

2022 CALIFORNIA STATE HR

ADVOCACY & LEGISLATIVE CONFERENCE

SHERATON GRAND HOTEL - SACRAMENTO

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CALIFORNIA
STATE COUNCIL OF SHRM



Employment Laws You
Missed Since 2020

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Brenda S. Kasper

Brenda S. Kasper is a founding member of **Kasper & Frank LLP**, a law firm representing California and multi-state employers for all of their human resources and employment law needs. She regularly advises employers of all sizes on wage and hour compliance, leaves of absence, disability accommodation, reductions in force, terminations and discipline management, employment contracts, personnel policies, and hiring issues. Brenda is a former HR director, so her legal advice is practical, creative and tailored to each client's needs. She is an instructor for the HR Certification program at the University of California San Diego Extension and holds her SHRM-SCP and SPHR-California certifications.

Session Objectives

- Understand key California legal developments since 2020 (also known as the COVID-19 Dissociative Fugue Period)
- Review the developments arranged by the Employee Life Cycle



HELLO

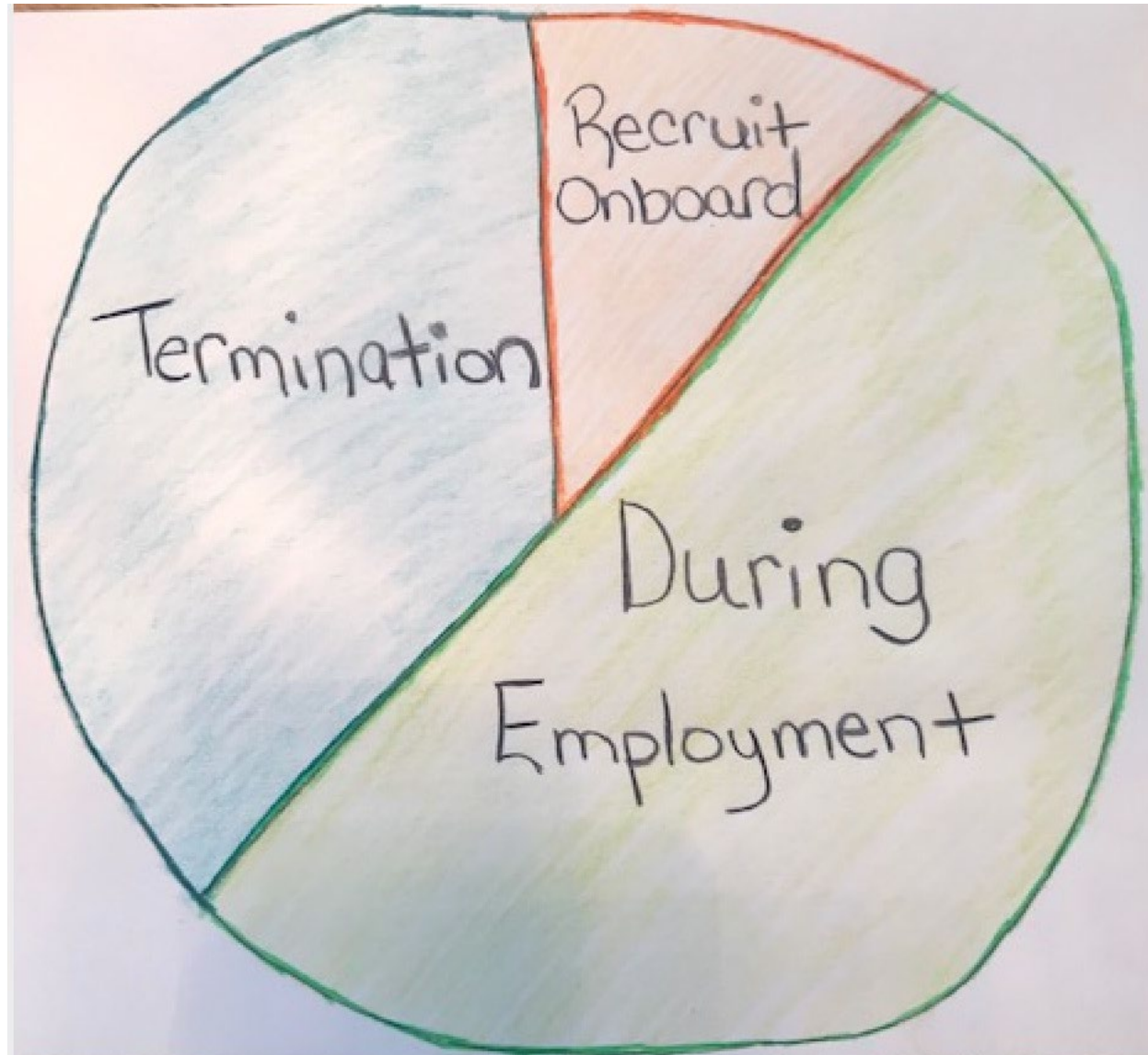
I AM...

SUING YOU

California Major Employment Law Coverage Chart

State Law	Employers Covered
Cal-WARN Act	<i>Industrial or commercial facilities</i> that employed 75 full or part time employees in preceding 12 months
California Family Rights Act	5 or more employees in any state
Shared Labor Contractor Liability	25 or more employees , including workers provided by labor contractor
Fair Employment and Housing Act	5 or more persons <ul style="list-style-type: none">• For harassment, employs 1 or more persons (including contractors)
Pregnancy Disability Leave	5 full or part time employees
Fair Pay Act	All California employers
Paid Sick Leave Law	All California employers
Ban on Salary History Inquiries	All California employers
Ban-the-Box Law	All California employers
Cal-OSHA	All California employers

The Employee Life Cycle



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New Statutes & Regulations

- AB 5 (and amendments)
- FEHA Statute of Limitations Expansion
- FEHA Document Retention Increased

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The A-B-C Test of AB 5 (January 1, 2020)

A

- Free from the control and direction of the hiring entity

B

- Performs work outside the usual course of hiring entity's business

C

- Customarily engaged in an independently established trade, occupation or business of the same nature as the work performed

“Professional Services” Exception From AB 5

Certain marketing
work

“Administrator of
human resources”
with certain
specifications

Certain travel agent
services

Graphic design

Grant writer

Fine artist

Certain “enrolled
agents”

Some payment
processing agents

Certain still
photographer and
photojournalist
services

Freelance writers,
editors or newspaper
cartoonists with
limitations

Licensed estheticians,
cosmetologists and
similar with
limitations

Occupation Exceptions From AB 5

Licensed insurance
agents

Real estate licensees
and repossession
agents

Lawyers, architects,
engineers, private
investigators,
accountants

Physician, surgeon,
dentist, podiatrist,
psychologist,
veterinarian

Registered securities
broker-dealers or
investment advisers

Direct sales
salespersons

Certain licensed
barbers,
cosmetologists

Certain commercial
fisherman

Newspaper carriers
under contract with
newspaper
publisher

Relationships
between a referral
agency and a service
provider

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No Mandatory Arbitration (AB 51)

- AB 51, which prohibited requiring arbitration in California as a condition of employment, was to be effective January 1, 2020
- In February of 2020, a court granted a preliminary injunction, stopping enforcement of the law
- In September of 2021, the Ninth Circuit Court of Appeals overturned the lower court's injunction; however, a party is petitioning the Court for rehearing
- AB 51 is not yet effective

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FEHA Document Retention Expanded (SB 807)

- Effective January 1, 2022
- Extends record retention requirements from 2 to 4 years from the date the records were created or the date an employment action was taken
- Amends several other procedural requirements, including:
 - Tolling the statute of limitations during investigation period
 - Extending the DFEH right-to-sue issue period for class actions to 2 years

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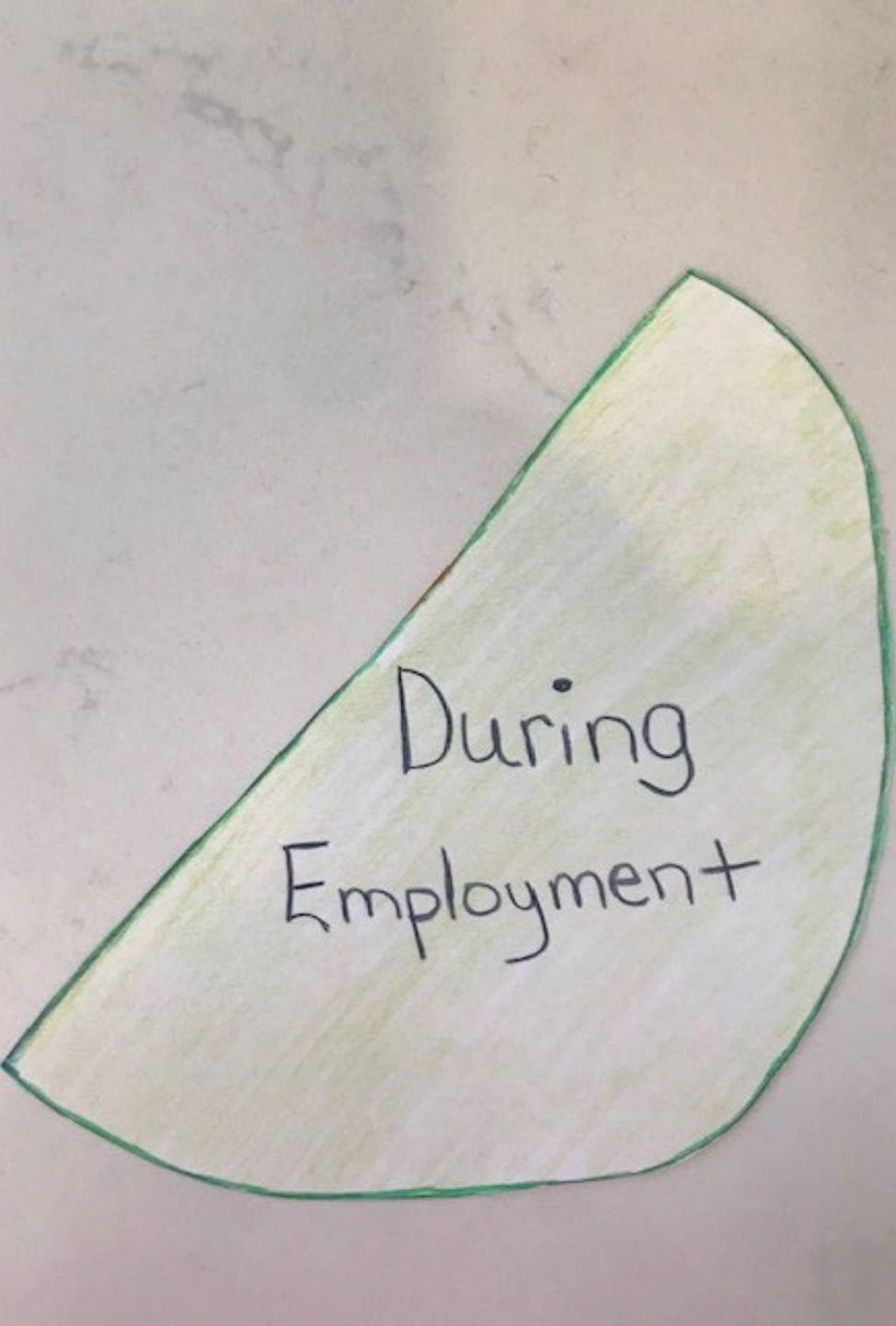
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New Statutes & Regulations

- Lactation Accommodation
- Expanded CFRA and PFL
- CROWN Act
- DFEH Pay Data Reporting
- Mandated Reporter Obligations
- Cal/OSHA Expansion
- Special Industry Rules

2020 Lactation Accommodation (SB 142)

Lactation room shall not be a bathroom and must be:

- In close proximity to employee's work area
- Shielded from view
- Free from intrusion while employee is expressing milk

Lactation room must:

- Be safe, clean and free of specified hazardous materials
- Contain a surface to place a breast pump and personal items
- Contain a place to sit
- Have access to electricity or alternative devices, including, but not limited to, extension cords or charging stations needed to operate an electric or battery-powered breast pump
- Give priority to lactation if it's a multi-use room

Employer must provide, in close proximity to employee's workspace:

- Access to a sink with running water
- Refrigerator suitable for storing milk (or another cooling device)

2020 Lactation Accommodation (SB 142)

- Special rules for multi-tenant buildings or worksites and certain agricultural employers
- Temporary location may be allowed due to “operational, financial or space limitations”
- Employers with fewer than 50 employees may be exempt if “undue hardship” based on “significant difficulty or expense” can be proved
- Significant penalty increase

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2020 Lactation Accommodation (SB 142)

Policy must include:

- Statement of employee's right to lactation accommodation
- Process by which employee makes lactation request
- Employer's obligation to respond to request
- Statement about employee's right to file a charge with the Labor Commissioner

Policy must be:

- Included in handbook
- Distributed to new employees upon hire
- Given to employees who request parental leave

2021 and 2022

Expanded CFRA (SB 1383 and AB 1033)

More covered employers

- Expanded to all employers with 5 or more employees

More eligible employees

- Eliminates 50 employee/75-mile radius rule

More covered family members

- Adds grandparents, grandchildren, siblings, child of any age, parent-in-law and domestic partner's child

More qualifying reasons

- Adds military exigency

2021 and 2022

Expanded CFRA (SB 1383 and AB 1033)

- Eliminates “key employee” exclusion
- Eliminates same parent limitation on leave
- “New Parent Leave Act” is repealed

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2021 and 2022 CFRA Amendments	
Covered Employer	Private employers of 5 or more employees
Eligible Employee (75-mile radius rule eliminated)	Worked for employer for more than 12 months and worked at least 1,250 hours in 12 months preceding leave
Family Member Expansion	Spouse, domestic partner, parent, <i>child of any age, child of domestic partner, grandparent, grandchild, sibling, parent-in-law</i>
Qualifying Event	Adds qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent
Other Changes	<ul style="list-style-type: none"> • Key employee designation eliminated • Cumulative leave limitation for parents employed by the same employer eliminated

	Family & Medical Leave Act (FMLA)	California Family Rights Act (CFRA)
Reason for Leave	6 Reasons for Leave: <ul style="list-style-type: none"> •SHC of employee •SHC of family member <ul style="list-style-type: none"> –Spouse, son, daughter, parent •Baby bonding <ul style="list-style-type: none"> –Birth, adoption, foster care placement •Pregnancy disability •Military exigency •Military caregiver 	4 Reasons for Leave: <ul style="list-style-type: none"> •SHC of employee •SHC of family member <ul style="list-style-type: none"> –Spouse, parent, registered domestic partner –<i>Child of any age, child of domestic partner, grandparent, grandchild, sibling, parent-in-law</i> •Baby bonding <ul style="list-style-type: none"> –Birth, adoption, foster care placement • Military Exigency <p><i>Pregnancy disability expressly excluded</i></p>
Duration	12 or 26 weeks of leave in a designated 12-month period 26 weeks for military caregiver leave	12 weeks of leave in a designated 12-month period <i>No key employee limitation on reinstatement</i> <i>No limitation of leave for certain parents</i>
Eligibility	12 months of employment, 1,250 hours worked in one year prior to leave, 50 employees in 75-mile radius	12 months of employment, 1,250 hours worked in one year prior to leave
Coverage	50 employees	5 employees

2021 Expansion of PFL for Military Exigency Leave (AB 2399)

- Expands Paid Family Leave (PFL) to provide benefits for employees who have family members deployed on active duty in connection with a military exigency
- Includes child, spouse, domestic partner or parent of the employee on, or called to, covered active duty in the Armed Forces of the United States
- Exigencies are similar to those under FMLA

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2020 Natural Hairstyle Discrimination (SB 188)

- Amends FEHA to include in the definition of race “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles,” including “hairstyles [such] as braids, locks and twists”

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2021 Mandated Reporter of Child Abuse (AB 1963)

- Expands the Child Abuse and Neglect Reporting Act to include the following as mandated reporters of child abuse or neglect:
 - “HR employee” of a business that employs minors and has at least 5 employees
 - An adult (employed by a business with at least 5 employees) whose duties require contact with and supervision of minors in performance of the minor’s job duties

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2021 DFEH Pay Data Reporting (SB 973)

- On or before March 31, 2021 (and each year thereafter), a private employer with 100 or more employees and who is required to file a federal EEO-1 report must submit a pay data report to the DFEH for the prior calendar year
- Employer may use “Snapshot Period” or “Reporting Year” to determine coverage

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2021 DFEH Pay Data Reporting (SB 973)

- Employer must report to DFEH pay and hours-worked data by job category and by sex, race, and ethnicity
 - DFEH anticipates option to report non-binary employees
- Employers must include employees assigned to California establishments and/or working within California
 - Includes remote workers working outside the state but assigned to the California establishment
- State developed model report form and FAQs

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2022 Warehouse Distribution Center Quotas (AB 701)

- Non-exempt employees must be provided with a written description of each quota to which the employee is subject, including:
 - Specific quota requirements; and
 - Potential adverse employment action that could result from failure to meet quota
- Written quota information must be provided upon hire or within 30 days of quota effective date
- Employee must be provided with most recent 90-day quota data upon request

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2022 Cal/OSHA Enforcement Expansion (SB 606)

- Expands enforcement power of Cal/OSHA by creating two new violation categories:
 - Enterprise-wide violation
 - Egregious violation
- Provides Cal/OSHA with subpoena authority where employer fails to provide requested information

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2022 New Garment Manufacturing Wage and Hour Rules (SB 62)

- Garment manufacturers prohibited from paying employees by piece rate
- Joint liability for payment of wages between garment manufacturers and their contractors
- Record retention obligations for wages extended to 4 years

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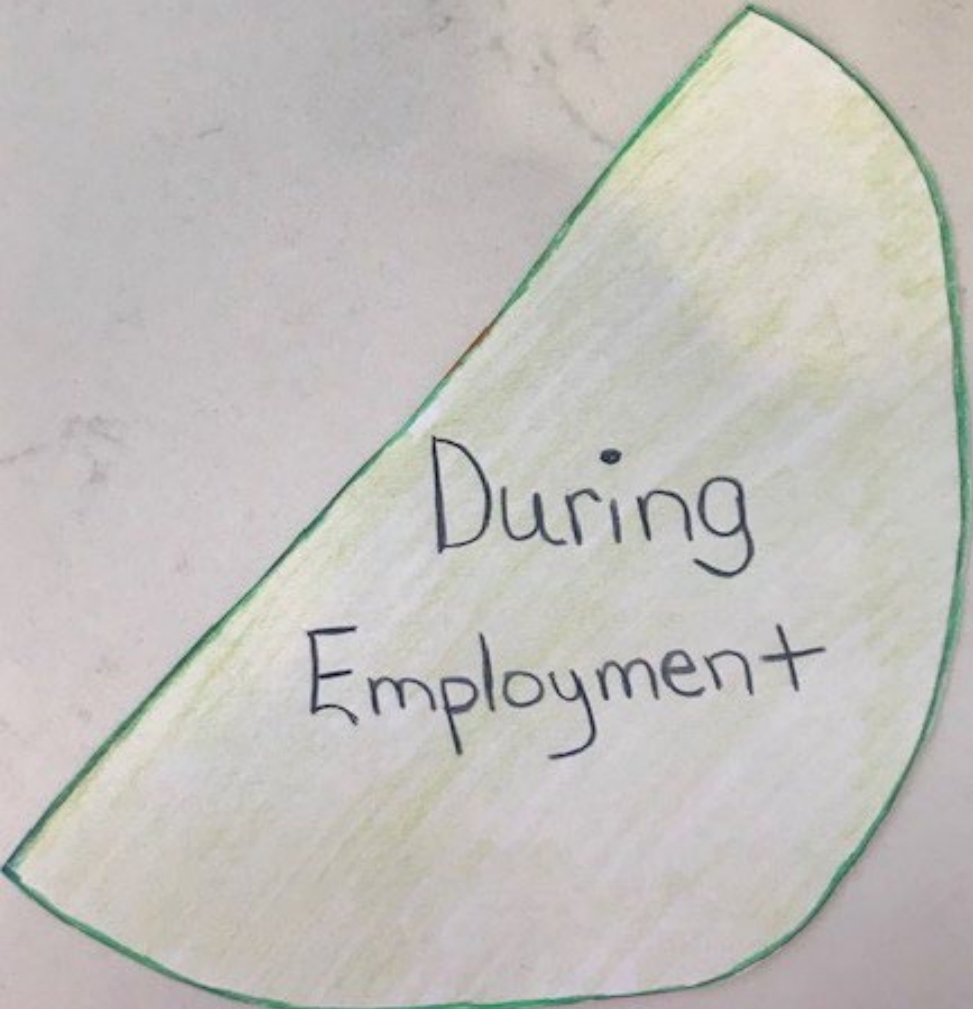
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During
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New Case Law

- Reporting Time Pay Obligations for On Call Scheduling
- New Language for “Unlimited” PTO/Vacation Policies
- Regular Rate for Rest and Meal Break Period Penalty Pay
- Rounding of Meal Periods Prohibited
- New Legal Test for Retaliation Cases

On-Call Scheduling

- When “on-call” employees contact Tilly’s two hours before on-call shifts, they are “report[ing] for work” within the meaning of Wage Order 7 and are owed reporting time pay
 - *Ward v. Tilly's, Inc.* (Cal. App. 2019)

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Vacation Payout Required Despite Unlimited Paid Time Off Policy

- Despite “unlimited PTO policy,” CA employer required to payout vacation on termination based on specific facts
 - No written policy
 - Implemented with an implied cap
 - Schedules precluded taking vacation, so employees didn’t reap benefits of the policy
 - *McPherson v. EF Intercultural Foundation, Inc.* (Cal. App. 2020)

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Rounding of California Meal Periods Not Permissible

- Employers cannot engage in the practice of rounding time punches — that is, adjusting the hours that an employee has actually worked to the nearest preset time increment — in the meal period context
- Premium pay required for violation of timing requirements, no matter how minor
 - *Donohue v. AMN Services, LLC* (CA S. Ct. 2021)

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Meal/Rest Premiums Must be Based on Regular Rate of Pay

- If employer does not provide an employee with a compliant meal, rest, or recovery period, Labor Code section 226.7 requires it to “pay . . . one additional hour of pay at the employee’s regular rate of compensation.”
- “Regular rate of compensation” is synonymous with “regular rate of pay,” such that the calculation of premium pay for a noncompliant meal, rest, or recovery period must account for not only hourly wages but also other nondiscretionary payments for work performed by the employee
 - *Ferra v. Lowes Hollywood Hotel, LLC* (Ca. S. Ct. 2021)

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Whistleblower Retaliation Claims

- Employers must prove by clear and convincing evidence that plaintiff would have suffered the challenged consequence (such as losing a job) even if plaintiff had not identified any wrongdoing
- More employee friendly standard
 - *Lawson v. PPG Architectural Finishes, Inc.* (Ca. S. Ct. 2022)

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New Statutes & Regulations

- “No Rehire” Provisions Prohibited
- “Silenced No More” Rules for Severance Agreements



No “Rehire” Provisions (AB 2143)

- Since January 1, 2020, California law prohibits “no rehire” provisions in settlement agreements related to employment disputes
- Does not apply if employer made “good faith determination” that the person engaged in sexual harassment or sexual assault

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No “Rehire” Provisions (AB 2143)

- Exception expanded in 2021 to include “good faith” determination former employee engaged in criminal conduct
- Requires employer to make and document good faith determination that former employee engaged in conduct *prior to* former employee making claim that caused settlement

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2022 “Silenced No More” Act (SB 331)

- Separation agreements cannot restrict the disclosure of unlawful acts in the workplace
- Agreements with a non-disparage or confidentiality provision must include specified language:
 - *“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 you have reason to believe is unlawful”*

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Key Takeaways

- Ensure your policies and practices are compliant with key California legal developments since 2020
- Always know the difference between federal, state and local law
- Prime directive is to comply with the law most favorable to the employee

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