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Seyfarth Shaw LLP

2022 Cal-Peculiarities:

How California Employment Law is Different

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Seyfarth Shaw LLP

AGENDA

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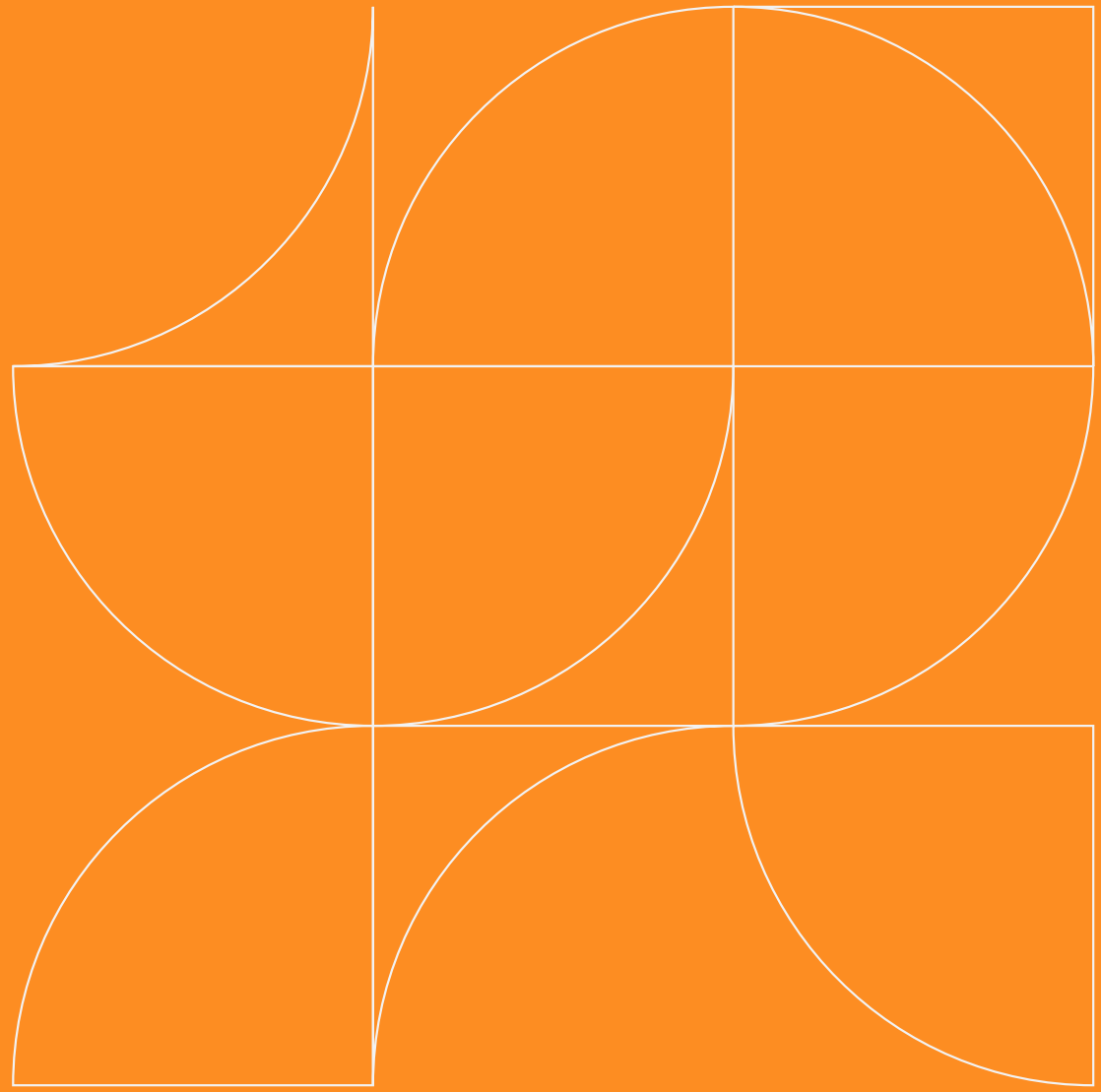
COVID-19
Supplemental Sick Pay



California's COVID-19 Supplemental Paid Sick Leave Renewed in 2022

- California's 2021 COVID-19 Supplemental Paid Sick Leave Law expired on September 30, 2021
- On February 19, 2022 a new iteration of California SPSL went into effect, retroactive to January 1, 2022
- The new 2022 SPSL will expire on September 30, 2022 (though employees on leave when it expires can continue taking it)
- Available where employees are unable to work for reasons related to COVID-19 (does not count if an employee is on vacation, on an unrelated leave, etc.)

Types of Leave

Two Buckets of Leave Available to Covered Employees

- One bucket of up to 40 hours is available if a full-time employee or family member tests positive for COVID-19
- The second bucket of up to 40 hours is available for other categories of covered reasons
  - Quarantine or isolation order or guideline covers employee or a covered family member
  - Advice from health care provider
  - Vaccine appointment related (or symptoms from receiving the vaccine)
  - Employee has symptoms of COVID-19 and is seeking a diagnosis
  - Employee is caring for a child whose school or childcare facility is closed due to COVID-19 on site
- No employee is entitled to more than 80 hours of leave

Documentation and Testing

What Can Employers Require?

- In certain specific situations employers can request documentation:
  - if an employee or an employee's family member tests positive for COVID-19
  - if an employee takes leave for more than three days or 24 hours for a single vaccine appointment and recovery
  - if the employer has a reasonable belief that the requested leave is invalid
- Employers may require employees to take COVID-19 tests five days after the employee tests positive for COVID-19 (but need to provide testing at no cost)

Rate of Pay & Wage Statement Requirements

- Employees must be paid using either:
  - Regular rate during the work week (which mirrors CA's regular PSL)
  - A 90-day look back method (with slightly different language than the state's PSL)
  - A $511 per day/$5,110 aggregate cap that was imposed by the FFCRA and adopted by the 2021 CA-SPSL which remains in place
- Employers only need to list the amount of leave that employees have used on the employees' wage statements
  - if an employee has not yet used any leave, the statement must list "zero"
  - The rates of pay and wage statement requirements differ from those in 2020 and 2021

Local California Supplemental Paid Sick Leaves (COVID-19)

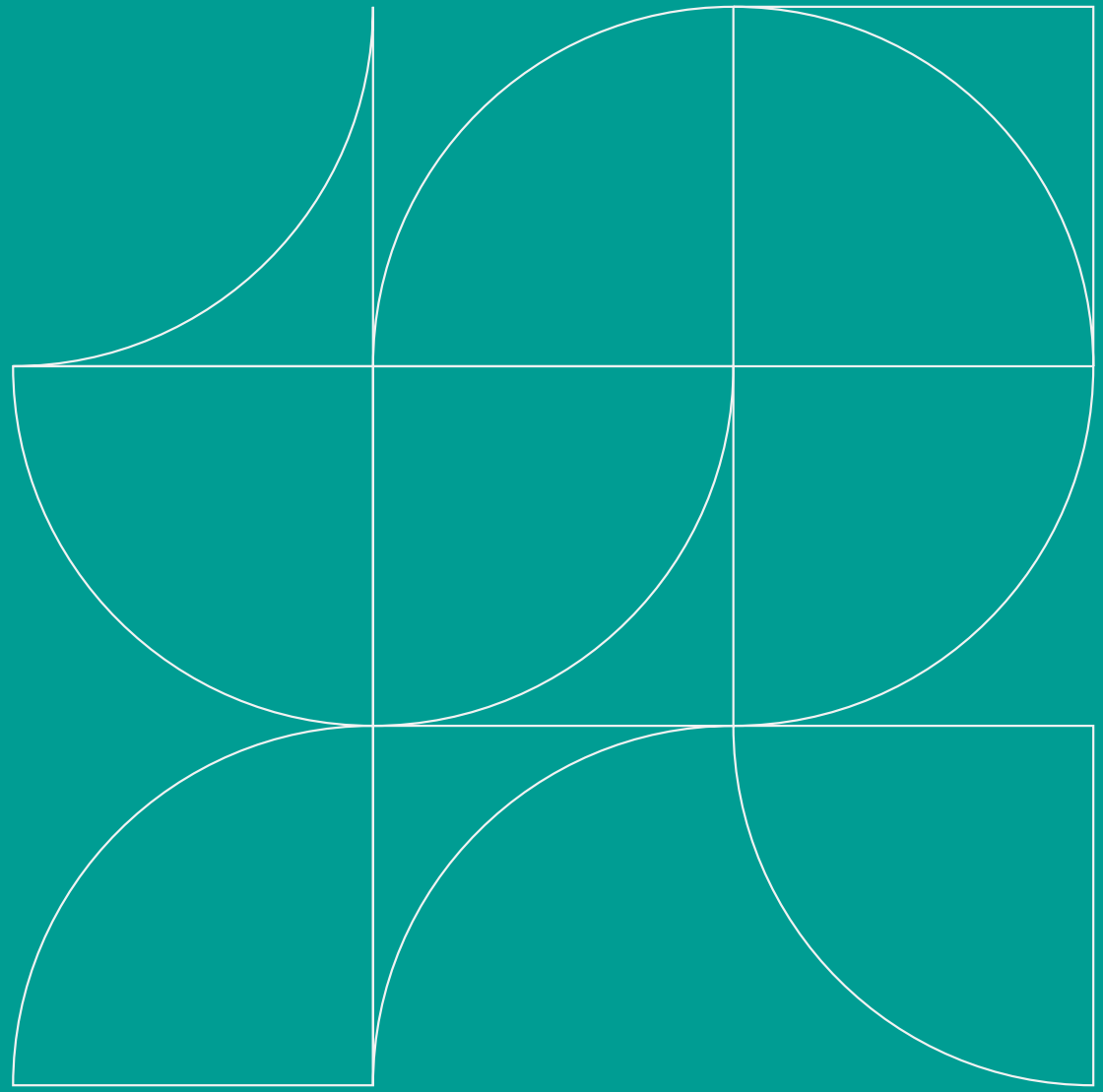
- Most local COVID Supplemental Paid Leaves sunset in 2021, but the following remain:
  - Los Angeles City: Scheduled to end two weeks after period of emergency
  - County of Los Angeles: applies to employees who work within the unincorporated parts of the County & includes paid leave for vaccination (scheduled to end two weeks after the end of the period of emergency)
  - Oakland: After the expiration of the declaration of emergency unless otherwise extended
  - Local leaves largely track state leave, but there may be some different covered reasons/rates of pay
  - Emeryville, San Diego, Santa Monica: No separate COVID-related supplemental sick leave, but each city provided guidance for application of PSL to COVID-related absences; San Francisco's OLSE has amended its guidance regarding an employer's ability to require documentation in light of COVID-19

Local California Supplemental Paid Sick Leaves (COVID-19)

Issues to Watch For

- Which sick leave law governs remote workers, your location or their home location?
- City/County boundary maps — a good thing
- When is a State of Emergency over?
- What is the applicable rate of pay for sick leave?
- Coverage under the regular state/local sick pay law (not specific to COVID)?
- Special COVID guidance under regular paid sick leave law? (Emeryville, San Diego, Los Angeles City, Santa Monica)

Cal-OSHA COVID-19 ETS Exclusion Pay



The Cal-OSHA COVID-19 Emergency Temporary Standards (ETS)

- On November 30, 2020, the Cal/OSHA Standards Board adopted the COVID-19 Emergency Temporary Standards (ETS)
- The Board amended the ETS back in December 2021, with an effective date of January 14, 2022
- The ETS was set to expire on May 5, 2022
- At its April 21, 2022 meeting, the Board voted to readopt the ETS
- The ETS is set to expire on December 31, 2022, but the Board is considering a permanent infectious disease standard modeled after the most recent version of the ETS

The Cal-OSHA COVID-19 Emergency Temporary Standards (ETS)

- The ETS applies to all employers, employees and places of employment, except:
  - Work locations where there is only one employee who does not have contact with other people;
  - Employees who are working from home;
  - Employees who are working from a location chosen by the employee that is not under the control of the employer, e.g., a café or a friend's home; and
  - Employees who are covered by the Aerosol Transmissible Diseases regulation (e.g., skilled nursing facilities, hospitals, clinics, medical offices, home health care, etc.)

Cal-OSHA COVID-19 ETS Exclusion Pay

- Employees who are excluded from the workplace under the ETS because they:
  - had a ***workplace COVID-19 exposure***; and/or
  - test positive for COVID-19 from the workplace

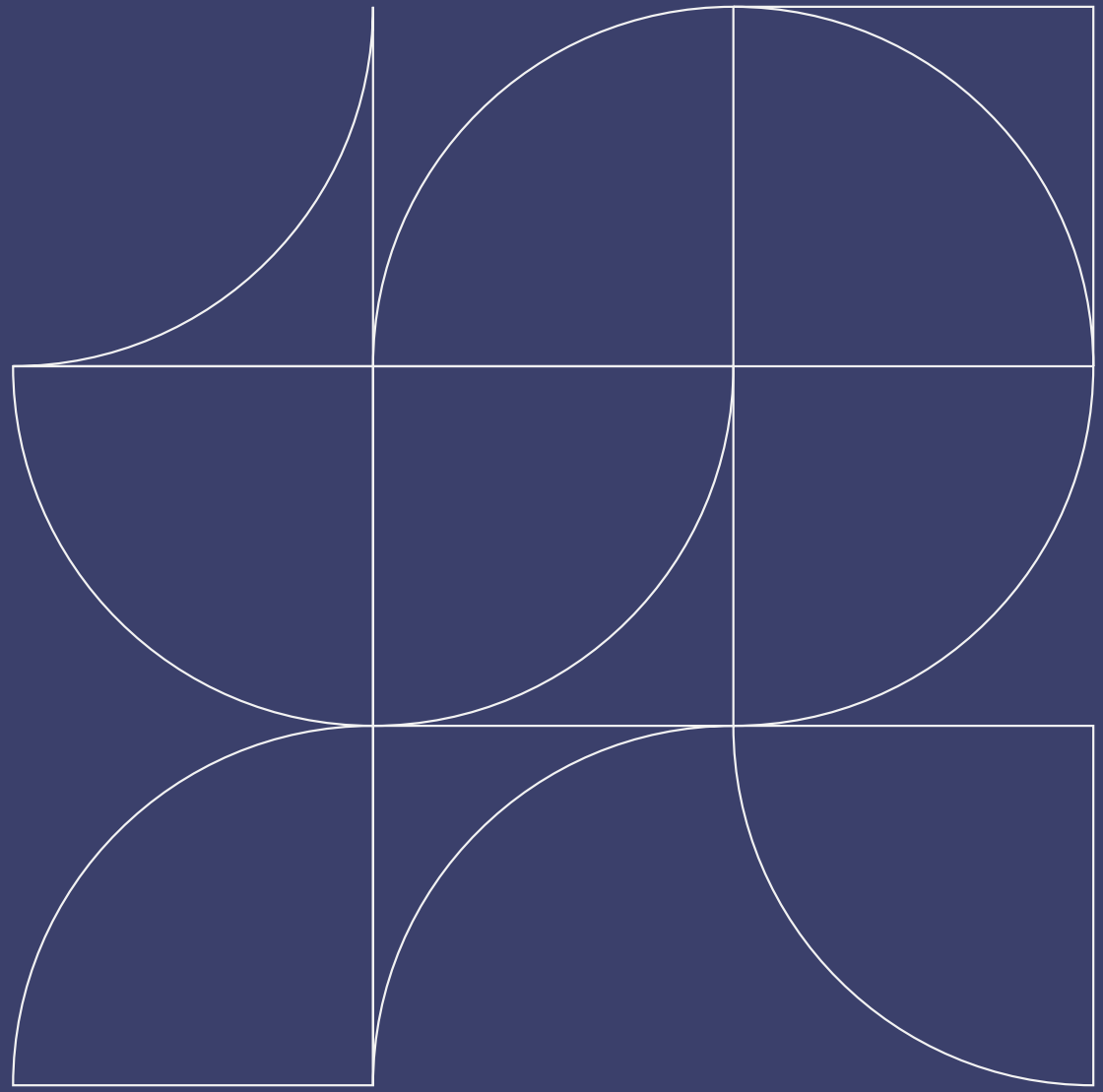
  are entitled to exclusion pay for the duration of their mandated absence (typically between five and 10 days)
- The rate of pay for exclusion pay is an employee's regular rate of pay ***for the pay period*** in which the employee is excluded
- Seniority and all other rights and benefits also continue
- Employer may ***not*** require an employee to use regular California Paid Sick Leave or 2022 COVID-19 Supplemental Paid Sick Leave before exclusion pay is due

Cal-OSHA COVID-19 ETS Exclusion Pay (ETS)

- Exclusion pay is not owed if:
  - the employee can work remotely;
  - the employer can show that it is more likely than not that the COVID-19 exposure was outside of the workplace;
  - the employee is receiving workers' compensation benefits; or
  - the employee is receiving disability benefits

West Hollywood, CA

Compensated Time Off Mandate



West Hollywood Compensated Time Off Law – An Anomaly

- Compensated time off law instead of PSL law
- West Hollywood's law includes **<u>two accrual caps</u>** – (a) **annual** accrual cap AND (b) **point-in-time** accrual cap
- Large point-in-time accrual cap – 192 hours as compared to 80 for next-highest (San Diego)

West Hollywood Compensated Time Off Law – Overview

- **Effective Dates**
  - Hotel Employers: January 1, 2022
  - All Other Employers: July 1, 2022
- **Eligibility and Coverage**
  - Independent Contractors are **not** covered
  - Ordinance contains definitions of “Employee,” “Hotel employer,” “Employer,” and “Hotel worker.”

Accrual of Compensated and Uncompensated Time Off

- **Accrual begins** on first day of employment or on July 1, 2022 for existing employees
- **Compensated Time Off**
  - **Accrual Rate:** 96/52 hours of compensated time off each week in a calendar year.
    - Pro-rated for part-time employees
  - **Annual accrual cap:** 96 hours
  - **Point-In-Time accrual cap:** 192 hour max balance
- **Uncompensated Time Off**
  - **Accrual Rate**: 80/52 hours per each week in a calendar year
  - **Annual accrual cap:** 80 hours (for sick leave after exhaustion of compensated time off)

Frontloading, Carryover, Annual Usage Cap, No Cash-Out

- West Hollywood **permits frontloading**
- **Year-End Carryover**
  - Equivalent to point-in-time accrual cap (192 hours of **compensated** leave; 80 hours of **uncompensated** leave)
  - Frontloading does **not** eliminate requirement for year-end carryover
- **Annual Usage:** No apparent cap on annual usage under the law
- **No Monthly Cash Out:** The original law required monthly cash-out if employee balance exceeded 192 hours, but the law was amended last month to **eliminate** this cash-out requirement

Buckets of Compensated Leave

- Compliance
  - Employers can comply with West Hollywood's law if they provide combined leave of **no less than 96 hours for full-time workers**
    - This provision is pro-rated for part-time employees
- Employers can choose to comply via a **single bucket <u>or</u> multiple buckets** of compensated time off:
  - <u>Option 1</u>: Bucket of paid time off only, or
  - <u>Option 2</u>: Bucket of at least 50% to vacation or personal necessity, **and** bucket of 50% to paid sick leave as defined by California law
    - West Hollywood's cites to California Labor Code
    - California Paid Sick Time and Vacation Time Law must be accounted for

Reasons for Use

- **Compensated** time off is defined as:
  - Paid sick leave
  - Vacation
  - Personal necessity

- **Bucketing**
  - Personal or vacation time is treated as vacation time under California law (and must be paid out upon termination)

- **Uncompensated Leave** shall only be used for sick leave for the illness of the employee or a member of their immediate family as defined by the California Family Rights Act (CFRA)

Use Requirements

- Usage **waiting period** for new hires
- **Increments of use**: no provision, but follow state law standard
- **Employee notice to company**: Rules require employees to provide “reasonable notice”
- **Documentation**: no provision

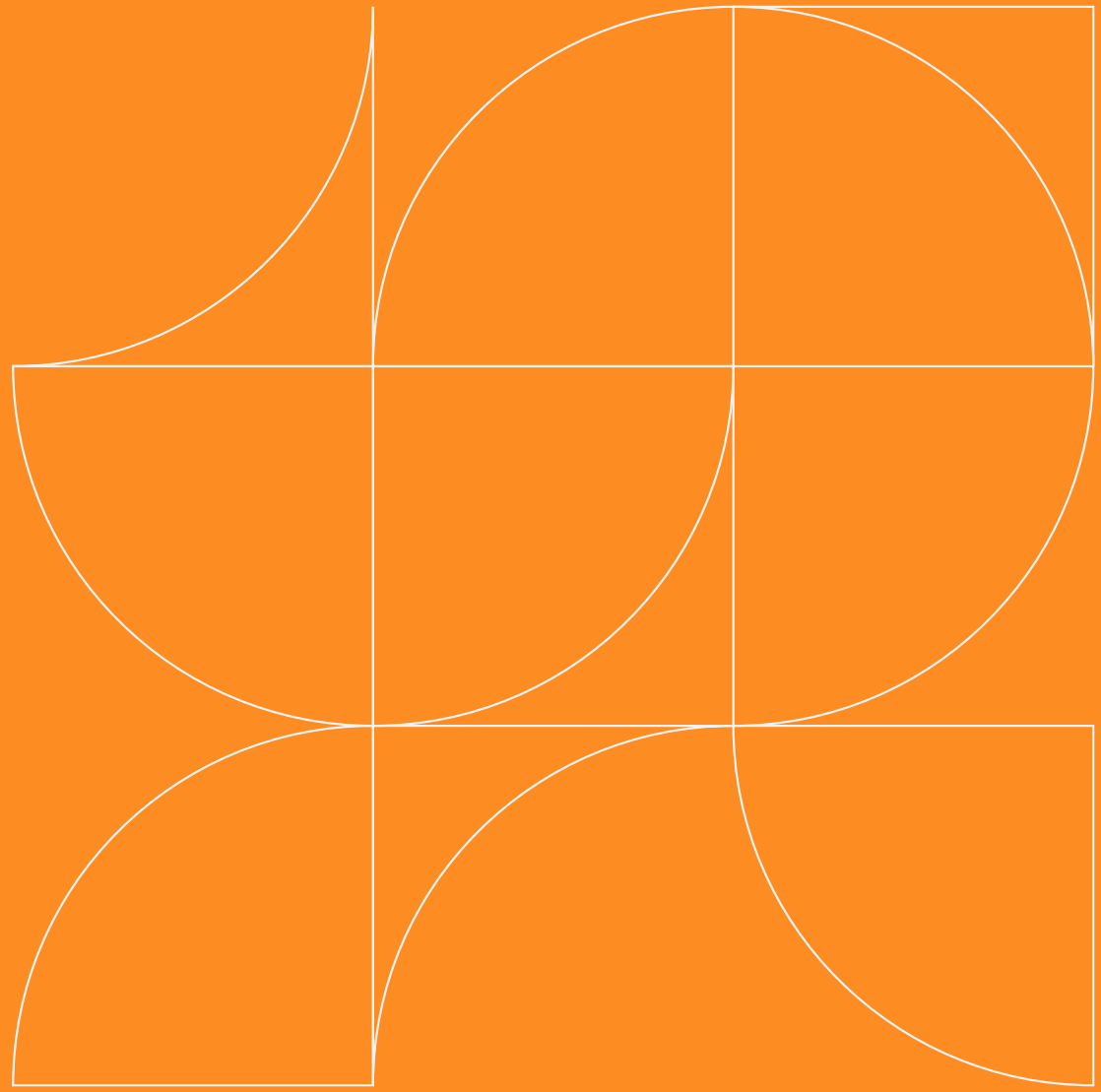
Notice and Posting

- Links
  - July 1 - December 31, 2022 Minimum Wage Notice
    - **Hotels**: https://www.weho.org/home/showpublisheddocument/53023/637872784272800000
    - **All businesses**: https://www.weho.org/home/showpublisheddocument/53021/637872784267800000
  - **Standard**: Employer must post and keep posted in a place accessible to the employer's employees a copy of the poster or notice furnished by the City
    - Must be in English, Spanish, and any other language spoken by at least five percent (5%) of the Employees

Separation of Employment

- **Payout Upon Separation:** Depends on single vs. multiple buckets for compliance
  - Accrued, unused compensated leave classified as **vacation or personal necessity leave** must be paid out at the employee's regular wage rate upon termination
  - Any portion of Compensated Leave classified as **sick leave** is not required to be paid to the employee upon termination
- **Reinstatement:**
  - No payout for unused uncompensated leave, but reinstatement required upon rehire within *one* (1) year of leaving

California Warehouse Distribution Center Employee Quotas



Warehouse Distribution Center Employee Quotas (AB 701) – Overview

- As of ***January 1, 2022***, AB 701 requires employers with over 100 employees at a single warehouse distribution center to give each employee a written description of any ***quota*** that applies
- A "***quota***" is a "work standard under which an employee is assigned or required to:
  - Perform at a specified productivity speed;
  - Perform a quantified number of tasks; ***or***
  - Handle or produce a quantified amount of material

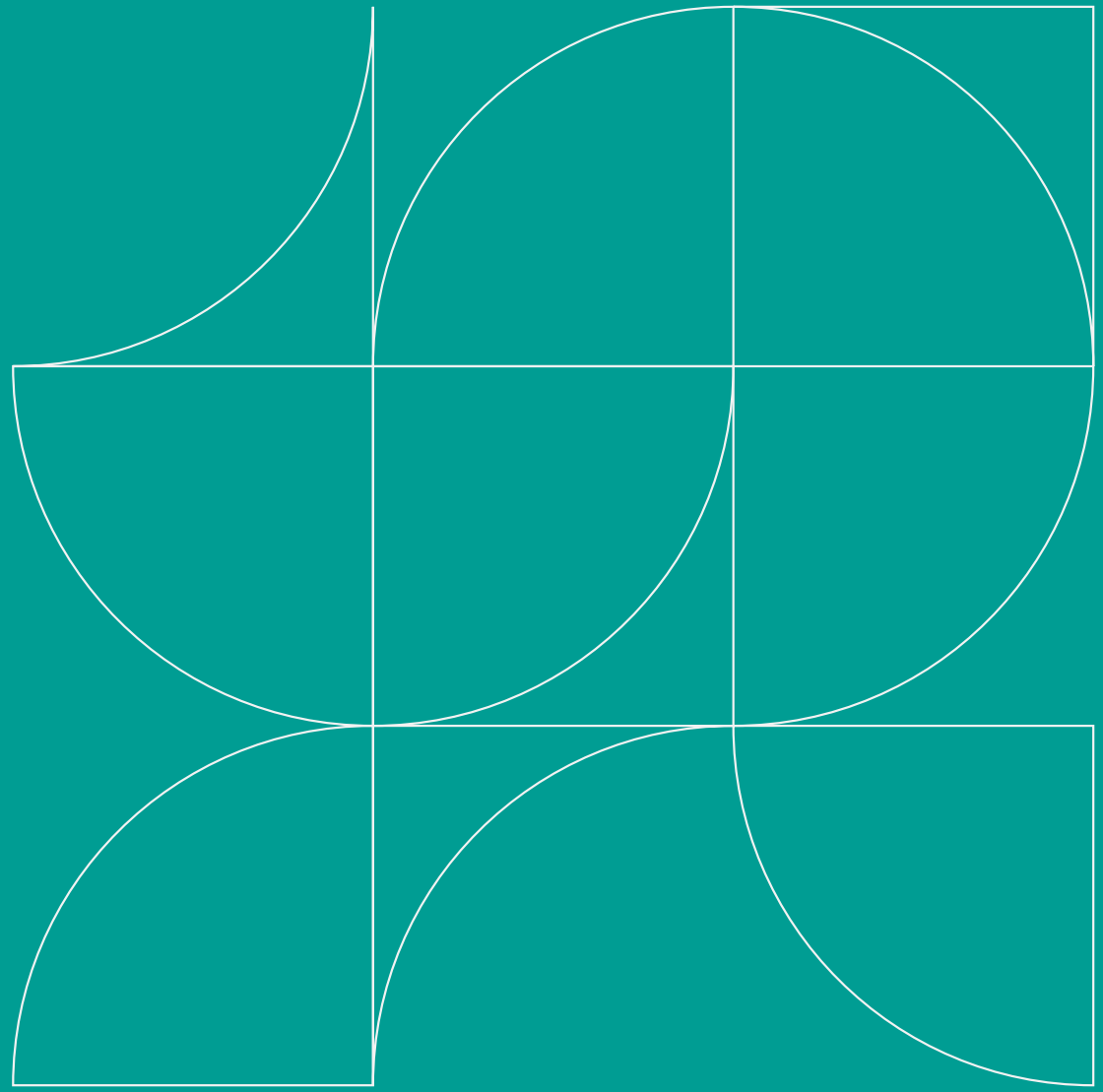
  within a defined period of time and under which the employee may suffer an adverse employment action if they fail to complete the performance standard

Warehouse Distribution

Center Employee Quotes (AB 701) – Overview (Cont.)

- The notice written description (or notice) must include:
  - The number of tasks to perform or materials to produce or handle;
  - The relevant time period; ***and***
  - Any potential adverse employment action that could result from a failure to meet the quota
- AB 701 prohibits employers from requiring employees to meet quotas that prevent compliance with meal and rest periods, use of bathroom facilities, or compliance with occupational health and safety standards
- AB 701 prohibits employers from taking adverse employment actions for failure to meet any quota that:
  - Has not been disclosed; ***or***
  - Does not allow a worker to comply with meal or rest periods or health and safety laws/standards

Minimum Wage Laws



State and Local Minimum Wage Laws Continue to Expand
STATE OF PLAY

$7.25

Federal

- $7.25 per hour (no change since 2009)
- $11.25 per hour for all workers on federal construction and service contracts
- *(Exec. Order 13658*)

$15.00

California

- 2022**: $15/hr *if*** with 26+ employees, $14 if 25 employees or less
- 2023: $15/hr for ***all employers***

State and Local
Minimum Wage Laws Continue to Expand

Exempt Employee Salary Threshold

- The salary threshold in California is two times the state minimum wage
- For 2022, this is $15 per hour X 2080 hours/year X 2 = $62,400. This means that any California employee earning less than $62,400 per year cannot be considered an exempt employee
- In 2022, for an employer with 25 or fewer employees, the California minimum wage is $14 per hour, so the salary threshold is now $58,240, increasing to $62,400 as of 2023
- The salary threshold is based on the state's minimum wage, and is not affected by any local or regional minimum wage ordinance

State and Local
Minimum Wage Laws Continue to Expand

Sample California Cities With Minimum Wage Levels Above $15.00:

$16.32 San Francisco	**$16.32** Berkeley	**$16.45** Palo Alto
$15.06 Oakland	**$16.20** San Jose	**$17.13** Emeryville

State and Local
Minimum Wage Laws Continue to Expand

Sample California Cities With Minimum Wage Levels Above $15.00:

$17.10
Mountain View

$16.20
Redwood City

$16.20
San Mateo

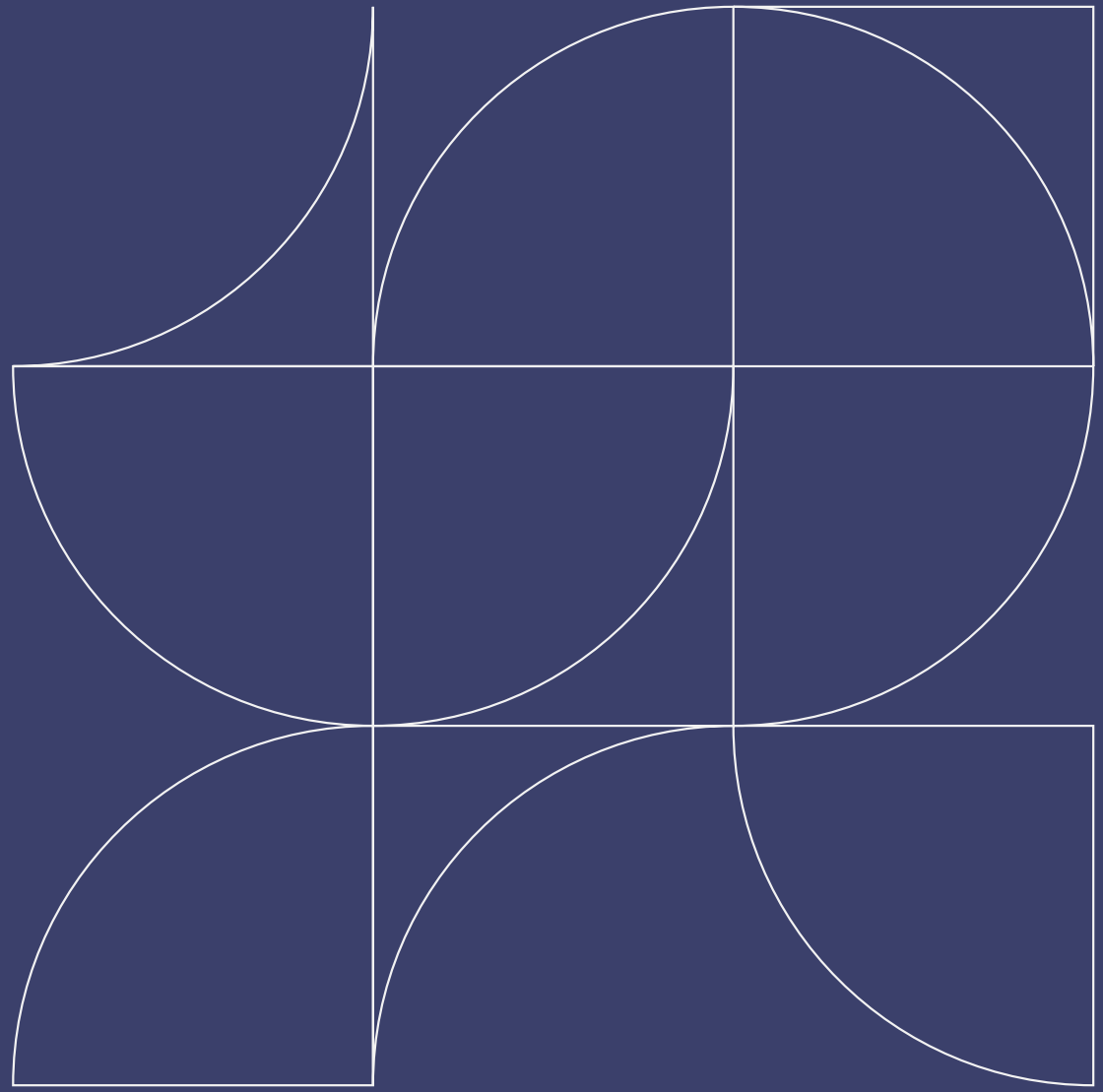
$16.40
Santa Clara

$17.10
Sunnyvale

$16.50
West Hollywood

(Higher for Hotel Employers)

Regular Rate – CA Paid Sick Leave, COVID-19 SPSL, and Meal and Rest Period Premiums



Regular Rate of Pay

- What is a “regular rate of pay”?
  - “[A]ll remuneration for employment paid to, or on behalf of, the employee,” subject to limited exceptions. 29 U.S.C § 207(e)
- Historically, California generally followed federal law regarding regular rate of pay calculations
  - However, that changed in 2018 with the CA Supreme Court decision in *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018), which created a CA unique regular rate calculation for flat sum bonuses

Regular Rate Cases Are on the Rise

Why do plaintiffs pursue regular rate cases?

- Unsettled law
  - Include or exclude from the regular rate
  - Which method to use for calculating the regular rate
- Difficult to comply
  - Technological challenges
  - Keeping up with business needs (e.g., COVID-19)
- Susceptible to collective, class, or representative treatment
  - Uniform policies and practices
  - Common legal questions
- Penalties and attorneys' fees

CA Paid Sick Leave

- “[A]n employer shall calculate paid sick leave using any of the following calculations:
  - (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek
  - (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Cal. Lab. Code § 246(l)(1)-(2)

2021 COVID-19
Supplemental Paid Sick Leave

- 2021 COVID-19 SPSL requires nonexempt employees to be compensated at the *highest* of the following:
  - "Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 supplemental paid sick leave, whether or not the employee actually works overtime in that workweek
  - Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
  - The state minimum wage
  - The local minimum wage to which the covered employee is entitled"

Cal Lab. Code § 248.2(b)(3)(A)(i)(I)-(IV)

2022 COVID-19
Supplemental Paid Sick Leave

- 2022 COVID-19 SPSL requires one of the following methods:
  - "Calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek
  - Calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total non-overtime hours worked in the full pay periods occurring within the prior 90 days of employment…."

Cal Lab. Code § 248.6(b)(3)(A)(i)(I)-(II)

Regular Rate of Pay *vs.* Regular Rate of Compensation

- Overtime Pay:
  - overtime compensation “at the rate of no less than one and one-half times the *regular rate of pay*” Cal. Lab. Code § 510(a)
- Paid Sick Leave (one of the two methods of calculations):
  - “calculated in the same manner as the *regular rate of pay* for the workweek” Cal. Lab. Code § 246(l)(1)
- Reporting Time Pay:
  - “at the employee’s *regular rate of pay*” Wage Order, § 5(A)
- Meal or Rest Period Premiums:
  - “one additional hour of pay at the employee’s *regular rate of compensation”* Cal. Lab. Code § 226.7(c)
- Regular Rate of Pay = Regular Rate of Compensation?

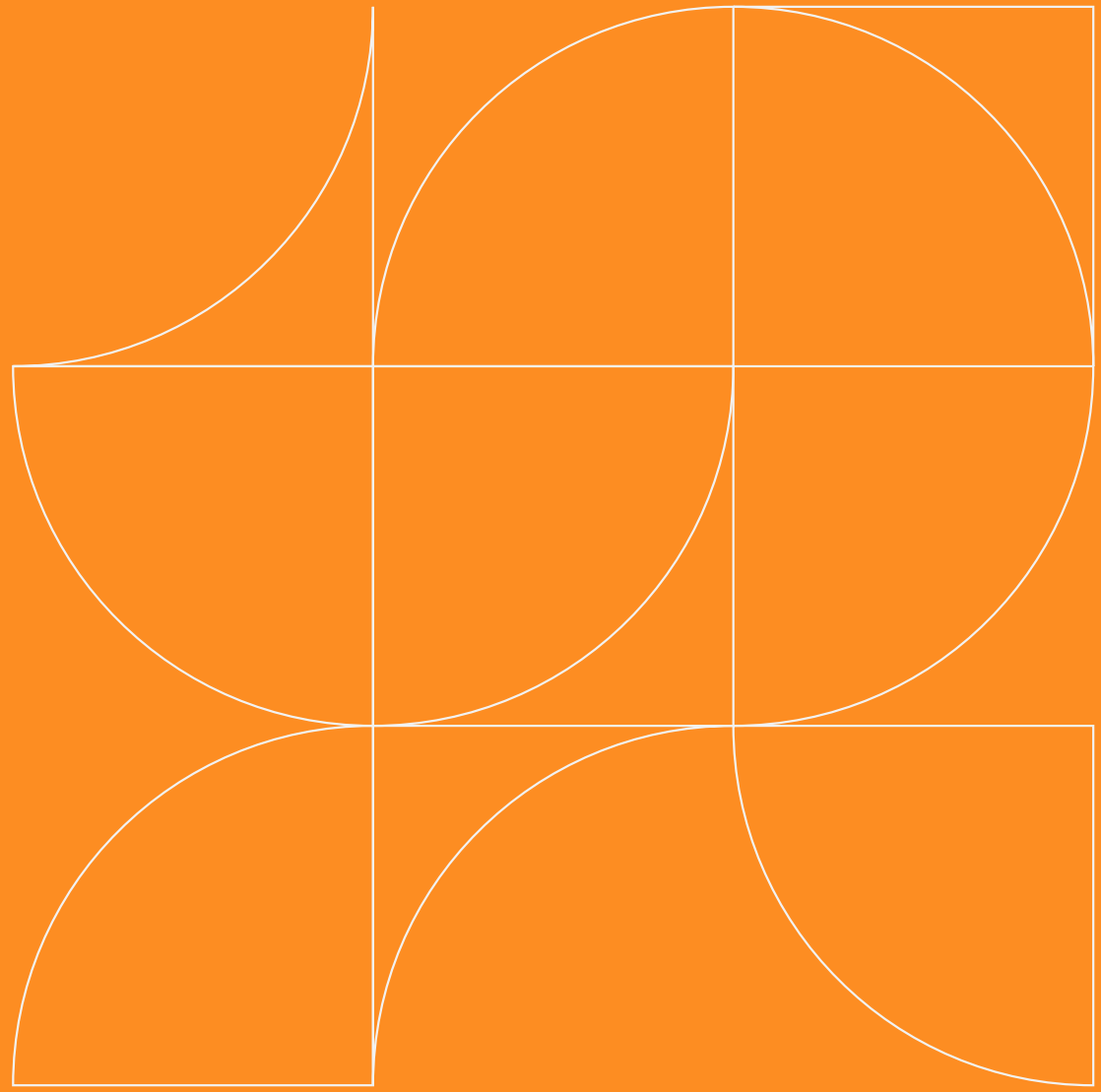
Ferra v. Loews Hollywood Hotel, LLC, 11 Cal. 5th 858 (2021)

- The plaintiff worked as a hotel bartender, earning both an hourly wage and a quarterly non-discretionary incentive payment
- When she was not provided with a legally compliant meal or rest period, she was paid an additional hour of pay at her base hourly rate
- The plaintiff sued and claimed that the meal premiums must include nondiscretionary payments
- Like many employers, this practice was in accordance with a widely held understanding that a “regular rate of compensation” is different than a “regular rate of pay”

Ferra v. Loews Hollywood Hotel, LLC, 11 Cal. 5th 858 (2021)

- The Lower Courts:
  - The trial court agreed with the employer
  - The Court of Appeal also agreed – these two phrases are "not synonymous," reasoning that "[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning"
- The Supreme Court:
  - The term "'regular rate of compensation' … has the same meaning as 'regular rate of pay'"
  - Meal and rest period premiums must include "not only hourly wages but all nondiscretionary payments for work performed by the employees"
  - The decision applies retroactively

Recent CA Supreme Court Decision on Waiting Time Penalties and Wage Statement Violations



Common Derivative Claims in Wage and Hour Class Actions

- Waiting Time Penalties:
  - Up to 30 days of wages for any willful failure to pay all wages owed at separation. Cal. Lab. Code § 203(a)
  - Available in an action for nonpayment of wages
- Wage Statement Penalties:
  - $50 per employee for the initial violation, $100 per employee for each subsequent violation (capped at $4,000 per employee)

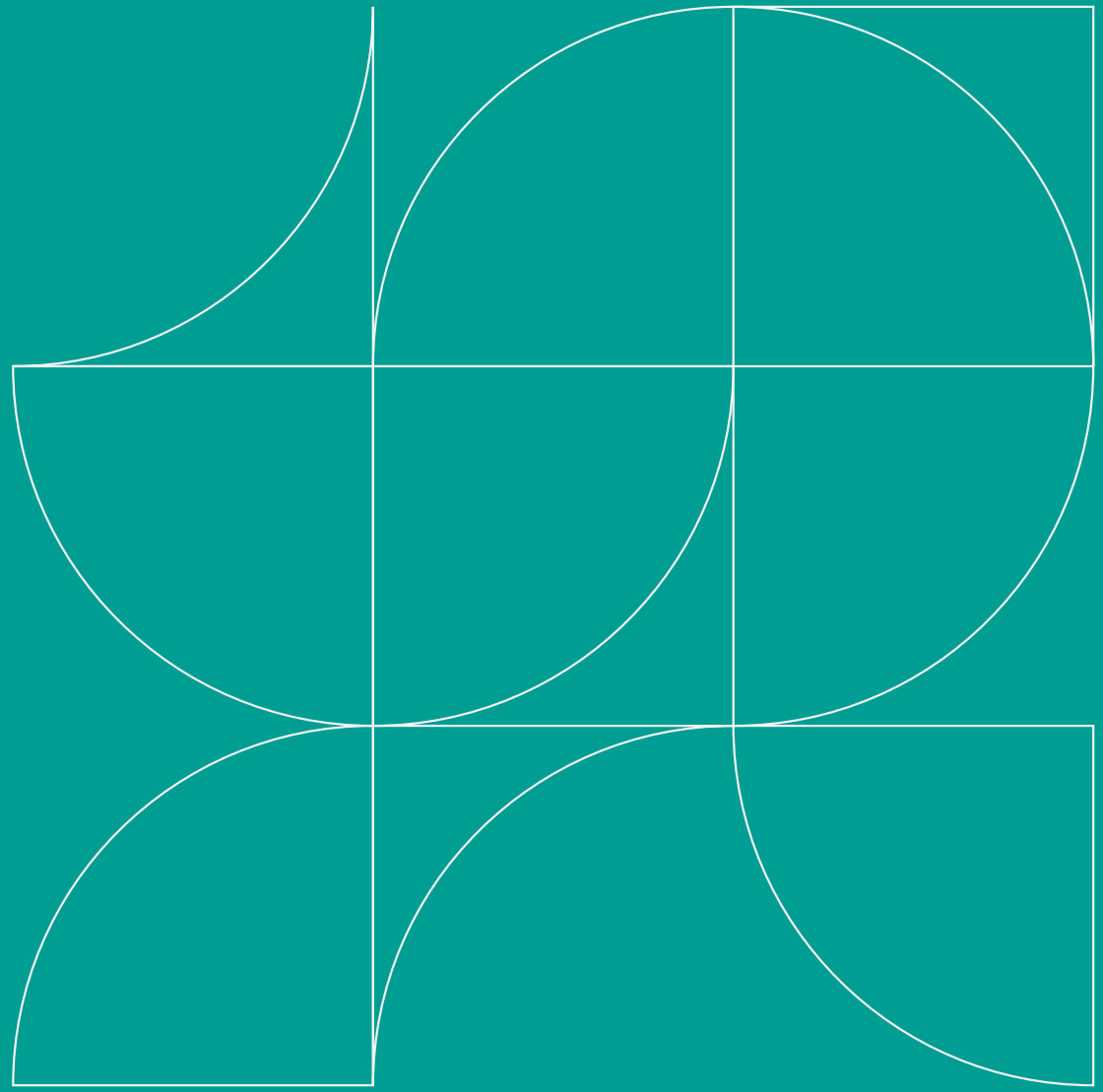
Are Meal/Rest Period Premiums A Wage?

- CA Supreme Court Flip-Flopped:
  - Meal and rest period premiums are considered "wages," rather than a "penalty," to provide a longer three-year SOL for employees. *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007)
  - A claim to recover meal/rest period premiums is not "an action for nonpayment of wages," so a prevailing employer cannot recover their attorneys' fees. *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244 (2012)
- Following *Kirby*, several published court of appeal decisions and district court decisions have held that a failure to pay meal or rest period premiums cannot trigger waiting time penalties or wage statement penalties

Make Meal/Rest Period Premiums A Wage Again

- *Naranjo's* holding:
  - Meal/rest period premiums are similar to overtime wages — i.e., to compensate employee for working overtime hours or working through a required break
  - A wage does not need to be tied to the amount of time worked — e.g., reporting time and split shift pay are considered wages
  - A failure to pay meal and rest period premium payments at separation can trigger waiting time penalties
  - A failure to pay meal and rest period premium payments can trigger wage statement violations

Rounding and Meal Periods



Meal Period Requirements

Brief Summary of the Law on Meal Periods

Brinker Restaurant Corp. *v. Superior Court,*
53 Cal. 4th 1004

- "An employer's duty with respect to meal breaks … is an obligation to provide a meal break to its employees."
- Clarified meal period timing requirements
  - First meal period before the end of an employee's fifth hour of work
  - Second meal period before the end of an employee's tenth hour of work
- Employers need not "police meal breaks and ensure no work thereafter is performed"

Best Practices Re: Rounding

Brief Summary of the Law on Rounding

See's Candy Shops, Inc. v. Superior Court, 210 Cal. App. 4th 889, 901 (2012)

- California law "permits employers to use a rounding policy for recording and compensating employee time as long as the employer's rounding policy does not 'consistently result[] in a failure to pay employees for time worked'"
- A rounding policy is lawful if it is "fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked'"
- Rounding policies have been found to violate this rule when they only round down and thereby "systematically undercompensate employees"

Donohue Decision

Summary

- AMN used a time system that rounded punches to the nearest 10-minute increment
- Rounding applied to meal periods
- Although AMN used a meal period attestation for apparently non-compliant meal periods, the attestation was only triggered based on rounded time

Two Key Holdings:

- Employers cannot engage in the practice of rounding time punches in the meal period context
- Time records showing non-compliant meal periods give rise to a rebuttable presumption of meal period violations

The Rise of Rebuttable Presumption

Summary

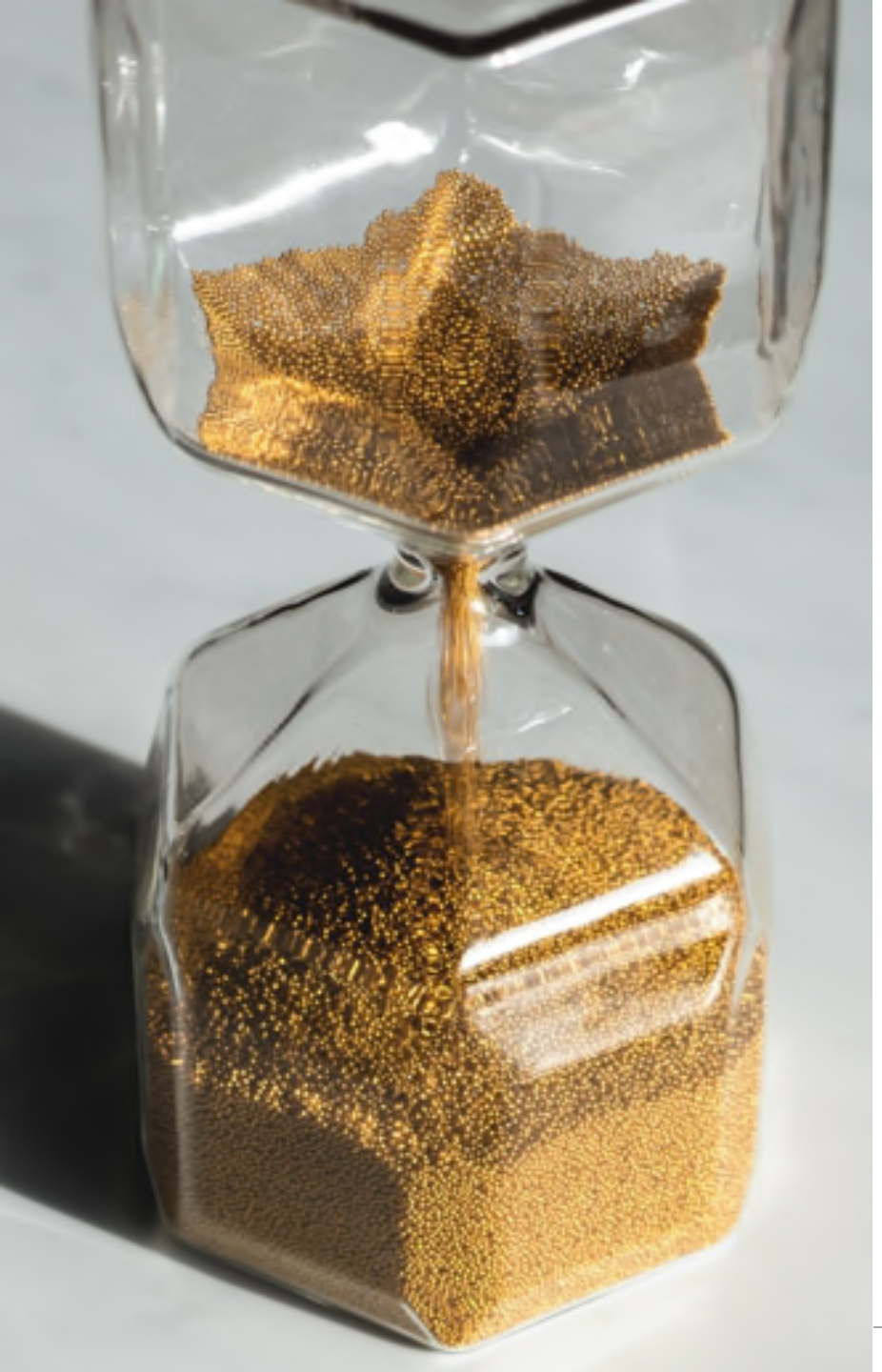
The court adopted Justice Werdegar's rebuttable presumption from her concurrence in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012)

> "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, ***the assertion is an affirmative defense, and thus the burden is on the employer***, as the party asserting waiver, to plead and prove it."

Rebutting the Presumption

Automatic Payment of Meal Period Premiums

- Employers can automatically pay meal period premiums based on apparently non-compliant meal periods as reflected in employee's time records
- Helpful in managing individual and class liability
- Does not eliminate liability in PAGA actions
- Can result in employers overpaying meal period premiums



Rebutting the Presumption

Meal Period Attestations

Have employees to attest whether or not they received a compliant meal period in the timekeeping system.

> "The employer is not required to police meal periods to make sure no work is performed. Instead, the employer's duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer's time records."

Rebutting the Presumption

“Representative Testimony, Surveys, and Statistical Analysis”

“Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work.”

“‘Representative testimony, surveys, and statistical analysis,’ along with other types of evidence ‘are available as tools to render manageable determinations of the extent of liability.’”

Best Practices Re: Rounding

Is Donohue a Precursor to the End of Rounding?

- *Donohue* did not address the use of rounding outside of the meal period context
- ***BUT*** the Cal. Supreme Court did go out of its way to point out that it "has never decided the validity of the rounding standard articulated in *See's Candy I*. . . ."
- The Cal. Supreme Court also suggested that: "the practical advantages of rounding policies may diminish further" as "technology continues to evolve" and that "technological advances may help employers to track time more precisely"
- ***Practical Advice*****: Discontinue rounding employee time punches**

Best Practices Re: Meal/Rest Periods

Written Policies, Training, Acknowledgements

- Review your written meal and rest period policies for California compliance
- Implement employee and supervisor training on meal and rest period requirements
- Policy / training acknowledgements
  - Not legally required, but recommended
  - It is much harder to defend a meal and rest period case, and overcome the *Donohue* meal-period-violation presumption, if the employer is not able to show that an employee signed off on the policy and was trained on it
- Post the applicable Wage Order

Best Practices
Re: Meal/Rest Periods

Meal/Rest Period Scheduling and Length

- Eliminate meal period rounding, period
- Consider other options to help limit potential meal/rest period exposure:
  - Providing meal periods that are 35 minutes or longer
  - Authorizing and permitting 15-minute rest periods
  - Scheduling meal periods to begin at least 30 minutes before the end of the fifth hour of work
  - Implementing a tool to coordinate and schedule meal/rest periods to ensure they are timely, and mandate its use
  - Automatically paying penalty for “facial” meal period violations
  - Alternative, implement a daily meal and rest period attestation

Best Practices Re: Timekeeping Attestations

Timekeeping Attestations

- **Does *Donohue* require employers to implement a system that employees can use to attest to meal and rest period compliance?**
  - No, but best practices do!
- **What should an attestation cover?**
  - The ideal attestation covers hours worked and meal/rest periods
- **Why should employers consider attestations?**
  - Reduces potential exposure without additional costs associated with automatic premiums
  - Creates a record to overcome *Donohue*'s rebuttable presumption for meal periods, as well as off-the-clock claims
  - Attestation reports allow employers to spot employee abuse and compliance deficiencies

Best Practices Re: Timekeeping Attestations

Timekeeping Attestations — Continued

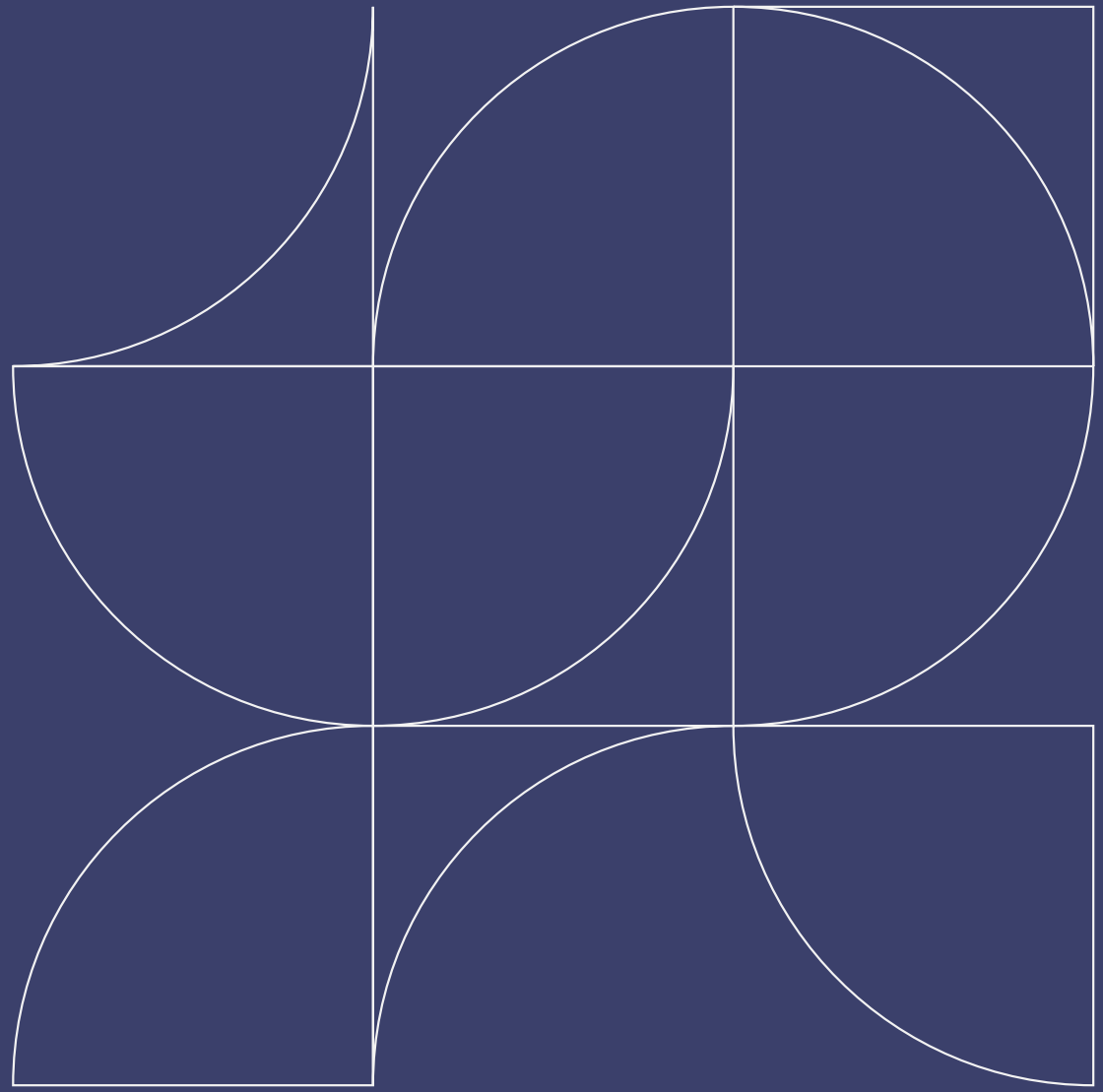
- **What does a typical attestation look like?**

  "I hereby certify that the hours recorded accurately identify all time worked, and that, I was provided with all relevant off-duty uninterrupted meal periods and authorized and permitted to take all relevant off-duty uninterrupted rest periods as provided in the [Company] Meal and Rest Period Policy."

- **Is there anything else it should cover?**

  As a result of *Donohue*, employers should consider adding a second sentence to the attestation: "I was not required to miss any meal or rest periods, or to take short or late meal or rest periods, and any short, late, or missed period was a result of my voluntary choice."

2022 Private Attorneys General Act (PAGA) Updates



PAGA Actions vs. Class Actions

- PAGA is a type of *qui tam* action, or a “bounty hunter law,” that allows an employee to bring a representative action on behalf of themselves, the State of California, and other “aggrieved employees”
- Recovery is limited to civil penalties (default $100 per employee per pay period for the initial violation, and $200 per employee per pay period for each subsequent violation)
- No class certification requirement (FRCP 23 or CCP 382)
- Broad standing for plaintiffs to sue
- Discovery: Potentially more expansive than class actions
- Some courts consider PAGA actions as non-complex cases

PAGA Manageability

- CA courts are split:
  - *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746, 765 (2021) (“we conclude that courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable.”)
  - *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685, 713 (2022) (holding courts cannot strike PAGA claims on manageability grounds; “[i]mposing a manageability requirement would create an extra hurdle in PAGA cases that does not apply to [state] enforcement actions.”)
- The Ninth Circuit has sided with *Estrada*:
  - *Hamilton v. Wal-Mart Stores, Inc.*, -- F.4th --, 2022 WL 2350262, at *8 (9th Cir. June 30, 2022) (“we conclude that imposing a manageability requirement in PAGA cases akin to that imposed under Rule 23(b)(3) would not constitute a reasonable response to a specific problem and would contradict California law by running afoul of the key features of PAGA actions.”)

Viking River Cruises Inc. v. Moriana, 142 S.Ct. 1906 (2022)

– Background:

- The arbitration agreement between Moriana and Viking River contained a “waiver” precluding an employee from bringing a class, collective, representative PAGA action
- The trial court and Court of Appeals had concluded that Moriana could not be compelled to arbitrate her PAGA claim, under the holding of *Iskanian v. CLS Trans. Los Angeles*, 59 Cal.4tth 348 (2014), which barred contractual waivers of individual and representative PAGA claims on grounds that individual PAGA claims cannot be split from representative PAGA claims

Viking River Cruises Inc. v. Moriana, 142 S.Ct. 1906 (2022)

– Summary of the SCOTUS Opinion:

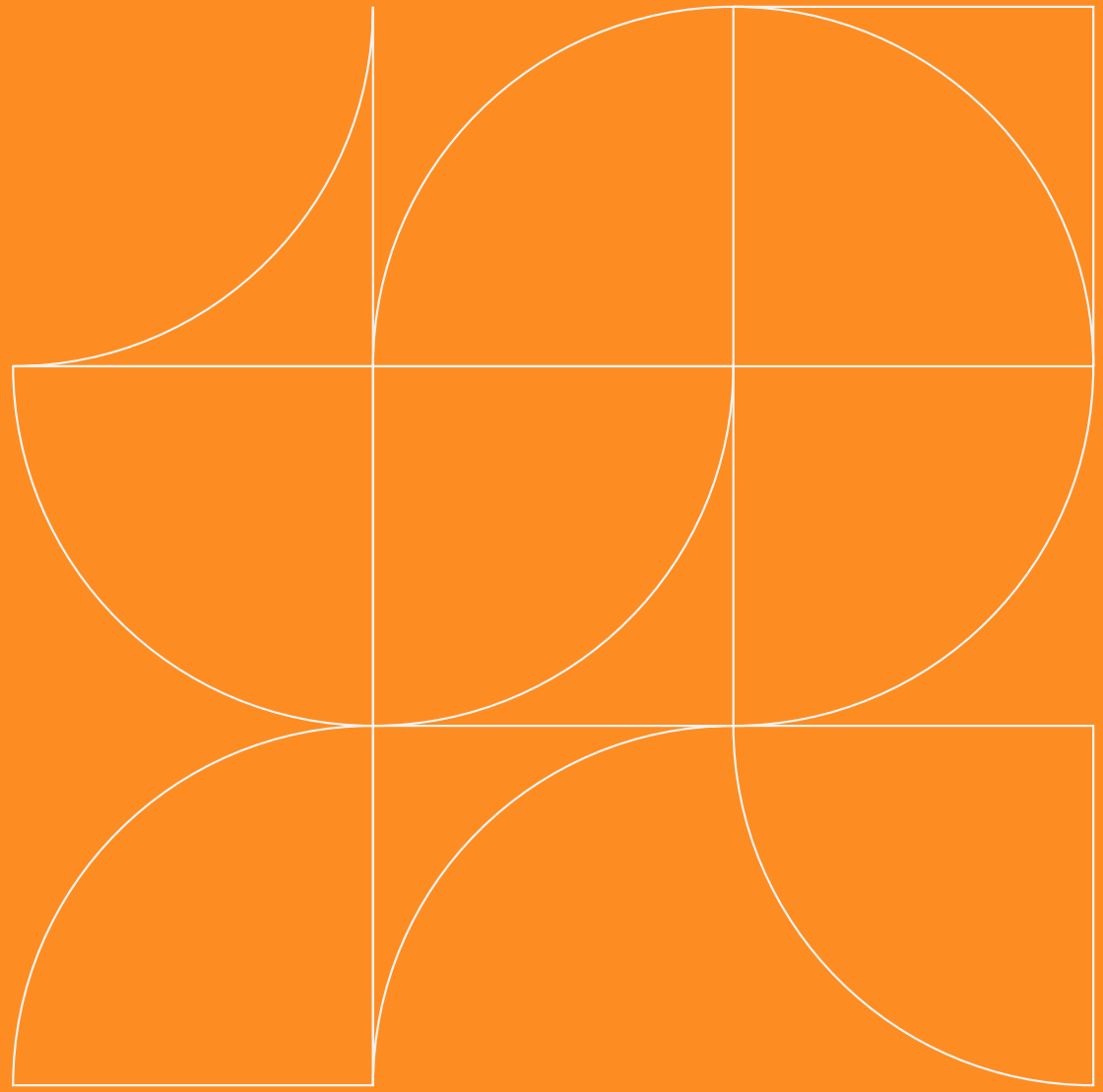
- The Supreme Court reversed the Court of Appeals' decision, and found that the Federal Arbitration Act ("FAA") preempts *Iskanian*'s rule that PAGA claims cannot be divided into individual and non-individual actions through an arbitration agreement
- The Court held that, under PAGA's standing requirement, plaintiffs can maintain representative PAGA claims "only by virtue of also maintaining an individual claim in that action." Thus, once the individual PAGA claim is compelled to arbitration, the employee lacks standing to maintain a PAGA representative claim
- The Court found that a waiver of "representative" PAGA claims was still invalid under *Iskanian* if construed as a "wholesale waiver" of such PAGA claims, and that this aspect of *Iskanian* was not preempted by the FAA

The Impact of *Viking River Cruises*

- Employees who did not sign an arbitration agreement may pursue a PAGA action, even if other employees have arbitration agreements with a PAGA waiver
- A wholesale PAGA waiver without a severability clause may not be enforceable
- Justice Sotomayor's concurring opinion:
  - Current standing requirement: the plaintiff could not maintain a representative PAGA claim if their individual claim has been compelled to arbitration
  - CA courts will have the last word on interpreting the standing requirement
  - CA Legislature "is free to modify [or clarify] the scope of statutory standing under PAGA"
- Employer waived the right to enforce arbitration agreement
- Mass arbitration

A Win for Employers:

LaFace v. Ralphs Grocery Co.
Suitable Seating Decision



LaFace v. Ralphs Grocery Co., 75 Cal. App. 5th 388 (2022)

- Suitable Seating Requirements:
  - Section 14(A): “All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”
  - Section 14(B): “When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.”
- CA Supreme Court issued the decision in Kilby v. CVS Pharmacy, Inc., 63 Cal.4th 1, (2016), which set forth the legal framework for determining the availability of suitable seating

LaFace v. Ralphs Grocery Co., 75 Cal. App. 5th 388 (2022)

– Affirmed the trial court's ruling that grocery store employer was not required to provide seats to its cashiers under section 14(B):

  - "The evidence showed that Ralphs's cashiers were supposed to stay busy when they were not checking out customers."
  - "[S]itting at or near the checkstands instead of cleaning, restocking, and fishing for customers, would have interfered with the active duties of the cashiers' employment."

– The appeal was limited to section 14(B)

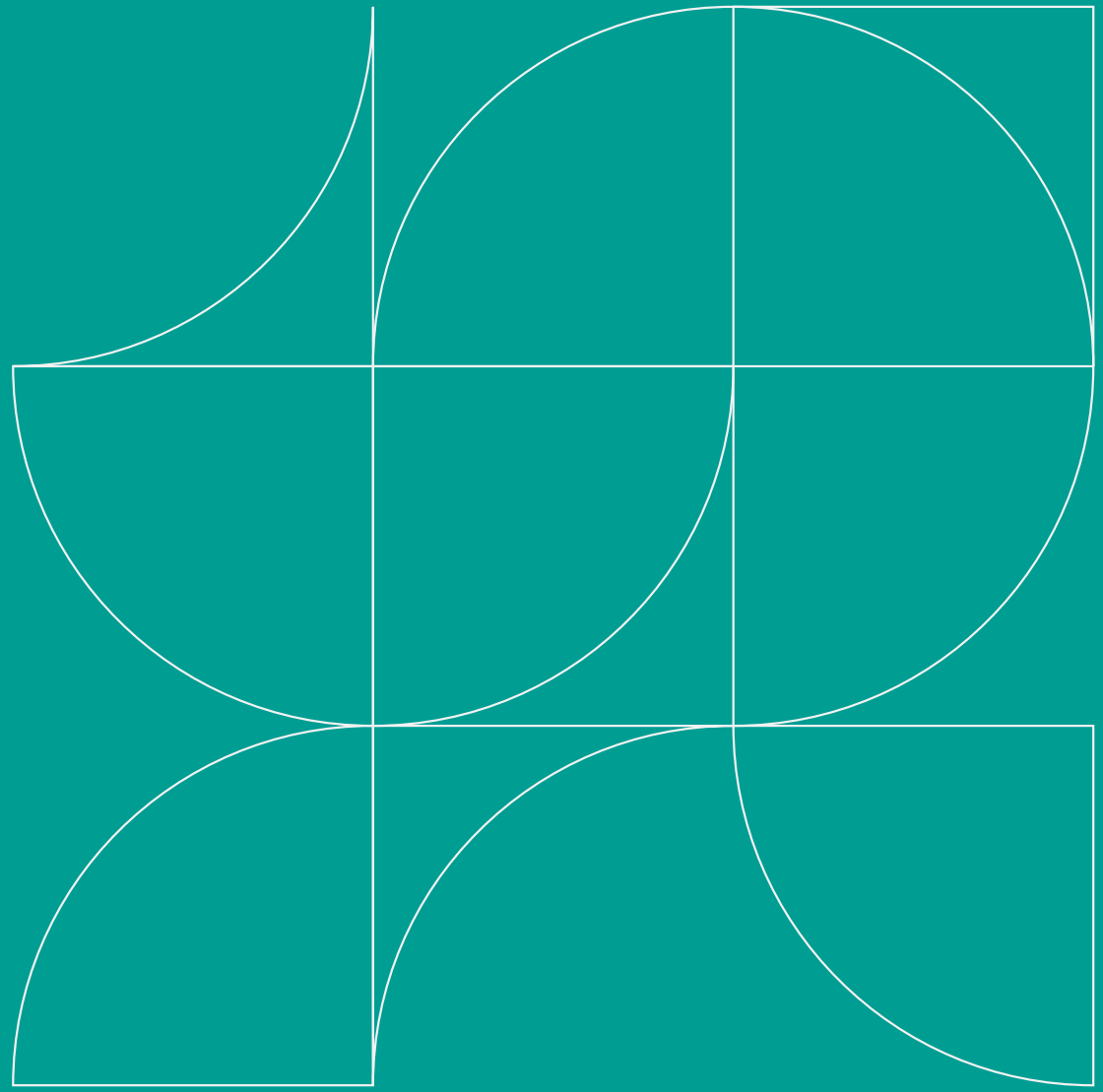
LaFace v. Ralphs Grocery Co., 75 Cal. App. 5th 388 (2022)

– No right to jury trial existed for PAGA action

- PAGA is a hybrid administrative enforcement action, and the right to a jury trial is not available to either the agency or employers
- Many of the violations were based on newly created rights that did not exist at common law or when the California Constitution was adopted in 1850. Thus, there is no presumption of entitlement to a trial by jury

– CA Supreme Court denied the plaintiff's petition for review on May 11, 2022

New Restrictions on Separation and Settlement Agreements



Pre-2022 Developments

- California law prohibits provisions in settlement agreements entered into after ***January 1, 2019*** that prevent the disclosure of facts related to sexual assault, sexual harassment, and sex discrimination claims filed in a "civil action" or in "a complaint" filed in an administrative action
  - Employers still can prohibit disclosure of the amount of the settlement payment
- As of ***January 1, 2020***, California law prohibits the inclusion of "no-rehire" clauses in agreements to settle employment disputes
  - ***Exception.*** Prohibition does not apply if employer made and documented a good-faith determination that such individual engaged in sexual harassment or sexual assault

Pre-2022 Developments (Cont.)

- ***Exception.*** Effective ***January 1, 2021***, "no-rehire" clause prohibition does not apply if employer made and documented a good-faith determination that such individual engaged in "any criminal conduct"
- For either exception to apply, the employer must have made and documented its good-faith determination ***before*** the aggrieved employee raised his or her claim
- Restriction on "no-rehire" provisions apply only to employees whose claims were filed in good faith

2022 Developments

- ***Settlement Agreements.*** California law bars provisions in settlement agreements entered into after ***January 1, 2022*** that prevent the disclosure of facts related to all forms of harassment, discrimination, and retaliation – not just those related to sexual assault, sexual harassment, or sex discrimination
  - Employers still can prohibit disclosure of the amount of the settlement payment

2022 Developments (Cont.)

- ***Separation Agreements/Non-Disclosure Agreements***
  - Effective ***January 1, 2022***, California law prohibits confidentiality and non-disparagement provisions in employment and non-disclosure agreements that have the purpose or effect of restricting disclosure of information about harassment, discrimination, or other workplace conduct the employee believes to be unlawful

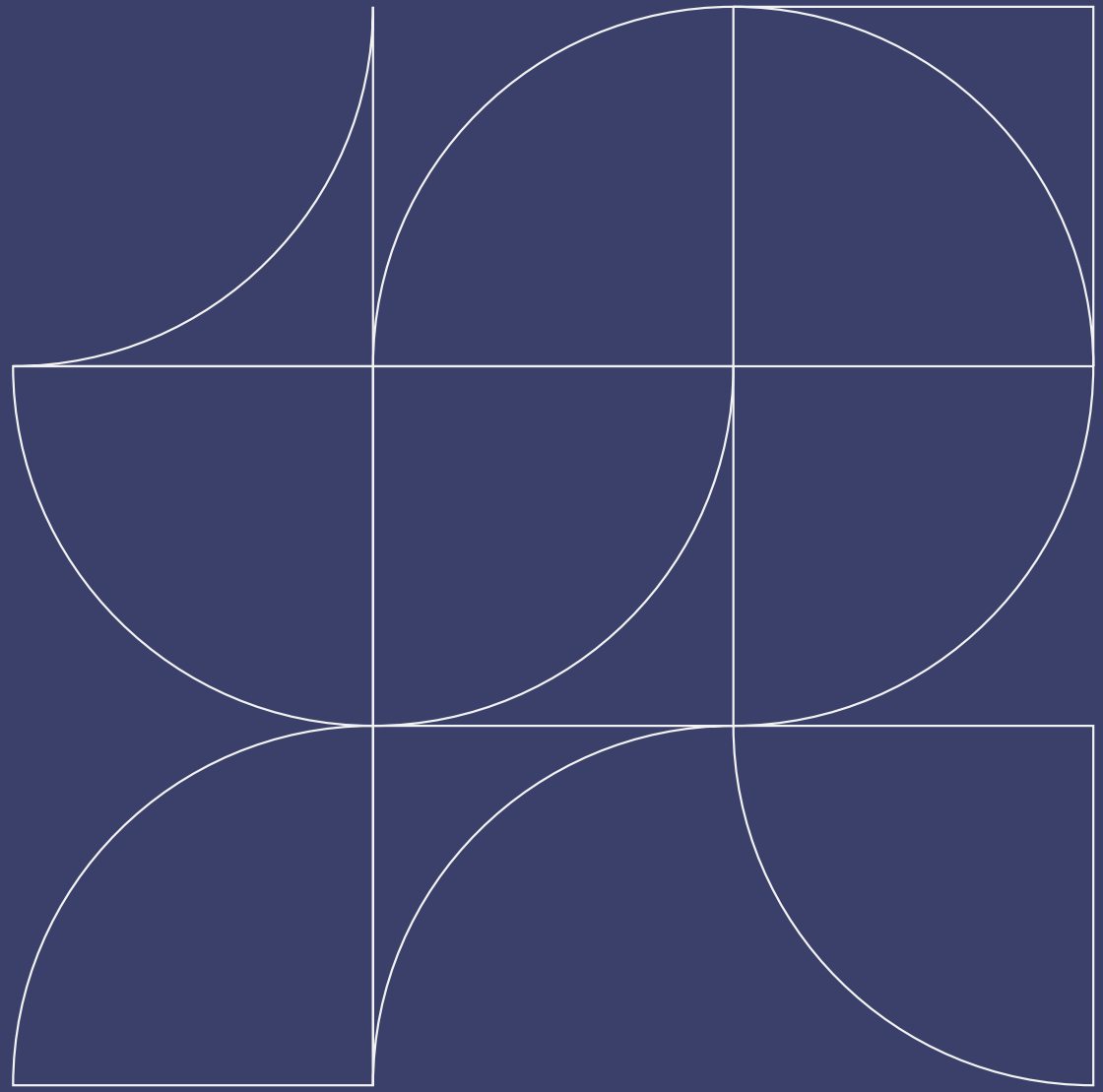
2022 Developments (Cont.)

- ***Separation Agreements/Non-Disclosure Agreements***
  - Effective ***January 1, 2022,*** employers must include the following language in a non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace:
    - Nothing in this Agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful
  - ***Exception.*** Requirements does not apply to negotiated settlement agreements to resolve an underlying claim filed by an employee in a court, administrative agency, alternative dispute resolution forum, or the employer's internal complaint process

2022 Developments (Cont.)

- For all employment agreements (excluding negotiated settlement agreements), employer must:
  - Notify the employee that the employee has the right to consult with an attorney regarding the agreement; ***and***
  - Provide the employee with a reasonable time period of not less than five business days to do so
    - A 21-day consideration period is required for employees age 40+ in order to release age discrimination claims

California Family Rights Act and Handbook Updates



A Refresh on SB 1383

Last Year's Major CFRA Expansion

Amends Cal. Govt. Code Section 12945.2

- Expanded the California Family Rights Act to require businesses with as few as five (5) employees to provide 12 weeks of mandatory family leave per year
- Eliminated any reference to a mileage threshold – now it's five (5) employees anywhere in the U.S., even if a company only has one (1) in California
- Expanded definition of child to include child of a domestic partner, and removes age limit/disability requirement for children
- Eliminated previous carve out for certain highly paid/key employees and company hardships
- Eliminated provision limiting time off where employer employs two parents – now they both get 12 weeks

A Refresh on SB 1383
CFRA Expansion

- Expanded family care and medical leave to include leave:
  - To care for grandparents, grandchildren, siblings, domestic partners with a serious health condition (in addition to existing leave to care for a parent or spouse), and
  - Because of a qualifying exigency related to covered active duty, or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the US Armed forces
- Created larger potential for stacking with FMLA where leave is for different uncovered reasons
- **Handbook Implication:**
  - CFRA has a mandatory written policy requirement
  - Employers should have implemented an updated CFRA/FMLA policy

AB 1033 Building on SB 1383

- Relatively minor tweak to add “parent-in-law” to list of covered family members for whom an employee may take time off to provide care under CFRA
- SB 1383 included a definition of parent-in-law, but neglected to include it in the definition of covered family member
- Regulations last year confirmed parent-in-law was not included
- AB 1033 corrects this

- **Handbook Implication:**
  - Employers who include robust definitions of covered family members should ensure parent-in-law is included
  - Those who do not define “parent” should ensure requests for leave related to parents-in-law are not rejected

California Family Rights Act and Handbook Updates

ACTION ITEMS

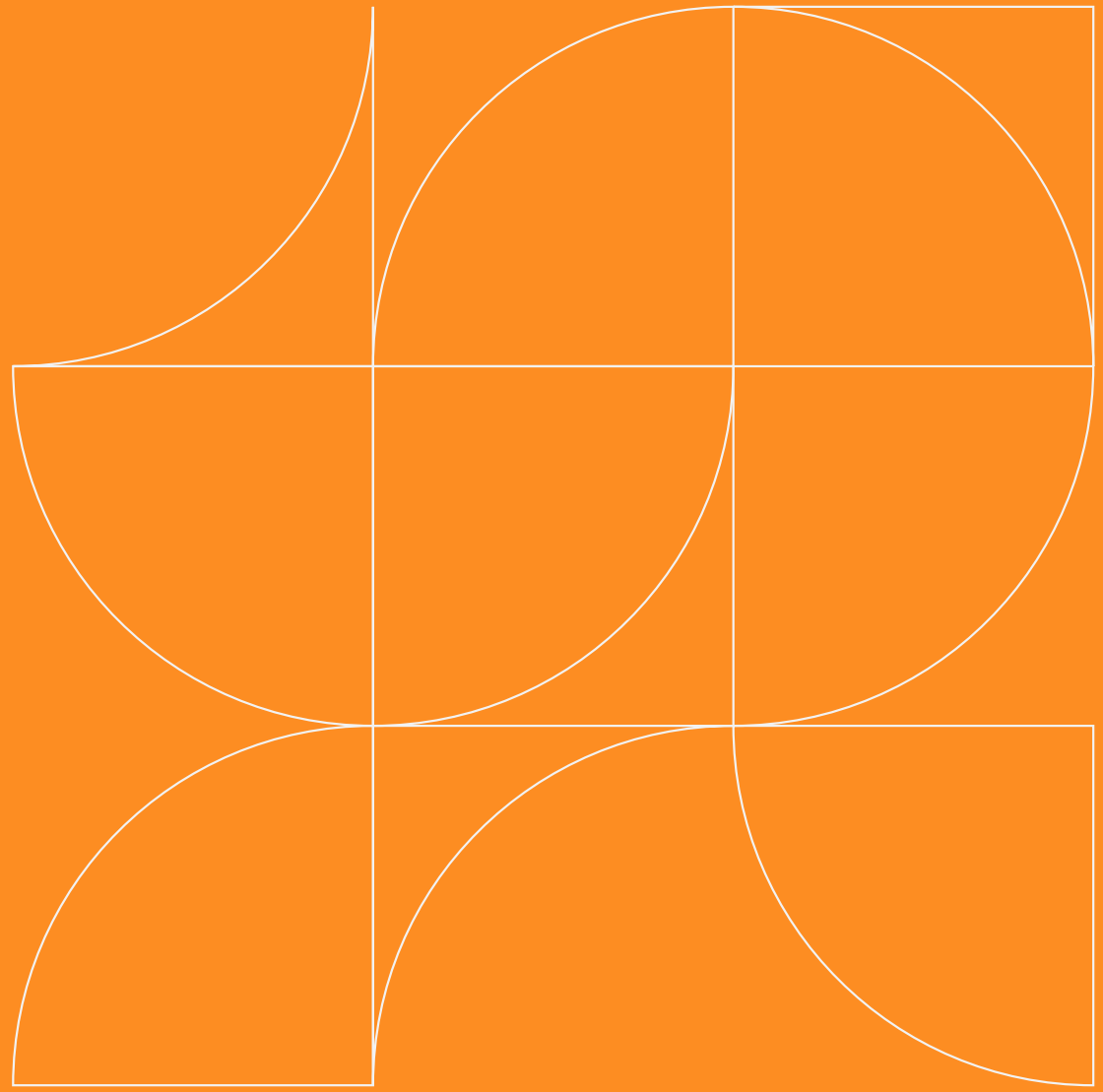
1 | Ensure 2021 and 2022 CFRA amendments are incorporated into the handbook

2 | Train managers on the changes in CFRA to prepare them for identifying additional red flags

3 | Contact Seyfarth Handbook and Policy Team to assist with updates

COVID-19/Great Resignation World of Work

– Work Culture Assessments



What Is A Work Culture Assessment?

An analysis of the Company's expectations, behaviors, policies, practices, engagement, and experiences for consistency with the Company's:

- Mission, vision, and values;
- Business objectives; and
- Legal compliance objectives

Why Should Employers Assess Their Work Culture Now?

- We are in one of the most transformative periods in the world of work in history:
  - COVID-19 − Remote and hybrid workforces; distributed workforces; employees' shifting priorities
  - The Great Resignation/Tight Labor Market
  - Technological Advancements/AI
  - Generation Differences
- Work culture is more important than ever for employers to attract, retain, and motivate top talent
- Employers can envision and help create a work culture that attracts the most sought after applicants and retains the most valuable employees

What Are the Overall Goals of a Work Culture Assessment?

- Attract the most highly sought after applicants;
- Retain the most valuable employees;
- Lower turnover;
- Reduce/effectively manage legal risk; and
- Help envision, create, and nurture the work culture the employer seeks to create, consistent with values, goals and the law

What Are the Elements of a Work Culture Assessment?

- Policy review
- Surveys
- Focus groups
- EEO-1/Inclusion and diversity data review
- Audit of internal complaints and investigations
- Audit of employment litigation
- Leadership interviews
- Key stakeholder interviews
- Audit of training, performance management, mentoring and coaching programs
- Open Door processes
- Hotline usage and metrics
- Other

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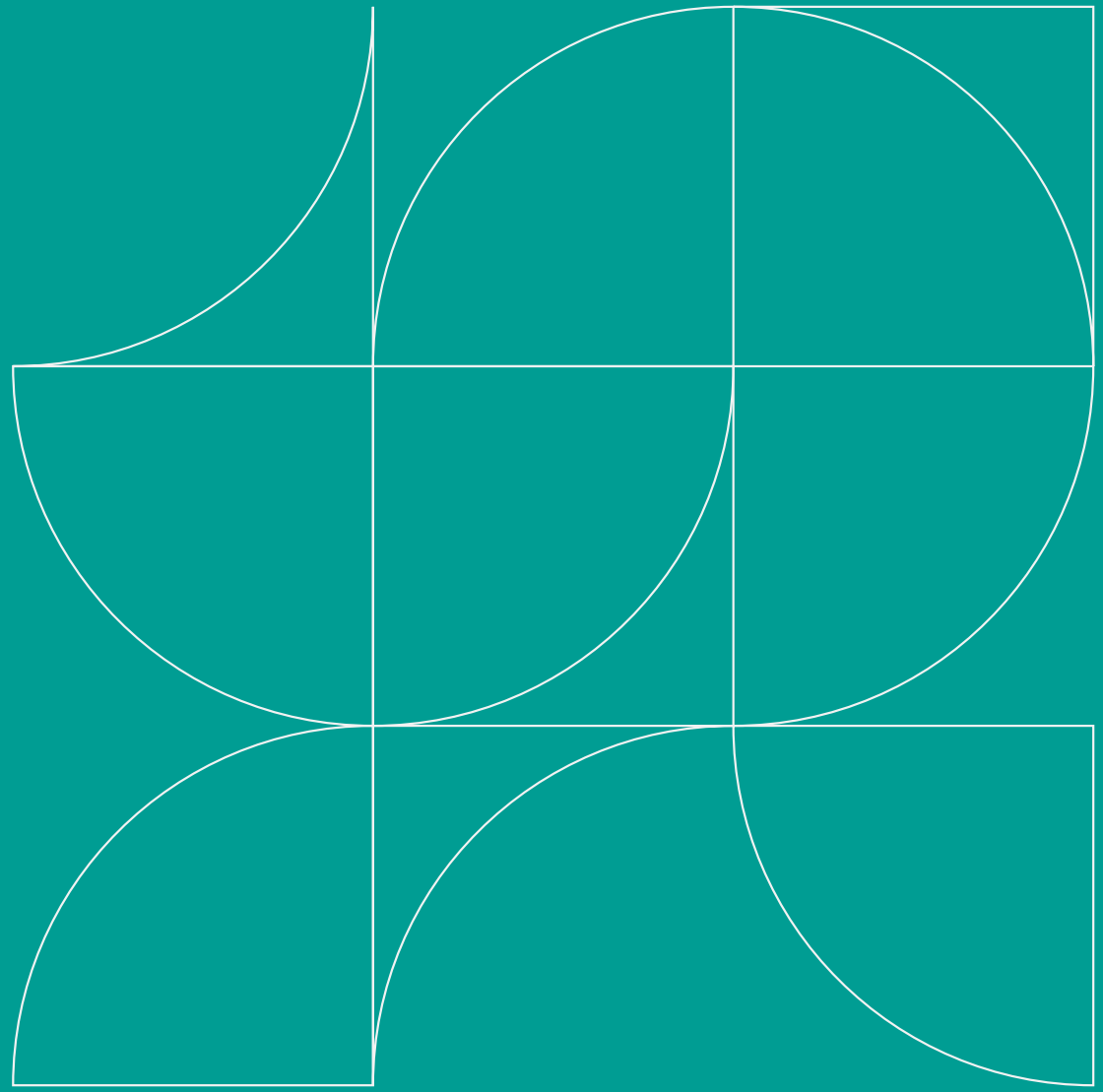

thank you

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