

WILSON TURNER KOSMO

LLP

2023 EMPLOYMENT LAW
OUTLOOK

ACCA Presentation

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PRESENTED
BY:

COMPLIANCE WITH NEW
CALIFORNIA LAWS/RULES

BE AWARE OF NEW
FEDERAL LAWS/RULES

CASES WE'RE WATCHING

POTENTIAL LEGISLATIVE
CHANGES

A photograph of a wooden desk with a silver laptop, a blue mug, a pen, and a notebook. The word 'AGENDA' is overlaid in white text on a blue semi-transparent background.

AGENDA



TIPS FOR COMPLIANCE WITH NEW CALIFORNIA LAWS/RULES

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PRIOR LAW: Employers must provide pay scale after an applicant has completed an initial interview (upon reasonable request)

NEW IN 2023: Additional requirements re: providing and retaining pay scales:

- Employers with 15+ employees (or third parties acting on their behalf) must provide the pay scale in job postings
- All employers must provide pay scale information to current employees upon reasonable request (for current position)
- All employers must maintain job title and wage rate history for each employee for duration of employment plus 3 years

NEW: Civil penalties of \$100 - \$10,000 per violation



PAY SCALE POSTING
REQUIREMENTS (SB 1162,
CAL. LABOR CODE 423.3)



WHAT IS THE “PAY SCALE” FOR A POSITION?

- ❖ “The salary or hourly wage range the employer reasonably expects to pay for the position.”
 - If employer intends to pay set hourly amount or piece rate amount, and not a pay range, employer may provide set hourly rate or set piece rate.
 - Does **not** include bonuses, tips or other benefits.
 - But if hourly or salary wage is based on piece rate or commission, then piece rate or commission must be included in posting.

WHICH JOBS ARE COVERED?

- **Employer** – must have 15 or more employees, at least one of which is in California.
 - Count employees in the same way as COVID-19 SPSL and minimum wage laws.
- **Position** - any position that may ever be filled in California, either in-person or remotely.

California FAQs:

https://www.dir.ca.gov/dlsa/California_equal_pay_act.htm

Other State/Local Laws:

- Colorado and Washington** – require covered employers to include pay scale in job postings
 - ✓ Must include general description of benefits, bonuses, commissions, other compensation
- New York City** – requires covered employers to include minimum and maximum annual salary or hourly wage in job posting
- New York State** – starting September 17, 2023, will require employers to post compensation or range of compensation and job description
- Other states/cities** have varying requirements re: posting and sharing information with other employees and applicant



WHAT ELSE DO
EMPLOYERS NEED
TO KNOW ?

PAY SCALE REPORT CHANGES (SB 1162, Cal. Gov. Code 12999)

PRIOR LAW: All employers with 100+ employees who are required to submit EEO-1 must submit same/similar report to the State of California re: pay information for various job categories

NEW IN 2023: Expanded reporting requirements:

- All employers with 100+ employees must submit annual report to DFEH. Can no longer simply submit EEO-1
- All employers with 100+ employees hired through labor contractors (as defined) must submit separate pay data report, including disclosure of labor contractor ownership
 - Data for employees hired through labor contractor must be provided by labor contractor
- All reports must include median and mean hourly rates for each combination of race, ethnicity and sex

NEW: Additional civil penalties authorized

INFO and FAQs: <https://calcivilrights.ca.gov/paydatareporting/>

STATEWIDE MINIMUM WAGE INCREASED TO \$15.50 ON JANUARY 1, 2023

Effective January 1, 2023:

- California's minimum wage increased to **\$15.50/hour** for all employers (regardless of number of employees)
- Employees classified as exempt from overtime must be paid at least **\$64,480** annually and **\$5373.33** monthly
- Computer Professional Exemption salary threshold increased to **\$53.80** per hour, **\$9,338.78** per month, and **\$112,065.20** per year

Many municipalities also increased their minimum wage on January 1, 2023 (including San Diego to **\$16.30/hour**)



- Exercise extreme caution with rounding time punches (*Camp v. Home Depot*)
- Make sure Meal/Rest Premiums are listed on the wage statement *and* that you are calculating premium pay at the “regular rate” of pay (*Naranjo v. Spectrum Sec. Servs., Inc.*)

The background of the slide features a stack of folders in yellow, green, and blue. In the foreground, a document titled "WEEKLY TIME" is visible, showing a table with columns for "Mon" and "Tue" and rows for dates "6/10" and "6/11". The table contains numerical values: 8.00 under Mon 6/10, 8.00 under Tue 6/11, and 16.00 under Tue 6/11. A blue pen is positioned over the document. The text "OTHER WAGE ISSUES TO KEEP IN MIND" is overlaid in white on a semi-transparent blue rectangular area.

OTHER WAGE ISSUES TO KEEP IN MIND

WEEKLY TIME

Mon	Tue
6/10	6/11
8.00	8.00
	16.00



BEREAVEMENT LEAVE REQUIREMENT (AB 1949, CAL. GOV. CODE 12945.7)

PRIOR LAW: Private employers do not have to offer time off (paid or unpaid) for bereavement

NEW IN 2023: Private employers with 5+ employees must provide up to five days off upon death of spouse, child, parent, sibling, grandparent, grandchild, domestic partner or parent-in-law

- Employee is eligible after 30 days of employment
- Time off need not be consecutive but must be completed within 30 days of person's death
- Unpaid leave but employees may use other paid time off (vacation or sick leave)
- Employers may request documentation of the death of the family member
- Employer is required to maintain the confidentiality of information/documentation



NO DISCRIMINATION/RETALIATION ON THE BASIS OF REPRODUCTIVE HEALTH DECISION-MAKING

- Contraceptive Equity Act of 2022 revises the Fair Employment and Housing Act to include “reproductive health decisionmaking” as a protected category.
- “Reproductive health decisionmaking” includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.

PRIOR LAW : The California Family Rights Act (CFRA) and Paid Sick Leave Law (PSL) allow eligible employees to take job-protected leave to care for certain family members (i.e. children, spouse)

NEW IN 2023: Employees may take CFRA or PSL leave to care for a “Designated Person”

- The “designated person” may be identified by the employee at the time they request the leave
- Employers may limit an employee to one designated person per 12-month period



CFRA AND PAID SICK
LEAVE TO CARE FOR
“DESIGNATED PERSONS”
(A B 1041)

DATA PRIVACY EXEMPTION EXPIRED DECEMBER 31, 2022 (CCPA & CPRA)

COVERED BUSINESSES: For-profit companies that do business in California *and*

- Have gross annual revenues over \$25M *or*
- Buy, receive, or share the personally-identifiable information of 100,000+ consumers *or*
- Derive 50%+ annual revenue from selling or sharing consumers' personal information

NEW: Covered businesses should plan/implement compliance program including the following:

- Update notices of collection and data security protocols
- Review and update records retention policies
- Update terms with service providers
- Review and consider insurance coverage
- Identify which data is subject to CCPA requests
- Update privacy policies
- Plan for processing privacy requests
- Train employees and vendors

COVID-19 SPSL EXPIRED (AB 152)

BACKGROUND: In February 2022, SB 95 reinstated California's COVID-19 Supplemental Paid Sick Leave (SPSL) for January 1, 2022 through September 30, 2022.

Later, the law was extended through December 31, 2022.

Leave in progress as of December 31, 2022 could have continued, even if it extended past December 31st.

This law has expired.



BACKGROUND: In 2020, California enacted mandatory employer notification requirements related to potential COVID-19 exposures in the workplace. These requirements were set to expire January 1, 2023

NEW : Notice requirement extended through January 1, 2024

- Starting January 1, 2023, employer can provide notice via posting, rather than individual employee communications. The notice must be posted within one business day from when the employer receives notice of potential exposure and remain posted for not less than 15 calendar days
- Employers are required to keep a log of all the dates the notice was posted
- No requirement to notify local public health agency of “outbreaks”



CHANGES TO COVID-19
EXPOSURE NOTICE
REQUIREMENTS (AB 2693)

A close-up photograph of a hand holding a fountain pen, poised to sign a document. The document has a line labeled 'Signature' and some other text that is partially visible and upside down. A blue diagonal bar is overlaid on the top left of the image.

FEDERAL ARBITRATION ACT PREEMPTS ISKANIAN RULE TO THE EXTENT IT PRECLUDES DIVISION OF PAGA ACTIONS INTO INDIVIDUAL AND NON-INDIVIDUAL CLAIMS THROUGH ARBITRATION AGREEMENT

Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (2022), reh'g denied.

- FAA preempts the state law rule against “splitting” a PAGA claim into an **individual component** involving a plaintiff’s alleged Labor Code violations and a **non-individual component** involving other individuals’ alleged violations
- FAA requires state courts to enforce agreements to **arbitrate individual PAGA claims**; and
- A PAGA plaintiff who is ordered to arbitrate their individual PAGA claim lacks standing to continue pursuing non-individual PAGA claims in court, therefore a court would be required to dismiss the non-individual PAGA claims



CONTINUING UNCERTAINTY RE: **ARBITRATION IN THE EMPLOYMENT CONTEXT**

- *Adolph v. Uber Technologies Inc.*

- California Supreme Court to decide if aggrieved employee who has been compelled to arbitrate individual claims under PAGA maintains standing to pursue representative action in court

- *U.S. Chamber of Commerce v. Bonta*

- May employers require employees to arbitrate their disputes as a condition of employment?



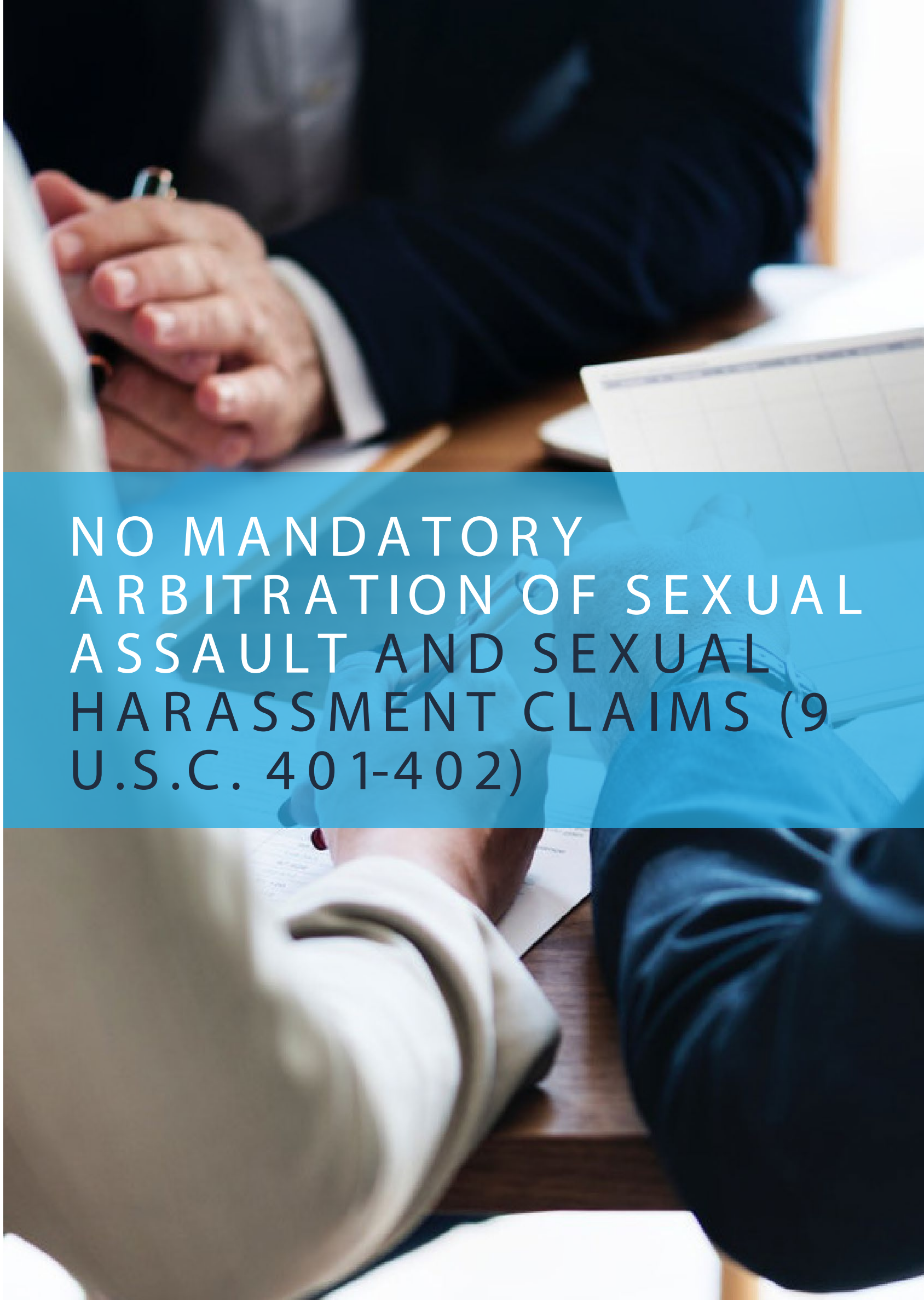
Be Aware of New Federal Laws/Rules

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CONCERN: “Forced” arbitration of sexual assault and sexual harassment disputes may force silence/confidentiality on victims and may favor companies or preclude discovery of inappropriate behavior

NEW: Claimant can void pre-dispute arbitration agreement or collective action waiver in connection with sexual assault or sexual harassment dispute

- Claimant has choice to pursue the claims in court
- Applies to any dispute or claim that arose or accrued after **March 3, 2022**



NO MANDATORY
ARBITRATION OF SEXUAL
ASSAULT AND SEXUAL
HARASSMENT CLAIMS (9
U.S.C. 401-402)

PREGNANT WORKERS FAIRNESS ACT

- **Covered employers:** 15+ employees nationwide
- **Qualified employees/applicants:**
 - can perform the essential functions of the position with or without reasonable accommodation, *or*
 - are unable to perform an essential function of the job for a *temporary* period, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.
- **Must make reasonable accommodations** to known limitations of qualified employees affected by pregnancy, childbirth, or related medical conditions unless the accommodation would impose an undue hardship on an entity's business operation.
- **California Employers – Be Cautious Re:**
 - Requiring medical certification
 - Employees who are not able to perform the essential function of the job for temporary period



PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT (“PUMP ACT”)

- **Existing Federal Law:** employers must provide break time for non-exempt employees to express breast milk for 1 year.
- **New Federal Law:**
 - Covers all employees – including exempt employees
 - Covers a two-year period
 - Clarifies that if non-exempt employee is not completely relieved from duty during the entire break time, break must be paid.
 - Expands legal remedies
- **California Employers:**
 - Take note that if employee is not completely relieved of duty during break, time must be compensated
 - Employers with 50 or more employees who wish to take advantage of state law’s exception based on “serious disruption of operation” should exercise caution.



- Prohibits enforcement of nondisclosure or non-disparagement provision in *any* agreement entered into before dispute arises re: sexual assault or sexual harassment.
- California Employers:
 - Review all agreements with nondisclosure or non-disparagement provisions – including contracts with applicants, independent contractors, and consumers.



SPEAK OUT ACT



Cases We're Watching

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CASES WE'RE WATCHING UNITED STATES SUPREME COURT

- *Helix Energy Solutions Group Inc. v. Hewitt* – US Supreme Court will decide whether highly compensated employees are exempt from overtime if they are paid by the day.
- *In Re Grand Jury* – U.S. Supreme Court dismissed case, leaving in place “primary purpose” test for communications between attorneys and clients. In-house counsel should note privilege only applies if *primary purpose of communication* is soliciting/providing legal advice.

CASES WE'RE WATCHING CALIFORNIA SUPREME COURT

- *Raines v. U.S. Healthworks Medical Group* – CA Supreme agreed to answer whether third party entity that acts as agent of employer can be held directly liable for violations under FEHA
- *Huerta v. CSI Electrical Contractors, Inc.* – Court will decide if employees must be compensated for time spent waiting in their cars to pass through an employer's security check



Potential Legislation We're Tracking

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- Predictive Scheduling
- FTC proposed regulation re: non-competes
- Minimum wage increases
- Biometric Monitoring regulations
- Employee privacy/workplace monitoring regs
- Remote work issues/scheduling flexibility



POTENTIAL
LEGISLATIVE CHANGES



QUESTIONS?

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A wide-angle photograph of the San Diego skyline at dusk. The sky is a mix of blue and purple, with some clouds. The city lights are on, and the buildings are reflected in the water in the foreground. A blue banner with white text is overlaid on the bottom part of the image.

FOR MORE INFORMATION

- SIGN UP FOR WTK SPECIAL ALERTS:
info@wilsonturnerkosmo.com
- ATTEND EMPLOYMENT LAW SEMINAR
- GET ANNUAL COMPLIANCE CHECKLIST

THANK YOU



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