that must be paid to employees classified as exempt under the so-called "white-collar exemptions" (the executive, administrative, and professional exemptions) to $66,560 per year ($5,546.67 per month).

The minimum compensation required in order to qualify for California's computer professional exemption also increases as of January 1, 2024. To qualify for the computer professional exemption in 2024, employees must be paid a minimum hourly rate of $55.58, a minimum monthly salary of $9,646.96, or a minimum annual salary of $115,763.52.

Additionally, the minimum annual compensation for employees who qualify for the inside sales exemption from overtime will increase from $48,360 to $49,920 on January 1, 2024.

Local minimum wages are irrelevant to the salary required for exempt status and do not operate to raise it above these levels.

Employers that fail to pay at least the minimum salary to employees they classify as exempt risk facing significant liability, including unpaid minimum and overtime wages and a cavalcade of penalties under the California Labor Code. If violations occur on a broad scale, employers could also risk additional exposure from class actions, Private Attorneys General Act (PAGA) claims, and audits by the Department of Industrial Relations.

What Should Employers Do Now?

- Review hourly pay rates under both state and local laws and adjust as necessary – Employers should review the base hourly rates of pay for their non-exempt employees under both California law and the laws of any local jurisdictions that may be applicable, and increase rates of pay as necessary to comply with the new minimums in effect as of January 1, 2024.

- Review the salaries paid to exempt employees – Employers should also review the salaries paid to exempt employees. To the extent that they are paying any exempt employees less than $66,560 annually, they should consider whether to raise salaries or convert employees paid less than that amount to non-exempt status.

- Review other forms of pay affected by the minimum wage – Employers should recognize that a variety of forms of compensation may be influenced by the change in the minimum wage, including split-shift premiums, meal period and rest break premiums, paid sick leave, and commissions.

- Address past underpayments strategically – Employers who discover they have paid employees less than the minimum wage or minimum salary in the past should seek advice from counsel regarding their options, and develop a plan to address the situation strategically and reduce the risk of triggering expensive litigation or drawing the attention of government audits.

Just in Time for Flu Season! California Increases Paid Sick Leave Requirement

In 2015, California became the first state in the nation to pass a law requiring employers to provide paid sick leave to most employees. Now, the Legislature has amended the law, increasing the amount of paid sick leave that employers must provide to eligible employees.

As originally enacted, the law permitted eligible employees to accrue sick leave at a rate of one hour for every 30 hours worked, to a maximum balance of six days or 48 hours per year. Alternatively, pursuant to the so-called “lump sum method,” employers could grant a lump sum of 24 hours or three days of paid sick leave (without proration) to eligible employees each year.

As of January 1, 2024, eligible employees still accrue sick leave at a rate of one hour for every 30 hours worked, but they now must be allowed to accrue a total balance of at least ten days or 80 hours of sick leave, and they must be able to accrue 24 hours of sick leave by the 120th day of their employment, and 40 hours of sick leave by the 200th day of their employment. Employers may still grant paid sick leave in a lump sum, but those electing to utilize the lump sum method must grant 40 hours or five days of paid sick leave per year.

Employers should also recognize that some cities, such as San Francisco and Oakland, have enacted their own local sick leave ordinances. Employers that are subject to local ordinances must comply with both the state law and all applicable local laws (to the extent that local laws are not preempted by the state law), meaning that employees may be entitled to the most generous provisions of each law in some circumstances.

What Should Employers Do Now?

- Update policies as necessary – The change in the paid sick leave law will require employers to update their sick leave policies for 2024 unless those policies already provide benefits at least as generous as those required by law.

- Remember to pay the "regular rate" – Employers must pay sick leave to non-exempt employees at the regular rate applicable during the workweek in which the employee uses sick leave. Employers unfamiliar with how to calculate the regular rate of pay (which is not necessarily the same as the employee's base hourly rate) should confer with counsel.

California Revises Regulations Regarding Use of Criminal History in Hiring Decisions

California's Fair Chance Act generally prohibits employers with five or more employees from seeking or considering information related to an applicant's criminal history until the employer has extended a conditional offer of employment. The Civil Rights Department has revised the regulations enacted pursuant to the Fair Chance Act, and the updated regulations impose additional restrictions and burdens on covered employers. Some of the key provisions in the revised regulations include:

- Expanded definition of "employer" – The regulations expand the definition of an "employer" to include (in addition to "a labor contractor and a client employer") (a) any direct or joint employer, (b) any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly (such as a background check vendor), (c) any staffing agency, and (d) any entity that selects, obtains, or is provided workers from a pool or availability list.

- Expanded definition of "applicant" – The revised regulations expand the definition of an "applicant" to include current employees who have applied for or indicated a specific desire to be considered for a different position with their current employer, as well as current employees who are subject to a review and consideration of criminal history because of a change in ownership, management, policy or practice.

- Restrictions on job postings and ads – The revised regulations prohibit employers from including statements in job postings or job applications suggesting that the employer will not hire candidates based on their criminal history (including statements like "no felons" or "must have a clean record").

- Increased restriction on use of information disclosed voluntarily by applicants – The revised regulations also prohibit employers from considering, prior to the issuance of a contingent offer of employment, information regarding an applicant's criminal history that the applicant disclosed voluntarily.

When an employer lawfully obtains information regarding an applicant's history following issuance of a contingent offer of employment, the Fair Chance Act requires the employer to conduct an individualized, reasoned, and evidence-based assessment of the information obtained before deciding whether to rescind the offer. The law permits employers to rescind an offer if a direct and adverse relationship exists between the applicant's criminal history and the specific duties of the job, such that a decision to deny employment is "job-related and consistent with business necessity." Generalizations and assumptions not supported by evidence are not sufficient to justify the rescission of a job offer.

The regulations require employers assessing the potential rescission of a job offer to consider three factors, including (a) the nature and gravity of the offense or conduct; (b) the time that has passed since the offense or conduct and/or completion of the sentence; and (c) the nature of the job held or sought.

With respect to the nature and gravity of the offense, the updated regulations specify that employers may consider:

- the specific personal conduct of the applicant that resulted in the conviction;
- whether the harm was to property or people;
- the degree or amount of harm;
- the permanence of the harm;
- the context in which the offense occurred;
- whether a disability, addiction or impairment contributed to the offense or conduct and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise;
- whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct; and/or
- the age of the applicant when the conduct occurred.

In considering the final factor (the nature of the job in question), the regulations direct employers to consider whether the context in which the conviction occurred is likely to arise in the workplace; and/or whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.

Employers must also consider any evidence of rehabilitation or mitigating circumstances that is "voluntarily provided by the applicant, or by another party at the applicant's request, before or during the initial individualized assessment."

What Should Employers Do Now?

- Recognize the expanded scope of the new regulations – Although most background check vendors should be familiar with the updated regulations, employers should nevertheless be alert to potential pitfalls, including the impact of the expanded definitions of "employer" and "applicant," and restrictions on the use of voluntarily disclosed information.

- Ensure that managers understand how to conduct proper individualized assessments – Employers should provide any necessary training to ensure that those conducting the required "individualized assessments" after obtaining information about an applicant or employee's criminal record are familiar with the process.

- Revise job advertisements/postings and job applications to eliminate any improper references to criminal history.

As if Retaliation Cases Weren't Tough Enough Already: Senate Bill 497 Creates a Presumption of Liability in Certain Circumstances

Retaliation claims represent some of the most challenging claims that employers confront from current or former employees. Whenever an employer makes a decision about an employee who has complained of illegal behavior or exercised a legal right, it is easy for the employee to attribute the action to retaliation, particularly when the two events occur close in time to one another. Retaliation claims can be especially difficult for employers to defend because, unlike some other employment law claims that involve complicated or esoteric legal principles, retaliation claims focus on a base human emotion that all jurors understand – revenge.

Senate Bill 497 (SB 497) amplifies the risk already faced by employers in certain retaliation cases by creating a presumption of liability if the employer discharges or disciplines an employee within 90 days after the employee complains of certain wage and hour or equal pay violations. The presumption applies to claims alleging retaliation pursuant to Labor Code Sections 98.6, 1102.5, and 1197.5. Employers can rebut the presumption by presenting evidence of legitimate, non-retaliatory motives for adverse employment actions occurring within the 90-day period.

If an employee prevails on a retaliation claim pursuant to one of the aforementioned statutes, the employee may recover a penalty of up to $10,000 for each violation, in addition to any damages otherwise recoverable.

What Should Employers Do Now?

- Carefully document misconduct or deficiencies in performance by employees who have complained of wage and hour violations – In light of the presumption created by SB 497, employers will bear the burden of proving that adverse employment actions taken within the past 90 days against employees who have complained of a payroll violation were not retaliatory. Wise employers will carefully document unsatisfactory performance or conduct by employees in order to increase their ability to meet their burden of proof.

- Inform managers about the new law – Employers should train managers regarding the new law in order to reduce the risk that a manager will unknowingly take action that prompts a retaliation complaint and a presumption of liability.

- Consider the timing of adverse employment actions strategically, and confer with counsel before taking action against employees who have complained of payroll violations in the last 90 days – Because the presumption created by SB 497 applies only to adverse employment actions taken within 90 days of an employee's complaint, employers should consider the timing of disciplinary actions strategically, while recognizing that delaying the action for an extended period of time may create the perception that the issue prompting the action was not serious. Wise employers should confer with counsel before deciding how to proceed with employees who have complained of payroll violations.

California Enacts New Leave Law for Reproductive Loss

State and federal law entitle employees to leaves of absence in a variety of circumstances, and California has expanded leave rights by enacting Senate Bill 848 (SB 848), which becomes effective on January 1, 2024 and permits eligible employees to take a leave of absence if they experience a reproductive loss. Following is a summary of some of the key provisions of the new law:

- Covered employers – SB 848 applies to employers with five or more employees.

- Covered employees – Employees eligible for leave pursuant to SB 848 include those who have completed at least 30 days of employment and suffered a "reproductive loss event," which includes a failed adoption, failed surrogacy, miscarriage, stillbirth, or any unsuccessful assisted reproduction.

- Duration and timing of leave – Eligible employees may take up to five days of leave within three months of the reproductive loss event, but do not need to take the leave on consecutive days. Employees who experience more than one reproductive loss within a 12-month period are entitled to up to 20 days of leave.

- Compensation during leave – Employers are not required to pay employees during reproductive loss leave, but employees may use sick leave, vacation, or Paid Time Off to maintain their income during leave.

- Confidentiality – The law requires employers to maintain the confidentiality of any employee requesting reproductive loss leave and prohibits disclosure of information provided by the employee except as necessary to internal personnel or counsel, or as required by law.

- Right to reinstatement – Employers must reinstate employees who take reproductive loss leave to their jobs upon completion of leave, and cannot retaliate against employees for exercising leave rights.

What Should Employers Do Now?

- Consider adding a Reproductive Loss leave policy to your Employee Handbook – Although the law does not require employers to publish policies on reproductive loss leave in their Employee Handbooks, employers that prefer to include a comprehensive summary of leave policies in their Handbooks should consider adding a policy addressing reproductive loss leave.

- Educate managers on the new leave law – In order to avoid potential problems that can arise from ignorance of the law, employers should inform managers about SB 848.

Latest Amendment to Law Regarding Cannabis Use Leaves Employers Dazed and Confused

California has amended the Fair Employment and Housing Act (FEHA) to prohibit employers from discriminating against applicants and employees based on their use of cannabis outside work hours and away from the work site. Senate Bill 700 (SB 700), which was passed by the Legislature in 2022, goes into effect on January 1, 2024.

The new law not only prohibits employers from taking adverse action based on off-duty/off-site use of cannabis, it also prohibits employers from requesting information about applicants' prior cannabis use, and from using any criminal history information about an applicant or employee's prior cannabis use, unless the employer is permitted to do so under a limited set of exceptions set forth in the law.

Although the law prohibits employers from taking adverse action based on off-duty cannabis use and restricts their ability to inquire about cannabis use, employers may still maintain and enforce policies that prohibit use of cannabis on the job, and prohibit being under the influence of cannabis while working.

What Should Employers Do Now?

- Review drug and alcohol policies to ensure that they do not prohibit the use of cannabis while off duty – Policies regarding drug use that have not been reviewed or updated recently may be overbroad and contain restrictions that are no longer consistent with current law, including SB 700.

- Review application forms and new hire documents to ensure they do not improperly seek information regarding cannabis use – Employers generally may require job applicants to undergo drug tests after receiving a contingent offer of employment, but they should not seek information regarding off-duty cannabis use during the hiring process or during employment.

- Confer with counsel before taking adverse action against an employee for suspected drug use – Employment decisions based on suspected drug use are fraught with danger for employers, so prudent employers should confer with counsel whenever considering an adverse action based on an employee's suspected use of drugs.

Salary or Not a Salary? SCOTUS Clarifies the "Salary Basis" Requirement for Exempt Employees

Many employers know that employees generally must be paid on a "salary basis" to be properly classified as exempt from overtime pay, but some do not understand the legal meaning of payment on a "salary basis." The U.S. Supreme Court clarified the concept in *Helix Energy Solutions Group, Inc. v. Hewitt*, holding that a supervisor's "daily rate" of pay, pursuant to which he earned over $200,0000 annually, did not qualify as a "salary" under the Fair Labor Standards Act (FLSA).

The FLSA requires covered employers to pay overtime to non-exempt employees who work more than 40 hours in a workweek. Employees who qualify for the so-called "white-collar" exemptions (applicable to executive, administrative and professional positions) are exempt from overtime, however, if they are paid on a "salary basis" and satisfy additional requirements. Employees are paid on a salary basis if they are paid a predetermined and fixed weekly amount that is not subject to reduction because of variations in the quality or quantity of work performed. Thus, absent certain exceptions, an exempt white-collar employee must be paid his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked.

In the *Helix* case, Michael Hewitt, an offshore oil rig supervisor, typically worked 12 hours a day, seven days a week, for a total of 84 hours in a workweek. He worked this schedule for 28 days and then had 28 days off work before returning. Hewitt earned a daily rate ranging from $963 to $1,341 over the course of his employment, with no overtime compensation. He received a paycheck every two weeks that amounted to his daily rate multiplied by the number of days he worked during the pay period.

The U.S. Supreme Court held that the daily rate pay structure did not compensate Hewitt on a salary basis under the FLSA because Hewitt received "a certain amount if he work[ed] one day in a week, twice as much for two days, three times as much for three, and so on." A "true salary," however, is "a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." Thus, to satisfy the salary basis test, the amount of Hewitt's weekly pay could not fluctuate based on the number of days he worked.

The *Helix* decision demonstrates that employees are not exempt from the overtime premium requirement merely because they are highly paid. A highly compensated employee whose pay is (or may be) reduced for time not worked during the workweek is not paid a salary. Thus, when an exempt employee works at all during the workweek, the employer generally must pay their entire weekly salary; doing otherwise jeopardizes the exempt classification altogether.

What Should Employers Do Now?

- <u>Review your exempt employee classifications for compliance</u> – As the *Helix* decision demonstrates, employers who classify employees as exempt pursuant to any of the "white-collar" exemptions should ensure they are paying those employees on a bona fide salary basis, remembering that the minimum salary cannot be prorated based on the employee's days or hours of work, and that non-salary compensation does not count toward satisfying the "salary basis" test.

- Beware of California's higher minimum salary level – The current minimum salary level for the white-collar exemptions under the FLSA is $684 per week, or $35,568 annually. California has a higher minimum salary level, however. For 2024, California law requires employees to earn an annual salary of no less than $66,560 to meet this threshold for the exemption.

- Remember the "duties" test – The "salary basis" and minimum salary level requirements are only two of the three requirements for the white-collar exemptions. Employees must also perform certain duties specific to the executive, administrative, or professional exemption to qualify for the exempt status. Simply holding the title of "manager" or "executive" is not sufficient.

Another Round of Decisions on Rounding Goes Against Employers

In order to comply with their obligation to maintain accurate records of the hours worked by their non-exempt employees, most employers require employees to record the times at which they start and stop work each day. Some employers utilize electronic timekeeping software, while others utilize mechanized time clocks or timecards that are completed by hand. Regardless of the method they utilize to track the time worked by non-exempt employees, however, employers are often confronted with time records that reflect employees working slightly more or less than they were scheduled or expected to work. An employee scheduled to work from 8:00 a.m. to 4:30 p.m. may clock in at 7:57 a.m., for example, and clock out at 4:29 p.m.

Employers should maintain records that reflect the precise times at which their non-exempt employees begin and end work each day, as well as the precise times at which they begin and end their meal periods. When employers calculate time worked for payroll purposes, however, federal law permits them to round starting and stopping times to the nearest increment of five, six or 15 minutes, provided that rounding practices are utilized in such a manner that they do not result, over a period of time, in a failure to compensate employees for all the time they actually worked.

Although rounding of time records has long been permitted under federal law and has been a common practice among many employers for a similarly long time, no legal authority clearly authorized or prohibited the practice under California law for many years. In 2012, a California appellate court finally addressed the issue and held that employers may round employee timecards to the nearest tenth of an hour if the rounding policy (a) is fair and neutral on its face and (b) "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all time they have actually worked." Two more recent California decisions disapprove of rounding and create potential liability for employers who engage in the practice, however.

First, the California Supreme Court ruled in *Donohue v. AMN Services, LLC*, that rounding is not permissible with respect to meal periods, relying strongly on language in the Labor Code and the Wage Orders stating that meal periods shall be "not less than 30 minutes" in length. Following the *Donohue* decision, another California Court of Appeal went a step further.

In *Camp v. Home Depot USA, Inc.*, the plaintiffs alleged that Home Depot rounded non-exempt employees' hours of work up or down to the nearest quarter hour, despite the fact that the timekeeping system recorded employees' work time by the minute. The Court observed that the California Supreme Court never expressly authorized the rounding of time records, particularly in circumstances where the employer can track (and has tracked) the precise time worked by employees. The Court then held that employers are *not* permitted to round when they are able to track, and have tracked, the precise time worked by employees during a specific shift. In light of *Camp*, employers that are able to track an employee's precise hours of work must pay the employee for all time worked, and may not round time records even if they do so in a neutral manner.

What Should Employers Do Now?

- <u>Maintain complete and accurate time records for non-exempt employees</u> – Employers should maintain records that reflect the precise times at which their non-exempt employees begin and end work each day, as well as the precise times at which they begin and end their meal periods. Handwritten records that reflect the exact same times each day, or only times that begin and end on the hour (i.e., 8:00 a.m. to noon and 1:00 p.m. to 5:00 p.m.), are likely to be viewed with skepticism.

- <u>Do not round time entries</u> – In the wake of the *Donohue* and *Camp* decisions, employers should not round the time entries of non-exempt employees when calculating hours of work for payroll purposes.

When Does a Furlough Become a Termination? Fairly Quickly!

When the COVID-19 pandemic first arose, many employers were confronted with the difficult question of whether or when a furlough (a.k.a., a temporary layoff or period of time when employees are not being assigned work) transforms into a termination, thereby triggering the obligation to pay final wages. The Ninth Circuit Court of Appeal has now provided employers with an answer: a furlough triggers the duty to pay final wages when the furlough has no specific return date within the span of a normal pay period.

In *Harstein v. Hyatt Corporation*, the hotelier informed over 7,000 employees in March of 2020 that they would be subjected to a furlough/temporary layoff. Hyatt told them that it was not "separating anyone's employment" at the time and that it hoped to reinstate them to work in a few months. Approximately three months later, however, in June of 2020, Hyatt informed these employees that their furlough would become a formal termination, and that they would receive their accrued but unused vacation when their employment ended.

Hyatt eventually faced several class action claims, including claims for failure to pay these furloughed employees their accrued but unused vacation wages when they were initially "temporarily" laid off. In response, Hyatt argued that it only "discharged" employees in June of 2020, and therefore paid the wages in a timely manner. The Ninth Circuit disagreed.

Ultimately, the Court (relying on several opinion letters from the California Department of Labor Standards Enforcement) held that a discharge – for purposes of triggering final pay obligations under the California Labor Code – occurs when there is a layoff with "no specific return date within the normal pay period." As a result, Hyatt's payment of accrued vacation wages was three months late, potentially exposing it to thousands of waiting time penalties and millions of dollars of liability.

What Should Employers Do Now?

- Recognize the varying scenarios in which the *Harstein* decision may apply – While the *Harstein* decision arose from the unique circumstances of the COVID-19 pandemic, the reasoning behind the decision can be applied in a wide array of situations, on both a large scale (such as planned mass layoffs or unexpected shutdowns of operations affecting large groups of employees) and an individual scale (such as long-term disciplinary suspensions or non-assignment from lack of work).

- Be aware of the various forms of compensation that must be paid when final wages are due – In addition to standard wages, compensation such as unused vacation or Paid Time Off and floating holidays must be paid at the conclusion of employment.

Arbitration, Class Action & PAGA Developments

Bonta Decision Delivers Good News for California Employers With Mandatory Arbitration Agreements

For years, employers and employees have engaged in litigation over the enforceability of agreements that require employees to resolve claims through binding arbitration. Employers typically favor arbitration because they view it as a more favorable forum than trial by jury, and arbitration affords employers with the opportunity to prevent employees from asserting class action claims. Employees, predictably, oppose mandatory arbitration and prefer to resolve disputes before a jury of their peers. Opponents of mandatory arbitration have also sought to introduce legislation restricting or prohibiting employers from imposing mandatory arbitration upon employees as a condition of employment.

In 2020, California enacted Assembly Bill 51 (AB 51), a law that sharply restricts the ability of employers to compel employees to resolve many of the most common employment claims in arbitration. AB 51 prohibits employers from (a) requiring their employees (as a condition of new or continued employment, or in exchange for an employment-related benefit) to waive any "right, forum, or procedure" in connection with a violation of FEHA or any section of the California Labor Code, and (b) retaliating against any applicant or employee for their refusal to grant such a waiver.

The California Chamber of Commerce filed suit challenging the validity of AB 51, arguing that the law is preempted by the Federal Arbitration Act (FAA). After years of litigation, the federal Ninth Circuit Court of Appeal ruled in *Chamber of Commerce v. Bonta* that the FAA wholly preempts AB 51 and issued a preliminary injunction barring enforcement of the law. As a result, employers are once again able to require employees to resolve most claims through binding arbitration, provided that their arbitration agreement satisfies other requirements for enforceability.

What Should Employers Do Now?

- <u>If you do not already require employees to resolve claims through arbitration, consider doing so</u> – Arbitration offers many significant benefits to employers, including the ability to prevent or restrict employees from asserting class action claims and, potentially, claims pursuant to California's PAGA. Employers that do not have arbitration agreements in place with their employees should confer with counsel to discuss the pros and cons of requiring arbitration as a condition of employment and to ensure that any agreement they adopt is drafted properly.

- <u>If you have arbitration agreements in place with employees, review those agreements to ensure they are enforceable under current law</u> – Although the recent *Bonta* decision is very favorable for employers, the law still imposes many strict and technical requirements on arbitration agreements if they are to be enforceable. In order to ensure they obtain the benefits of arbitration, employers should confer with counsel to review the language in their agreements and ensure the agreements are consistent with current law.

- <u>Remain alert to further developments regarding the enforceability of mandatory arbitration agreements</u> – The *Bonta* decision upholds a preliminary injunction that bars enforcement of AB 51, but mandatory arbitration remains a hot topic of both litigation and legislation, and continued evaluation of the law is almost certain. Employers should remain alert to new developments and be prepared to revise their arbitration agreements as necessary to comply with further developments in the law.

And Now the Bad News: Employees Bound by Arbitration Agreements May Still Assert PAGA Claims

Employers of all shapes and sizes have been plagued in recent years by a tidal wave of lawsuits asserting claims under California's PAGA, which essentially permits employees to stand in the shoes of the state Attorney General and seek penalties for violations of the Labor Code not only on their own behalf, but also as a representative of other employees. Because the Labor Code contains many technical and obscure rules, violations are common, and potential penalties for violations add up quickly, frequently amounting to multiple millions of dollars, even for companies of modest size.

Although employees can waive their right to assert class action claims through arbitration agreements, California law has long refused to enforce agreements that require employees to resolve PAGA claims through arbitration because, as mentioned above, employees in PAGA claims essentially stand in the shoes of the State of California in enforcing the Labor Code. In 2022, the United States Supreme Court ruled that agreements that require employees to resolve claims for PAGA penalties through binding arbitration are enforceable with respect to Labor Code violations that affected the employee, leaving in doubt the fate of claims seeking PAGA penalties for violations that did not affect the plaintiff herself.

In July of 2023, the California Supreme Court ruled in *Adolph v. Uber Technologies, Inc.* that a plaintiff can still maintain a representative action under PAGA after their individual claims are compelled to arbitration. In its decision, the Court noted that "[a]rbitrating a PAGA plaintiff's individual claim does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee." As a result, pursuant to *Adolph*, if an employee can establish that he or she actually suffered at least one Labor Code violation during their employment, they can establish standing to bring a PAGA claim against the company as a representative of other employees.

The Court left unanswered the question of whether the state court case is stayed during the time the individual claims are being arbitrated.

What Should Employers Do Now?

- <u>Move promptly to force employees into arbitration over PAGA claims that affect them individually</u> – In order to maximize the chance of enforcing an arbitration agreement, employers should not delay in seeking to force employees who file PAGA lawsuits to resolve their individual claims in arbitration, and should otherwise be very cautious about engaging in litigation activity that might suggest a waiver of the right to arbitrate.

- <u>Move to stay the representative portion of PAGA claims pending resolution of the employee's individual claim in arbitration</u> – Although the *Adolph* court did not address the question of how the representative portion of a PAGA lawsuit should be handled while the plaintiff's individual claims proceed in arbitration, employers should nevertheless seek to stay representative actions pending a determination that the employee was affected by a Labor Code violation and has standing to proceed in a representative capacity.

A Shot in the Arm for California Employers Seeking to Enforce Workplace Vaccine Mandates

For many years, employers deciding whether to adopt workplace vaccine mandates grappled with the challenge of creating and maintaining a safe and healthy workplace, and the competing obligations to respect their employees' right to privacy and provide religious and medical accommodations. Some of those challenges were minimized during the COVID-19 pandemic as employers and employees alike had little choice but to comply with various federal, state and local health orders. However, once pandemic-driven workplace mandates were lifted, employers were again left to struggle with the benefits and risks associated with enforcing mandatory vaccine policies. Fortunately, a California Court of Appeal has offered some useful guidance on how courts are likely to evaluate challenges to vaccine policies going forward.

In *Hodges v. Cedars-Sinai Medical Center*, the plaintiff, Diana Hodges, worked in an administrative capacity away from the main medical facility, and had no patient care responsibilities. During her employment, Ms. Hodges missed a year of work to undergo cancer treatments, which left her with a weakened immune system. However, Ms. Hodges ultimately returned to work without restrictions, and fully capable of performing her job functions. Sometime after her return to work, Cedars-Sinai Medical Center required all employees, as a condition of continued employment, to get a flu vaccine as part of its effort to reduce transmissions between staff and patients, and consistent with the Centers for Disease Control and Prevention's (CDC) recommendation that all health care workers get vaccinated against the flu. Cedars-Sinai Medical Center permitted exemptions for religious purposes and, consistent with CDC guidelines, those employees who had experienced severe allergic reactions to the flu vaccine or had been diagnosed with Guillain-Barré Syndrome.

Fearing side effects, Ms. Hodges refused to get the flu vaccine and sought her health care provider's assistance in applying for an exemption. Ms. Hodges' health care provider informed Cedars-Sinai Medical Center about Ms. Hodges' history of cancer, her resulting allergies, and her "extreme unwell state" resulting from her treatment, as well as her lack of patient contact. Cedars-Sinai Medical Center denied Ms. Hodges' request as falling outside the recognized exemptions and asked Ms. Hodges to reconsider. Ms. Hodges refused, and Cedars-Sinai Medical Center terminated her employment.

Ms. Hodges sued Cedars-Sinai Medical Center for disability discrimination, failure to engage in the interactive process, and failure to accommodate her disability under FEHA. The appellate court upheld the trial court's determination that Ms. Hodges failed to establish that she was disabled, or that Cedars-Sinai Medical Center perceived her as disabled. Further, the court agreed that Cedars-Sinai Medical Center's concerns about patient safety constituted a legitimate, non-discriminatory reason for its mandatory vaccine policy. Important to the court's determination was Cedars-Sinai Medical Center's careful alignment of its policy, including its recognized exemptions, with CDC guidelines.

What Should Employers Do Now?

- Apply vaccine policies objectively and consistently – The *Hodges* decision emphasizes that FEHA does not prohibit employers from adopting vaccine policies recommended by a recognized authority (in this case, the CDC), aimed at limiting the spread of diseases. Further, the court validated Cedars-Sinai Medical Center's reliance on medical information and the CDC's guidelines in formulating exceptions. Though not emphasized by the court in its written decision, employers should also be vigilant about applying vaccine policies in a consistent and objective manner.

- Engage in the interactive process – Central to the goal of applying vaccine policies in a consistent and objective manner is engaging in the interactive process in good faith if an employee seeks an exemption from an employer's vaccine mandates. Open communication with the employee regarding the bases for an exemption request, and the willingness to fully evaluate information received from the employee's health care provider is key, particularly if the request for exemption is ultimately refused.

The Cost of Religious Accommodation – Lessons From the U.S. Postal Service

Religious accommodation issues are not common, but when they arise, they create a particularly difficult terrain that employers must navigate carefully to avoid claims of religious discrimination or retaliation. The U.S. Postal Service (USPS) was confronted with such a claim when one of its employees, an evangelical Christian who believed that Sunday should be devoted to worship and rest, filed suit under Title VII, alleging the USPS failed to make reasonable accommodations for his Sunday Sabbath practice, and instead disciplined him for failing to work as a letter carrier on Sundays.

In *Groff v. DeJoy*, the employee initially held a position that did not require work on Sundays. After the USPS agreed to begin delivering packages for Amazon on Sundays, however, Groff's duties included some work on Sundays. To avoid working on Sundays, Groff transferred to a rural Post Office station that did not make Sunday deliveries. When that station later began doing Amazon deliveries as well, Groff remained unwilling to work Sundays. The USPS assigned Groff's Sunday deliveries to other employees and issued disciplinary warnings to Groff for his refusal to work on Sundays. Groff eventually resigned, then sued under Title VII of the Civil Rights Act, asserting that the USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of USPS's business."

Groff lost his battle at both the trial court and Court of Appeals because those courts required the USPS to show only that they would incur something more than a "*de minimis*" cost in providing the accommodation Groff requested, and their conclusion that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

Groff appealed to the United States Supreme Court, which reversed the lowers courts and held that the USPS needed to show far more than it did to defeat Groff's claims. Specifically, the Court held that an employer accused of failing to accommodate an employee's religious beliefs or practices must show that granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business.

What Should Employers Do Now?

- Consider requests for religious accommodation carefully and assess the costs of providing the accommodation realistically – In light of the increased burden imposed by the *Groff* decision, employers should carefully consider all requests for religious accommodation and assess the cost of providing the accommodation objectively and realistically, avoiding unsupported assumptions about costs and burdens. Ideally, the employer should be able to support any decision to deny an accommodation with specific data and/or documents.

- Confer with counsel before taking adverse action against employees who have requested accommodation – Employees who have requested accommodation (either for their religious beliefs or a disability) may assert claims of retaliation if the employer takes adverse action against them shortly after receiving a request for accommodation. Employers should confer with counsel to evaluate the risk of the proposed action and assess their options wisely.

U.S. Supreme Court Strikes Down Affirmative Action in College Admissions Cases

Last summer, the United States Supreme Court issued its long-awaited decision in two cases challenging the legality of race-based affirmative action in college admissions. In its decision, the Court ruled that affirmative action programs at Harvard and the University of North Carolina, which took the race of applicants into account at various points in the admissions process, violated the Equal Protection Clause of the Fourteenth Amendment. The Court did not prohibit the universities from considering how an applicant's race had impacted her life, but emphasized that "the student must be treated based on his or her experiences as an individual – not on the basis of race." Addressing affirmative action plans in general, the Court stated that such programs should be remedial in nature, and "must have reasonable durational limits."

Although the Supreme Court's decision was based on the Equal Protection Clause and not on Title VII, which is applicable to most employers, the decision nevertheless provides insight into how the Court may view affirmative action and diversity, equity and inclusion (DEI) policies maintained by private employers.

In response to the Supreme Court's decision, the Equal Employment Opportunity Commission (EEOC) issued a statement affirming the agency's belief that "it remains lawful for employers to implement diversity, equity, inclusion and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace," and adding that the decision "does not address employer efforts to foster diverse and inclusive workforces."

Since the Supreme Court issued its ruling, various groups have filed suit against a number of employers, challenging their DEI programs and accusing them of unlawful discrimination.

What Should Employers Do Now?

- Ensure that employment decisions are based on factors other than protected status – Both state and federal law have long prohibited employers from making employment decisions based on an applicant's race or membership in another protected class, so the Supreme Court's decision does not break new ground on that point. Employers should note that affirmative action programs are intended to remedy the effects of past discrimination, so employers who are not required by law to adopt affirmative action plans should not do so unless they acknowledge having engaged in discrimination previously. As in the past, employers should base hiring and employment decisions upon the qualifications, skills and performance of applicants and employees, rather than their race or other protected characteristic.

- Evaluate diversity, equity, and inclusion programs to ensure they do not create preferential treatment based on membership in a protected group – The Supreme Court decision does not address DEI programs as such, and the EEOC has already confirmed its belief that DEI programs remain lawful if they are crafted and implemented properly. Employers can seek to advance diversity while mitigating the risk of litigation by focusing on creating the broadest possible pool of qualified candidates for vacant positions, and by maximizing employees' opportunity for success by providing necessary training, opportunities for growth, career guidance, and other support.

What's a Little Lewd Texting Between Friends?

California's FEHA imposes liability on employers for sexual harassment based on whether the person engaging in the harassing conduct is a supervisor or non-supervisory employee. In the case of a non-supervisory employee, an employer is liable if it knew or should have known about the offending conduct, and failed to take appropriate corrective action. In the case of a supervisor, the employer is automatically liable for harassment committed by a supervisor, even if it did not know about the harassing conduct. Notwithstanding the mechanical liability assigned to an employer for the harassing acts of its managers and supervisors, a recent court decision declined to impose liability under that strict standard.

In *Atalla v. Rite Aid Corporation*, the plaintiff, Hanin Atalla, met Erik Lund when he was employed as a district manager for Rite Aid. At the time, Ms. Atalla was in her last semester of pharmacy school, and was shadowing Mr. Lund as one of several rotations necessary to meet her school requirements. When Ms. Atalla's rotation with Rite Aid ended, she stayed in close touch with Mr. Lund, and over time, the two became good friends. Several months later, Rite Aid hired Ms. Atalla as a pharmacy intern on a part-time basis, and upon completion of her schooling, hired her as a staff pharmacist.

Before and after Rite Aid hired Ms. Atalla, she and Mr. Lund, and their respective spouses, met socially on several occasions and attended dinners, and other occasions at their respective residences. Ms. Atalla and Mr. Lund texted frequently and joked with one another on a wide range of topics, including vacations, travel, exercise, weight loss, food, restaurants, family, pets, and work. Over the course of several months, they exchanged hundreds of text messages. Ms. Atalla also started to follow Mr. Lund on social media.

More than a year after becoming friends, Mr. Lund, having engaged in an evening of drinking, texted Ms. Atalla a photo of himself engaging in a sexual act. Ms. Atalla, who was sitting on her couch next to her husband, left the room and deleted the picture and the text. Soon thereafter, Ms. Atalla received two additional texts from Mr. Lund, one admitting that he was very drunk, and one indicating that he meant to send the picture to his wife. Ms. Atalla responded by informing Mr. Lund that she had already deleted the picture and his text. Following that exchange, Mr. Lund texted Ms. Atalla a picture of his genitals, to which Ms. Atalla responded, "Erik, stop please." Mr. Lund responded, "You are right" and the exchange ended.

One week later, Ms. Atalla's counsel sent a letter to Rite Aid asserting a claim of sexual harassment, and informing the company that Ms. Atalla would not be returning to work. Immediately thereafter, Rite Aid investigated the complaint, sustained Ms. Atalla's allegations, and terminated Mr. Lund within a few days. Rite Aid informed Ms. Atalla that it had terminated Mr. Lund's employment and invited her to return to work. Ms. Attala did not respond to Rite Aid's invitation to resume her employment, ceased all communications, and commenced a lawsuit alleging, in part, that Rite Aid was strictly liable for Mr. Lund's conduct. The trial court disagreed, and Ms. Atalla appealed.

The appellate court first acknowledged that employers are strictly liable under FEHA for harassment by a supervisor. The court went on to determine that the underlying goal of FEHA is, "…to provide effective measures to prevent *workplace* harassment," however, and defined the issue as whether Mr. Lund was acting in his capacity as a supervisor when he sent the inappropriate messages. Examining the facts within this framework, the court concluded that the text exchanges "…culminating in the inappropriate photos" had not occurred during normal business hours, and constituted a personal exchange that arose from a personal relationship predating Ms. Atalla's employment, and unconnected to Mr. Lund's employment by Rite Aid. Accordingly, the court declined to hold Rite Aid strictly liable for Mr. Lund's conduct.

What Should Employers Do Now?

- Remain mindful that California law protects employees engaged in legal, off-duty conduct – Given the facts of this case, employers might be tempted to adopt broad policies prohibiting personal relationships between supervisors and their subordinates. In fact, California law provides remedies for employees, supervisors or otherwise, if an employer takes adverse action against an employee for lawful conduct occurring during non-working hours away from the employer's premises.

- Continue to provide comprehensive harassment prevention training to managers and supervisors – Although employers are not permitted to prohibit personal relationships between employees, including employees that are in a supervisory relationship, comprehensive harassment prevention training that emphasizes the risks presented to the company, and the risk presented to the individual supervisor when engaged in social communications and interactions unrelated to work, may help deter such relationships.

- Do not draw false comfort from the *Atalla* decision – Although Rite Aid prevailed in the *Atalla* case, distinguishing between personal relationships and work relationships among coworkers is a murky proposition at best, and many courts will give the benefit of the doubt to employees when forced to confront the question of whether inappropriate conduct occurred in the context of a business relationship or a personal relationship.

ICE Reinstates Employers' Duty to Inspect I-9 Documents In Person

Federal law has long required employers to verify a new employee's identity and right to work in the United States using the Employment Eligibility Verification form, commonly known as Form I-9. Employees must complete, sign, and date Section 1 of Form I-9, and employers must complete, sign, and date Section 2 of the form no later than the employee's third day of employment. Employers must complete Section 3 of the form only when they re-hire an employee or re-verify an employee's right to work after a previous authorization has expired. Employers should generally accept documents offered by a new employee to demonstrate his or her identity and right to work unless they have a specific and substantial reason to believe the documents are invalid.

During the COVID-19 pandemic, the government excused employers from conducting inspections of I-9 documents in person, as the law generally requires, due to public health concerns. However, Immigration and Customs Enforcement (ICE) reinstated the requirement that employers inspect I-9 documents in person as of July 31, 2023.

As a result of the change, employers may no longer examine the I-9 documents of new employees remotely or virtually. Instead, employers must inspect I-9 documents in person within three days of hire. Notably, employers must also physically examine the I-9 documents of employees who were hired since March of 2020 and did not submit their I-9 documents for in-person examination previously.

ICE has published an FAQ page that addresses several common questions about I-9 protocols, which is available at https://www.uscis.gov/i-9-central/form-i-9-related-news/questions-and-answers-related-to-covid-19.

What Should Employers Do Now?

- Require new employees to present I-9 documents in person – Employers should resume requiring new employees to present their I-9 documents in person. If an employer does not have an employee available to examine I-9 documents for a new hire, the employer may designate a representative, such as a notary, to perform the task.

- Complete in-person review of I-9 documents for employees who previously submitted their documents virtually – ICE established a deadline of August 30, 2023 for employers to complete the in-person review of documents for employees who have not submitted their documents in person previously. Employers who have not yet complied with that requirement should identify all employees who have not yet submitted their I-9 documents for in-person review and conduct the necessary examinations as soon as possible.

California Employers Must Implement Workplace Violence Prevention Programs by July 1

California employers are familiar with the long-standing requirement to maintain an Injury and Illness Prevention Program. As of July 1, 2024, Senate Bill 553 (SB 553) will require virtually all employers in the state to create and maintain a workplace violence prevention program as well.

SB 553 applies to all employers in California except (a) those already covered by existing workplace violence prevention standards for healthcare, (b) places of employment where there are fewer than ten employees working at any given time and that are not accessible to the public, (c) places where employees work remotely from a location of their own choice that is not under the employer's control, and (d) a few other exceptions primarily in the public sector.

Covered employers must establish, implement, and maintain an effective workplace violence prevention plan that includes the following elements:

- designation of persons responsible for the plan;
- "effective procedures to obtain the active involvement of employees and union representatives" in developing and implementing the plan;
- methods the employer will use to coordinate the plan with employers;
- effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report;
- effective procedures to communicate with employees regarding workplace violence, including how to report a violent incident, threat or other workplace violence concern; effective means to alert employees to the presence of a workplace violence emergency; and how to obtain help from staff assigned to respond and/or law enforcement;
- procedures to identify and evaluate workplace violence hazards, including scheduled periodic inspections, and correction of any identified hazards;
- procedures for post-incident response and investigation;
- procedures to review and revise the plan as needed, including with the active involvement of employees and authorized employee representatives; and
- initial training about the plan when first established and annual training.

Cal/OSHA – Division of Occupational Safety and Health is likely to develop and publish a Model Workplace Violence Prevention Program similar to its Model Injury and Illness Prevention Program, but it has not yet published a model plan.

What Should Employers Do Now?

- Create a compliant workplace violence prevention plan if you do not already have one in place – Employers should ensure that their plan contains each of the elements required by law, and should be alert to the likely publication of a model plan from Cal/OSHA.

California Further Tightens Restrictions on Covenants Not to Compete

For decades, California has imposed restrictions on covenants not to compete and other forms of restrictive covenants, such as non-solicitation covenants and no-hire covenants. As a result of two new bills, Senate Bill 699 (SB 699) and Assembly Bill 1076 (AB 1076), these long-standing restrictions will become even tighter in 2024.

SB 699 prohibits employers and former employers from attempting to enforce invalid covenants not to compete without regard for whether the contract was signed outside California, or whether the employee worked outside California. In addition, the new law prohibits employers from entering into contracts that include covenants not to compete that are void. Employers that violate SB 699 are subject to suit by current, former, and prospective employees, who can seek injunctive relief, damages, attorneys' fees and costs.

SB 699's companion bill, AB 1076, goes a step further by requiring employers to notify current and former employees subject to unlawful covenants not to compete that those contractual provisions are void, and imposes a deadline of February 14, 2024 for employers to provide any required notices. Employers that fail to provide the notice are subject to civil penalties.

SB 699 and AB 1076 become effective on January 1, 2024, but AB 1076 requires employers to provide the notices mentioned above not only to all current employees who are subject to unlawful covenants not to compete, but also to former employees who were employed subject to unlawful covenants at any time after January 1, 2022, so the law has a limited retroactive effect.

What Should Employers Do Now?

- Review contracts that contain covenants not to compete to determine if the covenants are consistent with current California law – In light of California's broad prohibition of covenants not to compete, most such covenants are likely unenforceable.

- Provide the required notices to any current or former employees whose contracts contain illegal covenants not to compete – Employers should draft the required notices with care, and would be wise to confer with counsel regarding the specific language used.

- Delete unenforceable covenants not to compete from any form agreements that employees must sign – Agreements containing archaic and unenforceable covenants not to compete remain common, so employers should ensure that any form agreements they use are consistent with current law.

New NLRB Ruling Means It's Time to Review Your Employment Handbook and Policies

Last summer, the National Labor Relations Board (NLRB) issued a ruling in *Stericycle Inc.*, which adopts a new, stricter standard for evaluating whether a company policy or rule that does not expressly restrict employee concerted activity is "facially unlawful" under the National Labor Relations Act (NLRA). You may wonder what an NLRB case has to do with your company if your employees are not in a union. The NLRB is the federal agency that is responsible for determining violations of the NLRA, which applies to virtually all employers, irrespective of whether an employer's employees are unionized.

The policies at issue in the *Stericycle* case pertained to personal conduct, conflicts of interest, and the confidentiality of harassment complaints. Ultimately, the NLRB held that any employment policy that has a "reasonable tendency" to dissuade workers from engaging in organizing activity violates the NLRA. Prohibited policies would include, for example, those discouraging employees from discussing workplace concerns with other coworkers.

Notably, based on *Stericycle*, the NLRB will now review employer policies from the perspective of an *employee* who is subject to the rule, who is economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the Board will consider the employer's intent in maintaining a rule to be immaterial. Rather, if an *employee* could reasonably interpret the rule to have a coercive meaning, the NLRB will presume the policy to be improper, even if a contrary interpretation is also reasonable. The *Stericycle* ruling explicitly permits an employer to rebut the presumption that a rule is unlawful by proving that the rule advances a legitimate and substantial business interest that cannot be achieved by a more narrowly tailored rule. To state the obvious, this ruling tips the scales of justice in the employee's favor.

To put the *Stericycle* decision in context, some companies maintain policies that require confidentiality with respect to investigation of workplace complaints, and such policies may now run afoul of the NLRA under the *Stericycle* ruling. For example, if a company's anti-retaliation policy contains language that requires all parties involved in an investigation into a complaint of unlawful behavior such as discrimination or harassment to keep that complaint, the investigation, or the resolution of that complaint confidential, that policy could be read to forbid an employee from engaging in protected concerted activity. Other policies that should be examined in light of this decision include, but are not limited to, those relating to technology/electronic device use, conflicts of interest, discrimination, and harassment.

Notably, the *Stericycle* decision will be applied *retroactively*, meaning that current employment policies that violate the ruling must be revised immediately.

What Should Employers Do Now?

- <u>Review your Employee Handbook and policies and update as necessary</u> – Employers should review their Employee Handbooks and stand-alone policies to ensure that they do not have the unlawful effect of dissuading employees from engaging in organizing activity. Handbooks and policies should be read broadly, and from the perspective of the affected employee, to ensure compliance with the NLRB's new ruling.

And the NLRB Has Weighed In on Confidentiality and Non-Disparagement Clauses in Severance Agreements, As Well

Severance agreements commonly include clauses that prohibit the departing employee from disparaging the employer and require the employee to treat the terms of the agreement as confidential. Section 7 of the NLRA, however, gives employees the right to engage in concerted activities, which generally include communication regarding workplace issues. The conflict between Section 7 and the non-disparagement clauses and confidentiality clauses commonly found in severance agreements was highlighted in the 2023 NLRB decision, *McLaren Macomb*.

In *McLaren Macomb*, the employer implemented a furlough and offered severance agreements to the affected employees. The severance agreements included a clause requiring the employees not to disclose the terms of the agreement to anyone except a spouse, an attorney, or a tax advisor, unless disclosure was compelled by law. The agreements also prohibited employees from making statements "which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

In its decision, the NLRB noted that Section 7 generally affords protection to employees who communicate with third parties about workplace issues. Employees may discuss workplace issues with coworkers, union representatives, or agents of the NLRB, among others. As such, a severance agreement that prohibits a departing employee from communicating with such parties about workplace issues violates Section 7. The NLRB not only found the broad confidentiality and non-disparagement clauses to be unenforceable, it also found that the employer had violated the NLRA and engaged in unfair labor practices merely by offering agreements to the furloughed employees that contained terms that had a reasonable tendency to restrain or interfere with employees' rights under Section 7.

What Should Employers Do Now?

- <u>Tailor confidentiality and non-disparagement clauses more narrowly to avoid violating Section 7</u> – Employers should exercise care in drafting confidentiality and non-disparagement clauses in severance or settlement agreements, and avoid including overly broad clauses that infringe upon employees' rights under Section 7 of the NLRA. Agreements that prohibit employees from disclosing the financial terms of a settlement or severance package should remain enforceable, but employers cannot prohibit disclosure of the existence of an agreement and cannot prohibit employees from making every statement that might reflect negatively upon the employer.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2024. Please recognize that this document does not contain a comprehensive listing of all new laws or decisions that regulate employment, and that the information provided is only a brief summary and should not be used as a substitute for legal advice tailored to a specific factual scenario.

If we can be of any assistance to you in understanding these new developments or in any other matter relating to employment, please do not hesitate to contact us.

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