# OVERVIEW OF NEW EMPLOYMENT LAWS FOR 2024

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# Today's Agenda

- New legislation and regulations
- Wage and hour developments
- Class action, PAGA, and arbitration developments
- Discrimination and harassment developments
- But wait, there's more!

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# New Legislation and Regulations

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# California Minimum Wage Rises Again

- State minimum wage will be $16.00 per hour for all employers in 2024
- Be alert to local minimum wage rules
- Impact on minimum salary for white-collar exemptions
- Minimum pay for computer professionals and inside sales also increases in 2024

# What Should Employers Do Now?

- Adjust pay as necessary for non-exempt employees
- Review the pay of exempt employees, computer professionals, and inside sales workers
- Consider other forms of compensation affected by the minimum wage
- Address discrepancies strategically
    - Employers paid under 2024 minimums
    - Employees underpaid in 2023 and earlier

# Paid Sick Leave More Generous in 2024

- Accrual and lump sum systems remain available
- Accrual rate remains fixed at one hour of paid sick leave for every 30 hours worked, but….
  - Any cap on accrued balance cannot be lower than ten days or 80 hours
  - Employees must accrue 40 hours of sick leave within the first 200 days of their employment

# What Should Employers Do Now?

- Update policies as necessary
- Remember to pay sick leave for non-exempt employees at the “regular rate of pay”
- New Wage Theft Protection Act Notice?

# Regulations Regarding Use of Criminal Records Tighten Again

- California's Fair Chance Act generally prohibits questions regarding criminal records prior to a contingent offer of employment, and consideration of arrests that have not resulted in a conviction
- What happens if a lawful background check shows that an applicant or employee has a criminal record?
    - Employer must conduct an "individualized assessment" of the situation before deciding whether to rescind an offer

# Regulations Regarding Use of Criminal Records Tighten Again

What is an “individualized assessment”?

Employer must consider three factors:

- the nature and gravity of the offense or conduct;
- the time that has passed since the offense or conduct and/or completion of the sentence; and
- the nature of the job held or sought

Required process following individualized assessment

- Notice to employee; opportunity to respond, consideration of response, and final decision in writing

# What Should Employers Do Now?

- Become familiar with the expanded scope of the regulations, including the revised definitions of “employer” and “applicant,” and restrictions on the use of voluntarily disclosed information
- Assure that managers understand how to conduct proper individualized assessments
- Eliminate any improper references to criminal history from job advertisements/postings and application forms

# Accused of Retaliation for an Employee's Wage Claim? Now you Bear the Burden of Proof!

- Senate Bill 497 creates a presumption of liability if an employer discharges or disciplines an employee within 90 days after the employee complains of certain wage and hour or equal pay violations
- Employers can rebut the presumption by presenting evidence of legitimate, non-retaliatory motives for adverse employment actions occurring within the 90-day period

# What Should Employers Do Now?

- Carefully document misconduct or deficiencies in performance; recognize that you are creating potential evidence that will be presented to a jury
- Inform managers about the new law
- 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

# California Enacts Reproductive Loss Leave

- Covered employers- five or more employees
- Covered employees- completed at least 30 days of employment and suffered a "reproductive loss event,”
- Duration of leave- up to five days within three months of reductive loss; need not be consecutive
- Confidentiality

# What Should Employers Do Now?

- Consider adding a policy on reproductive loss leave to your Employee Handbook
- Recognize that employees eligible for reproductive loss leave may also qualify for other forms of leave at the same time
- Inform managers of the new law and its key provisions

# New California Law Protects Off-Duty Use of Cannabis

New law prohibits:

- Discrimination based on off-duty, off-site use of cannabis
- Requesting information about applicant's prior use of cannabis
- Basing employment decision on criminal record of cannabis use unless otherwise permitted by law

Policies prohibiting being under the influence of cannabis while working are still permitted

# What Should Employers Do Now?

- Review drug use policies to assure that they do not prohibit the use of cannabis while off duty
- Review application forms and new hire documents to assure they do not improperly seek information regarding cannabis use
- Confer with counsel before making an adverse employment decision based on the use of cannabis

# Wage and Hour Developments

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# Salary or Not a Salary?

- *Helix Energy Solutions Group, Inc. v. Hewitt* (SCOTUS 2023)
  - Hewitt, an offshore oil rig supervisor, earned over $200,0000 annually
  - Worked 12 hours a day, 7 days a week, 84 hours in a workweek.
  - Earned "daily rate" ranging from $963 to $1,341, with no overtime
  - This *did not* qualify as "salary" under FLSA
- "Salary basis" met if employee paid predetermined and fixed weekly amount
  - *Not met* if amount earned is subject to variations in quality or quantity of work

# What Should Employers Do Now?

- Review your exempt employee classifications for compliance
- Be mindful that California has a higher minimum salary level
  - Current minimum salary level for the white-collar exemptions under the FLSA is $684 per week, or $35,568 annually
  - For 2024, California's threshed for the exemption is $66,560
- Remember the "duties" test

# California Cases Disapproving Rounding Create Liability Pitfalls to Watch For

- Federal Law: employers may round shift start and end times to nearest increment of five, six or 15 minutes, provided rounding practices are neutral and do not result in failure to compensate for all hours worked over time
- California Law:
  - **2012**: Appellate court adopted federal standard, allowing rounding to nearest tenth of hour
  - **2021**: California Supreme Court held rounding is not permissible with respect to meal periods
  - **2022**: Appellate court held employers are not permitted to round when they are able to track, and have tracked, precise time worked by employees during specific shift

# What Should Employers Do Now?

- Maintain complete and accurate time records for non-exempt employees, reflecting the exact start and stop times associated with shifts and meal periods
  - i.e., minute-to-minute time entries
- Do not round time entries

# When Does A Furlough Turn Into Termination?

- *Harstein v. Hyatt Corporation* (Ninth Circuit 2023)
  - *March 2020*: Hyatt informed over 7,000 employees they were subject to furlough/temporary layoff
  - *June 2020*: Hyatt told furloughed employees they were being terminated and would receive accrued but unused vacation on official termination dates
- Furlough/layoff triggers duty to pay final wages when furlough/layoff has no specific return date within the normal pay period
- Hyatt's payment of accrued, unused vacation was three months late

# What Should Employers Do Now?

- Recognize the scenarios beyond the COVID-19 pandemic in which *Harstein* may apply:
  - Planned mass layoffs
  - Unexpected shutdowns of operations
  - Long-term disciplinary suspensions
  - Non-assignment from lack of work
- Recognize forms of compensation that must be paid when final wages are due:
  - Standard wages
  - Unused vacation (floating holidays)
  - Paid Time Off

# Arbitration, Class Action and PAGA Developments

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# Good News for Employers With Mandatory Arbitration Agreements

- In 2020, California enacted AB 51, restricting employers' ability to compel employees to resolve many employment claims in arbitration
- *Chamber of Commerce v. Bonta* (Ninth Circuit 2023)
  - The California Chamber of Commerce filed suit challenging AB 51, arguing it is preempted by the Federal Arbitration Act (FAA)
  - Court held that FAA preempts AB 51 and issued a preliminary injunction barring enforcement of AB 51
- Employers can require employees to resolve most claims through binding arbitration, provided arbitration agreements are enforceable

# What Should Employers Do Now?

- If you do not already have arbitration agreements, consider implementing them
- Review existing arbitration agreements to ensure they are enforceable under current law
- Look out for new developments regarding the enforceability of mandatory arbitration agreements

# Employees Bound by Arbitration Agreements May Still Assert PAGA Claims

- In 2022, SCOTUS ruled that agreements requiring employees to resolve claims for PAGA penalties through binding arbitration are enforceable with respect to Labor Code violations that affect the employee
- *Adolph v. Uber Technologies, Inc.* (CA Supreme Court, 2023)
  - A plaintiff can maintain a representative action under PAGA after their individual claims are compelled to arbitration
  - If an employee suffered at least one Labor Code violation, they have standing to bring a PAGA claim as a representative of other employees

# What Should Employers Do Now?

- Move to force employees into arbitration over PAGA claims that affect them individually
- Move to stay the representative portion of PAGA claims in court pending resolution of the employee's individual claim in arbitration

# Discrimination and Harassment Developments

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

- To adopt or not adopt a workplace vaccine mandate
  - maintaining a safe & healthy workplace v. privacy, religious and medical accommodations
  - Benefits and risks
- *Hodges v. Cedar-Sinai Medical Center*
  - CSMC implements mandatory flu vaccine policy based on CDC guidelines
  - Ms. Hodges seeks an exemption
  - CSMC declines exemption request

# What Should Employers Do Now?

- Adopt vaccine policies recommended by a recognized authority aimed at limiting the spread of disease
- Apply vaccine policies consistently and objectively
- Engage in the interactive process in good faith if an employee seeks exemption from an employer's vaccine mandate

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# Religious Accommodation – Lessons from the US Postal Service

- *Groff v. DeJoy*
  - Evangelical Christian mail carrier – Sunday is a day of worship & rest
  - The Amazon Sunday deliveries
  - USPS assigns Sunday deliveries to other mail carriers and disciplines Groff
  - Groff resigns then sued under Title VII – the USPS could have accommodated his Sunday Sabbath practice "without undue hardship"
    - The lower courts weigh in – the "de minimis" standard
    - The U.S. Supreme Court weighs in – substantial increased cost

# What Should Employers Do Now?

- Consider requests for religious accommodation carefully and realistically
- Confer with counsel before taking adverse action against an employee who has requested religious accommodation

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

- United States Supreme Court ruled that affirmative action programs at Harvard and University of North Carolina violated the Equal Protection Clause
  - Both institutions took the race of college applicants into account at various points in the admission process
  - Institutions are not prohibited from considering an applicant's race as it impacted the applicant's life
- Affirmative action plans in general should be remedial in nature and "must have reasonable durational limits"
- Title VII – impact on diversity, equity and inclusion policies maintained by private employers?

# What Should Employers Do Now?

- Affirm that employment decisions are based on factors other than protected status
- Evaluate diversity, equity and inclusion programs to assure that they do not create preferential treatment based on membership in a protected group

# What's a Little Lewd Texting Between Friends?

- FEHA imposes liability on employers for sexual harassment based on the status of the offending employee
  - Nonsupervisory employee: if employer knew or should have known
  - Supervisory employee: strict liability
- *Atalla v. Rite Aid Corporation*
  - Hanin Atalla and Erik Lund
    - The personal relationship & the professional relationship
    - The offending text messages
    - The lawsuit
    - The court's ruling: preventing *workplace* harassment

# What Should Employers Do Now?

- Remain mindful that California law protects employees engaged in legal, off-duty conduct
- Continue to provide comprehensive harassment prevention training to managers and supervisors
- Do not draw false comfort from the *Atalla* decision

# But Wait, There's More!

# Duty to Inspect I-9 Documents in Person Resumed

- Federal law requires verification of an employee's identity and right to work in the United States using the Employment Eligibility Verification form (a.k.a. Form I-9)
- COVID-19 pandemic reprieve
- Reinstatement of employer's duty to inspect in person (effective July 31, 2023)

# What Should Employers Do Now?

- Require new employees to present I-9 documents in person within 3 days of hire
  - *What if I don't have an employee available in person to examine I-9 documents for a new hire?*
- Complete in-person review of I-9 documents for employees who previously submitted their documents virtually
  - *Deadline was August 30, 2023*

# Mandatory Workplace Violence Prevention Programs

- Senate Bill (SB) 553 requires virtually all CA employers to create and maintain violence prevention program
  - *Deadline is July 1, 2024*
- SB 553 applies to all CA employers, but NOT:
  - *Already covered by existing standard for healthcare*
  - *Fewer than 10 employees working at any given time and not accessible to the public*
  - *Other exceptions primarily for public sector employers*

# What Should Employers Do Now?

- Establish, implement, and maintain an effective workplace violence prevention plan
  i. Designate a person responsible for implementing the plan
  ii. Procedures to obtain the active involvement of employees and union representatives in developing and implementing the plan
  iii. Methods to coordinate the plan with other employers
  iv. Procedures to accept and respond to reports of workplace violence and to prohibit retaliation

# What Should Employers Do Now? *(continued)*

v. Procedures to ensure employee compliance

vi. Procedures to communicate with employees re: workplace violence matters (ex. reporting, investigations, investigation results, corrective actions, etc.)

vii. Procedures to respond to actual or potential workplace violence emergencies (ex. emergency alerts, evacuation/sheltering plans, how to obtain help, etc.)

viii. Procedures to develop and provide training

# What Should Employers Do Now? *(continued)*

ix. Procedures to identify and evaluate workplace violence hazards

x. Procedures to correct workplace violence hazards in a timely manner

xi. Procedures for post-incident response and investigation

xii. Procedures to review the effectiveness of the plan and revise the plan as needed

xiii. Procedures or other information required as necessary and appropriate to protect employee health and safety

# Tightened Restrictions on Covenants Not to Compete

1. Senate Bill (SB) 699

   - Prohibits employers from attempting to enforce invalid covenants not to compete
   - Prohibits employers from entering into contracts that include void covenants to compete
   - Violations subject to lawsuit by current, former, or prospective employees, who may seek injunctive relief, damages, attorney's fees and costs

# Tightened Restrictions on Covenants Not to Compete (continued)

2. Assembly Bill (AB) 1076

- Requires employers to notify current and former employees subject to unlawful covenants to compete and employed any time after January 1, 2022 that the covenant is void
- Deadline for notice is February 14, 2024
- Employers who fail to provide notice are subject to civil penalties

# What Should Employers Do Now?

- Review contracts containing covenants not to compete to determine if the terms are consistent with California Law
- Provide the required notices to any current or former employees whose contracts contain illegal covenants not to compete
- Delete unenforceable covenants not to compete from any form agreements

# NLRB Adopts New, Stricter Standard for Employment Policies

- Overview of the National Labor Relations Act (NLRA)
- *Stericycle, Inc.*, 372 NLRB No. 113 (2023)
  - Policies are presumptively unlawful if they have a "reasonable tendency" to dissuade workers from engaging in organizing activity, but employer may rebut
  - Interpreted from the perspective of an "economically dependent" employee
- Examples of policies that may now run afoul of the NLRA

# What Should Employers Do Now?

- Review your Employee Handbook and stand-alone policies to ensure they do not dissuade employees from engaging in organizing activity
  - Interpreted broadly
  - Perspective of an “economically dependent” employee
- Update policies as necessary to ensure compliance

# NLRB Prohibits Severance Agreements Broadly Waiving Employee Rights

- Conflict between severance agreements and NLRA § 7
- *McLaren Macomb*, 372 NLRB No. 58 (2023)
  - Severance agreements that prohibit employees from communicating with coworkers, union representatives, NLRB agents, among others about workplace issues violate NLRA § 7
  - Includes non-disparagement and confidentiality clauses

# What Should Employers Do Now?

- Narrowly tailor non-disparagement and confidentiality clauses to avoid violation employee rights under NLRA § 7
  - Prohibited disclosure of financial terms should remain enforceable
  - May not prohibit disclosure of the existence of a severance agreements
  - May not prohibit every statement that may reflect negatively on the employer

# Q&A

# THANK YOU


Ernest M. Malaspina
emalaspina@hopkinscarley.com

Shirley Jackson
sjackson@hopkinscarley.com

Elaisha Nandrajog
enandrajog@hopkinscarley.com


hopkins carley


70 South First Street • San Jose, CA 95113 • 408.286.9800
555 Twin Dolphin Drive, Suite 200 • Redwood City, CA 94065 • 650.804.7600