Stradling's 2024 Annual Employment Law Update

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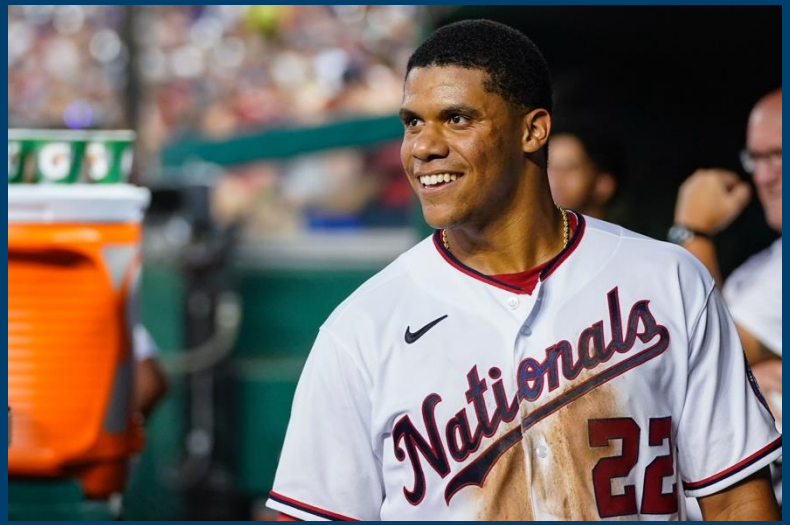
Presented by: Jared Speier

PRESENTED BY

Jared Speier
jspeier@stradlinglaw.com



NEW LEGISLATION

BAN ON CAPTIVE MEETINGS

SB 399

- California Worker Freedom from Employer Intimidation Act effective 1/1/2025
- Prohibits employer from subjecting, or threatening to subject, employee to any adverse action because they:

BAN ON CAPTIVE MEETINGS

SB 399

- Decline to attend employer-sponsored meeting or
- Affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives

The purpose of which is to communicate the employer's opinion about religious or political matters

BAN ON CAPTIVE MEETINGS

SB 399

- "Political matters" means matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization
- "Religious matters" means matters relating to religious affiliation and practice and the decision to join or support any religious organization or association

BAN ON CAPTIVE MEETINGS

SB 399

- Requires employee who refuses to attend such a meeting to continue to be paid
- Civil penalty of $500 per employee for each violation
- On 11/13/2024, NLRB held that captive audience meetings violate NLRA

HEALTHCARE WORKERS MINIMUM WAGES

SB 828

- Prior legislation established a minimum wage schedule for healthcare workers
- Amount has a starting range of $18 to $23 per hour depending on type and size of the healthcare facility
- Implementation was delayed by one month
  - From June 1, 2024 to July 1, 2024

FREELANCE WORKER PROTECTION ACT

SB 988

- Establishes minimum requirements for freelance writers to be classified as independent contractors
  - Effective for agreements entered into starting 1/1/2025
- Freelance worker defined as “a person or organization composed of no more than one person, whether or not incorporated or employing a trade name, that is hired or retained as a bona fide independent contractor by a hiring party to provide professional services in exchange for an amount equal to or greater than two hundred and fifty dollars ($250).”

FREELANCE WORKER PROTECTION ACT

SB 988

- Under Labor Code section 2778(b), “professional services,” includes (there are qualifiers as well):
  - Marketing; HR administrator; travel agent services; graphic design; grant writer; fine artist; enrolled agent; payment processing agent; photographer; photojournalist; videographer; photo editor; freelance writer, translator, editor, illustrator or newspaper cartoonist; content contributor; licensed esthetician, electrologist, manicurist, barber or cosmetologist; specialized performer hired to teach a master class for no more than one week

FREELANCE WORKER PROTECTION ACT

SB 988

- Still must pass the *Borello* test for independent contractor status
  - Not ABC test
- "Hiring party" excludes governmental entities as well as "individual(s) hiring services for the personal benefit of themselves, their family members, or their homestead."
- Agreement for services must be in writing and include, at a minimum:

FREELANCE WORKER PROTECTION ACT

SB 988

- The name and mailing address of each party
- An itemized list of all services to be provided by the freelance worker, including the value of those services and the rate and method of compensation
- The date on which the hiring party shall pay the contracted compensation or the mechanism by which the date shall be determined
- The date by which a freelance worker shall submit a list of services rendered under the contract to the hiring party to meet the hiring party's internal processing deadlines for purposes of timely payment of compensation

FREELANCE WORKER PROTECTION ACT

SB 988

- Aggrieved freelance worker may bring civil action for damages, reasonable attorney fees, costs, injunctive relief and any other remedy deemed appropriate by the court
  - If worker requests written contract prior to starting work and the hiring party refuses, worker awarded additional $1,000
  - If compensation not paid by time due under the contract, damages up to twice the unpaid amount

JOB POSTINGS

SB 1100

- Job postings, applications and similar employment documents may not include a statement that applicant must have a driver's license unless:
  - Reasonable expectation that driving is a job function
  - Reasonable expectation that using alternate form of transportation would not be comparable in travel time or cost to employer

INTERSECTIONALITY

SB 1137

- Discrimination prohibited not just on basis of individual protected traits
- Now prohibited on basis of intersectionality
  - The combination of two or more protected traits
- “Intersectionality is an analytical framework that sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm.”

INTERSECTIONALITY

SB 1137

- Examples provided by EEOC:
  - "National origin discrimination often overlaps with other forms of discrimination such as race, color, or religious discrimination. Thus, a person could challenge discrimination based on a combination of protected bases that are inseparable, such as both national origin and religion."
  - "A stereotype about Hispanic women would apply only to Hispanic women; it would not apply to either Hispanic men or non-Hispanic women."

LOCAL ENFORCEMENT

SB 1340

- Any political subdivision of the state may enact and enforce anti-discrimination laws that are at least as protective as state law
- Local enforcement may take place only after CRD issues right-to-sue notice
- State of limitations under state law extended during any local enforcement

HOUSEHOLD DOMESTIC EMPLOYEES COVERED UNDER CAL/OSHA

AB 1350

– Beginning 7/1/2025 “household domestic service” to be included in definition of employment under Cal/OSHA regulations

– Exceptions for:

– Publicly funded household domestic service

– Employment in family daycare homes

– Individuals in their own homes who privately employ individuals to perform ordinary household tasks such as housecleaning, cooking, caregiving

CROWN ACT AMENDMENTS

AB 1815

– Amends definition of “race” and “protective hairstyles” under FEHA and Unruh Act

– Race is “inclusive of traits associated with race, including but not limited to hair texture and protective hairstyles.”

– Removed “historically” from “traits historically associate with race.”

– Deemed vague and confusing

CROWN ACT AMENDMENTS

AB 1815

– Protective hairstyles “include but are not limited to such hairstyles such as braids, locs, and twists”

WORKERS' COMPENATION NOTICE

AB 1870

– Revises notice that must be posted that includes workers' compensation information such as to whom injuries should be reported and employee rights to select own treating physician

– Now must include that injured employees may consult with attorney to advise of rights and in most instances attorney's fees will be paid from award to employee

FIRST-AID MATERIALS

AB 1976

– Before 12/1/2027 Cal/OSHA must submit draft rulemaking proposal to Standards Board to require first-aid materials in the workplace include naloxone hydrochloride or another opioid antagonist approved by USFDA

– Standards Board will have until 12/1/2028 to consider adopting proposed standards

SMALL EMPLOYER FAMILY LEAVE MEDIATION PROGRAM

AB 2011

– CRD will provide mediation program for resolution of alleged violations of family care and medical leave, bereavement leave, and reproductive loss leave provisions

– For employers with between 5 – 19 employees

– Makes pilot program permanent

PAID FAMILY LEAVE

AB 2123

– Can no longer require employees to use accrued vacation leave or paid time off before receiving paid family leave benefits from EDD

WHISTLEBLOWER POSTING

AB 2299

– Requires Labor Commissioner to develop model list of employees' rights and responsibilities under whistleblower laws

– Employers that post model list will be deemed in compliance with posting requirements

JANITORIAL WORKING CONDITIONS

AB 2364

- Department of Industrial Relations must contract with UCLA Labor Center for study to improve worker safety and safeguard employment rights in janitorial industry
- Report to be issued by 1/1/2026
- By 6/15/2025 DIR must convene advisory committee of government, employer and worker representatives to make recommendations re scope of study

JANITORIAL WORKING CONDITIONS

AB 2364

– Amount per participant janitorial employers must pay to qualified organizations providing required sexual violence and harassment prevention trainings from $65 to $80 per participant for training sessions with 10 or more participants and $200 per participant if fewer than 10 participants

– Amount will increase after 1/1/2026 based on CPI

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Existing law provides protection to employees who take time off for jury duty, court appearances or when victims of certain crimes or abuse
  - Now paid sick leave as well as vacation, personal time or compensatory time can be used for these purposes
  - Now related discrimination or retaliation claims can be filed with the Civil Rights Department
- AB 2499 broadens definition of “victims” to include a victim of a “qualifying act of violence”

TIME OFF FOR VICTIMS OF CRIMES

AB 2499 – Some Definitions

- "Crime" means a crime or public offense that would constitute a misdemeanor or felony, regardless of whether any person is arrested, prosecuted, or convicted of, committing the crime
- "Family member" means a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner, or designated person

TIME OFF FOR VICTIMS OF CRIMES

AB 2499 – Some Definitions

- "Designated person" means any individual related by blood or whose association with the employee is the equivalent of a family relationship
- The designated person may be identified by the employee at the time the employee requests the leave
- An employer may limit an employee to one designated person per 12-month period for leave pursuant to this section

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Employer with 25 or more employees shall not discharge or in any manner discriminate or retaliate against an employee who is a victim or who has a family member who is a victim for taking time off from work for any of the following purposes:
  - To obtain or attempt to obtain any relief for the family member. Relief includes, but is not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the family member of the victim

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- To seek, obtain, or assist a family member to seek or obtain, medical attention for or to recover from injuries caused by a qualifying act of violence
- To seek, obtain, or assist a family member to seek or obtain services from a domestic violence shelter, program, rape crisis center, or victim services organization or agency as a result of a qualifying act of violence
- To seek, obtain, or assist a family member to seek or obtain psychological counseling or mental health services related to an experience of a qualifying act of violence

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- To participate in safety planning or take other actions to increase safety from future qualifying acts of violence
- To relocate or engage in the process of securing a new residence due to the qualifying act of violence, including, but not limited to, securing temporary or permanent housing or enrolling children in a new school or childcare
- To provide care to a family member who is recovering from injuries caused by a qualifying act of violence

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- To seek, obtain, or assist a family member to seek or obtain civil or criminal legal services in relation to the qualifying act of violence
- To prepare for, participate in, or attend any civil, administrative, or criminal legal proceeding related to the qualifying act of violence
- To seek, obtain, or provide childcare or care to a care-dependent adult if the childcare or care is necessary to ensure the safety of the child or dependent adult as a result of the qualifying act of violence

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Time off can be limited 12 wks except can be limited to 5 days and total leave to 10 days if family member is victim of non-fatal crime
- Employee must give reasonable advance notice to take time off, unless advance notice not feasible
- When unscheduled absence occurs, no adverse action can be taken if employee, within reasonable time after absence, provides appropriate certification to employer
- Reasonable accommodations required for employee who is victim or whose family member is victim of qualifying act of violence who requests an accommodation for the safety of the employee while at work

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Reasonable accommodations may include the implementation of safety measures, including a transfer, reassignment, modified schedule, changed work telephone, permission to carry telephone at work, changed work station, installed lock, assistance in documenting domestic violence, sexual assault, stalking, or another qualifying act of violence that occurs in the workplace, an implemented safety procedure, or another adjustment to a job structure, workplace facility, or work requirement in response to domestic violence, sexual assault, stalking, or other qualifying act of violence, or referral to a victim assistance organization

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Employer is not required under this section to provide a reasonable accommodation to an employee who has not disclosed the employee's status, or the employee's family member's status, as a victim
- Interactive process required
- And…

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Employer must inform employees of these rights in writing
  - To new employees upon hire;
  - To all employees annually;
  - At any time upon request; and
  - Any time an employee informs an employer that the employee or the employee's family member is a victim

TIME OFF FOR VICTIMS OF CRIMES

AB 2499

- Civil Rights Department will develop form by 7/1/25
  - Not required, but same information must be provided
  - No notice requirement until form made available
- CRD expected to update FAQs before end of year

ENTERTAINMENT EVENT VENDORS

AB 2602

- Regulates use of artificial intelligence in entertainment industry
- Prohibits employers from using AI-generated digital replicas in lieu of human performed under certain circumstances
- Cannot use AI version of performer's voice or likeness if:

ENTERTAINMENT EVENT VENDORS

AB 2602

- Such usage replaces work performer could have done in person;
- Contract of employment does not specify how digital replica will be used; and
- Performer did not have legal or union representation when contract entered into

– Applies to new performances fixed on or after 1/1/2025

WORKPLACE VIOLENCE PREVENTION REQUIREMENTS FOR HOSPITALS

AB 2975

- Hospitals already required to implement workplace violence protection standards
- By 3/1/2027, Cal/OSHA Standards Board must amend existing standards to require hospitals to implement weapons screening policy and use specified weapons detection devices other than handheld metal detector wands

WORKPLACE VIOLENCE PREVENTION REQUIREMENTS FOR HOSPITALS

AB 2975

- Standards will also require hospitals to implement policies addressing personnel education and training, alternative search and screening protocols, responsive protocols for detected weapons, and public notification
- After standards are adopted by Standards Board, will have to set effective date giving hospitals up to 90 days to comply

SOCIAL COMPLIANCE AUDIT

AB 3234

- Employer that voluntarily subjected itself to non-governmental labor laws social compliance audit must post report of findings regarding child labor law compliance on its website
- Audit reviews operations to ensure employer operations or practices compliant with state and federal labor laws, including wage and hour regulations and health and safety regulations, including those regarding child labor laws

E-VERIFY

U.S. Citizenship and Immigration Services

REMEMBER FEDERAL REQUIREMENTS

– Employers using E-Verify have until 1/5/2025 to download and retain records for cases last updated on or before 12/31/2014

– After that date the U.S. Citizenship and Immigration Service will dispose of those records per applicable records retention and disposal schedule

– Records should be downloaded in case of future compliance issues

REMEMBER FEDERAL REQUIREMENTS

Mental Health Parity and Addiction Act

– Final rules issued in September

– Requirements for group health plans and health insurance issuers related to access to mental health and substance use disorder benefits and medical/surgical benefits

– Emphasis on collection of data and assessing whether meaningful benefits are provided

REMEMBER FEDERAL REQUIREMENTS

Mental Health Parity and Addiction Act

- Most requirements apply to plan years beginning on or after 1/1/2025
  - Certain requirements enforceable for plan years beginning on or after 1/1/2026
- Employers with fully insured plans may want to contact carrier to determine if complying with these rules
- Employers with self-insured plans should ensure qualified provider is performing the necessary analysis

MINIMUM WAGE

MINIMUM WAGE INCREASES

- Effective January 1, 2025, the state's minimum wage will increase to $16.50
- At least 40 Local Ordinances mandate an increased hourly wage above the state's minimum
- Examples:
  - City and County of Los Angeles at $17.27
  - Winner is West Hollywood at $19.65
  - Some have separate standards for hotel workers
- https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2

EFFECT OF MINIMUM WAGE INCREASE

- Salary basis test 2025: $68,640 annually
- $1,320/wk
- Don't forget - employees must also meet the "duties" test to qualify as exempt
- On federal side, effective 1/1/2025 minimum salary to be exempt under Fair Labor Standards Act will increase to $1,128/wk or $58,656/year
- From $844/wk or $43,888/year

EFFECT OF MINIMUM WAGE INCREASE

- Inside salespeople
  - Regular rate of pay must exceed 1.5x minimum wage
  - Also, more than ½ of compensation must be payment of commissions
- Increases split shift premium, uniform maintenance allowance, and minimum pay for employees who must supply personal hand tools (2x minimum wage)

COMPUTER SOFTWARE PROFESSIONALS

- Computer software professionals
  - Intellectual or creative work that requires exercise of discretion and independent judgment
  - Highly skilled and proficient
  - Primarily engaged in
    - Systems analysis, or
    - Systems or programs design, development, documentation, analysis, creation or modification, or

COMPUTER SOFTWARE PROFESSIONALS

- Documentation, testing, creation or modification of computer programs related to design of software or hardware for operating systems
- Compensated at
  - Hourly rate of $56.97 for every hour worked; or
  - $118,657.43 annually; or
  - $9,888.13/mth
  - 2.5% increase
- Federal FLSA minimum of $27.63/hr
- Still must be provided meal and rest periods
- Physicians and Surgeons up to $103.75/hr

BUT WAIT . . .

– Proposition 32 attempted raise the minimum wage to $18 an hour starting in January 2025

– Small businesses with 25 or fewer employees would be required to start paying at least $17 next year, and $18 in 2026.

– Adjusted by inflation starting in 2027

– Lost 50.7% to 49.3%

WAGE AND HOUR

BOOTUP TIME

Cadena v. Customer Connexx LLC

– Collective action under the FLSA from 15 call center agents alleged they were owed overtime pay for time spent powering up and down their computers to log in, clock in and be ready to take calls at scheduled start time of shift

– Plaintiffs alleged they worked between 12-20 minutes per day they were not paid for

BOOTUP TIME

Cadena v. Customer Connexx LLC

- District Court held that time was too trivial to be compensable under de minimis doctrine
  - Note that the California Supreme Court rejected the de minimis doctrine
- Plaintiffs appealed

BOOTUP TIME

Cadena v. Customer Connexx LLC

- Ninth Circuit reversed
  - Judge Marsha Berzon wrote opinion
- Held factual question regarding:
  - Practical administrative challenges of recording time
  - Aggregate amount of time at issue
  - Regularity of extra work

BOOTUP TIME

Cadena v. Customer Connexx LLC

- "To the extent workers may have spent up to 11, 15, 20 or even 30 minutes per shift on these tasks, the time cannot be characterized as de minimis."
- "A reasonable fact-finder could conclude that when all the time is aggregated per employee, factoring in instances when the tasks at issue took 10 to 30 minutes, …, as well as those in which the tasks took a few minutes or less – the total uncompensated time could be 'substantial' over time."

BOOTUP TIME

Cadena v. Customer Connexx LLC

- Ninth Circuit also noted that employer's policy prohibited employees from clocking more than 7 or more minutes before their start time but employees not paid for the time
  - Factual questions as to whether employees were paid for time clocked in prior to scheduled shift start time

BOOTUP TIME

Cadena v. Customer Connexx LLC

- Same reasoning can apply to other situations
  - Security checks
  - Tasks performed after clocking out
  - Donning and doffing
  - Texting or emails while not clocked in
  - Travel time after clocking out to locations where breaks can be taken

BONUS TRUE-UPS

– Remember that nondiscretionary bonuses, incentive pay, and commissions are part of the regular rate

  – For overtime, meal/rest period premium wages and paid sick leave

  – True-up payments required

PAGA

PAGA REFORM

California Employee Civil Action Law Initiative

- Was on the November ballot
- Eliminates Employees' Ability to File Lawsuits for Monetary Penalties for State Labor-law Violations Initiative Statute
- Gave sole enforcement power back to Labor Commissioner

PAGA REFORM

- A Trade Was Made . . .
- On July 1, 2024, California Governor Gavin Newsom signed SB 92 and AB 2288 into law, significantly reforming PAGA
  - In exchange, the ballot measure was removed
  - New reforms contains many changes, but is not a wholesale dismantling of PAGA as the ballot measure envisioned

PAGA REFORM

- Significant Changes . . .
  - Changes can be broken down into four categories
    1. Standing Requirements and Applicability
    2. Structural Changes
    3. Post-filing Penalty Reductions
    4. Pre-filing Penalty Reductions

PAGA REFORM

Standing Requirements and Applicability

- Applicability of Changes
  - These changes only apply to civil actions:
    - Filed after June 19, 2024, or
    - Where the LWDA notice was filed after June 19, 2024
- Standing
  - Significantly narrowed from prior law
  - Plaintiff must have “personally suffered” the alleged violations
  - Plaintiff must experience the alleged violation within the statute of limitations
  - New standing requirements do not apply to actions brought by nonprofit legal aid associations involved in PAGA litigation for at least 5 years

PAGA REFORM

Structural Changes

- Reduced Wage Statement Penalties
  - Applies to technical violations (wrong address) or if employee could "promptly and easily determine" the accurate information required by section 226
  - Penalty reduced to $25 per employee per pay period
- No Derivative Penalties
  - Undercuts "stacking" arguments
  - Cannot recover multiple penalties for one underlying wage violation
  - Under old statute one missed meal period would result in at least three separate violations

PAGA REFORM

Structural Changes

- Reduced Penalties for Isolated Errors
  - If the violation occurred over the lesser of 30 days or 4 pay periods, penalty is reduced to $50 per employee per pay period
- Revised Definition of Subsequent Violations
  - Agency or court must issue a finding that the policy or practice was unlawful to be considered a subsequent violation
  - Penalty is increased to $200 for subsequent violations
  - Increased penalty also applicable to “malicious, fraudulent, or oppressive” violations

PAGA REFORM

Structural Changes

- Reduced Penalties for Weekly Pay Periods
  - Penalties are assessed per employee per *pay period*
  - Previously employers paying on a weekly basis would be subject to double penalties
  - New legislation removes that argument
- More Money Goes to the Employees
  - Previously employees only received 25% of the assessed penalties
  - New legislation increases that percentage to 35%

PAGA REFORM

Structural Changes

- Injunctive Relief
  - Injunctive relief is now a remedy Plaintiff's can seek under PAGA
  - Will likely require court oversight or reporting to determine whether violations have been remedied
- Court Has Discretion to Lower Penalties
  - This has been the standard under applicable caselaw, but now is codified in the amended statute

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- The previous PAGA statute provided an ability to cure violations after receiving a PAGA letter. However, it was narrow in its application
- The new legislation expands significantly on employers’ ability to cure violations effective October 1, 2024
  - Employers can now cure:
    - wage statement penalties,
    - failure to pay meal/rest period premiums,
    - failure to pay overtime, and
    - expense reimbursement violations.

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- Procedure
  - Small employers (less than 100 employees) can notify the LWDA that it would like to cure the alleged violations
    - The LWDA then has 17 days to review whether the violations have been cured
    - If they find that it has not been cured or do not respond, then plaintiff may commence a civil action
    - If they find that it has been cured then plaintiff may appeal to the superior court
  - Small employers must notify the LWDA or the court within 33 days of the postmarked date of the notice

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- Procedure
  - Large employers (more than 100 employees) can file a request for a stay and early neutral evaluation with the court
    - All discovery and other proceedings will be stayed pending the conference
  - Employers must notify court upon initial appearance re: cure
  - Court will schedule early evaluation conference within 70 days

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- Procedure
  - Remains to be seen how this will play out in the courts and with the LWDA
    - Will the LWDA be able to review cure petitions?
    - How much will the LWDA scrutinize the petition?
    - Who will act as the “neutral evaluator” performing the early evaluation conference?

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- Effect of Cure
  - If the court or LWDA finds that the violations have been cured all penalties are cured violations are reduced to $15
  - If the court or LWDA find the violation are cured AND the employer took “reasonable steps” prior to receiving the PAGA notice, then penalties are reduced to $0

PAGA REFORM

Post-filing Penalty Reductions, also known as “Cure”

- How to cure a violation
  - For wage violations employee must be “made whole” and must receive:
    - All underpaid wages;
    - 7% interest going back 3 years from the date of the notice;
    - Any liquidated damages;
    - Reasonable attorney’s fees and costs to be determined by the court
  - For wage statement errors related to the name and address of the employer a written correction must be provided
    - Can be in a summary form, but needs to identify correct information for each pay period
  - For other wage statement errors, fully compliant wage statements must be provided
    - Can be provided in a digital form accessible by employees

PAGA REFORM

Pre-filing Penalty Reductions

- Employers can take “reasonable steps” to reduce penalties by 85%
  - Reasonable steps taken prior to receiving the PAGA notice or request for personnel/payroll records result in penalties being reduced to a maximum of $15
  - If employer takes reasonable steps within 60 days after receiving the PAGA notice, then penalties are reduced to a maximum of $30
  - Regardless of the timing of the reasonable steps, if an employer also cures the alleged violation, the penalty is reduced to $0

PAGA REFORM

Pre-filing Penalty Reductions

- What are reasonable steps?
  - The specific steps that will be deemed “reasonable” will be evaluated by the totality of the circumstances and take into consideration the size and resources available to an employer, as well as the nature, severity and duration of the alleged violations
  - They include:
    - Conducting regular audits;
    - Reviewing, revising, and disseminating lawful written policies;
    - Implementing comprehensive training programs;
    - Maintaining accurate records; and
    - Developing a robust compliance plan

PAGA REFORM

Pre-filing Penalty Reductions

- Regular audits
  - Schedule periodic internal audits to identify and rectify potential violation
    - Scope of audit depends on size of the business, the management structure, prior violations, etc.
  - Implement software solutions to monitor and manage wage and hour compliance-related activities and use automated tools to track employee work hours, breaks, and other relevant data
  - How “regular” is enough?

PAGA REFORM

Pre-filing Penalty Reductions

- Lawful written polices
  - If you haven't revised your handbook on a regular basis, now is the time
  - Regularly review and update workplace policies to ensure they align with PAGA provisions and developments in caselaw
  - Communicate policy changes to all employees and provide training as needed

PAGA REFORM

Pre-filing Penalty Reductions

- Training programs
  - Train supervisors on applicable Labor Code and wage order compliance
  - Ensure all employees are aware of their rights and responsibilities under PAGA
  - This training can be conducted around the same time you conduct your internal audits to identify and correct any wage and hour issues

PAGA REFORM

Pre-filing Penalty Reductions

- Accurate records
  - Keep detailed records of work hours, breaks, wages, and other employment conditions
  - Ensure all documentation is up-to-date and readily accessible for review
    - This is paramount to be able to determine whether to cure violations after receiving a PAGA notice

PAGA REFORM

- Pre-filing Penalty Reductions
  - Compliance plan
    - Create a compliance plan that addresses all PAGA provisions and outlines corrective actions. For instance, implementing a disciplinary policy if employees are not complying with your meal and rest period policies
    - Assign a dedicated compliance officer to oversee and enforce the plan

PAGA

Ibarra v. Chuy & Sons Labor, Inc.

- Definition of aggrieved employees not required in prelitigation PAGA letter
  - Prelitigation notice must include sufficient information for the LWDA to assess the claims
  - If facts and theories supporting the claims are provided, then there is no need to define the aggrieved employees

PAGA

Turrieta v. Lyft

- Other aggrieved employees do not have standing to intervene in ongoing PAGA actions
  - Previously there was a high bar to overcome, but intervention was possible
  - Increases strategic options when faced with multiple overlapping PAGA lawsuits

PAGA

Leeper v. Shipt

- Plaintiff's may not bring "headless" PAGA claims
  - Plaintiff brought a PAGA action on behalf of other aggrieved employees, but not himself
  - A recent strategy after *Viking River* and *Adolph* to avoid individual arbitration of PAGA claims
  - Appellate court reversed, holding that individual arbitration of PAGA claims should proceed and stayed the representative action

NATIONAL LABOR RELATIONS ACT

NLRB

- Tighter restrictions on “stay or pay” and non-competes
  - General counsel for NLRB issued statement that NLRB will be taking a more aggressive approach in invalidating these provisions
  - Not the “law of the land” but serves as enforcement guidance
  - Argues that they violate Section 7 of the NLRA
  - Memorandum issued on October 7
  - Employers have 60 days to cure any violations

NLRB

Stay or Pay

- Provision that requires employees to pay an amount if they leave before a certain time
- Similar to training repayment agreements and sign on bonuses tied to a mandatory stay period
- Presumptively unlawful, employer must prove otherwise
- To be lawful, must advance a legitimate business interest and be narrowly tailored as determined by a four part test . . .

NLRB

—Four Part Test

1. Voluntarily entered into in exchange for a benefit
   - — Not conditioned on continued employment
   - — Employee has the option to pay out of pocket
2. Reasonable and specific repayment amount
   - — Must be no more than what employer spent on the benefit and must be specified up front
3. Reasonable “stay” period
   - — Must be related to cost of the benefit and value to employee
4. Does not require repayment if employee terminated without cause

NLRB

—What to do now

1. Take stock of your existing agreements
2. Work with counsel to determine whether any violate the new NLRB memo
3. Understand the risks associated with moving forward
4. Pause, refrain from, or continue using stay or pay provisions

NLRB

Morales v. Home Depot

- NLRB decision stating employer could not ask employee to remove BLM message
  - Overturned lower decision
- Violated the NLRA because related to previous discrimination complaints of other employees
  - NLRB GC made statements in favor of the decision
- BLM message was a “logical outgrowth” of previous complaints

NLRB

Morales v. Home Depot

- Employee wore the message prior to the racial complaints
- However, he was not asked to remove the BLM message until after the complaints occurred
- NLRB did not decide, but seemed to indicate that the conduct was not protected prior to the complaints but became protected thereafter

NLRB

Morales v. Home Depot

- If employer interferes with employees' right to engage in protests they must show that the protest activities will:
  - Jeopardize employee safety
  - Damage machinery or products
  - Exacerbate employee dissension, or
  - Unreasonably interfere with the employer's public image that the employer has established as part of its business plan

Morales v. Home Depot

- It is difficult to meet that standard . . .
  - Threats of violence may not be enough to establish employee dissension. These should be dealt with by disciplining the employee who made the threat
  - The scope of the public image defense is “exceedingly narrow.” The following will NOT qualify:
    - Uniform or dress code policy
    - Status as a retailer or service provider
    - The fact that they work with the public
    - The fact that customers may be offended by the message

NLRB

Morales v. Home Depot

- So what should you do?
  - Uniformly enforce your dress code
    - Home Depot allowed employees to wear other messages besides BLM
  - Don’t overreact to protest activities and make sure you understand the ramifications before acting

NLRB

Starbucks v. McKinney

- New standard for injunctions
  - The NLRB must show that it is likely to succeed on the merits for an injunction to be enforced
  - Previously deference was given to the NLRB and the standard was much lower to obtain an injunction
  - While injunctions are rare, this is an even rarer win for employers when facing the NLRB

NLRB

Smith v. Prime Communications LP

- Non-disparagement and confidentiality provisions in severance agreement violated NLRA
  - Non-disparagement provisions stated that it was meant to be as broad as possible and will prohibit even true statements about Prime
  - Was prohibited from making contact or emailing any employee of Prime
  - Could not disclose the terms or existence of the agreement
  - $5,000 liquidated damages provision for any violation plus attorneys fees

NLRB

Smith v. Prime Communications LP

- NLRB held that these provisions had a “chilling tendency” on Smiths rights under the NLRA
- Would preclude Smith from assisting other coworkers who may be interested in challenging similar agreements or otherwise involved in employment disputes

NLRB

Hilst Enterprises

- Settled with the NLRB after finding that certain work rules violated the *Stericycle* standard
  - Prohibits work rules which would “chill” the exercise of their rights
- Handbook policy stated that salary information was considered sensitive company information and discussion of salaries could lead to discipline

DISCRIMINATION & HARASSMENT

DOL Guidance

- Guidance on using artificial intelligence in hiring decisions
- Presented a 10 steps roadmap to avoid discrimination

DOL Guidance

1. Identify the Legal Requirements
   - Understand the state and federal laws that apply to your hiring decisions
2. Establish Staff Roles
   - Train employees so they know what tools they have available and the risks in using those tools
3. Understand Your Technology
   - Collect information from your vendors about the technology you intend to use

DOL Guidance

4. Continue to Work With Vendors
   - Ensure that the AI is consistent with your policies and practices. You will be responsible for the technology, not the vendor
5. Assess the Impacts
   - Run tests to determine the positive and negative impacts
6. Provide Accommodations
   - Just because the software is rigid doesn't mean you get to be

DOL Guidance

7. Use “Explainable” AI
   - Guidance recommends that you collect “explainable” AI statements
   - Essentially you have to be able to explain in plain terms why the AI models produce their outputs
8. Ensure Human Oversight
   - Have clear policies and procedures regarding who can use AI and who is accountable for oversight

DOL Guidance

9. Manage Incidents
   - Have a framework ready to address problems
   - Incident could be an accessibility issue or negative impact of the software
10. Monitor AI Regularly
   - Many AI tools can be prone to errors which left unchecked can create liability
   - AI systems can change overtime as the data they rely on changes

Discrimination Decisions

Okonowsky v. Garland

- A hostile work environment can be based on social media
- Case filed by a female staff psychologist working for the federal bureau of prisons
- Claimed that her male supervisor ran an Instagram account that he used to post harassing and violent content

Discrimination Decisions

Okonowsky v. Garland

- Employer argued that it could not create a hostile work environment because it occurred “outside of work” and it was the supervisor’s personal account
- The account was followed by a hundred of coworkers including the guards and the human resources manager

Discrimination Decisions

Okonowsky v. Garland

- The supervisor posted hundreds of sexist, racist, anti-Semitic, homophobic, and transphobic memes that impliedly references the bureau of prisons
- Supervisor was told to stop posting, however, after the warning the posts became more frequent and targeted plaintiff specifically

Discrimination Decisions

Okonowsky v. Garland

- Supervisor was transferred to another facility, however, he did not refrain from posting
- Plaintiff eventually resigned
- Trial court granted summary judgment for the employer stating that the environment was not objectively hostile because the conduct occurred entirely outside of work

Discrimination Decisions

Okonowsky v. Garland

- The appellate court reversed the decision finding that online posts can support a workplace harassment claim
- The court considered that simply unfollowing the account was not sufficient given that the posts were permanent and could be accessed in perpetuity

Discrimination Decisions

Okonowsky v. Garland

- This case makes evident the importance of strong anti-harassment and social media policies as well as active enforcement of those policies
- Managers should also think long and hard before connecting with subordinates on social media

Discrimination Decisions

Rajaram v. Meta Platforms, Inc.

- Hiring employees on H1-B Visas
- Employee, a U.S. citizen alleged that employee preferred to hire H1-B employees over citizens
- The lower court held that 42 U.S.C 1981 does not prohibit employers from discriminating against U.S. citizens
- The appellate court reversed . . .

Discrimination Decisions

Rajaram v. Meta Platforms, Inc.

- The text of the statute does prohibit discrimination against US citizens
- The court did not rule on whether the specific practices violated the law and remanded the case to the lower court to decide

Discrimination Decisions

Veverka v. Dept. of Veterans Affairs

- Director of a veterans home made complaints regarding safety and health issues to an independent state agency
- He was subsequently removed from his position due to performance issues

Discrimination Decisions

Veverka v. Dept. of Veterans Affairs

- The lower court held that although the whistleblower disclosures were a contributing factor the employer would have recommended termination for legitimate reasons, thereby avoiding liability
- This standard is different from FEHA where injunctive relief and attorneys fees are still available if discrimination was a substantial motivating factor

Discrimination Decisions

Bailey v. San Francisco Dist. Attorney's Office

- African-American employee overheard a coworker using a racial epithet against her
- She did not report it because the offending employee was best friends with the HR person
- Supervisor discovered the incident and reported it to HR, who subsequently began to retaliate against the employee

Discrimination Decisions

Bailey v. San Francisco Dist. Attorney's Office

- HR person leered at her, laughed at her, commented that her works comp claim wasn't real, gestured "you're going to get it" in the parking lot
- The trial court found that the HR persons "social ostracism" did not amount to an adverse employment action
- The court of appeal reversed . . .

Discrimination Decisions

Bailey v. San Francisco Dist. Attorney's Office

- An adverse employment action can result from a series of subtle but damaging injuries
- The impact of the employer's actions must be considered holistically
- Court overturned the lower court's summary judgement and ordered the case to proceed

Discrimination Decisions

Kama v. Mayorkas

- Plaintiff was identified as participating in an illegal scheme of receiving compensation for acting as other employee's personal representative during an investigation
- Thereafter he made a formal complaint of a hostile work environment
- He later refused to participate in the investigation into his criminal conduct

Discrimination Decisions

Kama v. Mayorkas

- He was later terminated for failing to participate in the investigation
- He argued that the temporal proximity of his termination to his complaint created liability for the employer
- Temporal proximity of 56 days between his complaint and termination was insufficient given the legitimate basis for his termination

Discrimination Decisions

Paleny v. Fireplace Products U.S. Inc.

- Plaintiff alleged that she was harassed and discriminated against after she disclosed that she would be undergoing egg retrieval procedures
- It was undisputed that she was not pregnant and did not have a pregnancy related disability

Discrimination Decisions

Paleny v. Fireplace Products U.S. Inc.

– Two distinct protections under FEHA

1. Employees disabled by a pregnancy related condition are entitled to leave
2. Employees are entitled to accommodation if requested by the employee and recommended by a healthcare provider

Discrimination Decisions

Paleny v. Fireplace Products U.S. Inc.

- Paleny was required to show that she was subjected to unlawful employment practices due to pregnancy or a physical disability
- So she had to establish that she was disabled due to pregnancy or requested reasonable accommodations
- She could not show either because she was not experiencing infertility

Discrimination Decisions

Behrend v. San Francisco Zen Center, Inc.

- Behrend was an employee assigned to the maintenance crew in their work practice apprentice program
- He claimed that he needed accommodations to move off of the crew due to physical and mental disabilities arising from a car accident
- His accommodations were denied and he was later terminated

Discrimination Decisions

Behrend v. San Francisco Zen Center, Inc.

- The court granted summary judgment under the “ministerial exception”
- The ministerial exception only applies to “ministers” and not all employees of religious organizations
- The parties did not dispute that the work itself was an essential component of Zen training

Discrimination Decisions

Behrend v. San Francisco Zen Center, Inc.

–The ministerial exception is not limited to teachers and leaders but also those who perform vital, but not necessarily hierarchical functions

Discrimination Decisions

Hoglund v. Sierra Nevada Memorial-Miners Hospital

- Supervisor made comments about employee's age and regularly asked when an employee was going to retire
- Reassigned some of her duties to younger employees and refused to offer additional training

Discrimination Decisions

Hoglund v. Sierra Nevada Memorial-Miners Hospital

- Employee was later terminated as part of a reduction in force due to “bad reviews” from other employees
- Any significant participant in the adverse employment action who exhibited discriminatory animus will raise an inference that the decision was discriminatory

Discrimination Decisions

Miller v. California Dept. of Corrections

- Employee was on workers compensation leave for two years
- Thereafter was placed on an unpaid leave of absence
- Employer offered her an alternate position which she did not accept citing a newly disclosed mental disability

Discrimination Decisions

Miller v. California Dept. of Corrections

- Court granted summary judgment for the employer
- Employer showed that she could not perform the essential functions of her position and had offered reasonable accommodations which she had accepted or refused

Discrimination Decisions

Perez v. Barrick Goldstrike Mines, Inc.

- Employer did not have to present contrary evidence before contesting doctor's certification
- Employee got in a work related accident
- Doctor's note indicated that there were no signs of injury, yet the employee should remain off work for a time

Discrimination Decisions

Perez v. Barrick Goldstrike Mines, Inc.

- Employer found no signs of the accident that Plaintiff stated occurred and another employee emailed stating that Plaintiff told him he was faking the injury
- Employer hired an investigator showing Plaintiff engaging in various activities without difficulty

Discrimination Decisions

Perez v. Barrick Goldstrike Mines, Inc.

- Court found that medical evidence is not necessary to question an employee's doctor's note, other evidence is sufficient
- FMLA leave must be supported by a certification from an employee's healthcare provider
- If the employer doubts its validity it may require the employee to submit a second certification

Discrimination Decisions

Perez v. Barrick Goldstrike Mines, Inc.

- Employer is not required to request a second certification
- However, employers must be confident in their evidence undermining the medical certification. Mere suspicion will likely not suffice.

ARBITRATION

"It's from Mr. McGregor. He's now willing to submit to binding arbitration."

ARBITRATION

Reynosa v. Superior Court

- Employee could still withdraw from arbitration after participating when employer did not pay arbitration fee
  - Employer paid the arbitration fee 17 days late
  - Employee continued to engage in the arbitration, but decided to withdraw a few months later
  - Employee's participation in the arbitration did not prevent them from later withdrawing when they did not know about the late payments

ARBITRATION

Quach v. Cal. Commerce Club

- Prejudice no longer required to waive right to arbitration
  - Despite having an arbitration agreement, employer filed an answer and engaged in discovery prior to moving to compel arbitration
  - Previous standard required a showing of prejudice to the other side prior to finding that a party waived their right to compel
  - Now merely acting inconsistent with arbitration may waive your right to enforce the arbitration provision

ARBITRATION

Mahram v. The Kroger Co.

- Importance of clear language in delegation and third-party beneficiary clauses
  - Arbitration agreement must clearly and unmistakably assign the decision of arbitrability to the arbitrator
  - Third party beneficiaries must be clearly identified
    - This is particularly important when working with staffing agencies
    - Better yet, third party beneficiaries should be signatories to the agreement where possible

ARBITRATION

Soltero v. Precise Distribution

- Precise could not use staffing agencies arbitration agreement where staffing agency was not a party to the litigation
  - Principals of equitable estoppel did not apply since the dispute did not arise out of the employees' contract with the staffing agency
  - Additionally, a third party beneficiary must be a beneficiary of the arbitration provision, not merely the employment agreement containing the arbitration provision

ARBITRATION

Doe v. Second Street Corp & Liu v. Miniso Depot CA, Inc.

- Plaintiffs have the option to invalidate an arbitration agreement as long as they allege one instance of sexual harassment occurring after March 3, 2022
- The invalidation extends to the entire case, not just the sexual harassment cause of action
- Still yet to be decided if class action waivers will be effectively invalidated when combining wage and hour claims with sexual harassment claims

PENDING BEFORE CA SUPREME COURT

PENDING CASES

Camp v. Home Depot USA, Inc.

- Sixth District Court of Appeal held rounding prohibited where timekeeping system captures all time worked by the employee and employer has ability to pay by the minute
- Other appellate courts allow rounding where policy is fair and neutral on its face and equally benefits employees and employer

–May determine whether employers can continue to round time

Non-Competition

FTC Ban on Non-Competition

–President Biden issued an executive order in July 2021 on promoting competition

- Order encourages the FTC to ban or restrict non-competition agreements

–FTC's initial response included releasing a draft of a strategic plan through 2026 including two stated goals

- Identify, investigate, and actions against anticompetitive mergers and practices
- Engage in research, advocacy, and outreach to promote public awareness and understanding of fair competition and its benefits

FTC Ban on Non-Competition

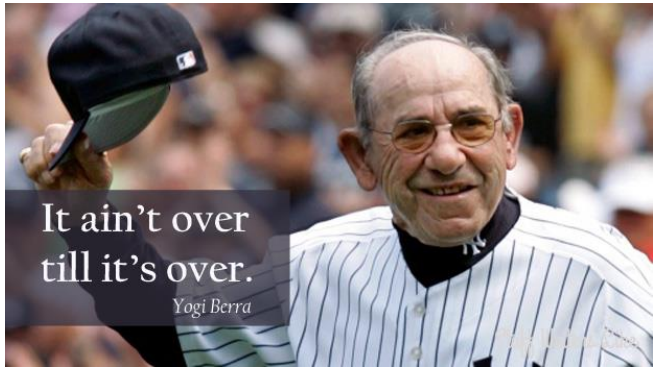
–FTC voted 3-2 to publish proposed rule banning non-competition agreements

– Under the rule employers cannot:
  – enter into or attempt to enter into a noncompete with a worker;
  – maintain a noncompete with a worker; or
  – represent to a worker, under certain circumstances, that the worker is subject to a noncompete.
– Does not apply to “senior executives” or those engaged in a bona fide sale of a business

FTC Ban on Non-Competition

–On August 20, 2024, a district court in Texas issued a permanent injunction barring the FTC rule

–However, the decision has been appealed so it will be important to keep tabs on any developments



Non-Competition Decision

Samuelian v. Life Generations Healthcare

- Clarified two issues:
  - A contractual restraint on trade is evaluated under a reasonableness standard where a business owner sells less that their entire interest; and
  - Members of a manager-managed LLC can be subjected to fiduciary obligations by the company's operating agreement

Non-Competition Decision

Samuelian v. Life Generations Healthcare

- Non-competition provisions are generally void unless they are entered into in connection with the sale of a business or interest in a business
- A reasonableness standard applies even when selling a partial (but substantial) interest, in this case it was still significant ($60 million)
- However, the restrictions will be evaluated in the context of what interest was sold

OSHA


36.6
STATE OF CALIFORNIA
CAL OSHA
DEPARTMENT OF INDUSTRIAL RELATIONS

CAL/OSHA Indoor Heat Standards

- Indoor heat standard is in effect as of July 23, 2024
  - Becomes effective when the actual temperature or “heat index” is more than 87 degrees
    - Heat index is measured using a “wet bulb globe temperature device”
  - When employees wear clothing that restricts cooling (waterproof or fireproof), becomes effective at 82 degrees

CAL/OSHA Indoor Heat Standards

  - Or, when the temperature or heat index in a specific part of an indoor place exceeds 87 degrees and the temperature is over 82 degrees elsewhere
- Once the temperature thresholds are hit, then the requirements for indoor employees closely mirror those for outdoor employees:
  - Providing water, cool down breaks, heat illness prevention plan, etc

CAL/OSHA Indoor Heat Standards

- If standards are applicable, employers need to create an indoor heat illness prevention plan
  - Can be included in an existing IIPP
- Employers must also provide training on heat illness prevention

WORKPLACE VIOLENCE PREVENTION PLANS

–Plan can be part of IIPP or stand-alone Plan

–Requires records of workplace violence hazard identification, evaluation, and correction and training records to be created and maintained by employer

–Also requires violent incident logs and workplace incident investigation records to be maintained

– Also record on OSHA Form 300 log if employee injured and meets other requirements for recording on 300 log

WORKPLACE VIOLENCE PREVENTION PLANS

- As of 1/1/2024 records must be available to Cal/OSHA, employees and their representatives
- Enforceable by Cal/OSHA by issuance of citation and notice of civil penalty
- By no later than 12/1/2025, Cal/OSHA must adopt standards regarding the Plan

WORKPLACE VIOLENCE PREVENTION PLANS

- Cal/OSHA has published a Model Plan for Non-Health Care Settings and for Health Care, FAQs and other materials
- https://www.dir.ca.gov/dosh/Workplace-Violence.html
- Model Plan still requires customization for each worksite
- Some insurance brokers are preparing Plans for clients at no charge

WORKPLACE VIOLENCE PREVENTION PLANS

–While the Plan must be tailored to each worksite, all Plans must include:

- Names and job titles of people responsible for plan
- Procedures to obtain active involvement of employees and their representatives in developing and implementing the plan, including hazard identification, training, and incident reporting
- Methods employer will use to coordinate implementation of the plan with other employers, as applicable

WORKPLACE VIOLENCE PREVENTION PLANS

- Procedures for the employer to respond to reports of workplace violence and to prohibit retaliation for such reporting
- Procedures to ensure compliance with plan by supervisory and nonsupervisory employees
- Procedures to communicate with employees regarding workplace violence matters, including how to report an incident, how concerns will be investigated, and how to inform employee of results and any corrective actions taken

WORKPLACE VIOLENCE PREVENTION PLANS

- Procedures to respond to actual workplace emergencies, including alerting employees, evacuation or sheltering plans, and obtaining help from staff assigned to respond to emergencies (if any) or law enforcement
- Training procedures
- Procedures to identify, evaluate and correct workplace violence hazards, including scheduled inspections
- Procedures for post-incident response and investigation

MISCELLANEOUS UPDATES

Politics at Work

- First amendment only applies to government action and does not limit the rights of private employers
- However, state laws differ
- In California, employees cannot be disciplined or restricted from expressing their political affiliations or being affiliated with a particular party

Politics at Work

- Additionally, employees cannot be disciplined for legal off-duty conduct
- However, if the off duty conduct negatively impacts the employer's reputation or operations it can be the basis for discipline or termination
  - This is a nuanced standard so it is recommended to speak with your legal counsel before proceeding
- Don't forget the NLRA, which allows employees to engage in "concerted activities"

Tracking Employees

- Use of employee tracking has increased along with remote work
- Employee's have used "jigglers" to trick trackers into thinking they are working
- California Consumer Privacy Protection Act also applies to employees
- Employee handbook should indicate what information is being tracked or is accessible by the company to avoid any liability

Jared Speier
jspeier@stradlinglaw.com