



CALIFORNIA EMPLOYMENT LAW UPDATE

January 27, 2022



Littler

CDA
CALIFORNIA DELIVERY ASSOCIATION

Presented By



BRUCE SARCHET

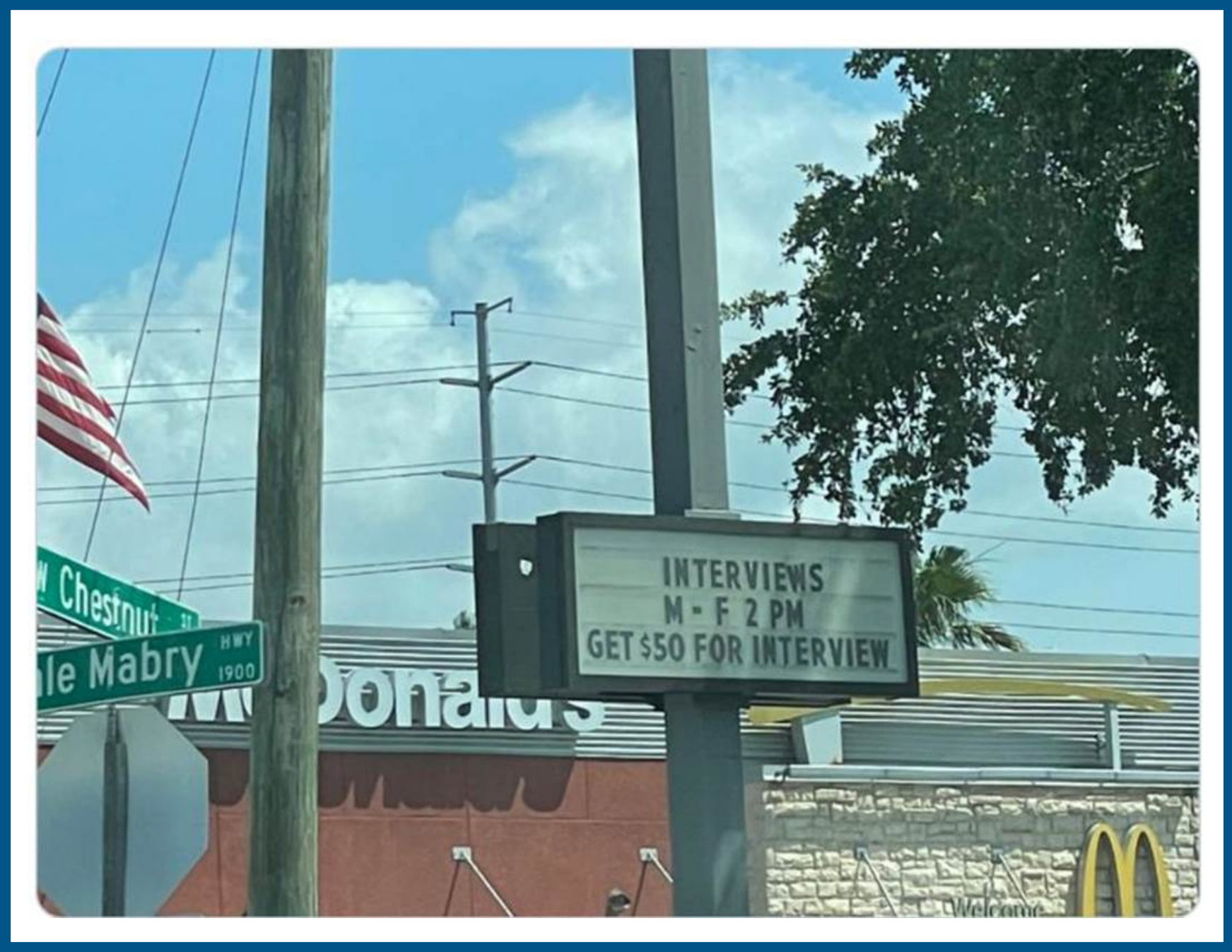
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Sacramento

Happy New Year?







Insight

In-Depth Discussion

NEWS & ANALYSIS > INSIGHT

Here We Go Again! California's Latest Crop of Employment Laws

By Bruce J. Sarchet on October 11, 2021

PRINT 

California is at it again – adopting a host of new labor and employment laws that will further regulate and complicate business operations in the Golden State. Littler’s Workplace Policy Institute has been tracking these bills as they worked their way through the legislature and been signed into law by Governor Newsom. The new California laws are summarized briefly below. Also, please join us [at our annual webinar on October 19, 2022](#), in which members of WPI will discuss these new laws in further detail, along with strategies and options for future compliance.

These new California employment laws become effective on January 1, 2022, unless otherwise noted.

New Employment Laws Generally Applicable to All Employers

Wage Theft Is “Grand Theft”

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Focus Areas

[Workplace Policy Institute](#)

What Does This Mean For Us?



The way things were

The new normal is already here. Get used to it

The era of predictable unpredictability is not going away

The era of predictable unpredictability is not going away



Luca D'Urbino

Dec 18th 2021

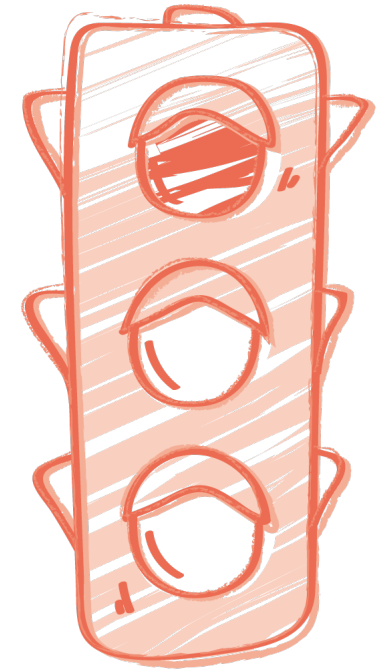
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IS IT NEARLY over? In 2021 people have been yearning for something like stability. Even those who accepted that they would never get their old lives back hoped for a new normal. Yet as 2022 draws near, it is time to face the world's predictable unpredictability. The pattern for the rest of the 2020s is not the familiar routine of the pre-covid years, but the turmoil and bewilderment of the pandemic era. The new normal is already here.

What Does This Mean For Us?

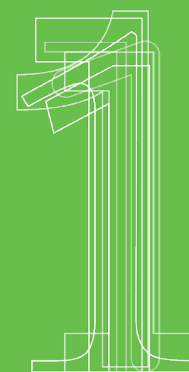
- Operating a delivery business in California (in a pandemic, with a crushing labor shortage, and a dozen new employment laws) presents employment and labor law challenges for employers.
- Challenges which simply were not present last month.
- **THAT'S** why we need to keep current!



Agenda

1. COVID in the Workplace
2. New California Employment Laws
3. Universal Health Care in CA?
4. Independent Contractors
5. NLRB Update
6. Wage and Hour Update
7. Parting Thoughts





COVID IN THE WORKPLACE

January 13, 2022

(Slip Opinion)

Cite as: 595 U. S. ____ (2022)

1

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Wash-

The applications for stays presented to JUSTICE KAVANAUGH and by him referred to the Court are granted. OSHA's COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit

ceive a COVID-19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact

Can You Still Have a Mandatory Vaccination Policy?

- Yes!
- Many employers do.
- Must allow exemptions for medical reasons and sincerely held religious beliefs.
- But this is not required by either federal or Cal/OSHA.
- What is required is compliance with the Cal/OSHA ETS.

Cal/OSHA: The Written COVID-19 Prevention Plan

- Employers are Still Required to:
 - Have a system for employees to report symptoms, close contacts, and possible COVID hazards at work without fear of reprisal.
 - Have procedures for employees with medical and/or other conditions that put them at increased risk of severe illness to request accommodations.
 - Provide information about access to COVID testing, when required.
 - Communicate information about COVID hazards and the employer's policies and procedures.



Recordkeeping and Reporting



Report Report information about C+ cases and outbreaks to the local health department when required by law

Maintain Maintain records of steps taken to implement a written COVID-19 Prevention Program

Make Make the written program available to employees, authorized representatives, and Cal/OSHA upon request

Keep Keep a record of and track all C+ cases including employee name, contact information, occupation, location, date of last day at workplace, date of positive COVID test

New! The Duration of Isolation.

CDC Newsroom

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CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population

[Español \(Spanish\)](#)

Media Statement

For Immediate Release: Monday, December 27, 2021

Contact: [Media Relations](#)
(404) 639-3286

Given what we currently know about COVID-19 and the Omicron variant, CDC is shortening the recommended time for isolation for the public. People with COVID-19 should isolate for 5 days and if they are asymptomatic or their symptoms are resolving (without fever for 24 hours), follow that by 5 days of wearing a mask when around others to minimize the risk of infecting people they encounter. The change is motivated by science demonstrating that the majority of SARS-CoV-2 transmission occurs early in the course of illness, generally in the 1-2 days prior to onset of symptoms and the 2-3 days after.

Additionally, CDC is updating the recommended quarantine period for anyone in the general public who is [exposed to COVID-19](#). For people who are unvaccinated or are more than six months out from their second mRNA dose (or more than 2 months after the J&J vaccine) and not yet boosted, CDC now recommends quarantine for 5 days followed by strict mask use for an additional 5 days. Alternatively, if a 5-day quarantine is not feasible, it is imperative that an exposed person [wear a well-fitting mask](#) at all times when around others for 10 days after exposure. Individuals who have received their booster shot do not need to quarantine following an exposure, but should wear a mask for 10 days after



COVID rapid tests can be hard to come by. This was the message in a pharmacy in Washington, D.C.
Selena Simmons-Duffin/NPR



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That's Great, Right?

- Well, the CDC does not enforce things.
- In the past, we have advised compliance with CDC guidance, because if you don't follow it, and you have an outbreak...
- So, you should still do that.
- But the real place to look for the rules is Cal/OSHA.

January 8, 2022

The screenshot shows the California Department of Industrial Relations website. The header includes the CA.GOV logo, a home icon, and the text 'California Department of Industrial Relations'. Navigation links for 'Cal/OSHA - Labor Law', 'Safety & Health', 'Workers' Comp', and 'Self Insurance' are visible. The main content area features the title 'COVID-19 Emergency Temporary Standards Frequently Asked Questions' in a large, bold, orange font. Below the title is a link for 'español' and a 'Back to top' link. The sub-header 'CDPH Isolation and Quarantine' is underlined.

This means that, with only one exception noted below, the new isolation and quarantine recommendations from CDPH replace the exclusion periods and return to work criteria in sections 3205(c)(9) and 3205(c)(10) of the ETS. The exclusion requirements are as follows in the tables below.

This means that, with only one exception noted below, the new isolation and quarantine recommendations from CDPH replace the exclusion periods and return to work criteria in sections 3205(c)(9) and 3205(c)(10) of the ETS. The exclusion requirements are as follows in the tables below.

The June 17, 2021 ETS remains in effect until January 14, 2022. Until then, the quarantine rules for fully vaccinated workers set forth therein continue to apply because exclusion period for this group of workers is not longer than those recommended by the updated CDPH guidance. However, employers are encouraged to review and begin the process of implementing the CDPH recommendations before then. The CDPH recommendations will replace exclusion periods and return to work criteria for all workers when the second readoption of the ETS takes effect on January 14, 2022.



I am looking for

I am a

Programs

A-Z Index

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State of California—Health and Human Services Agency **California Department of Public Health**

TOMÁS J. ARAGÓN, M.D., Dr.P.H.
State Public Health Officer & Director



GAVIN NEWSOM
Governor

January 8, 2022

TO: Local Health Jurisdictions

SUBJECT: Guidance for Local Health Jurisdictions on Isolation and Quarantine of the General Public

Isolation and Quarantine Recommendations for the General Public (not applicable to healthcare personnel)

Table 1

Persons Who Test Positive for COVID-19 (Isolation)	Recommended Action
Everyone, regardless of vaccination status, previous infection or lack of symptoms.	<ul style="list-style-type: none">• Stay home (PDF) for at least 5 days.• Isolation can end after day 5 if symptoms are not present or are resolving and a diagnostic specimen* collected on day 5 or later tests negative.• If unable to test or choosing not to test, and symptoms are not present or are resolving, isolation can end after day 10.• If fever is present, isolation should be continued until fever resolves.• If symptoms, other than fever, are not resolving continue to isolate until symptoms are resolving or until after day 10.• Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings (see Section below on masking for additional information) <p>*Antigen test preferred.</p>

Table 2

Persons Who are Exposed to Someone with COVID-19 (Quarantine)	Recommended Action
<ul style="list-style-type: none">• Unvaccinated; OR• Vaccinated and booster-eligible but have not yet received their booster dose.** <p>(Refer to CDC COVID-19 Booster Shots to determine who is booster eligible)</p>	<ul style="list-style-type: none">• Stay home (PDF) for at least 5 days, after your last contact with a person who has COVID-19.• Test on day 5.• Quarantine can end after day 5 if symptoms are not present and a diagnostic specimen collected on day 5 or later tests negative.• If unable to test or choosing not to test, and symptoms are not present, quarantine can end after day 10.• Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings (see Section below on masking for additional information).• Strongly encouraged to get vaccinated or boosted.• If testing positive, follow isolation recommendations above.• If symptoms develop, test and stay home.

** Workplace Setting (not applicable to healthcare personnel):

In a workplace setting, asymptomatic employees in this category are not required to stay home from work if:

- A negative diagnostic test is obtained within 3-5 days after last exposure to a case
- Employee wears a well-fitting mask around others for a total of 10 days
- Employee continues to have no symptoms.

Table 3

Persons Who are Exposed to Someone with COVID-19 (No Quarantine)	Recommended Action
<ul style="list-style-type: none">• Boosted; OR• Vaccinated, but not yet booster-eligible. <p>(Refer to CDC COVID-19 Booster Shots to determine who is booster-eligible)</p>	<ul style="list-style-type: none">• Test on day 5.• Wear a well-fitting mask around others for 10 days, especially in indoor settings (see Section below on masking for additional information)• If testing positive, follow isolation recommendations above.• If symptoms develop, test and stay home.



NEW CALIFORNIA LAWS FOR 2022

AB 1003 – Wage Theft Now In The Penal Code

- New Section 487m of the California Penal Code.
- “Grand Theft” now defined to include intentional theft of wages, including gratuities, in excess of \$950 from any one employee, or \$2,350 from a group of employees.
- “Employer” includes the “hiring entity of an independent contractor.”

AB 1003 – What is Grand Theft, anyways...

- In California, grand theft may either be a misdemeanor or a felony.
- County jail for up to one year (misdemeanor), or 16 months - three years (felony).



Ok, so what does this mean?

- Great question!
- We know that some existing Labor Code violations currently are misdemeanors.
- But we believe actual criminal prosecution is extremely rare.

AB 1003 – Practical Suggestions

- Audit for wage and hour law compliance today.
- Not just your written policies, but your practices as well.
- Do your best to stay current. Example: As of July (and retroactively), missed meal/rest premiums must now be paid at the “regular rate of pay.”
- So, this means audit tomorrow, too.



Sb 807 – Record Retention

- Currently, FEHA requires that personnel records be retained for two years.
- SB 807 lengthens this to four years.
- If litigation has been filed, records must be maintained until the applicable statute of limitations has run, or until the conclusion of the litigation, whichever occurs later.



SB 807 – Practical Suggestions

- You never know what is going to happen.
- Why discard after only 4 years?
- Might need to show comparability (we treat like cases alike) in 5, 10 or 15 years.



SB 331 – Restrictions on Severance Agreements

- Cannot prevent the disclosure of “information about unlawful acts in the workplace.”
- Must notify employee of right to consult with an attorney and provide a reasonable time period (not less than five business days) in which to so consult. (Regardless of age.)

Severance Agreements – Not Restricted

- Parties can still keep in confidence the monetary amount of a severance payment.
- Does not prohibit an employer from protecting its trade secrets, proprietary information or confidential information “that does not involve unlawful acts in the workplace.”

SB 331 - Sample Language (From the Statute)

“Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”





UNIVERSAL HEALTH CARE

AB 1400 California Guaranteed Health Care for All Act (CalCare)

**Assembly Members Ash Kalra, Lee, Santiago
Principal Coauthors » Assembly Members Chiu and Ting
and Senators Lena Gonzalez, McGuire, and Wiener
Coauthors » Assembly Members Carrillo, Friedman,
Kamlager, McCarty, Nazarian, Luz Rivas, Wicks and
Senators Becker, Cortese, Laird, and Wieckowski**

SUMMARY

Today's U.S. health care system is a complex, fragmented multi-payer system that still leaves wide gaps of coverage and poses significant issues of affordability. Despite health care spending in the U.S. far exceeding other high-income, industrialized countries that offer a publically financed single-payer system, we consistently report worse health outcomes and disparities among vulnerable populations.

AB 1400 sets in motion a single-payer health care coverage system in California, called CalCare, for all residents, regardless of citizenship status. By streamlining payments and lowering per-capita health care spending, CalCare guarantees quality health care and long-term care without creating barriers to care or out-of-pocket costs.

By affirming health care as a right to all Californians and establishing a payment system that eliminates waste and aligns reimbursements with the actual cost of care, we can make significant progress on financing and acquiring state and federal approvals.

HEALTH SYSTEM STATUS QUO

An estimated 2.7 million Californians remain uninsured¹ and millions more with coverage often delay or are unable to access necessary medications or health care services due to cost. Since the Covid-19 pandemic, that number has grown as many workers have lost their employer-based coverage or were unable to afford the high cost of health care due to economic constraints.

Health care spending in the United States far outpaces other industrialized countries.² Based on prior years of health insurance rate filing data, hospital costs and physician services

represent an overwhelming proportion of the overall projected premium dollar — 75% of the projected 2018 premium dollar.

Americans use significantly less health care services than people in other industrialized countries³ — including physician visits and hospital admissions — yet spending is greater due to higher prices. Despite higher spending, Americans have worse health outcomes, including shorter life expectancy and greater prevalence of chronic conditions.⁴

Another challenge with our health care system is the pervasiveness in health disparities. California is a diverse state — racially, ethnically, economically, and geographically — and vulnerable populations face greater health risks and have less access to safety net programs.

California's growing senior population, aged 60 years and over, is expected to grow more than three times as fast as the total population,⁵ which will place additional strain on health care services. As more aging adults enter Medicare, there will be a need to improve access and lower costs by pooling state and federal funds.

continued »»

- 1 Covered California estimates, Jan. 12, 2021.
- 2 I. Papanicolas, L.R. Woskie, and A.K. Jha, "Health Care Spending in the United States and Other High-Income Countries." *JAMA*, Mar. 13, 2018.
- 3 Health at a Glance 2017: OECD Indicators — number of doctor consultations per person, hospital discharges, and average length of stay in hospital.
- 4 "U.S. Health Care from a Global Perspective: Spending, Use of Services, Prices, and Health in 13 Countries," The Commonwealth Fund, Oct. 2015.
- 5 California Department of Aging website, "Facts About California's Elderly." https://aging.ca.gov/Data_and_Reports/.

CALCARE – According to its supporters:

- Comprehensive Benefits and Freedom of Choice.
- No Premiums, Copays or Deductibles.
- Addressing Health Care Disparities.
- Long-Term Services and Supports for People with Disabilities and the Elderly.
- Reducing Health Care Spending and Improving Care.
- Global Budgets for Institutional Providers.



January 19, 2022

TO: Members, Assembly Appropriations Committee

SUBJECT: JOINT OPPOSITION TO AB 1400 (KALRA, LEE AND SANTIAGO) GUARANTEED HEALTH CARE FOR ALL – AS INTRODUCED FEBRUARY 19, 2021 – SCHEDULED FOR HEARING – JANUARY 20, 2022 AND ACA 11 (KALRA AND LEE) TAXES TO FUND HEALTH CARE COVERAGE AND COST CONTROL – AS INTRODUCED JANUARY 5, 2022 OPPOSE JOB KILLERS

The California Chamber of Commerce and the below listed organizations are **OPPOSED** to **AB 1400 (Kalra, Lee, and Santiago)** as introduced on February 19, 2021, and **ACA 11 (Kalra and Lee)** as introduced on January 5, 2022, as **JOB KILLERS**, as the bills would create a new and exorbitantly expensive government bureaucracy, which would control and finance a state-run health care system (CalCare), ultimately resulting in significant job loss to California. Similar proposals in the past have been estimated to annually cost more than \$400 billion (see SB 562 (Lara), 2017 Senate Floor analysis), which is a financial commitment four times that of Medi-Cal. Successfully standing up a new function that would be twice the size of the existing state budget is highly doubtful, given the state's recent experience with

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The Califo benefit delays and massive fraud in the unemployment system. The crippling tax increases required to pay for this massive new bureaucracy could be as much as \$200 billion annually and would be increased in the future by a simple majority of the Legislature. **to AB 1400 (Kalra, Le and Lee) as** introduced on January 5, 2022, as **JOB KILLERS**, as the bills would create a new and exorbitantly expensive government bureaucracy, which would control and finance a state-run health care system (CalCare), ultimately resulting in significant job loss to California. Similar proposals in the past have been estimated to annually cost more than \$400 billion (see SB 562 (Lara), 2017 Senate Floor analysis), which is a financial commitment four times that of Medi-Cal. Successfully standing up a new function that would be twice the size of the existing state budget is highly doubtful, given the state's recent experience with benefit delays and massive fraud in the unemployment system. The crippling tax increases required to pay for this massive new bureaucracy could be as much as \$200 billion annually and would be increased in the future by a simple majority of the Legislature.

Is This Really In Our Future?



**INDEPENDENT
CONTRACTOR**



**AB 5 –
INDEPENDENT
CONTRACTORS –**

California's War On Independent Contractors

- 2018: California Supreme Court: “For determining independent contractor status, the Borello test, which we have been using for 30 years, is no good, we should change to the ABC Test.”
- Business community: “You can’t be serious! You are legislating! That’s the job of the Legislature.”

AB 5

- Legislature: “We agree! Let’s pass AB 5!”
- AB 5: 130 words to describe the ABC Test.
- 3,478 words to describe exceptions to the ABC Test.
- If you “win” and get an exception, you get to use Borello, the test which the CA Supreme Court said was no good!

2020

- **January 1, 2020:** AB 5 goes into effect.
- **January 6, 2020:** first bill introduced to amend AB 5.
- **May 22, 2020:** Prop. 22 qualifies for the November ballot.
- **September 4, 2020:** AB 2257 signed and goes into effect.
- **November 3, 2020:** Prop. 22 adopted by the voters, 58% - 42%

The Future?

- Looks like we are stuck with the A-B-C test.
- No other amendments on the horizon.
- The business-to-business exception does not really offer any help.
- At the end of the day, make sure the worker at the end of the line gets a W-2.



NLRB UPDATE

The NLRA: “Protected, Concerted Activity”

- All employees have a right, protected by federal law, to SPEAK with each other and with the outside world about their working conditions.
- But wait a minute, I don’t have a union.
- You still need to pay attention! The NLRA protects employee rights, regardless of union membership!

Members of the NLRB

- Five-member Board, appointed by the president, confirmed by the Senate.
- By tradition, the president appoints three members from their own political party, two from the other.
- Currently, a majority of the Board was appointed by “D” presidents.



NLRB Update

1. Employee Handbooks
2. Employee access to Employer's email system.

The NLRB and Employee Handbooks

- From 2004 to 2017, the Board prohibited the maintenance of employer rules if “employees would reasonably construe the language to prohibit protected, concerted activity.”
- 2018, the Board reversed course. (*Boeing*)
- Today, the Board applies a balancing test, evaluating whether the business justifications for a rule are outweighed by the adverse impact on rights protected by the NLRA.

The NLRB's War On Handbooks is Back

- Lauren McFerran, an NLRB member in 2018, filed a vehement dissent to the majority's decision in *The Boeing Co.*
- She is now the Board Chairperson.
- Since 2018, she has also dissented in six cases where a variety of work rules were found lawful, applying the balancing test of *Boeing*.



The Current Chairperson Would Have Found Unlawful:

- A rule prohibiting “disparaging the Company ... or other employees”
- A rule prohibiting “inappropriate communications.”
- A rule restricting disclosure of “confidential or proprietary information regarding the company or your coworkers.”
- A rule prohibiting use of the employer’s name “to endorse, promote, denigrate or otherwise comment on any product, opinion, cause or person.”
- A rule prohibiting posting photos of coworkers without their consent.
- A rule requiring employees to forward telephone calls regarding a current or former employee’s position or compensation.

Suggestion: Handbook Review

These sorts of policies may soon be unlawful:

- Rules requiring civility and courtesy, or prohibiting offensive, insulting and even “harassing” behavior that is not based on anti-discrimination considerations.
- Rules that prohibit negative, damaging, critical or disparaging statements about the employer, the workplace or coworkers;
- Rules prohibiting uncooperativeness, failure to follow instructions, walking off the job or similarly disruptive behavior;
- Rules prohibiting “false” statements to management;
- Rules prohibiting disloyalty;

Suggestion: Handbook Review

These sorts of policies may soon be unlawful:

- Rules prohibiting self-identification as an employee;
- Rules requiring approval for public statements;
- Rules limiting communications with customers about the workplace;
- Rules restricting access to the workplace when off-duty;
- Rules treating handbooks or policy manuals as confidential, and rules restricting “sensitive” or “personal” employee information.

Company email policy

- This e-mail system is our property! All non-business e-mail communications are banned!
- This includes communications which would otherwise be protected by the National Labor Relations Act!



Application of the Policy, 2007

- Employee # 1: Hi, employee # 2, I am on my duty-free lunch period now, and am sending you this e-mail on the Company e-mail system. I sure hope you can make to the union meeting tonight at my house. We need to organize! Free Pizza!!
- Employer: “You’re Fired!”
- NLRB: That’s OK!

Register Guard, 351 NLRB No. 70 (2007)

Reasoning

- Employer property is employer property.
- Bulletin Boards, Photocopiers, Telephones – these can't be used for union solicitation, and e-mail should be treated the same way.

Register Guard, 351 NLRB No. 70 (2007)



Reversed!

- NLRB: “E-mail is a pervasive means of communication at work, which is a new ‘natural gathering place’ where employees congregate to share interests.”
- Employees have the right to access company email (on their own time) for union organizing purposes.

Purple Communications, 361 NLRB No. 126 (2014)

Reversed Again!

- NLRB: “Employees have no statutory right to use employer equipment, including IT resources, for Section 7 purposes. However, we shall recognize an exception to the Register Guard rule in those rare cases where an employer’s email system furnishes the only reasonable means for employees to communicate with one another.”

Caesars Entertainment, 368 NLRB No. 143 (2019)

The Future?

- August 12, 2021: the General Counsel of the NLRB issues a memo indicating that any cases involving the use of company email for union solicitation must be submitted to “the Division of Advice” of the NLRB.
- What does this mean?

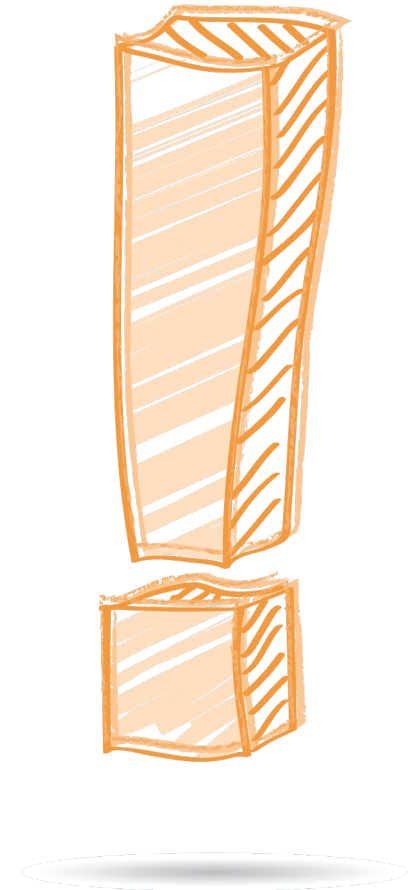
Suggestion: Email Policies

- Don't change today.
- But be ready to change tomorrow.



And remember!

- The NLRA protects the rights of your employees.
- Even if you are running a non-union shop!





WAGE AND HOUR UPDATE

Wage and Hour Update

1. Preliminary/Postliminary Duties.
2. Meal Periods & Rounding.
3. Calculating the Regular Rate of Pay.



1. Preliminary/Postliminary Duties

AT THE COFFEE SHOP:

- Employee is the first to arrive.
- He disarms the alarm at the front door.
- He unlocks the front door.
- He opens the door.
- He walks across the coffee shop.
- He turns on the computer.
- *Then*, he clocks in.

At the coffee shop...

- He works for about 17 months.
- He quits.
- He sues for “off the clock” work.
- Total damages: \$102.67.
- Company response: you can’t be serious!



California Supreme Court

- We are serious!
- “... a few extra minutes of work each day can add up...”
- “...small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy.”
- California rejects the FLSA’s *de minimis* doctrine.

What is Work Time?

- Time when employee is subject to the control of an employer.
- Time when employee is suffered or permitted to work, whether or not required to do so.
- Employee subject to employer's control does not have to be “working” during that time to be compensated.

2. Meal Periods and Rounding

AT THE STAFFING AGENCY:

- Nurse recruiters don't have predetermined shifts.
- But they are expected to work eight-hour days.
- They are provided a 30-minute, uninterrupted, duty-free meal period before the end of the fifth hour of work.
- They are “free to leave the premises” and “control their own time.”
- If they are not given a compliant meal period, they are paid one extra hour of pay (per CA law).

At the Staffing Agency

- They clock in and out on their computers.
- The software rounds all time entries to the nearest 10-minute increment.
- “For example, if an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:25 a.m., the time punches would have been recorded as 11:00 a.m. and 11:30 a.m. Although the actual meal period was 23 minutes, the meal period would be recorded as 30 minutes.” (and no extra hour of pay would be provided).

Off to Court!

- Class action certified.
- Trial Court: rounding sometimes subtracts time, sometimes adds time. It all balances out over time.
- Appellate Court: that's right.
- California Supreme Court: not so fast...

CA Supreme Court's Conclusion

- It is irrelevant that employees sometimes get longer lunches, and sometimes shorter.
- The law requires a meal period of “not less than 30 minutes.”
- Rounding which results in a meal period of < 30 minutes, with no extra hour of pay provided, violates California law.

Donahue v. AMN Services,
11 Cal. 5th, 58 (2021)

Practical Suggestion

- Do not round!
- Pay by the minute.



3. The Regular Rate of Pay

- First thing, remember that if an employee misses a meal period or rest break, they are owed one hour of pay at “the regular rate of *compensation*.”
- Ok, so now let’s go to:

The Bar at the Hotel in Hollywood!

- A bartender is paid by the hour.
- She also receives an “incentive bonus” every three months, based on a set formula. (Non-discretionary – she gets it if she meets the target.)
- The Employer includes the bonus in calculating the regular rate of *pay* for calculating her overtime rate.
- But does not include the bonus in calculating the regular rate of *compensation* for missed meal periods and rest breaks.

Off to court!

- Class action certified.
- Trial court: The employer did it right.
- Appellate court: We agree.
- California Supreme Court: Not so fast...



CA Supreme Court's Conclusion

- Employers must use the regular rate of *pay* in calculating premiums for missed meal periods and rest breaks.
- This decision is retroactive.

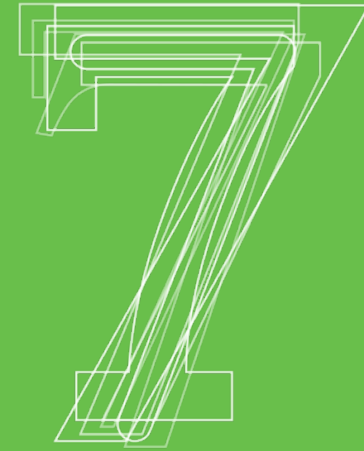
Ferra v. Lowe's Hollywood Hotel,
11 Cal. 5th 858 (2021)

Practical Suggestions

- If you pay non-discretionary bonuses (based on a set formula), be sure to include those payments in the regular rate of pay for both overtime and missed meals.
- Example, at the end of the quarter, when the bonus is paid, go back and recalculate the regular rate of pay, and “true up” all overtime hours worked in the quarter, and all missed meal/rest premiums paid in the quarter.
- Remember that this applies to heat recovery breaks, and lactation breaks, as well.

Practical Suggestions

- Consider looking backwards and truing up prior underpayments.
- Pay interest on that amount? 10% would seem safe.
- This presents an interesting communications challenge.



PARTING THOUGHTS

Reminder! Return for a second dose! ¡Recordatorio! ¡Regrese para la segunda dosis!

Vaccine	Date / Fecha
COVID-19 vaccine Vacuna contra el COVID-19	<div style="display: flex; justify-content: space-around; align-items: center;"> 3 / 9 / 21 </div> <div style="display: flex; justify-content: space-around; font-size: 0.8em; margin-top: 5px;"> mm dd yy </div>
Other Otra	<div style="display: flex; justify-content: space-around; align-items: center;"> / / </div> <div style="display: flex; justify-content: space-around; font-size: 0.8em; margin-top: 5px;"> mm dd yy </div>

Bring this vaccination record to every vaccination or medical visit. Check with your health care provider to make sure you are not missing any doses of routinely recommended vaccines.

For more information about COVID-19 and COVID-19 vaccine, visit [cdc.gov/coronavirus/2019-ncov/index.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html).

You can report possible adverse reactions following COVID-19 vaccination to the Vaccine Adverse Event Reporting System (VAERS) at vaers.hhs.gov.

Lleve este registro de vacunación a cada cita médica o de vacunación. Consulte con su proveedor de atención médica para asegurarse de que no le falte ninguna dosis de las vacunas recomendadas.

Para obtener más información sobre el COVID-19 y la vacuna contra el COVID-19, visite [espanol.cdc.gov/coronavirus/2019-ncov/index.html](https://www.espanol.cdc.gov/coronavirus/2019-ncov/index.html).

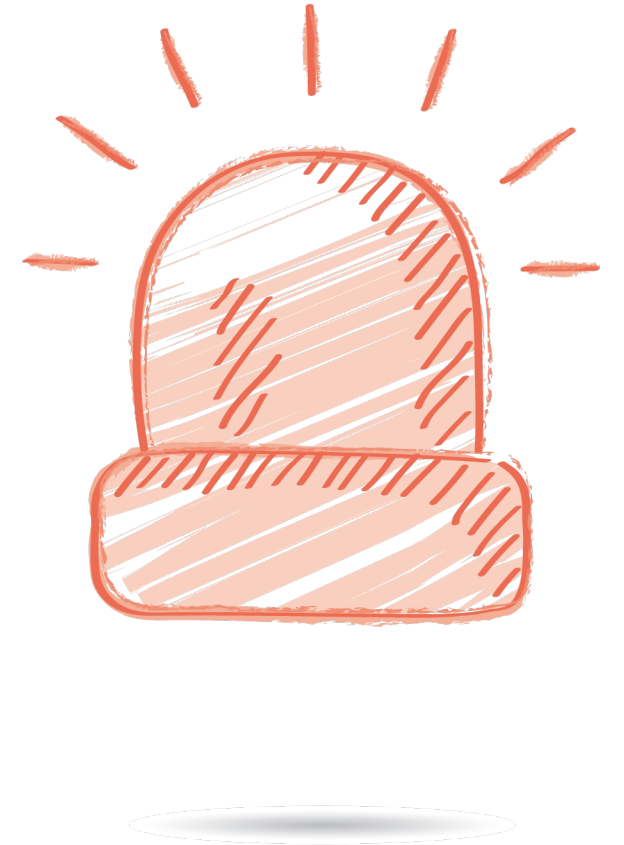
Puede notificar las posibles reacciones adversas después de la vacunación contra el COVID-19 al Sistema de Notificación de Reacciones Adversas a las Vacunas (VAERS) en vaers.hhs.gov.

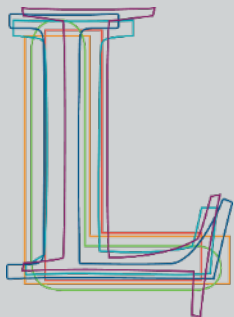
The vaccination card

- One of my clients told me that she was reviewing a vaccination card presented by an employee..
- On the back, it stated: “Para obtener más informaciⁱón sobre el COVID-19 y la vacuna contra el COVID-19.”
- BUT THAT’S NOT HOW YOU SPELL: “INFORMACIⁱÓN!”
- YOU SPELL IT WITH A “**C**,” NOT A “**T**!”

Policing the Workplace

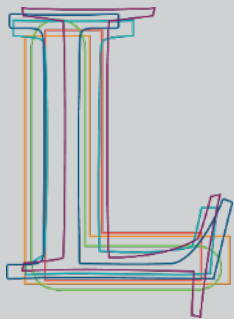
- Sorry to say, front line supervisors today are the mask police.
- Also, sorry to say HR needs to be the forgery/fraud police.





Questions?

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Thank You!

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