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CALIFORNIA LABOR AND EMPLOYMENT LAW UPDATE

MEAL PERIOD PREMIUMS

MEAL PERIOD PREMIUMS

- Are they considered wages?
- Do they need to be on your wage statements?
- **Naranjo v. Spectrum Security Services Inc.,** answers these questions.

NARANJO V. SPECTRUM SECURITY SERVICES, INC.

- Naranjo sought meal break premium pay for all class members. Naranjo also sought derivative penalties for Spectrum's alleged failure to provide accurate wage statements (Cal. Lab. Code Section 226) and failure to timely pay all owed premiums upon termination. (Cal. Lab. Code Section 203)

NARANJO V. SPECTRUM SECURITY SERVICES, INC.

- Lower court rulings:
  - The trial court awarded statutory penalties to Naranjo and the class under Labor Code 226.
  - The trial court did not award penalties for failure to pay premium pay.
  - The Court of Appeal held in favor of the employer on the wage statement and waiting penalty claims. The Court of Appeal argued that meal break premiums were not wages.

NARANJO V. SPECTRUM SECURITY SERVICES, INC.

- Key issues:
  - The Supreme Court looked at whether the premium of an extra hour of pay for missed breaks is considered wages and should be reported on employee's wage statements during employment and paid within the appropriate deadlines when an employee leaves their job.
  - The Court concluded that earned premiums must be reported regardless if they have been paid.

NARANJO V. SPECTRUM SECURITY SERVICES, INC.

- Key Takeaways:
  - Employers must ensure that they list meal period and rest break premium pay on employees' wage statements and timely pay all premiums upon separation of employment.

VIKING RIVER CRUISES V. MORIANA

VIKING RIVER CRUISES

- **Iskanian v. CLS Trans. Los Angeles** held that pre-dispute waivers of an employee's ability to bring a "representative" PAGA action violates California public policy and are unenforceable, including waivers found in otherwise valid arbitration agreements.
- The Ninth Circuit concluded that Iskanian is consistent with the FAA and Concepcion.

VIKING RIVER CRUISES

- Facts: Angie Moriana worked for Viking River Cruises as a Sales Representative.
- After her employment ended, Moriana filed a PAGA only action in state court alleging that she was not timely paid her final wages upon separation as well as other wage and hour claims. Viking River cruises moved to compel Moriana's individual PAGA claim and to dismiss the other PAGA claims.

VIKING RIVER CRUISES

- Lower courts:
  - The trial court denied the motion and the California Court of Appeal.
  - They held that categorical waivers of PAGA standing violate state policy.
  - The court further concluded that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable representative claims.

VIKING RIVER CRUISES

- Supreme Court:
  - Held that Iskanian's rule of prohibiting waiver of a "representative" claim is consistent with the FAA.
  - Held that an employer and employee may contractually agree to limit arbitration to an employee's individual claims and exclude their representative PAGA claims.
  - Held that Plaintiff's individual PAGA claims must be compelled to arbitration under the terms of their agreement. The representative PAGA claims asserting violations against non-party employees that remained in court must be dismissed.

VIKING RIVER CRUISES

- Key Takeaways:
  - Employers can compel arbitration of a PAGA plaintiff's claims when their claims arise from alleged Labor Code violations committed against the plaintiff personally.
  - Employers should review their arbitration agreements to ensure they require arbitration of employees' individual PAGA claims consistent with the language and concepts under in Viking River Cruises.

ADDITIONAL PAGA NEWS

ADDITIONAL PAGA NEWS

- **Turrieta v. Lyft** (2021)
  - Holds that a PAGA representative does not have standing to challenge a PAGA settlement in a similar lawsuit that would wipe out the employee's lawsuit.
- **Moniz v. Adecco USA, Inc.** (2021)
  - In 2017, Plaintiff filed a PAGA notice alleging Defendant violated the Labor Code.

ADDITIONAL PAGA NEWS

- A week later, Correa filed her own PAGA notice based on similar facts as Moniz.
- Correa sought to intervene in Moniz, which the trial court denied.
- Moniz settled in September 2019. LWDA and Correa objected to the settlement.

ADDITIONAL PAGA NEWS

- Trial court:
  - The trial court rejected the LWDA and Correa's objections and approved the settlement in Moniz.
  - Correa then moved for a new trial and attempted to vacate the Moniz settlement.
  - The court denied these requests.
  - Correa filed a notice of appeal from the trial court's orders denying her requests.

ADDITIONAL PAGA NEWS

- Moniz held that a PAGA representative is a proxy for the state of California.
  - Thus, they have standing to appeal a PAGA settlement.
  - This conclusion is at odds with Turrieta.
  - The California Supreme Court granted review in Turrieta to resolve this court split.

ADDITIONAL PAGA NEWS

- Other issues discussed:
  - Second, the court rejected Correa's argument that the release in Moniz was ineffective because it encompassed a release of claims not listed in Moniz's PAGA notice.
  - The Court reasoned that res judicata would prevent a future PAGA representative from litigating the same "cause of action"/any claim that could have been brought in Moniz.
  - As such, a PAGA representative could extinguish the state's right to recover penalties for specific claims not listed in a PAGA notice if those claims involve the same primary right as those contained in the PAGA notice.

ADDITIONAL PAGA NEWS

- Standard for evaluating a PAGA settlement
  - Moniz laid out the appropriate standard as the "fair, reasonable, and adequate" standard.

ADDITIONAL PAGA NEWS

- Key Takeaways:
  - The California Supreme Court will determine whether a PAGA representative has "the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state."

PAGA MANAGEABILITY

MANAGEABILITY – PAGA LAWSUITS

- **Wesson v. Staples The Office Superstore** (2021)
- The California Court of Appeal held that:
- Courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable
- As a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them
- The trial court did not abuse its discretion in striking plaintiff Wesson's PAGA claim as unmanageable

MANAGEABILITY – PAGA

- Wesson is the first published appellate decision to squarely address the issue of manageability in the PAGA context
- California state courts have been reluctant given the lack of direction from either the legislature or the appellate courts on this issue
- With the publication of Wesson, trial courts have guidance and authority to rely on to strike unmanageable PAGA cases
- Employers should consider requesting that PAGA plaintiffs offer a trial plan showing exactly how they intend to manageably try the case, including the defenses
- If individualized issues will predominate at trial, whether in plaintiff's case in chief or with regard to the defendant's defenses, the defendant should consider moving to strike the PAGA claim as unmanageable

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MANAGEABILITY – PAGA

- Estrada v. Royalty Carpet Mills, Inc.,
- The Appellate Court held that the trial court lacked authority to strike the PAGA claim based on manageability concerns.
- The court concluded, "requiring the PAGA claims be manageable would graft a crucial element of class certification onto PAGA claims" and "undercut [the] Supreme Court's prior holdings."

MANAGEABILITY – PAGA

- Key Takeaways:
- Estrada creates a split of authority among appellate courts regarding whether a trial court may strike a PAGA claim as unmanageable.

HR 4445: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

HR 4445: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- HR 4445 was signed into law on March 3, 2022, by President Biden. It took effect immediately.
- HR 4445 prohibits the enforcement of any predispute arbitration agreement relating to sexual assault or sexual harassment dispute brought under federal, tribal or state law, if the alleged victim chooses to file their claim in court.

HR 4445: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- This applies to any dispute or claim that arises on or after March 3, 2022.
- It also applies to "pre-dispute joint action waivers."
- This law could be interpreted quite broadly to mean any case that includes an allegation of sexual assault or harassment invalidates the arbitration agreement.
  - However, it is too soon to tell. Courts interpretation of this issue will better shape our understanding.

HR 4445: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- Key takeaways:
  - Employers should consider amending their arbitration agreements in light of this law.

MANDATORY ARBITRATION AB 51

MANDATORY ARBITRATION – AB 51

- AB 51 was signed by Governor Newsom on October 10, 2019, and effective January 1, 2020. AB 51 prohibits California employers from requiring employees to sign an arbitration agreement as a condition of employment.
- Legal challenges:
  - Chamber of Commerce v. Bonta, 13 F.4th 766 (2021).
    - The Chamber of Commerce argued that the Federal Arbitration Act ("FAA") preempted AB 51. The lower court issued a TRO and granted a preliminary injunction.

MANDATORY ARBITRATION – AB 51

- The Ninth Circuit took this case up on appeal.
- The Ninth Circuit held that portions of AB 51 conflicted with the FAA.

MANDATORY ARBITRATION – AB 51

- Key Takeaways:
  - AB 51 only applies if an employee refuses to sign the agreement.

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE REINSTATED

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE REINSTATED

- Governor Gavin Newsom signed Senate Bill 114 into law on February 9.
- This law requires covered employees (public and private employers with 26 or more employees) to provide employees with paid sick leave if an employee or a family member is subject to a quarantine period or experiencing Covid-19 symptoms.

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE REINSTATED

- This law applies retroactively to January 1, 2022. It is set to expire on September 30, 2022.

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE REINSTATED

- Employers must provide up to 80 hours of Supplemental Paid Sick Leave.
- Covered employers are not required to pay more than $511 per day or $5,110 in aggregate to a qualifying employee, unless federal legislation is enacted that increases these amounts beyond what was previously included in the federal Families First Coronavirus Response Act.

CALIFORNIA COVID-19 SUPPLEMENTAL PAID SICK LEAVE REINSTATED

- This law specifically prohibits employers from requiring an employee to use any other paid or unpaid leave, paid time off or vacation provided to the employee before or in lieu of using supplemental paid sick leave.

CAL/OSHA UPDATES

- Senate Bill 606 expanded California's Division of Occupational Safety and Health's authority:
  - (1) Enterprise-wide Violations
  - (2) Egregious Violations
  - (3) Subpoena Power
  - (4) Injunction Power

CAL/OSHA UPDATES

- Senate Bill 606 would create a rebuttable presumption that a violation committed by an employer that has multiple worksites is enterprise-wide:
- (1) If the employer has a written policy or procedure that violates these provisions, except as specified, or
- (2) the division has evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer's worksites.

CAL/OSHA UPDATES

- SB 606 authorizes the division to issue **an enterprise-wide citation requiring enterprise-wide abatement** if the employer fails to rebut such a presumption.
- It would impose specified requirements for a stay of abatement pending appeal of an enterprise-wide citation.
- SB 606 will subject an enterprise-wide violation to the same penalty provision **as willful or repeated violations.**

CAL/OSHA UPDATES

- Be aware → SB 606 allows CAL/OSHA to issue a citation for an "egregious violation"
- Cal/OSHA must treat each instance an employee is exposed to an egregious violation as a **separate** violation for the purposes of issuing fines and penalties.

CAL/OSHA UPDATES

- SB 606 also allows Cal/OSHA to issue and enforce subpoenas during its investigations if an employer does not provide the requested information within a "reasonable period of time."
- What is a "reasonable period of time?"
  - It is not defined in the law.
  - Time will tell how Cal/OSHA determines reasonableness.

CAL/OSHA UPDATES

- SB 606 permits Cal/OSHA to seek an injunction in court to restrain certain uses or operations of employment if Cal/OSHA has grounds to issue a citation.
- This expands Cal/OSHA's power.
  - Pre-SB 606, Cal/OSHA was limited to seeking injunctions
    - Applicable in cases where they found "a serious menace to the lives or safety of persons"

CAL/OSHA UPDATES

- Key Takeaways:
  - Be attentive to Cal/OSHA investigations.
  - Review your written safety policies and procedures to ensure compliance with Cal/OSHA regulations.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- Effective July 14, 2022, all employers who conduct business and have employees working in San Francisco or employees who telework must comply with the FFWO.
- The FFWO gives employees the right to request "flexible or predictable work arrangements" to assist with caregiving responsibilities.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- The covered employer is required to do the following when they receive a request from a covered employee:
- (1) meet with the requesting employee within 21 days of the request; (2) respond to the employee's request in writing, either approving or denying the request within 21 days (or longer by agreement) after meeting with the employee.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- If an employer grants the covered employees request, the employer must confirm the arrangement in writing.
- If an employer denies the request, the employer must give a "bona fide business reason" for the denial and notify the employee of their right to request reconsideration under the ordinance.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- Process for reconsideration:
  - When an employee requests reconsideration, the employer must meet with the requesting employee within 21 days of receiving it.
  - Employer must approve or deny the request in writing within 21 days of meeting the employee.
  -

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- The amended FFWO expands the criteria of a covered employee to include more workers.
  - Care for Persons Age 65 or Older Expanded
  - Covered Employees to Include Teleworkers Living Outside the city
  - Covered Employees now have a Right to a "Flexible or Predictable Working Arrangement" Unless it Causes Undue Hardship to the Employer.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- **Penalties**
  - Penalty provision allows the OLSE to require violators to pay the cost of care the employee whose rights were violated incurred due to violation if the cost is greater than $50.00 penalty scheme now in effect.
  - The OLSE will be able to recover its full costs for investigating and remedying the violation if those costs are greater than the current $50.00 scheme.

SAN FRANCISCO'S FAMILY FRIENDLY WORKPLACE AMENDED ORDINANCE

- Key Takeaways:
  - Covered employers should consult with legal counsel concerning compliance with the amended FFWO.

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- The Employee Development Department ("EDD") is responsible for collecting payroll taxes as well as enforcing collection of payroll taxes through audits of individual businesses.
- What can trigger an EDD audit?
  - Filing payroll tax returns late
  - Paying payroll taxes late
  - Paying workers in cash
  - * this is not an exhaustive list*

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- If the EDD audits your business, you will receive a three-page letter notifying you of the audit and containing a list of documents that the auditor wants the business to produce.
  - You will also be provided a list of questions that must be answered before the audit process will commence.

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- EDD Independent Contractor Test
  - Be aware! Misclassifications of employees can mean that the business is paying the EDD less money than it is owed under the applicable laws.

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- The EDD follows the "ABC Test" outlined in the *Dynamex* California Supreme Court decision:
- A worker is presumed to be an employee, unless the following apply:
  - (A) The worker is free from the hiring entity's control of how he/she performs the work;
  - (B) The worker performs work that is outside the usual course of the hiring entity's business; and
  - (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- After the audit concludes, the EDD will inform the business of their result:
- (1) If the EDD finds that the business overpaid their payroll taxes, a refund will be issued to the business;
- (2) If EDD finds that the business underpaid their taxes, the business owes the extra taxes; or
- (3) The EDD may conclude that the appropriate amount of taxes were paid.

EMPLOYEE DEVELOPMENT DEPARTMENT AUDITS

- Key Takeaways:
  - Be careful classifying your workers!
  - The failure to properly classify your workers may result in liability and EDD audits.
  - Reach out to experienced labor counsel to assist you in the *Dynamex* ABC test to your workers.

WHISTLEBLOWER CLAIMS

WHISTLEBLOWER CLAIMS

- Section 1102.5 finds it is unlawful for employers to retaliate against employees for making certain complaints (to government officials or someone in an authority position) based on a reasonable belief that certain actions in the workplace violate federal, state, or local laws.
- FEHA prohibits retaliations based on an employee's protected activity.

WHISTLEBLOWER CLAIMS

- **Lawson v. PPG Architectural Finishes, Inc.** (2022)
- The key issue in this case was the plaintiff's burden of proof when asserting a retaliation claim.
- In Lawson the court determined whether it is appropriate to apply the McDonnel Douglas test to claims under Section 1102.5

WHISTLEBLOWER CLAIMS

- McDonnel Douglas Test

  A plaintiff must show the following: (1) they engaged in protected activity; (2) they were subject to an adverse employment action; and (3) there is a causal link between the two.

  If a Plaintiff can provide the above the employer must provide a legitimate, nonretaliatory reason for the adverse employment action.

WHISTLEBLOWER CLAIMS

- In 2003, the California Legislature adopted a new standard under Section 1102.6 for evaluating whistleblower retaliation claims.
- Under this standard, a plaintiff must show by a preponderance of evidence that a protected activity was a **"contributing factor"** in a prohibited action against the employee.
- The Defendant must show through clear and convincing evidence that the adverse employment action would have occurred for legitimate, independent reasons regardless of protected activity.

WHISTLEBLOWER CLAIMS

- The plaintiff in *Lawson* claimed that his employer, a paint manufacturer, fired him after he made internal complaints that he was being forced to sell "mistinted" paints so the company could avoid having to buy back unpopular colors from retail stores.
- The plaintiff was a poor performer and missed his sale targets a various other metrics that were used to evaluate his performance.

WHISTLEBLOWER CLAIMS

- Lower Court:
  - The lower court found that the employer set forth a legitimate, nondiscriminatory reason for plaintiff's termination.
  - They also held that the plaintiff did not provide sufficient evidence that the termination was pretextual.

WHISTLEBLOWER CLAIMS

- Ninth Circuit
  - The plaintiff argued that the trial court should have applied the Section 1102.6 standard for evaluating whistleblower claims.
  - The Ninth Circuit asked the Supreme Court to provide an opinion.

WHISTLEBLOWER CLAIMS

- California Supreme Court:
  - The Court agreed with the plaintiff and found that while the McDonnel Douglas standard is a method of proving employer intent, it is not "well suited to litigation under the section 1102.6 framework."
  - Thus, plaintiffs do not have to meet the McDonnel Douglas standard when proving that a retaliatory motive was a "contributing factor" to an adverse employment action.

WHISTLEBLOWER CLAIMS

- Key takeaways:
  - Employers should articulate and document all the reasons or factors for an adverse employment action, but particularly after an employee engages in protected activity;
  - Note that Lawson clarifies the standard for whistleblower retaliation claims only. FEHA retaliation claims are still evaluated under the McDonnel Douglas standard.

JOY SILK DOCTRINE

JOY SILK DOCTRINE

- Under *Joy Silk*, an employer faced with a union demand for recognition had to recognize the union unless it had a *good faith doubt* as to majority status in the group the union seeks to represent.
- In the absence of good faith doubt, the employer could not insist on a secret ballot election. If the employer failed to recognize the union without good faith doubt as to the union's majority status, the Board could issue an order forcing the employer to recognize and bargain with the union..

JOY SILK DOCTRINE

- In a brief filed in *Cemex Construction Materials Pacific LLC*, the General Counsel argued that the Board should forgo 50 years of precedent by reverting to the *Joy Silk* doctrine.

JOY SILK DOCTRINE

- Key Takeaways:
- (1) If the Board agrees with the General Counsel's position and that action was upheld in the courts, employers would lose the right to insist on secret ballot elections to ensure employees have an opportunity to refrain from union representation if they so choose.
- (2) This would also prevent employers from communicating with their employees in a non-threatening manner.

CAPTIVE AUDIENCE

CAPTIVE AUDIENCE

- On April 7, 2022, the NLRB General Counsel issued a memorandum stating her intent to ask the NLRB to reconsider the "captive audience" rule.
- The General Counsel takes the position that mandatory meetings are inconsistent with employees' rights under the NLRA.
  - The General Counsel believes such meetings chill employees' rights to avoid listening to employer speech concerning unionization.

CAPTIVE AUDIENCE

- What does this mean?
  - It does not change current law.
  - But it signals that the General Counsel may bring unfair labor practice charges against an employer for holding a "captive audience" meeting.

CAPTIVE AUDIENCE

- **Key Takeaways:**
  - Employers should be cautious about holding mandatory meetings.
  - Employers may want to consider holding voluntary meetings until the General Counsel has indicated how she will pursue these claims.

MORE NLRB UPDATES

MORE NLRB UPDATES

- On February 10, 2022, the General Counsel of the NLRB issued a memorandum stating that the NLRB will strengthen information sharing, investigation, enforcement, and outreach efforts with other agencies.
  - Including:
    - Equal Opportunity Employment Commission
    - Occupational Safety and Health Administration
    - Department of Labor's Wage and Hour Division
    - Department of Homeland Security and the Employee Immigrant Rights Section
    - *This is not an exhaustive list*

MORE NLRB UPDATES

- Goals of these partnerships:
  - Increased effort to reduce misclassification of employees.
  - Create mechanisms for data sharing about acquisitions, mergers, etc.
  - Introduce stronger whistleblower protections.
  - *this is not an exhaustive list*

MORE NLRB UPDATES

- **Key Takeaways:**
  - Employers should remain up to date regarding the collaboration and information sharing between these different enforcement agencies.

MORE NLRB UPDATES

- On December 7, 2021, the NLRB asked for public input on whether to reconsider the standard set fort in **American Steel Construction, 371 NLRB No. 41 (2021).**

MORE NLRB UPDATES

- Consider **Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB 934 (2011).**
  - This allowed for unions to set the scope of the bargaining unit.
  - Many argued that **Specialty Healthcare** was contrary to the language set forth in Section 9(c)(5) of the National Labor Relations Act.
  - Under the Trump Administration the NLRB reversed **Specialty Healthcare**.

MORE NLRB UPDATES

- **American Steel Construction:** The NLRB will decide the scope of the bargaining unit.
- The NLRB has allowed the parties and amici to file briefs on these two key questions:
  - (1) Should the Board adhere to the standard [set forth] in **The Boeing Company,** 368 NLRB No. 67 (2019).
  - (2) If not, what standard should replace it? Should the Board return to the standard in **Specialty Healthcare,** 367 NLRB 934 (2011), either in its entirety or with modifications?

MORE NLRB UPDATES

- **Key Takeaways:**
  - Given the current NLRB composition, it is likely that the appropriateness of a petitioned for bargaining unit will change.

THE BOEING COMPANY AND FACIALLY NEUTRAL WORK RULES

THE BOEING COMPANY AND FACIALLY NEUTRAL WORK RULES

- Neutral work rule:
  - It is one that does not explicitly reference or restrict Section 7 conduct.
  - During the Obama Administration, the NLRB relied on **Lutheran Heritage** "reasonably construe" standard to invalidate neutral work rules.

THE BOEING COMPANY AND FACIALLY NEUTRAL WORK RULES

- **The Boeing Company, 365 NLRB No. 154 (2017)**
  - It revised the standard for determining the validity of neutral rules with a balancing test.
    - A particular rule's negative impact on the employee's ability to exercise their rights under the NLRA.
    - An employer's right to maintain discipline and productivity in the workplace.

THE BOEING COMPANY AND FACIALLY NEUTRAL WORK RULES

- The Board later clarified that work rules challenged in the future will be divided into three separate categories:
  - (1) Rules that the Board designates as lawful to maintain;
  - (2) Rules that warrant individualized scrutiny; and
  - (3) Rules that the Board designate as unlawful to maintain.

THE BOEING COMPANY AND FACIALLY NEUTRAL WORK RULES

- **Key Takeaways:**
  - Employers should expect that the NLRB standards will be considerably less employer-friendly.

SB 331: "SILENCED NO MORE ACT"

SB 331

- Governor Newsom signed SB 331 into law on October 7, 2021.
- SB 331 impacts settlement agreements, non-disparagement agreements and separation agreements executed with employees in California after January 1, 2022.

SB 331 – SETTLEMENT AGREEMENTS

- No settlement agreement provision can require confidentiality about facts related to discrimination, harassment, and/or retaliation.

SB 331 – NON-DISPARAGEMENT AGREEMENTS

- Non-disparagement agreements:
  - SB 331 bans any provision that prohibits an employee from disclosing information about any type of harassment or discrimination or other conduct that an employee reasonably believes is unlawful in the workplace.

SB 331 – NON-DISPARAGEMENT AGREEMENTS

- Key Takeaway:
  - Consider including language that explicitly states that the individual is permitted to discuss or disclose information about unlawful acts in the workplace.

SB 331 – SEPARATION AGREEMENTS

- Separation agreement with current or former employee will require careful drafting.
- (1) Include notice that the employee has the right to consult an attorney.
- (2) Provide at least five business days to consult with an attorney.
- (a) Employee may sign the agreement before the five-day mark so long as the decision is "knowing and voluntary."
- (b) Employer cannot induce employee to sign agreement early through fraud, misrepresentation or a threat to withdraw or alter the offer prior to the expiration, or by providing different terms to the employees who sign such an agreement before the expiration of such time period.

FINAL UPDATES

FINAL UPDATES – PRE-EMPLOYMENT DRUG TESTING

- On June 13, 2022, the Ninth Circuit Court of Appeals in **Johnson v. WinCo Foods Holding, Inc, et. al.** Held:
  - Class members who were not yet employed by WinCo were not entitled to compensation for the time it took to take pre-employment drug tests.
  - WinCo was not required to reimburse travel expenses associated with undergoing the pre-drug employment test.

FINAL UPDATES – PRE-EMPLOYMENT DRUG TESTING

- The Ninth Circuit explained that drug testing is a way to secure employment.
- Further, the class members were not performing work for WinCo while undergoing the pre-employment drug tests.
  - Ultimately, the Court determined that at this point, the class members were not employees.

FINAL UPDATES – PRE-EMPLOYMENT DRUG TESTING

- The Ninth Circuit also determined that Plaintiffs were not hired until they passed the drug test.
  - In this case, there was no written contract. They only had a verbal offer.

FINAL UPDATES – PRE-EMPLOYMENT DRUG TESTING

- **Key Takeaways:**
  - This decision is limited to pre-employment drug testing.
  - Employers should make clear that any employment offer they extend is contingent upon passing a pre-employment drug test.

FINAL UPDATES – ADA

- On May 12, 2022, the Equal Employment Opportunity Commission issued guidance addressing the application of ADA to employers utilizing software, algorithms, and AI in their hiring and employment decisions.

FINAL UPDATES – ADA

- Some algorithmic decision-making tools may violate the ADA.
- For example:
  - An employer fails to provide disabled job applicants and employees with reasonable accommodations that are needed for the assessment tool.
  - The technology "screens out" disabled individuals, intentionally or not.
  - When the assessment contains "disability-related inquiries" or functions as an impermissible "medical examination."

FINAL UPDATES – ADA

- The guidance also states that employers are generally responsible for any discriminatory effect of software utilized during the hiring process when the software is utilized by a third-party on behalf of the employer.

FINAL UPDATES – ADA

- **Key Takeaways:**
  - Review the EEOC's "Promising Practices" for employers who seek to ensure compliance with the ADA.
  - Consult with experienced employment counsel regarding any Algorithmic decision-making tool for employee applicants.

FINAL UPDATES - ADA

- On March 18, 2022, the Department of Justice issued "Web Accessibility Guidance" for state and local governments and public accommodations under the ADA.
- The purpose of the guidance is to "offer[] plain language and user-friendly explanations to ensure that it can be followed by people without a legal or technical background."

FINAL UPDATES - ADA

- However, the Guidance does not contain any technical standards.
- The Guidance states that "businesses … have flexibility in how they comply with the ADA's general requirements of nondiscrimination and effective communication."
- It also states that the DOJ "does not have a regulation setting out detailed standards" for compliance.

FINAL UPDATES - ADA

- **Key Takeaways:**
  - Questions regarding the technical standards for web accessibility will likely be revealed through litigation.
  - Consult with experienced legal counsel regarding any questions about web accessibility.

THANK YOU FOR ATTENDING

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QUESTIONS?

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