

General Session

Non-COVID Legal Developments for California Employers

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HR LEADERS
COMPLIANCE SUMMIT

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Disclaimer:

The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.

California Employer Compliance Considerations for 2021

AB 2257- Defining the Issue and Its Importance

- The distinction between employees and independent contractors is relevant to-
 - Payroll taxes
 - Eligibility for overtime
 - Eligibility for benefits
 - Application of employment laws
- Misclassification disputes are extremely common and can lead to substantial liability

California Employer Compliance Considerations for 2021

What Are the Rules Now?

- ABC test is the default standard
- Hiring party must show:
 - **A:** Worker is free from control and direction
 - **B:** Worker performs work outside the usual course of hiring party's business
 - **C:** Worker is customarily engaged in independent occupation or business of the same nature
- ABC test is applicable retroactively

California Employer Compliance Considerations for 2021

Exceptions to the ABC Test

- Business-to-business contracts
- Certain contracts for professional services
- Certain specific occupations
- “Single engagement” contracts
- Referral agencies
- Music
- ... and Proposition 22

What is the Significance of the Exceptions?

- If an exception applies, the worker does not automatically qualify as a contractor
- When an exception applies, the worker's classification is determined under the traditional multi-factor test
- Many workers who fall under an exception still will not qualify as contractors

What Should Employers Do Now?

- Audit existing contractor classifications under attorney-client privilege
- Address misclassifications strategically
 - Consider all relevant circumstances, including the number of misclassified contractors, whether they still work for the company, whether they should have been exempt or non-exempt, and whether they worked significant overtime
- Review and update contractor agreement templates as necessary

California Family Rights Act (CFRA)

What is the CFRA?

- CFRA = California
- FMLA = Federal
- Allows employees to take unpaid, job-protected leave for specified family and medical reasons
- CFRA has closely mirrored FMLA rights...

but now with greater divergence

California Employer Compliance Considerations for 2021

CFRA Changes #1 and #2 of 7

Which employers are covered?

Previously...

- CFRA = 50 employees within a 75-mile radius

Now...

- CFRA = **5 employees, no geographic radius**
- FMLA = 50 employees within a 75-mile radius

California Employer Compliance Considerations for 2021

CFRA Change #3 of 7

Who is included as a “family member”?

Previously...

- CFRA = Employee's parent, child, spouse or domestic partner

Now...

- CFRA = Employee's parent, child, spouse or domestic partner, **and grandparents, grandchildren, and siblings**
- FMLA = Employee's parent, child, spouse (but not necessarily domestic partner*)



California Employer Compliance Considerations for 2021

CFRA Change #4 of 7

Additional reasons for leave?

Previously...

- CFRA = No covered active duty or call to covered active duty coverage

Now...

- CFRA = Allows leave for "qualifying exigency" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the U.S. armed forces.
- FMLA = Does the same thing and more.



California Employer Compliance Considerations for 2021

CFRA Change #5 of 7

Two parents working for the same company?

Previously...

- CFRA = Parental leave was collective and limited to one parent at a time.

Now...

- CFRA = Each parent can get separate 12-week entitlements for bonding with a child following birth, adoption, or placement of a foster child, and both *may* elect to take leave at the same time
- FMLA = Parental leave remains collective and limited to one parent at a time.



California Employer Compliance Considerations for 2021

CFRA Change #6 of 7

“Key Employee” Exception?

Previously...

- CFRA = Employer could refuse to reinstate an employee returning from leave to the same or comparable position if, among other things, the employee was salaried and among highest paid 10% of the employees employed within 75 miles of the employee's worksite.

Now...

- CFRA = No more “key employee” exception
- FMLA = Still retains the “key employee” exception.



California Employer Compliance Considerations for 2021

CFRA Change #7 of 7

New Parent Leave Act?

Previously...

- NPLA = Baby bonding when employer had between 20 and 49 employees.

Now...

- CFRA = Now incorporates this because of its 5-employee count reduction
- FMLA = Only if other FMLA requirements are met

California Employer Compliance Considerations for 2021

Overview of Changes to CFRA

Change	Previously	Now
Employee Count Radius	75 miles	N/A – Eliminated
Minimum Employee Count	50 employees	5 employees
“Family Members”	Employee's parent, child, spouse or domestic partner (Same as FMLA*)	Now includes employee's grandparents, grandchildren, and siblings
Specific Military Leave	Not previously provided	Leave for qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the United States Armed Services (Closer to FMLA)
Parents Working for Same Company	Limited to collective 12 weeks, not at the same time (Same as FMLA)	Each parent can get separate 12-week entitlements, both can elect to take leave at the same time
“Key Employee” Exception	Same as FLMA	N/A – Eliminated
Repeal of New Parent Leave Act	Protected baby bonding leave (for employers with 20 to 49 ee’s)	Eliminated because it is now duplicative of what the CFRA will provide.



California Employer Compliance Considerations for 2021

California Further Restricts Use of “No Rehire” Clauses

- New law limits use of “no re-hire” clauses in settlement agreements
- Clauses are prohibited if employee filed an employment claim in court, with administrative agency, in arbitration, or in internal process and did so in good faith

California Further Restricts Use of “No Rehire” Clauses

The law does not:

- prevent employers from terminating employment
- prohibit no-rehire clauses when employer, prior to any complaint by employee, has documented a good faith determination that employee engaged in sexual harassment or criminal conduct
- require rehiring if the employer has a legitimate, non-discriminatory reason for refusing to rehire the employee



California Employer Compliance Considerations for 2021

Hours Worked: What is compensable time?

California Law

The California Wage Orders define “**hours worked**” as:

- “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

Employers must pay at least **minimum wage** to employees for all “hours worked.”

California Employer Compliance Considerations for 2021

Frlekin v. Apple Inc.

- Retail store employees brought a class action alleging their time spent waiting for and undergoing Apple's exit searches (typically 5 to 20 minutes) was compensable time.
- Apple Policy:
 - Required all employees to undergo exit searches of all bags, packages, purses, backpacks, briefcases, and personal Apple technology devices such as iPhones.
 - Instructed managers and security to ask employees to open every bag, unzip internal compartments, and remove any Apple products (verify serial number) or other bag contents.
 - Failure to comply may lead to disciplinary action, up to and including termination.



California Employer Compliance Considerations for 2021

Frlekin v. Apple, Inc. (continued)

Court found:

- Key question: Was employee time spent waiting for and undergoing mandatory personal bag checks *controlled activity*?
- Elements of control:
 1. Whether an activity is mandatory?
 - *Employees required to locate and wait for a manager/security guard.*
 2. What is the location of the activity?
 - *Employees confined to the workplace until after the bag check.*
 3. What is the degree of the employer's control?
 - *Employees compelled to take specific actions and movements.*



Frlekin v. Apple, Inc. (continued)

- Elements of control (continued):
 4. Whether the activity primarily benefits the employee or employer?
 - *Apple's interest to detect and deter theft.*
 5. Whether the activity is enforced through disciplinary measures?
 - *Apple policy re: discipline, up to and including termination.*

California Employer Compliance Considerations for 2021

Ridgeway v. Wal-Mart

- Long-haul truck drivers brought a class action alleging Wal-Mart violated California law requiring minimum wage for all hours worked.
- Layovers consisting of 10-hour rest periods mandated by law.
- Wal-Mart Policy:
 - Layovers taken at home (not tractor cab) required manager preapproval.
 - Drivers must record any breaks taken at home and the approving manager's name.
 - Drivers subject to disciplinary action, up to and including "immediate termination," for taking an unauthorized layover at home.



Ridgeway v. Wal-Mart (continued)

Court found:

- Key question: Did Wal-Mart's policy **restrain** employee conduct such that the drivers were not free to spend the layover time as they saw fit?
- Wal-Mart's policy imposed **constraints** on employee movement such that employees could not travel freely and avail themselves of the full privileges of a break.
- Requirement that drivers seek **permission**, rather than provide **notification**, before taking layover at home meant Wal-Mart reserved the right to decline.

The Administrative Exemption and the “Salary Basis” Test

- Facts of the Semprini case
- The administrative exemption and the “salary basis” test
- The broader message from the Semprini decision

What information to include on paystubs?

California Labor Code section 226

- i. gross wages earned
- ii. total hours worked by the employee, except for exempt employees
- iii. number of piece-rate units earned and any applicable piece rate, if applicable
- iv. all deductions
- v. net wages earned
- vi. inclusive dates of the pay period
- vii. name of the employee and only the last four digits of his or her Social Security number (or employee identification number)
- viii. legal name and address of the employer
- ix. all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate



What's in a name?

California Labor Code section 226

- * viii. the legal name and address of the employer

California Employer Compliance Considerations for 2021

Noori v. Countrywide Payroll & HR Solutions

- Employee alleged wage statements violated Lab. Code § 226 because employer identified as “CSSG.”
 - **C**ountrywide **S**taffing **S**olutions **G**roup = an unregistered out-of-state fictitious business name for Countrywide

California Employer Compliance Considerations for 2021

Noori v. Countrywide (continued)

Court found:

- CSSG was not the employer's "registered name, nor is it a minor truncation."
- Law does not require an employer to state its complete or registered name, and fictitious business names may be sufficient in certain circumstances.
- But CSSG acronym may be **confusing or meaningless**.
- Employer's name accurately stated on paycheck was insufficient.



Commute Time as “Hours Worked”

- The general “coming and going” rule
- Facts of the Oliver case
- The deciding factor- employer’s right to control

California Employer Compliance Considerations for 2021

California's Fair Employment and Housing Act (FEHA)

- Employers must engage in a “timely, good faith **interactive process**” by which the employer communicates with the disabled employee in selecting an appropriate reasonable accommodation.
- Employers **must initiate** the interactive process when:
 - i. an employee with a known physical or mental disability or medical condition requests an accommodation;
 - ii. the employer becomes aware of the need for accommodation through a third party; or
 - iii. the employer becomes aware of the possible need for accommodation because the disabled employee has exhausted leave of absence rights and the employee or employee's health care provider indicates that further accommodation is necessary.



California Employer Compliance Considerations for 2021

FEHA (continued)

- Employers required to accommodate only a “**known**” disability.
 - Duty to provide reasonable accommodation does not arise until the employer is aware of the employee’s disability and physical limitations.
- Where the disability, resulting limitations, and necessary reasonable accommodations are **not obvious** to the employer, the employee bears the burden to specifically identify both the disability and resulting limitations.
- Employers not required to accept an employee’s subjective belief that he or she is disabled and may rely on **medical information** from the employee’s medical provider.

California Employer Compliance Considerations for 2021

Doe v. Department of Corrections

- Psychologist filed lawsuit alleging his employer, California Department of Corrections and Rehabilitation (CDCR), failed to provide reasonable accommodation of his disabilities (*i.e.*, asthma and dyslexia) and engage in the interactive process.
- Accommodation request: work in a quiet place to help focus and concentrate because he suffered from "LD-NOS."

Doe v. Department of Corrections (continued)

- Doctor's notes:
 - Vague references to an "underlying medical condition," a "physical disability, and "migraines."
 - "Easily distracted" and became "disorganized" under stress.
 - No description of work limitations caused by a disability.
- Doe refused CDCR's request for signed release of medical records to obtain information re: nature and extent of his disability.

Doe v. Department of Corrections (continued)

Court found:

- Doctor's notes –
 - too vague and should have identified the disability or specified a diagnosis (e.g., asthma or dyslexia).
 - did not describe any kind of work limitations resulting from his disability.
- CDCR never knew the extent of Doe's limitations.
- CDCR was unable to determine whether Doe was disabled and could be afforded reasonable accommodation.

Liability of Staffing Companies for Workplace Misconduct

- Facts of the Duckworth case
- The court's decision
- Implications for employers and staffing companies