2023 Legal Update

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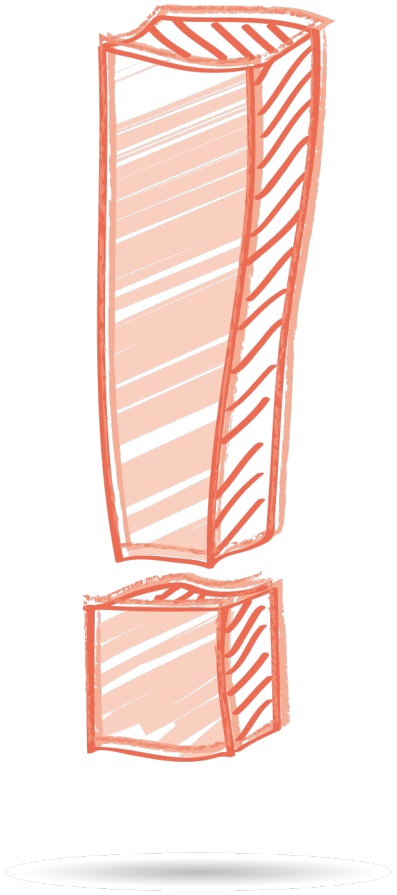
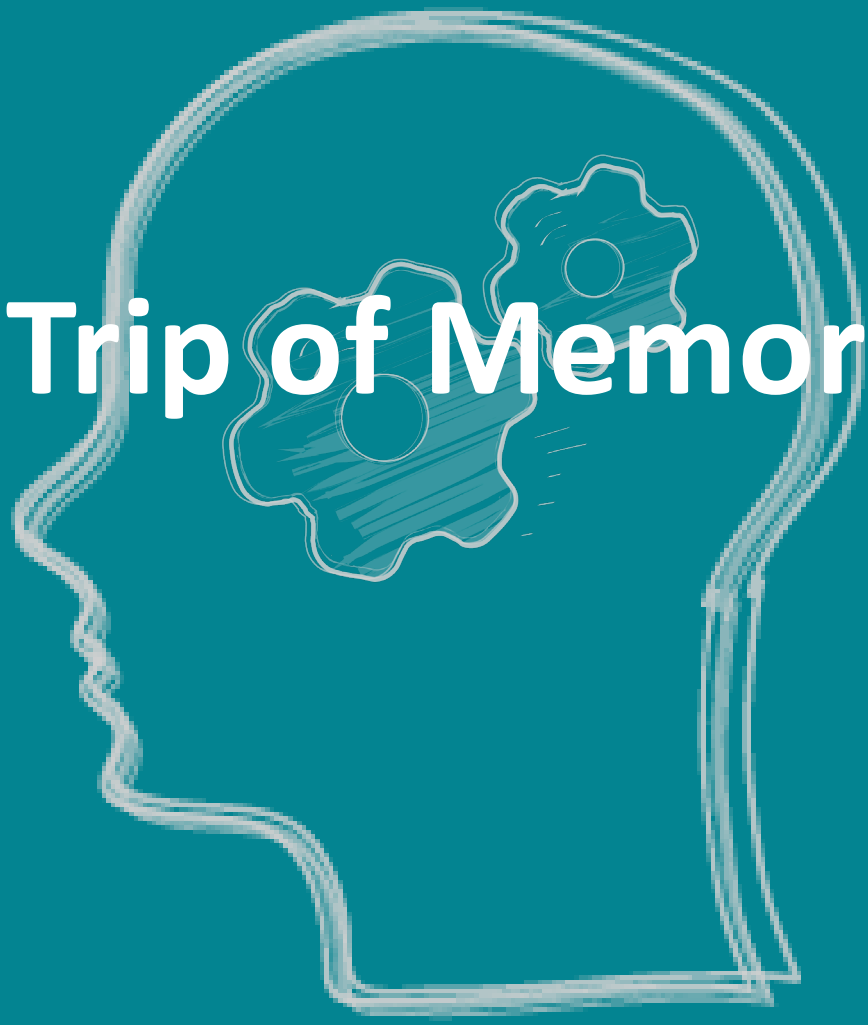
DISCLAIMERS!



- **This is a lot of information to cover!**
- So, we won't cover *everything.*
- Many of these laws become effective 1-1-23, but some are effective NOW. (Some are effective later on)
- Finally, as always, this webinar does not substitute for advice of counsel!

A Brief Trip of Memories Past…



2017 (Effective 1-1-18)

- Ban the box
- Pay history inquiries prohibited
- Labor Commissioner enforcement authority increased
- General contractors liable for wage violations of subcontractors

2018 (Effective 1-1-19)

- "Me Too"
  - Corporate board diversity (women)
  - Harassment training for small employers
  - Bystander intervention training "encouraged"
  - Limitations on confidentiality clauses in severance/settlement agreements
  - Standards of proof for discrimination/harassment claims
- Home care aide registry

2019 (Effective 1-1-20)

- The ABC test for independent contractors - AB 5
- Employment arbitration agreements are a misdemeanor – AB 51
- CCPA
- 3-year statute of limitations for FEHA claims
- No “No-rehire” clauses in settlement agreements
- CROWN Act

2020 (Effective 1-1-21)

CA COVID Response Laws

1. Notice To Employees
2. FFCRA “Gap” Leaves
3. Workers’ Compensation
4. Workplace Safety
5. Unemployment Insurance

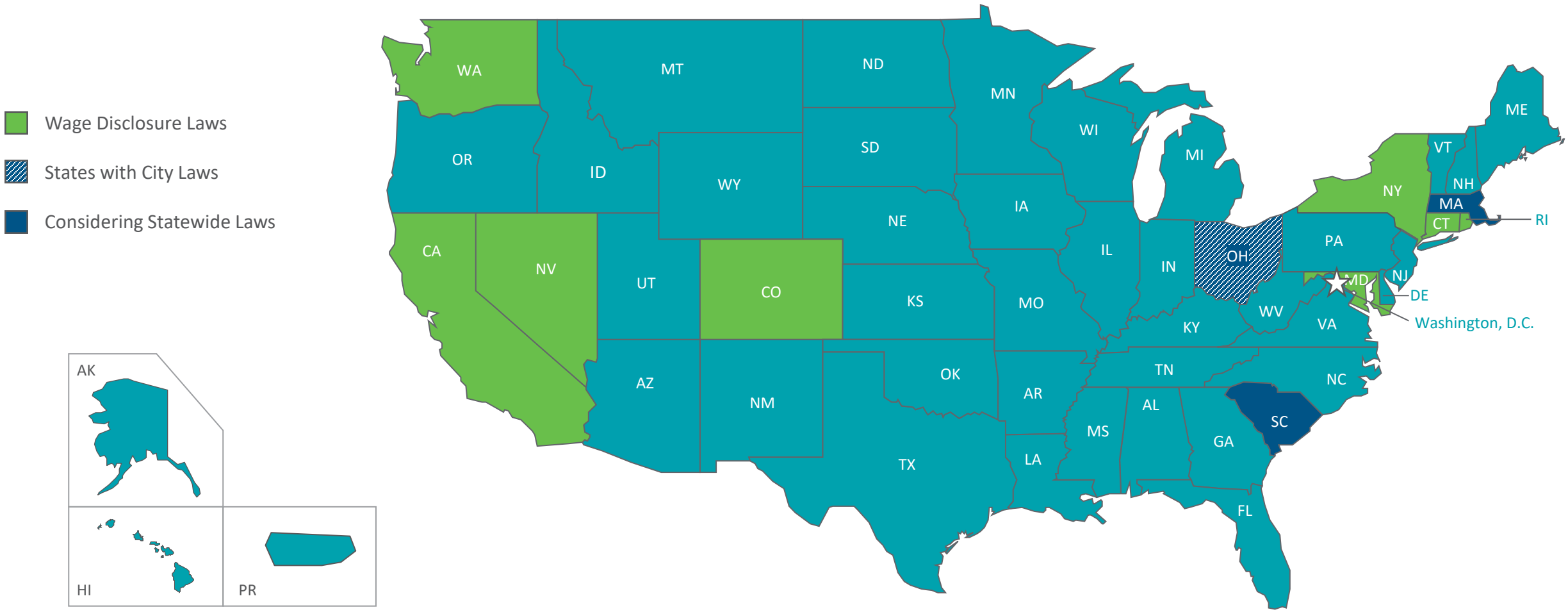
- Amendments to AB 5
- CCPA extended another year
- Corporate board diversity (underrepresented communities)
- Child abuse reporting
- Pay data reporting

2021 (Effective 1-1-22)

- Wage theft = grand theft
- More restrictions on confidentiality clauses
- Hospitality industry right to recall
- Warehouse quotas

1. Wage Transparency

States With Wage Transparency Laws



Wage Transparency In The Golden State Today: SB 1162

A. Pay Scale Disclosures In Job Postings

B. Amendments To The Pay Data Reporting Requirement

Job Postings: Pay Scale Disclosure

Pay Scale Disclosures: Labor Code 432.3

1. Applies to employers with 15 or more employees. Includes the public sector.
2. “Pay scale” must be disclosed in any job opening (including those posted by a third party).
3. “Pay scale” must be disclosed to all applicants, including those not actually given a job interview.

“Pay Scale” Defined: Labor Code 432.3

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

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

Questions:

- Bonuses?
- Commissions?
- Incentive Pay?
- PTO?

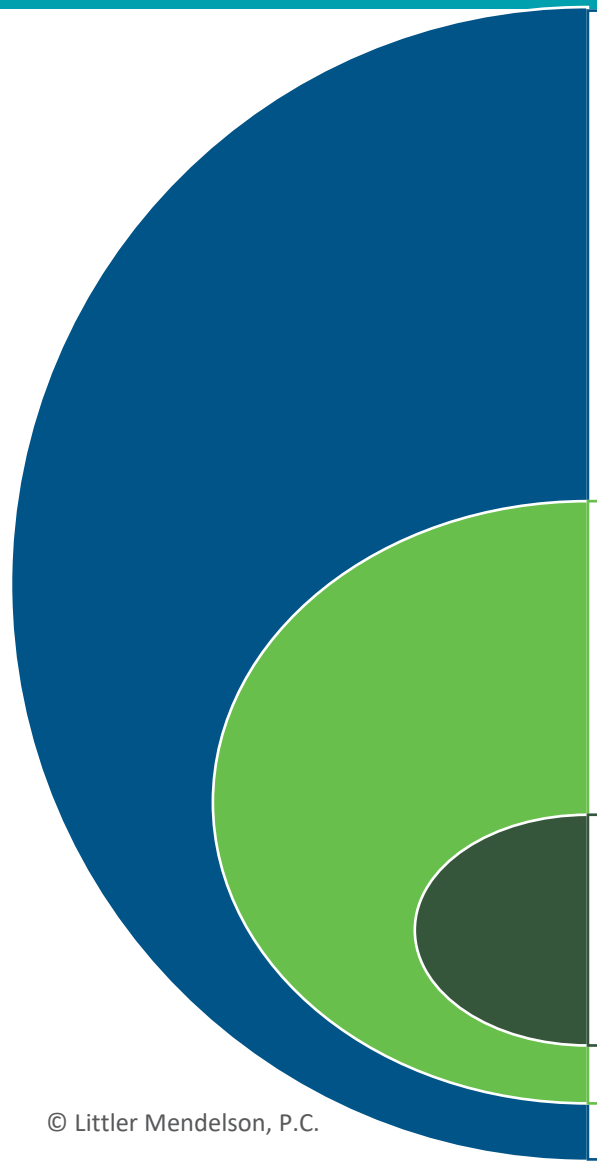
Pay Scale Disclosures: Labor Code 432.3

- Employers must provide current employees the pay scale for their current position, upon request.
- Employers must retain records of job titles and wage rate history for employees for the duration of their employment plus three years.
- Labor Commissioner can inspect these records – in the absence of records, rebuttable presumption in favor of employee's claim.

Pay Scale Disclosures: Penalties

- 1 year statute of limitations – starts the date the employee learned of the violation.
- Labor Commissioner can investigate.
- Penalties of $100 - $10,000 per violation.
- Right to cure - no penalty for first violation if all job postings for open positions updated.
- Private right of action.

Pay Transparency Nationwide: Tiers



Tier 1

- Colorado, Washington and Jersey City, New Jersey require the most information be disclosed: the wage or a wage range for the position, a description of bonus or commission available, and a description of all benefits to be offered to the successful candidate. If no wage scale exists, a Washington employer must identify the minimum wage it would pay or the salary expectation set by the employer prior to posting the position or making any offers on internal positions. In Colorado, if no wage scale exists, the employer must post the good faith minimum and maximum it would pay for the position.
- Jersey City does not require bonus/commission to be disclosed but does require a description of all employee benefits offered.

Tier 2

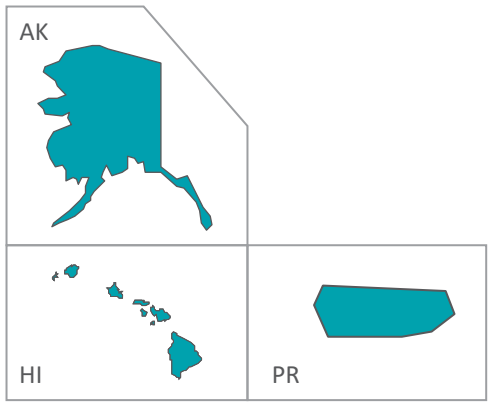
- California, Connecticut, Albany County, New York, Ithaca, New York, New York City, and Westchester County, New York, all require the salary range be included in the job posting. These states do not require additional information be posted in the job advertisement itself. Depending on the specific jurisdiction, the "minimum and maximum salary."

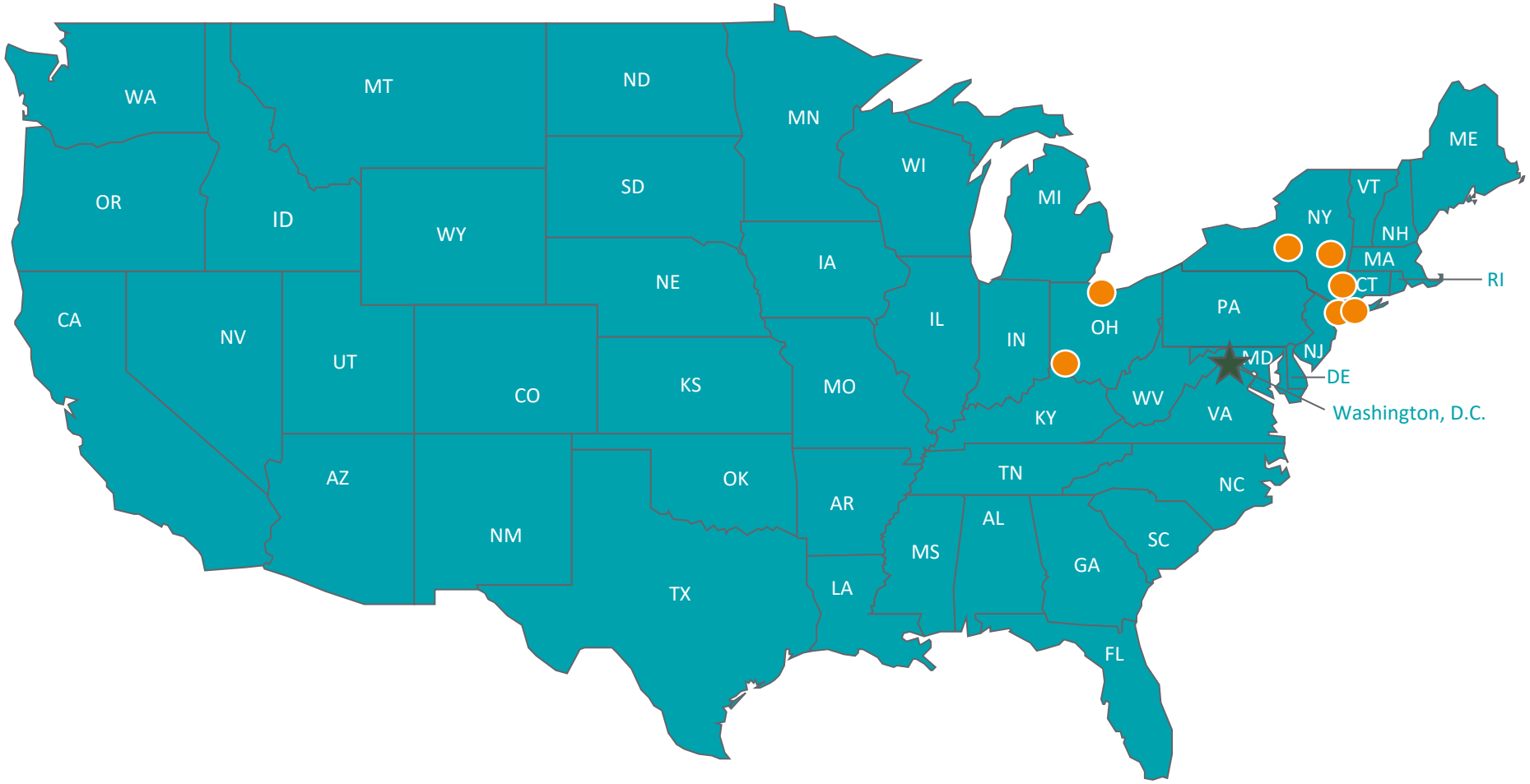
Tier 3

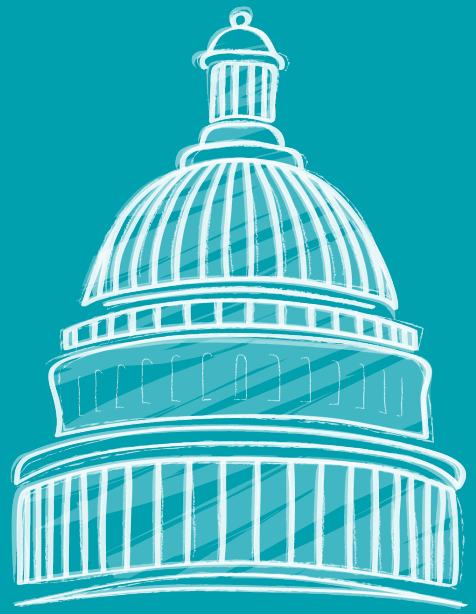
- Maryland, Nevada, Cincinnati, Ohio, Toledo, Ohio, and Rhode Island all require that the employer provide the wage range for a position, *only upon request* or having applied and/or interviewed for the job. Although there are nuanced requirements for these states, they do not require disclosure of the pay scale in their job postings.

Don’t forget about the Cities!

Cincinnati, OH
Toledo, OH
Jersey City, NJ
New York City, NY
Ithaca, NY
Albany County, NY
Westchester County, NY.





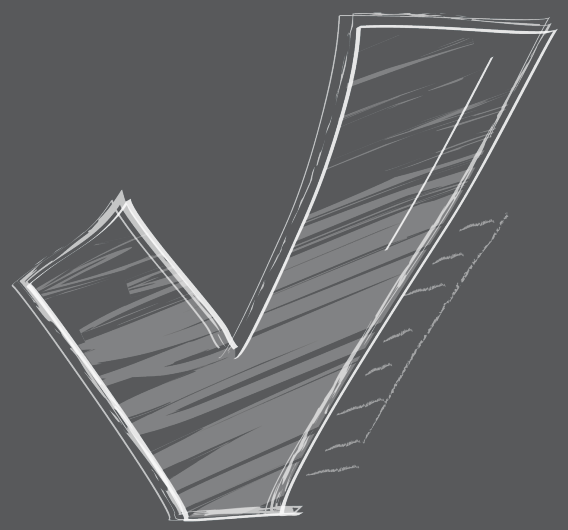


Minimum Wage Change!

- Minimum wage went to $15.50/hour on January 1st
- A provision in the law allows wages of at least $15 to be raised annually up to 3.5% for any increase in inflation of over 7% as measured by the national Consumer Price Index. Gov. Gavin Newsom announced in May that all employers of every size will begin paying a minimum wage of $15.50 beginning Jan. 1, 2023.
- Exempt salary amount has therefore gone up to $64,480 annually in order to remain exempt
- Keep this in mind when disclosing the salary in your job openings.
- Employers in at least 30 cities are already paying a higher local minimum wage

Practical Suggestions

- Consider conducting pay equity audits under attorney-client privilege.
- Start collecting current employee wage data now to preserve those records.



Pay Data Reporting

From Our Shocktober Webinar: 2020

Pay Data Reporting: SB 973

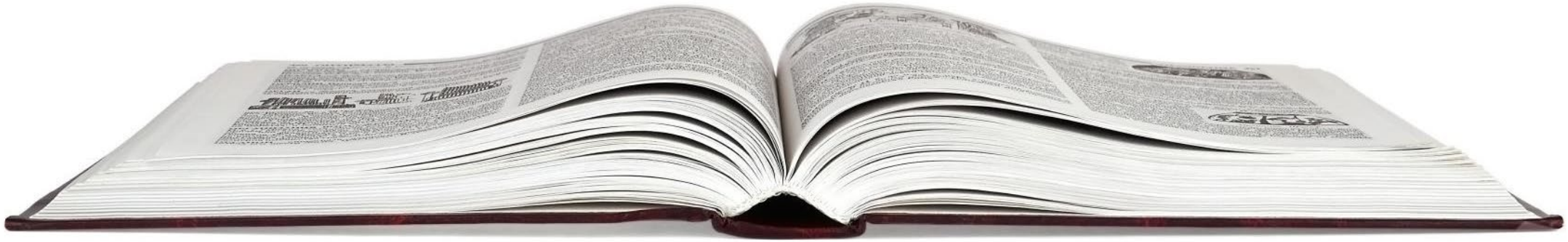
- Applies to California employers with 100 or more employees.
- Must submit to DFEH a "pay data report" by no later than March 31, 2021, and annually thereafter.
- Report must include a breakdown of employees by race, ethnicity, and sex in 10 broadly defined job categories.
- The report also must include a breakdown by 11 BLS "pay bands."
- Information based on W-2 data.

Pay Data Report Amendments: SB 1162

- Applies to private employer that has 100 or more employees, and
- Employer that has 100 or more employees hired through labor contractors* within the prior calendar year.
  - Must disclose ownership names of all labor contractors.
- Must submit two reports if employer falls under both criteria.
- For employers with multiple establishments, must submit a report covering each establishment.

*Labor Contractors: Special Definition

An individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.



Enforcement

- First report is due May 10, 2023.
- Civil Rights Department (CRD) can seek an order requiring compliance – can recover costs.
- EDD will provide names of employers per CRD's request.
- Penalties of $100/employee for first violation and $200/employee for subsequent failure to file.
- Penalties may be apportioned against labor contractors who fail/refuse to provide pay data to employers.
- For consideration: failure to file vs. incomplete report?

SB 1162 Requires Significant Disclosures

Pay data must be submitted to contain the **number of employees** by race, ethnicity and sex in these job categories:

Executive or senior level officials and managers	First or mid-level officials and managers	Professionals	Technicians	Sales Workers
Administrative support workers	Craft workers	Operatives	Laborers and helpers	Service Workers

Annual Pay Data Report

Employers must supply the following information:

1. Number of employees by race, ethnicity, and sex in the above ten categories (employer to create a “snapshot”);

2. Within each of the above job categories, for each combination of race, ethnicity and sex, the mean and median hourly rate (using W-2s);

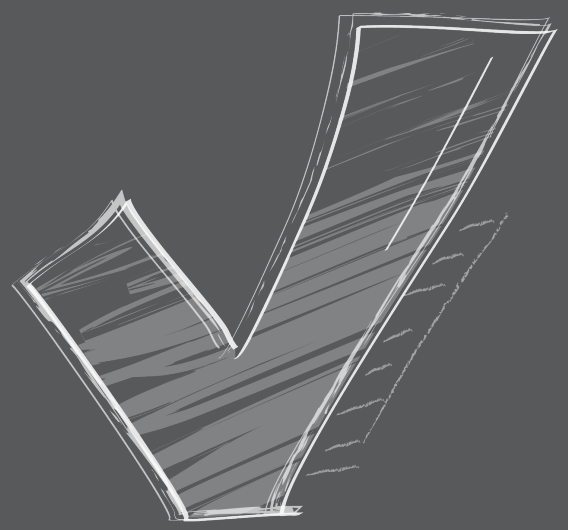
3. Number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in the Occupational Employment Statistics Survey (using W-2s);

4. The total number of hours worked by each employee counted in each pay band during the reporting year; and

5. For employers with multiple establishments, there must be a separate report covering each establishment.

Practical Suggestions

- Designate a single person in the organization with overall responsibility.
- Map out a timeline for compliance.
- Use the A/C privilege where needed.



2. MARIJUANA

A Brief History of Marijuana In California…

A Brief History of Marijuana In California…

Recreational

A Brief History of Marijuana In California…

- Recreational
- Medical

A Brief History of Marijuana In California…

- Recreational
- Medical
- Medicational

A Brief History of Marijuana In California…

- Recreational
- Medical
- Medicational

(Today in California, use is legal under state law.)

Meanwhile, According To The Federal Government…

- Marijuana remains a schedule one controlled substance: no medicinal value. Just like heroin and LSD.
- But not like cocaine, which is on schedule 2.

California Policies: No Marijuana In The Workplace

- Will still be enforceable in 2022-23, based on federal law.
- Unless that changes…
- And, as of January 1, 2024…

AB 2188: Cannabis Discrimination

It will be unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment based on:

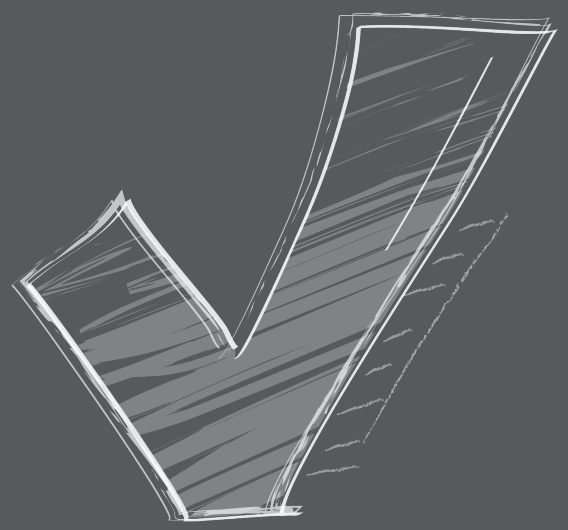
1. The person's use of cannabis off the job and away from the workplace; and
2. An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.

AB 2188: Some Employers/Employees Not Covered

- Federal Contractors
- Construction and Licensed Contractors
- Positions subject to federal testing or federal background investigations/ security clearances.
- Not exempted: those positions deemed “safety sensitive” by an employer.

Practical Suggestions

- Consider whether to continue testing applicants and employees for marijuana, including assessing the risks of not testing for marijuana.
- If testing is continued, consult with testing administrators and labs to ensure detection of active THC rather than nonpsychoactive cannabis metabolites.
- Review and update policies.



Impact On Other States!

"California … frequently creates political winds that sweep across the country."

The Economist, June 20, 2019

Hallucinogenic laws trending nationwide

- Oregon voters passed the 2020 Oregon Ballot Measure 109, making it the first state to both decriminalize psilocybin and also legalize it for therapeutic use.
- MAGIC MUSHROOMS or SHROOMS: Psilocybin and psilocyn are the mind-altering agents found in certain wild mushrooms. They work by imitating serotonin, causing hallucinations and a fusion of reality with fantasy.
- Colorado followed with the 2022 Colorado Ballot Measure 122.
- The use, sale, and possession of psilocybin in the United States is illegal under federal law.

California Senate Bill 58 goes further

Would allow use of psilocybin, psilocyn, dimethyltryptamine (DMT), ibogaine, and mescaline. Treats depression, anxiety and PTSD (supported by veteran groups).

AYAHUASCA or THE SPIRIT MOLECULE: Dimethyltryptamine (DMT) can be found in many plants, including reed canary grass. Similar to mushrooms, it works by acting upon serotonin receptors, causing hallucinations.

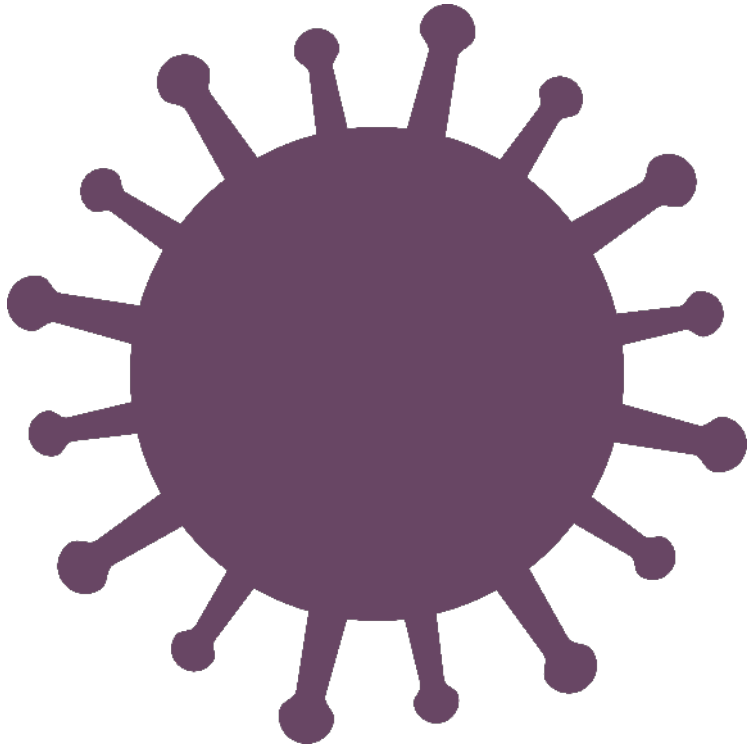
MESCAL: Mescaline can be derived from certain types of cactus plants, such as peyote and San Pedro. It works by activating dopamine and serotonin receptors, causing euphoria, anxiety and hallucinations.

IBOGA: The roots of the shrub iboga are the natural source for the psychedelic substance ibogaine. Ibogaine imitates serotonin, causing hallucinations. It has recently been explored to treat opiate withdrawal.

3. COVID

COVID

1. Cal/OSHA
2. Workers' Compensation
3. Employee Notification/Posting
4. SB 93: Right to Recall



1. What's Cal/OSHA Been Up To?

- Emergency Temporary Standard are now expired.
- Cal/OSHA proposed a new (non-emergency) two-year regulation.
- December 15th meeting:
  - Adopted regulation, which goes to OAL
  - Once adopted, exclusion pay will no longer apply.

New OSHA Regulation

- The Occupational Safety and Health Standards Board adopted the COVID-19 Prevention **Non-Emergency** Regulations. The COVID-19 Prevention Emergency Temporary Standards (ETS) will continue to remain in effect while the Office of Administrative Law (OAL) reviews the proposed Non-Emergency COVID-19 Prevention Regulations. OAL has 30 days to review.
- If approved by OAL, the new non-emergency regulations will remain in effect for **two years**.

New FAQs coming: Cal/OSHA Enforcement Branch

Pending OSHA Regulations

- Employers must report information about employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA, consistent with existing regulations.

- Employers must make COVID-19 testing available at no cost and during paid time to employees following a close contact.

- Employers must exclude COVID-19 cases from the workplace until they are no longer an infection risk and implement policies to prevent transmission after close contact

Pending OSHA Regs

- Employers are no longer required to maintain a standalone COVID-19 Prevention Plan. Instead, employers must now address COVID-19 as a workplace hazard under the requirements found in section 3203 (Injury and Illness Prevention Program, IIPP).
- Employers must do the following:
  - Provide effective COVID-19 hazard prevention training to employees.
  - Provide face coverings when required by CDPH and provide respirators upon request.
  - Identify COVID-19 health hazards and develop methods to prevent transmission in the workplace.
  - Investigate and respond to COVID-19 cases and certain employees after close contact.
  - Make testing available at no cost to employees, including to all employees in the exposed group during an outbreak or a major outbreak.
  - Notify affected employees of COVID-19 cases in the workplace.
  - Maintain records of COVID-19 cases and immediately report serious illnesses to Cal/OSHA and to the local health department when required.

“Close Contact:” New Definition

- “Close contact” is now defined by looking at the size of the workplace in which the exposure takes place.
- For indoor airspaces of 400,000 or fewer cubic feet, “close contact” is now defined as sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period.
- For indoor airspaces of greater than 400,000 cubic feet, “close contact” is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period.

2. Workers' Comp: From Our Shocktober Webinar (October 2020)

California: SB 1159 (effective 9-17-20)

- Creates a "disputable presumption" of industrial injury for an employee who tests positive for COVID within 14 days of work.
- Positive test must occur between July 6, 2020 and January 1, 2023.
- Presumption may be controverted by other evidence.
- Claim must be rejected within 30 or 45 days (not 90 days), otherwise it is presumed compensable.

Workers Compensation Presumption: AB1751

- Extends the presumption to January 1, 2024

3. Covid-19 Posting Requirements: AB 2693

- Amends LC 6409.6 – which required written notice to employees.
  - Can now post in the workplace.
  - But there are detailed requirements for the posting – more than in the written notice.
  - Also Cal/OSHA's final standard may require notice.
    - Stay tuned…
  - Also no longer required to notify local public health agency of outbreaks.

4. California's Right to Recall Law (SB93)

- CALIFORNIA LABOR CODE SECTION 2810.8) REQUIRES CERTAIN HOSPITALITY AND SERVICE INDUSTRY EMPLOYERS TO OFFER TO REHIRE QUALIFIED FORMER EMPLOYEES WHO WERE LAID OFF DUE TO THE COVID-19 PANDEMIC.
- Employees of specified enterprises who were laid off for COVID-19 related reasons must be notified of job openings for the same or similar positions as the ones they last held. They must be offered available jobs, with priority based on length of service, before new employees can be hired.

Nuts and Bolts of Recall Rights

- Recall rights are effective April 16, 2021 through December 31, *2024*
- Qualified laid-off employees must respond to notices within five days, preferably in writing.
- Refresher of industries: Employees at hotels or private clubs with 50 or more guest rooms, airports/service providers and event centers. Employees engaged in building services such as janitorial, maintenance and security services at retail and commercial buildings.

4. LEAVES OF ABSENCE

Updates to Leave of Absence laws

1. Leave to care for a “designated person.”
2. Bereavement leave.
3. I want to leave leave.

1. CFRA – "Designated Person": AB1041

- Employee may take CFRA leave to care for a "designated person."
  - "Any individual related by blood or whose association with the employee is the equivalent of a family relationship."
  - Includes domestic partners.
    - Neighbor?
    - Pastor?
- Employer may limit an employee to one designated person per 12-month period.

2. Bereavement Leave: AB 1949

- Amends CFRA: 5 days leave, unpaid, for bereavement upon death of family member.
  - Additional leave on top of 12 weeks CFRA.
  - May be used multiple times in a year.

Bereavement Leave: AB 1949

- Applies to Employers with 5 or more employees and all public sector employers.
- Employee must have at least 30 days of service.
- Qualifying family member: spouse, child, parent, sibling, grandparent, grandchild domestic partner, or parent-in-law.

Bereavement Leave: AB 1949

- Can be used intermittently.
- Must be used within 3 months of the death.
- Employer may require proof of death
  - Employee must provide within 30 days of first day of leave.
- No retaliation for use.
- Bereavement leave must be taken pursuant to employer's existing bereavement leave policy.

3. I Want To Leave Leave: SB 1044

- Employee may **leave work** or **refuse to show up** to work if:

3. I Want To Leave Leave: SB 1044

- Employee may **leave work** or **refuse to show up** to work if:

  An employee feels unsafe regardless of:

  a. existing health and safety standards or

  b. whether employer has provided health and safety protections

Emergency Leave: SB 1044

In the event of an emergency condition, an employer shall not:

1. Take or threaten adverse action against any employee for refusing to report to, or leaving, a workplace because the employee feels unsafe.
2. Prevent an employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety.

Emergency Leave: SB 1044

- Only applies to conditions of **disaster or extreme peril.** (*Not Health Pandemics*)
- Compliance by employer with existing health and safety regulations is relevant in considering whether a reasonable person would feel unsafe.
- Does not apply to:
  - Employees providing public access to energy or water services;
  - Employees whose primary duties include assisting in emergency evacuations
- Exempts several groups from cell phone provision, including bank employees and employees operating specific equipment.
- Potential PAGA exposure, but there is a right to cure.

5. Garment Worker Protection

What is it?

- Senate Bill 62, also known as the **Garment Worker Protection Act**, went into law on January 1, 2022.
- The law addresses proper payment of employees in the garment industry and the responsibility for parties contracting to have garment operations performed.
- The Act is intended to prevent wage theft, mandate fair pay and improve working conditions for the approx. **45,000** garment workers employed in California.
- California has the highest concentration of garment workers in the country.

GWPA, cont'd.

The Act:

- (1) prohibits piecework pay;
- (2) creates joint and several liability for unpaid wages for "brand guarantors*," along with manufacturers and contractors; and
- (3) creates new recordkeeping requirements for manufacturers and brand guarantors.

** anyone contracting for the performance of garment manufacturing.*

Serious damages from violation of the GWPA

- A garment manufacturer, contractor or brand guarantor who contracts with another person for the performance of garment manufacturing operations will be jointly and severally liable – with any manufacturer and contractor who performs these operations for the garment manufacturer or brand guarantor – for:
  - a garment worker's full amount of unpaid wages
  - any other compensation owed, including interest
  - attorney's fees
  - civil penalties for failing to secure valid workers' compensation coverage

6. DATA PRIVACY

CCPA/CPRA: Data Privacy Law

- Employer's exemption from CCPA/CPRA expired December 31st.
- Laws now applicable to information about employees, applicants, IC and workers. Requires new disclosures about data collection.
- CCPA applies to businesses that satisfy specific criteria.
- CCPA regulates collection and use of "personal information" which may identify or relate to a particular person.
  - IP addresses, Background search results, resumes from online applicants, Covid-19 data.

Does CCPA apply to my company?

1. Company does business in CA;
2. Company is a for-profit business;
3. Company meets any of these criteria:
   - Gross annual revenues over $25mill
   - Buys/receives/shares PII of 100k or more customers/households
   - Derives at least 50% of annual revenue selling/sharing consumers PII.

Federal data privacy: H.R. 8152

- On July 20, 2022, the House Energy and Commerce Committee approved the proposed American Data Privacy and Protection Act (ADPPA) by a 53-2 margin
- The bill would create national standards and safeguards for personal information collected by companies, including protections intended to address potentially discriminatory impacts of algorithms
- **Covered entity** is defined as an entity that "collects, processes, or transfers covered data and is subject to the Federal Trade Commission Act," in addition to nonprofit organizations and common carriers
- Section 207 of the ADPPA would go a step further by requiring companies to evaluate certain artificial intelligence tools and **submit those evaluations to the FTC**.

CPRA/CPPA Littler Resources

- News & Analysis | Littler Mendelson P.C. ~ Free Articles!
- California Privacy Rights Act of 2020 (CPRA) | Littler Mendelson P.C.
  - Compliance Suit
  - Webinars
  - Publications
  - Podcasts
  - CPRA/CPPA Team

7. AB 701: Warehouse Quotas

Warehouse Quota: Disclosure to Employees

Why enact a bill to regulate quotas?

Warehouse Distribution Center (WDC) employees have a high rate of injury and illness.

Quotas prevent employees from obtaining full benefit of minimum wage if a quota is increased to make up for impact of a minimum wage increase.

What disclosures are required?

Employers must provide a written description of each quota an employee is subject to – within 30 days of hire. Eff.1/1/22

Must include the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.

A covered employer may not take adverse employment action against an employee for failure to meet any quota that has not been disclosed in writing to the employee as required by the law.

Who must abide by this law?

Employers who “directly or indirectly control” 100 or more non-exempt employees at a single site.

A WDC that employs 1,000 or more employees at one or more sites in California.

Employees provided by staffing agencies are covered if the employer controls the terms and conditions of their employment.

Examples of Quotas

Processing a required number of packages in a specific amount of time, such as 200 packages per hour

Having to clear all packages from a conveyor belt based on belt speed

Clearing all incoming or outgoing inventory within a single shift

Filling a certain number of containers in a specific time or in one work shift

Existing Employees

Employees now have the right to request a copy of any quota, as well as the most recent 90 days of the employee's own personal "work speed data."

Employers are required to comply with such requests as soon as practicable, but no later than 21 calendar days from the date of the request.

Cannot Interfere with other rights

An employee cannot be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities (including reasonable travel time to and from bathrooms), or compliance with occupational health and safety standards.

Nor may a quota be so high that if an employee takes meal and rest breaks, goes to the bathroom, or attempts to exercise their rights under occupational health and safety standards, they will fail to meet the quota.

8.
Arbitration Update

The “I Do Not Recall Signing” Defense

- Employees often argue they are not bound by an arbitration agreement because they do not recall signing it, even though the agreement contains their signature.
- New Appellate Case: Plaintiffs said they got a large stack of docs to sign on first day, and got no copies. Would not have signed it if they had known.
- Court of Appeal held that absent evidence that their signatures were forged , the plaintiffs failed to show the arb agreements were not authentic and unenforceable.
- Burden shifts to employer who satisfied it by having custodian of records identify agreement in a declaration.

Cont'd.

- Common objection: Custodian lacks personal knowledge since not personally present when signed. (HR turnover!)
- Argument rejected by Court.
- Electronic signatures:
  - The Court of Appeal reasoned that an individual cannot confirm or deny the authenticity of an electronic signature simply by looking at the document.[3] Accordingly, "the individual's inability to recall signing electronically may reasonably be regarded as evidence that the person did not do so."[4] By contrast, a person "is capable of recognizing his or her own personal signature" and if "the individual does not deny that the handwritten signature is his or her own, that person's failure to remember signing is of little or no significance."
- Iyere v. Wise Auto Group, Inc. 2023 WL 314122

Pay Fees or Face a Jury

- Once a case is sent to arbitration, fees are assessed.
- There are strict deadlines for paying fees. Initial Fee deposits are often as high as $10,000-15,000.
- If employer fails to pay its arbitration fees on time, it will be found in material breach of the arbitration agreement.
- De Leon v. Juanita Foods, Inc. No.B315392 (Cal.Ct.App.Nov.23, 2022)
  - Case sent to JAMS and assessed a deposit fee. Defendant paid a few days late. Plaintiff filed a motion to vacate order compelling arb.

9. FEDERAL UPDATES

FTC Proposes a Ban on Noncompetes

- Jan.5th the Federal Trade Commission proposed a rule that would ban all non-compete agreements, with limited exceptions.
- The Rule defines a noncompete as "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the workers employment with the employer."

Noncompete Ban, cont'd

- Also includes Ban on repayment of employer (or third party) training costs if workers employment terminates within a specified time period, and the required repayment is not reasonably related to the cost the employer incurred for training the worker.
- Applies to all existing non-competes
- This rule will supersede all state laws and regulations in conflict with the new rule.
- It's just a "proposed rule" for now – stay tuned.

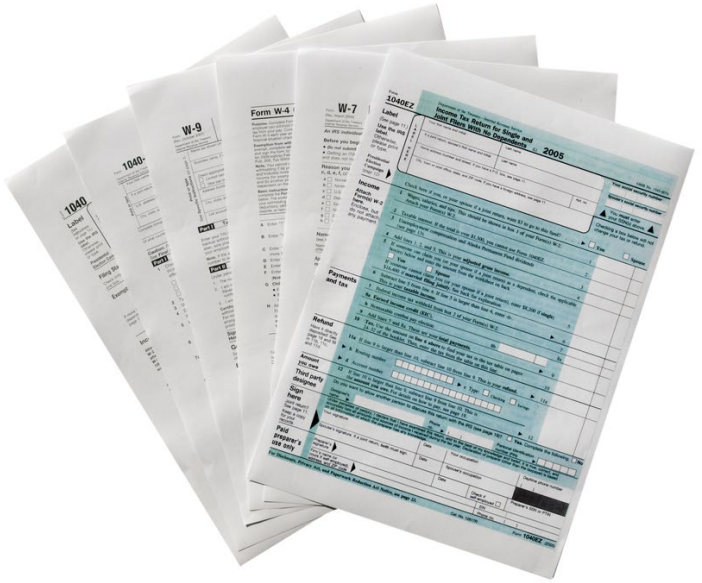
FTC Proposes Rule Banning Non-Competes | Littler Mendelson P.C.

New US DOL Proposed Rule: Independent Contractor Classification

- Using California's AB5 legislation (which became law in 2020) as its foundation, the rule would replace the many factors that businesses currently use to determine whether an independent contractor is an employee with just these three:
  a) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
  b) the service is performed outside the usual course of the business of the employer; and
  c) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Consequences of new Federal “AB5” Rule

- The rule is not consistent with most of the IRS’s tax and reporting regulations
- The rule is not consistent with the laws that individual states have in place.
- As happened in California, this rule will lead to federal lawsuits from business groups, industry associations and chambers of commerce. (*What’s the latest?)
- US Department of Labor announces proposed rule on classifying employees, independent contractors; seeks to return to longstanding interpretation | U.S. Department of Labor (dol.gov)



EEOC Guidelines:
Employer's use of Artificial Intelligence

- U.S. Equal Employment Opportunity Commission (EEOC) recently released a draft of its new Strategic Enforcement Plan (SEP).
- According to the EEOC, technology that can result in discrimination may include:
  - Software that incorporates algorithmic decision-making or machine learning.
  - Automated recruitment, selection, or production and performance management tools.
  - Other existing or emerging technological tools used in employment decisions.

Use of AI

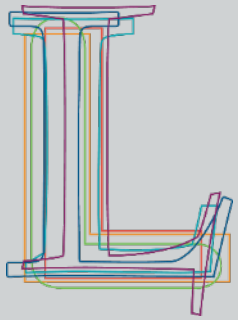
- AI use in the workplace has skyrocketed. Nearly 1 in 4 organizations uses AI to support HR-related activities, according to a 2022 survey by the Society for Human Resource Management (SHRM).
- Nearly 80 percent of these companies use AI for recruiting and hiring purposes.
- AI software can more efficiently source, recruit, evaluate and communicate with job candidates.

Possible ADA Violation

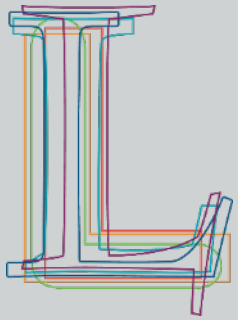
- Employers may rely on different types of software that incorporate algorithmic decision-making at various stages of the employment process:
  - resume scanners that prioritize applications using certain keywords
  - "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally **"screens out"** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation.
- Public comments on the SEP draft must be received by Feb. 9, 2023.

Homework!

- Check out this open AI, called ChatGPT.
- ChatGPT: Optimizing Language Models for Dialogue (openai.com)
- ChatGPT interacts in a conversational way. The dialogue format makes it possible for ChatGPT to answer followup questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.



Questions?



Thank You!