



Cal-Peculiarities

*2020 Edition - How California
Employment Law is Different*

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Seyfarth Shaw LLP

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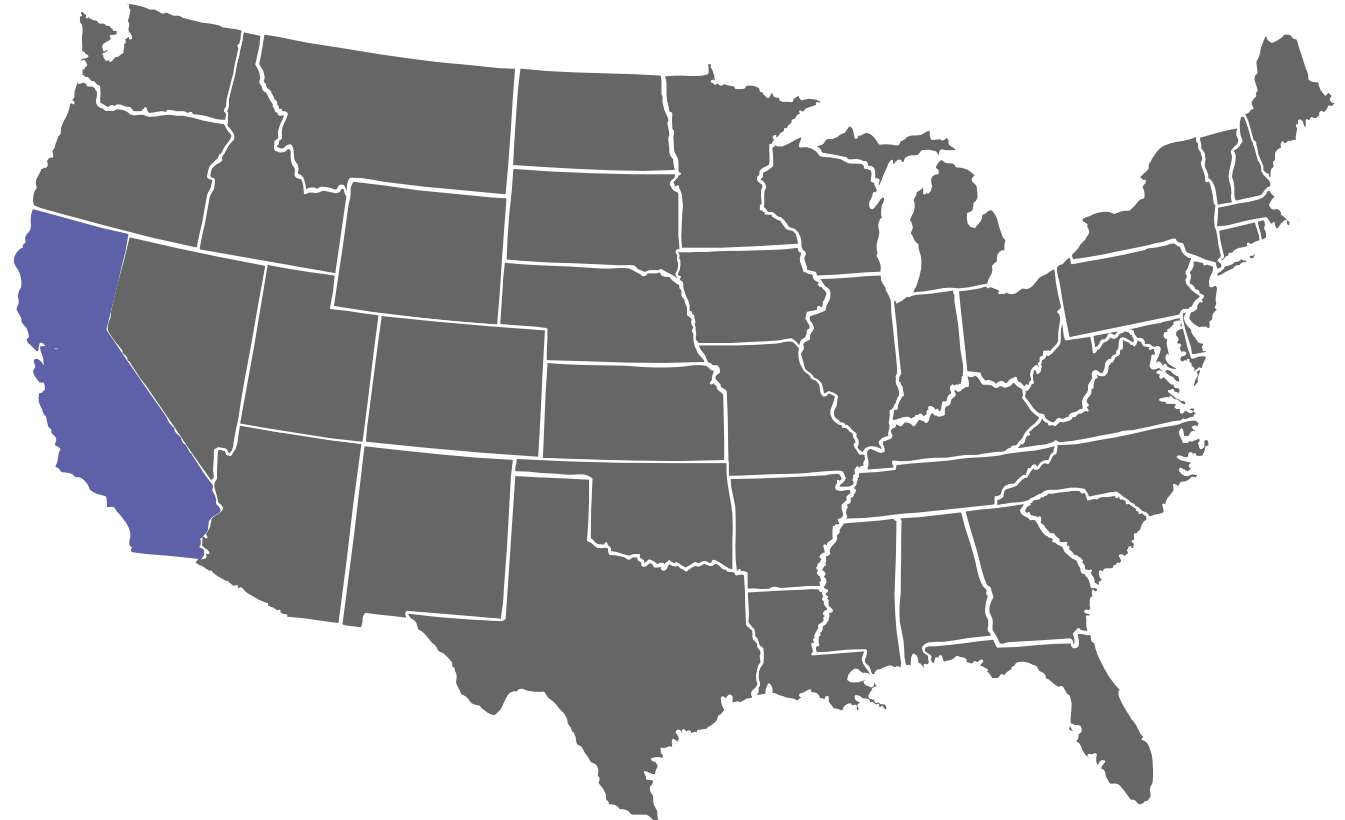
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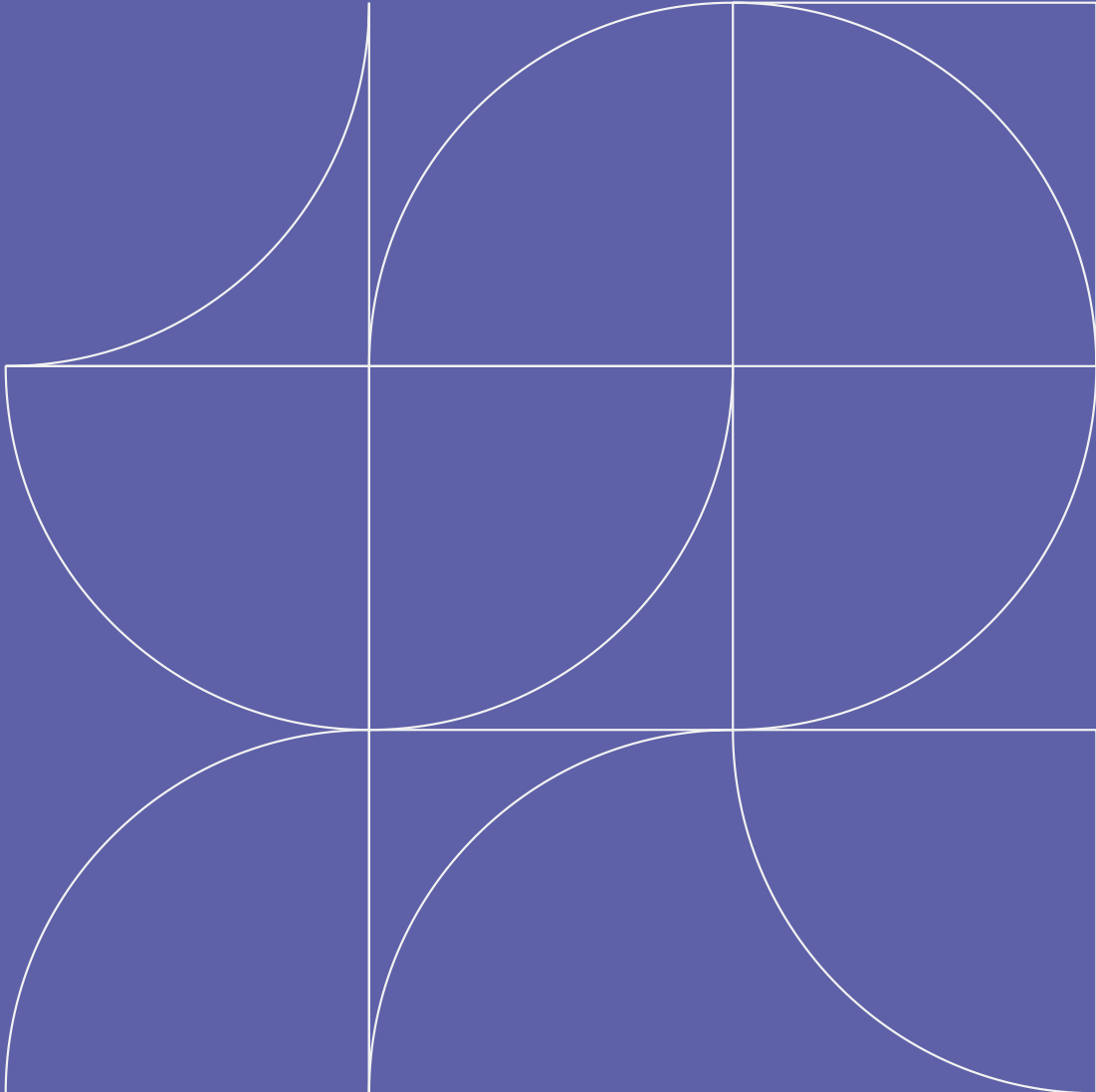
Agenda



- 01** COVID-19 Sick Pay Issues
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- 03** State of ABC Test and Independent Contractors
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COVID-19 Sick Pay Issues

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COVID-19 Sick Pay Issues

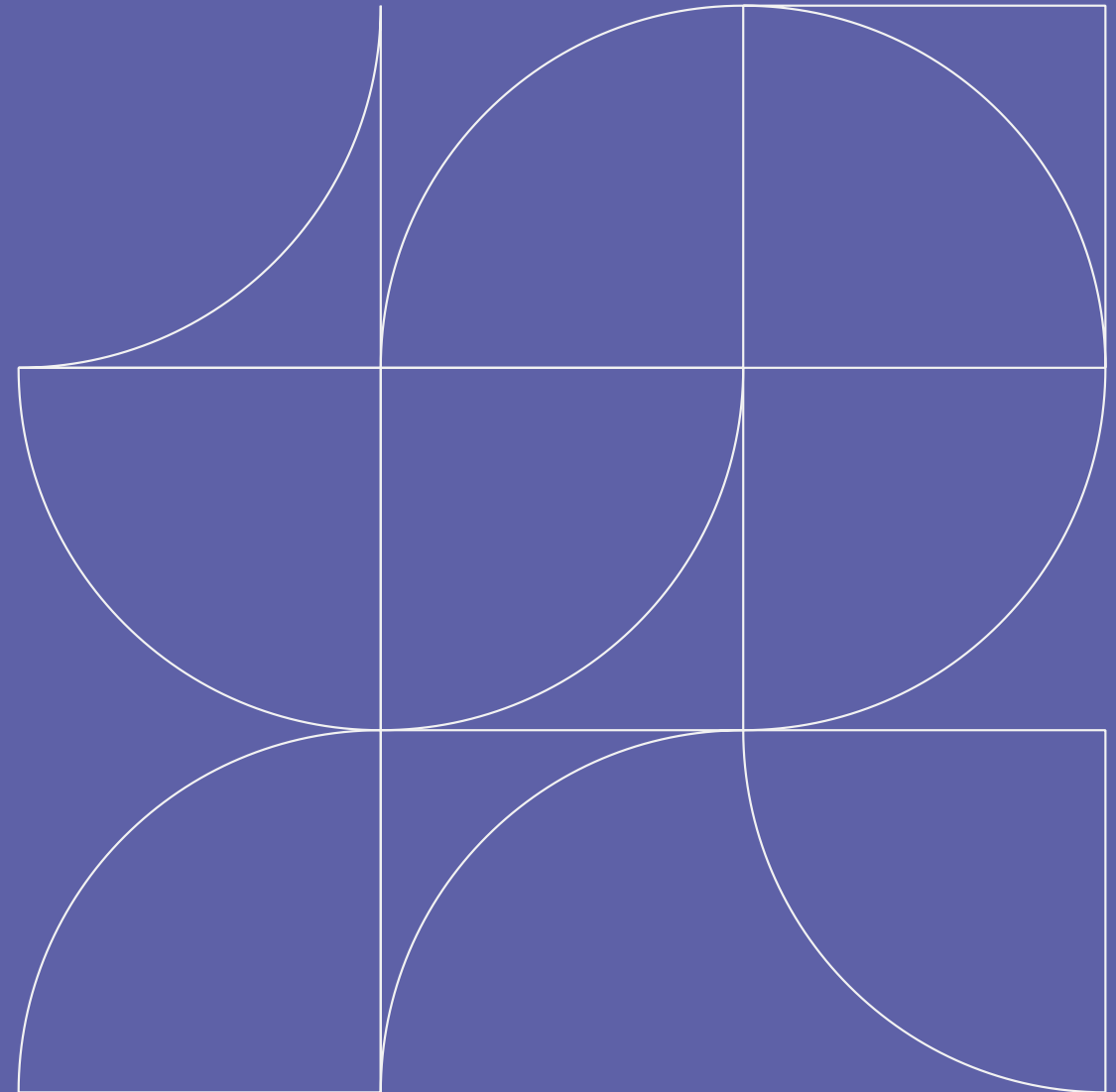


Many Different Regional and Industry Orders

- Governor Newsom's Food Sector Order
- The Los Angeles City Ordinance
- The Los Angeles County Ordinance
- The City and County of San Francisco Ordinance
- The San Jose Ordinance
- The Oakland City Ordinance
- The Long Beach City Ordinance

COVID-19 Return to Work Issues

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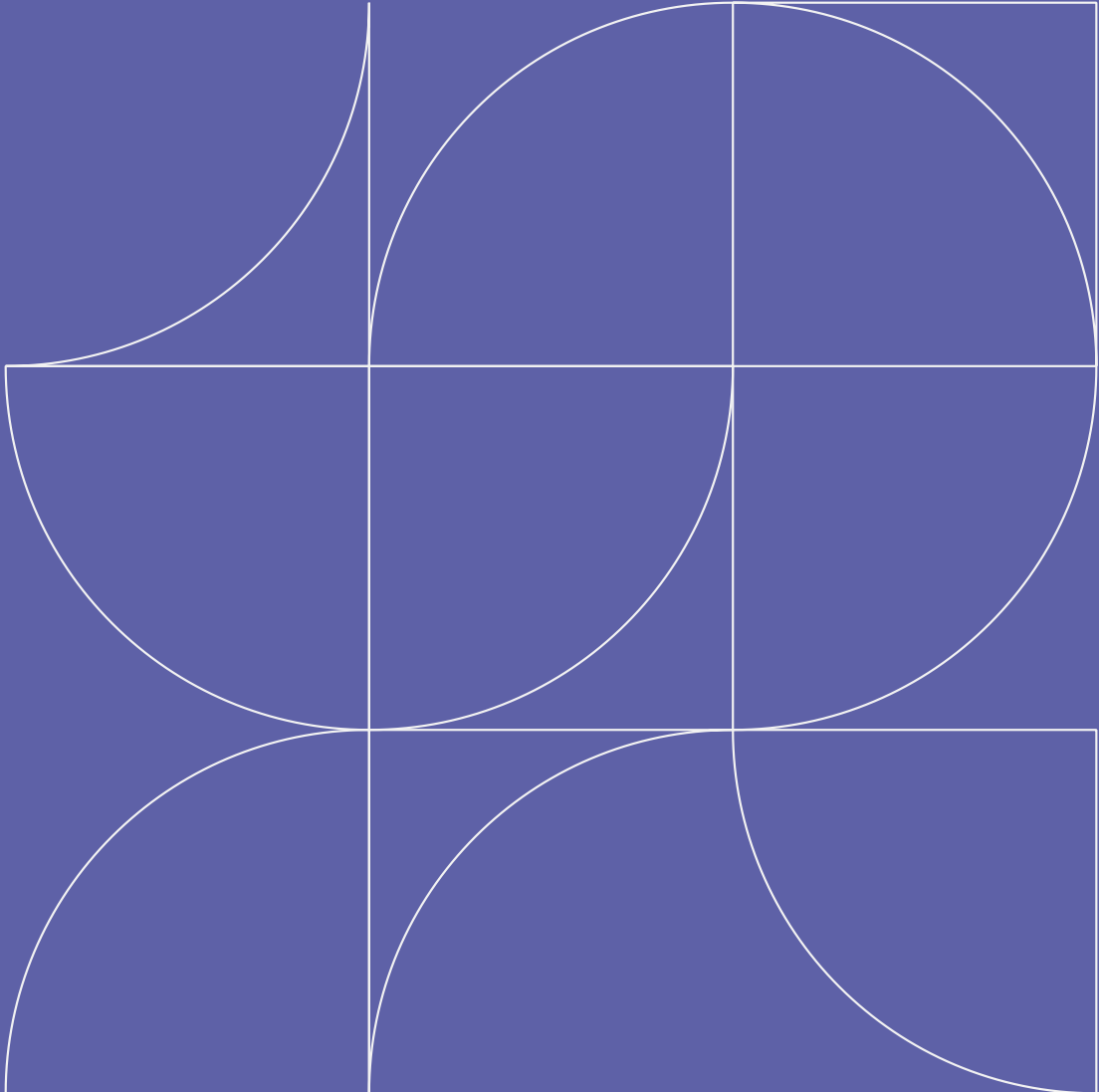
COVID-19 Return to Work Issues



- Compensability of pre- and post-shift activities
 - Ways to avoid or limit liability and class actions
 - *De minimis* scope of *de minimis* doctrine
- “Continuous workday” issues
- “Reporting pay” issues
- Other return-to-work issues
 - Pay reductions?
 - Reclassifications?
 - Break issues?
 - Special accommodations?
- Seyfarth’s COVID-19 Resource Center to sign up for daily updates and for a 30+ page *Return to Business Checklist*:
 - www.seyfarth.com/returntobusiness

State of ABC Test and Independent Contractors

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Refresher: ABCs of Independent Contracting and *Dynamex*



Facts

Delivery drivers sued Dynamex for unlawfully classifying them and 1,800 other drivers as independent contractors.

Their motion for class certification argued that they were employees because Dynamex knew they provided services and had negotiated their rates.

Issue

What legal standard determines whether a worker classified as an independent contractor is really an employee?

Prior Standard

Primarily *how much control* companies exercised over workers and whether workers were *economically dependent or independent*. The “suffer or permit” to work standard introduced uncertainty.

New ABC Test—Employer’s burden to prove

- A. Worker is free from the control and direction of the hiring entity in connection with the performance of the work, under the contract and in fact,
- B. Worker performs work that is outside the usual course of the hiring entity’s business, **and**
- C. Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed (e.g., a plumber or electrician).

AB 5 – Cal. Labor Code § 2750.3: California’s Independent Contractor Bill



- Effective January 1, 2020
- Expands *Dynamex* by making “ABC” test the default for **all** Labor Code, Unemployment Insurance Code, Wage Order claims
 - ABC test now covers additional claims
 - Example: expense reimbursement claims
- Broadens potential liability to businesses that misclassified independent contractors
- Exemptions
 - Business-to-business
 - Service providers
 - Professional services
 - Other

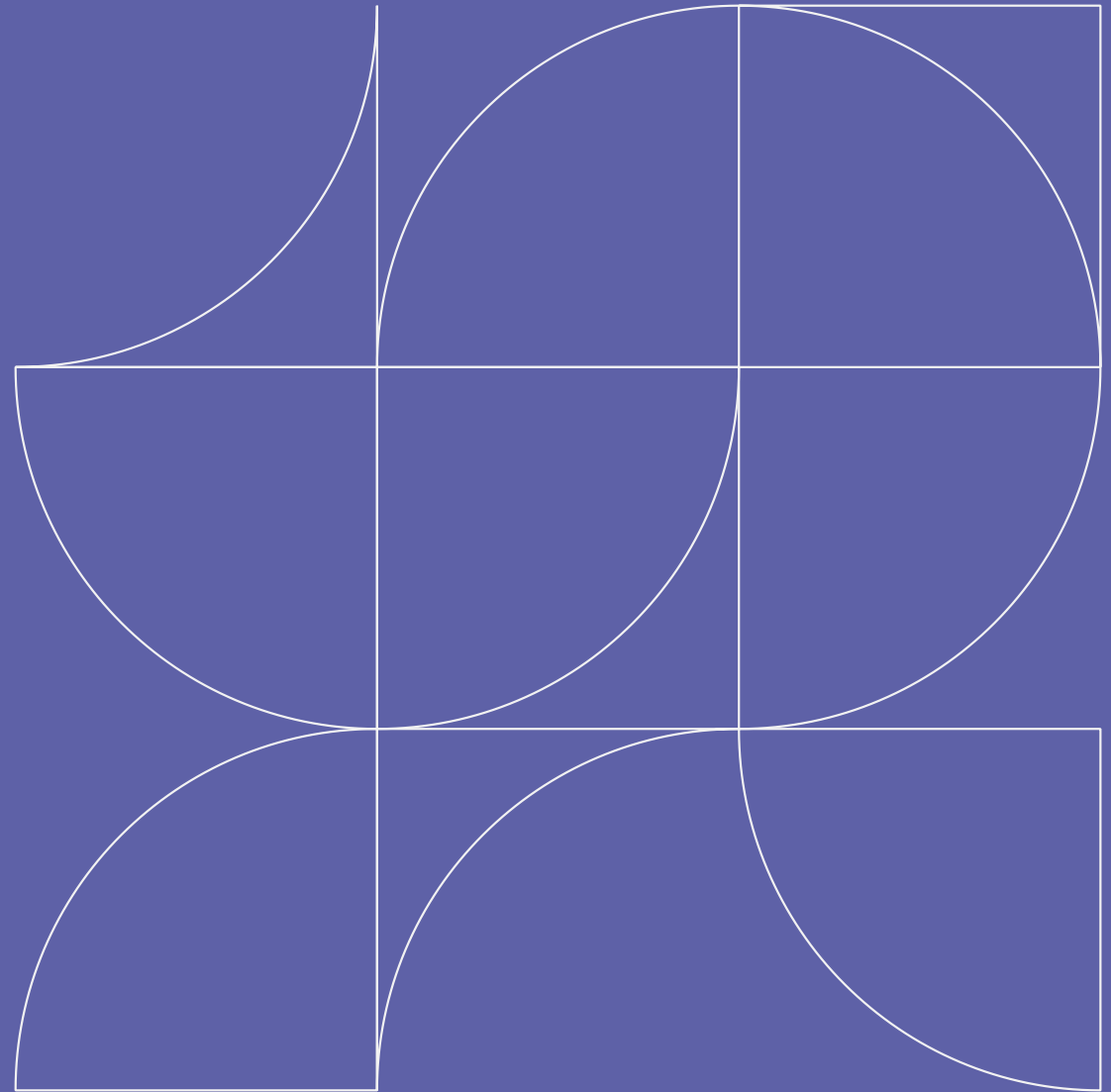
The Future of AB 5 in California



- Clean up legislation
 - AB 1850
- California's enforcement of AB 5
- 35 bills introduced in the state legislature to make changes to AB 5
- Limited successes in attacks on new law
 - Trucking companies
 - Freelancer Creative Professionals (musicians, writers, and artists): AB 2257
 - InstaCart litigation
 - Protect App-Based Drivers & Services ballot measure: November 2020

New Bans

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New Bans



Ban on “No Rehire” Clauses in Settlements

- Major change in prior practice
- Exception for sexual harassers
- Leeway left to deny rehire for legitimate reasons

Ban on Mandatory Arbitration

- New Labor Code section 432.6 makes it unlawful for employers to impose arbitration agreements on employees as a condition of employment, even if employees are permitted to opt out
- Challenged as preempted by Federal Arbitration Act
- Lawsuit by the U.S. and California Chambers of Commerce, as well as several trade organizations
- Court has enjoined state law enforcement as to arbitration agreements governed by the FAA
- Also note: Legislative changes making employers pay arbitration fees and making arbitration companies report arbitrator demographics

For Employers with Mandatory Arbitration Agreements:

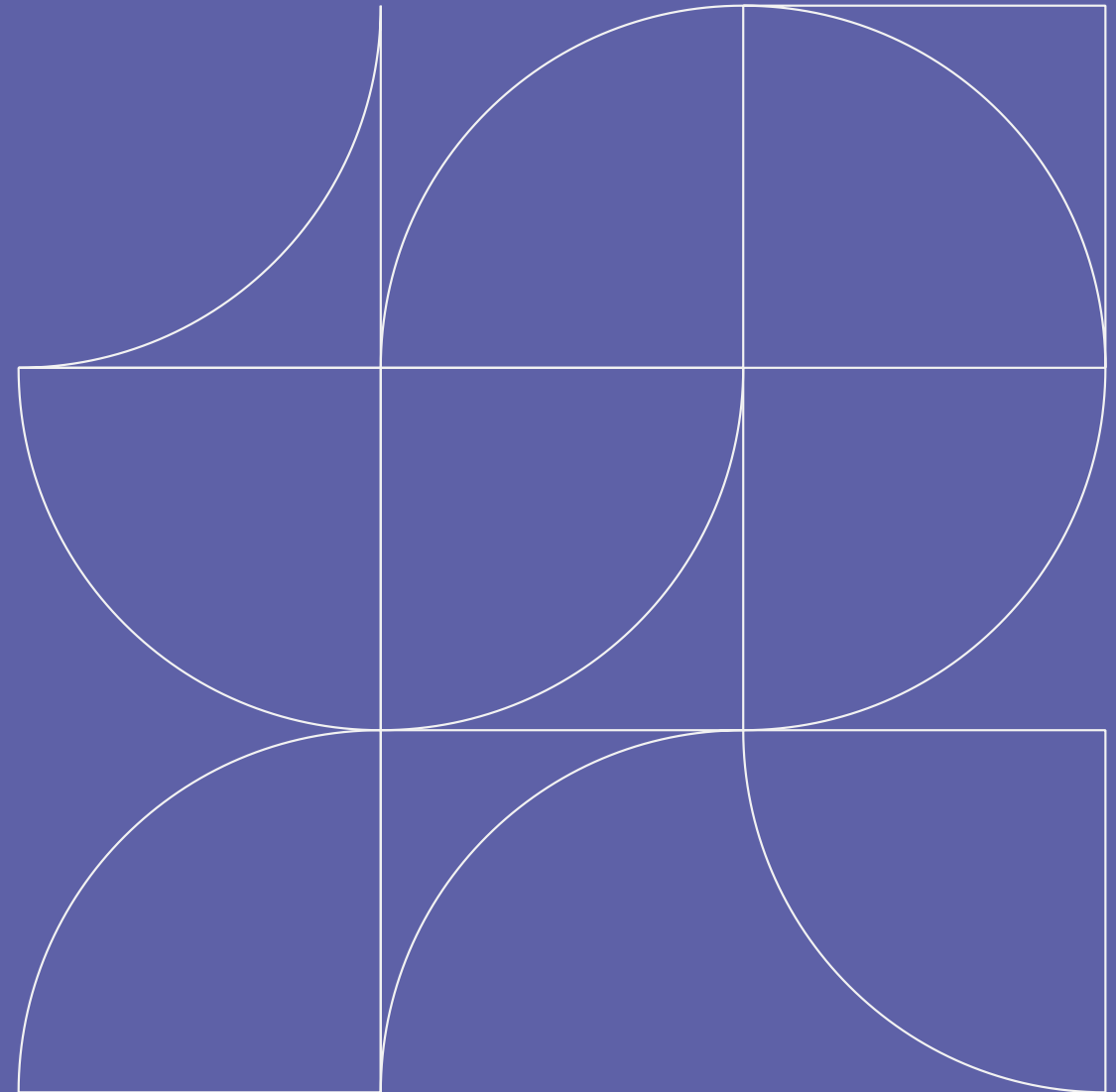
Action Items



1. Stay the course and risk litigation?
2. Make all future arbitration agreements voluntary, not a condition of employment?
3. Review settlement agreements and severance agreements
 - Also possibly affected by AB 51

Minimum Wage Laws

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State of Play

\$7.25

Federal

- \$7.25 per hour (no change since 2009)
- \$10.10 per hour for all workers on federal construction and service contracts
- *(Exec. Order 13658 (2014))*

\$13.00

California

- All CA minimum wage workers to get \$15/hr by 2023
- 2020: \$13/hr if 26+ employees, \$12 if 25 employees or less
- 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



Sample California Cities: Trend Toward or At/Above \$15.00

\$14.25

Santa Monica,
Pasadena;
Los Angeles

- \$14.25 per hour for employers with 26+ employees (July 1, 2019)
- \$13.25 per hour for employers with 25 employees or less (July 1, 2019)

\$15.59

Berkeley

- \$15.59 per hour (July 1, 2019)

\$15.40

Palo Alto

- \$15.40 per hour (January 1, 2020)

Oakland

\$14.14

(January 1, 2020)

San Diego

\$13.00

(January 1, 2020)

Emeryville

\$16.30

(July 1, 2019)

State and Local Minimum Wage Laws Continue to Expand



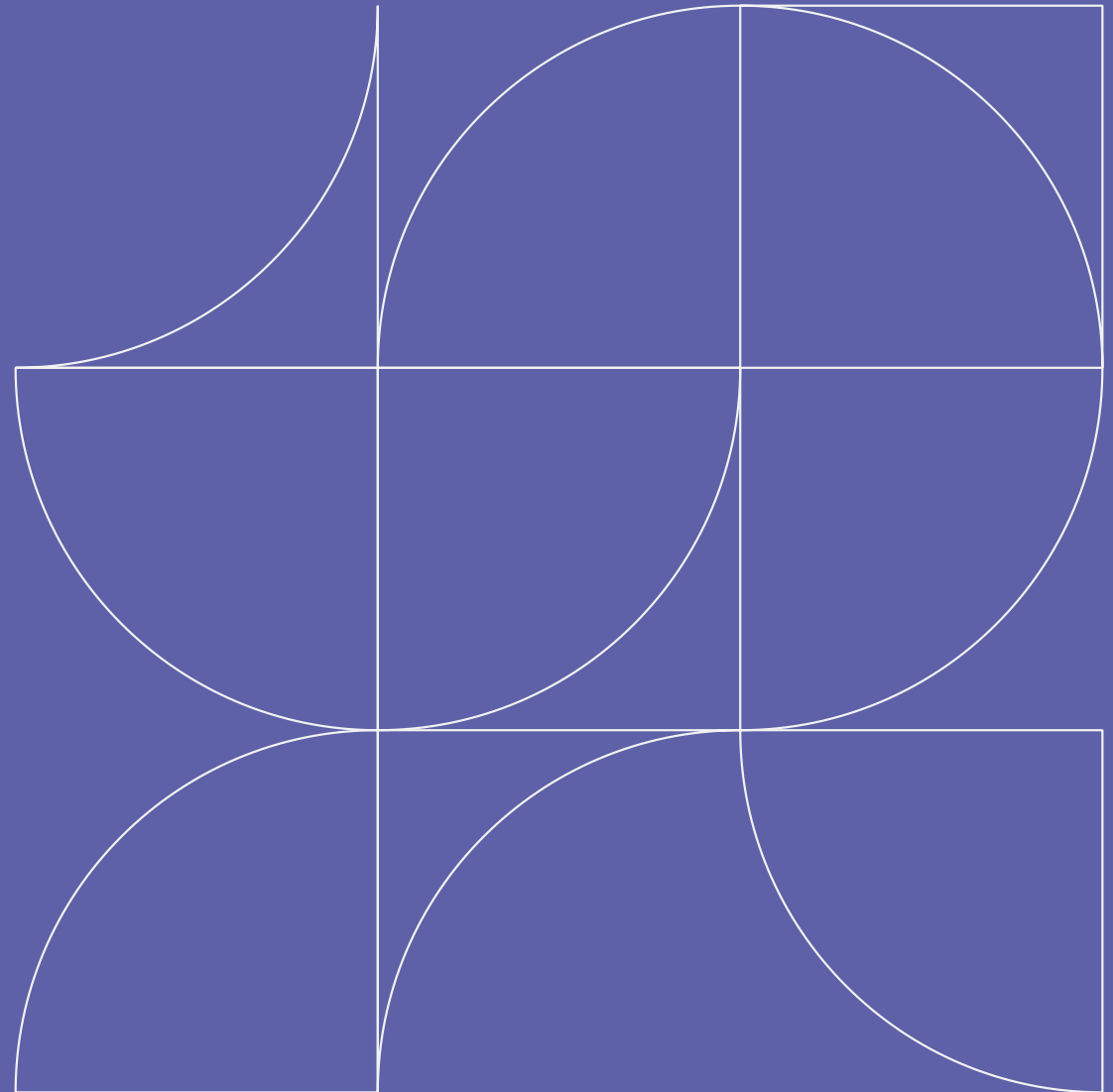
Action Items



1. Increase minimum wage rates, as ordinances take effect, for all non-exempt employees in affected jurisdictions.
2. Ensure that required posters are being displayed.
3. Ensure that salary-exempt administrative, executive, and professional employees continue to meet the threshold salary (twice the state minimum wage for a 40-hour week), which now is \$54,080 (2 times \$13/hour times 40 hours/week times 52 weeks/year).

Lactation Accommodation Requirements Expansion

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Lactation Accommodation Requirements Expanded



Requires employers to provide a lactation room for employees that meets the following requirements:

- Not a bathroom
- In close proximity to the employee's work area
- Shielded from view
- Free from intrusion while the employee is lactating
- Safe, clean, and free of hazardous materials
- Containing a surface to place a breast pump and personal items
- Containing a place to sit
- With access to electricity or alternative devices (e.g., extension cords, charging stations) that may be needed to operate an electric or battery-powered breast pump
- With access to a sink with running water and a refrigerator suitable for storing milk.

**If a multipurpose room is used for lactation and other uses, lactation must take precedence over the other uses.*

More Lactation Accommodation



- Written policy requirement
- Policy must include ***all*** of the following:
 - Statement about an employee’s right to request lactation accommodation;
 - Process by which the employee makes such a request;
 - Employer’s obligation to respond to such request; and
 - Statement about an employee’s right to file a complaint with the Labor Commissioner for a any violation

Lactation Accommodation Requirements Expanded



Violations:

- Denial of lactation break time or space will be a violation under rest period laws
- Employer subjected to \$100 penalty per violation
- Bill contains an anti-retaliation provision and will also require an employer to develop and implement a policy regarding any lactation accommodations, and make it readily available to employees.

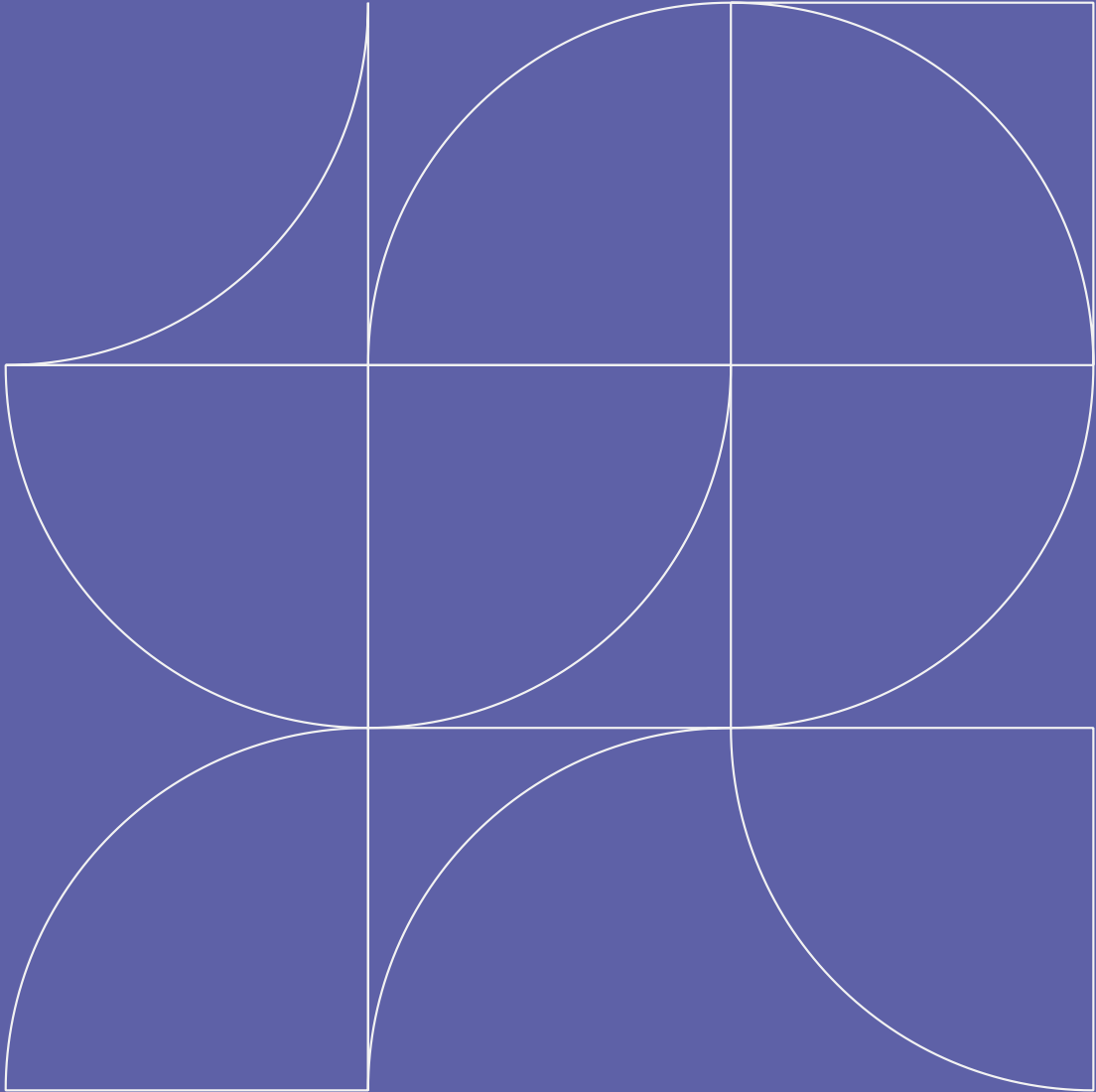
Action Items



1. Develop and distribute a lactation accommodation policy.
2. Have a system to pay for failures to provide for rest breaks (including lactation accommodation).
3. Review physical facilities for compliance.
4. Consider COVID-19 implications if space previously used for lactation accommodations has been repurposed for social distancing requirements.

Paid Family Leave Expansion

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Expanded Paid Family Leave

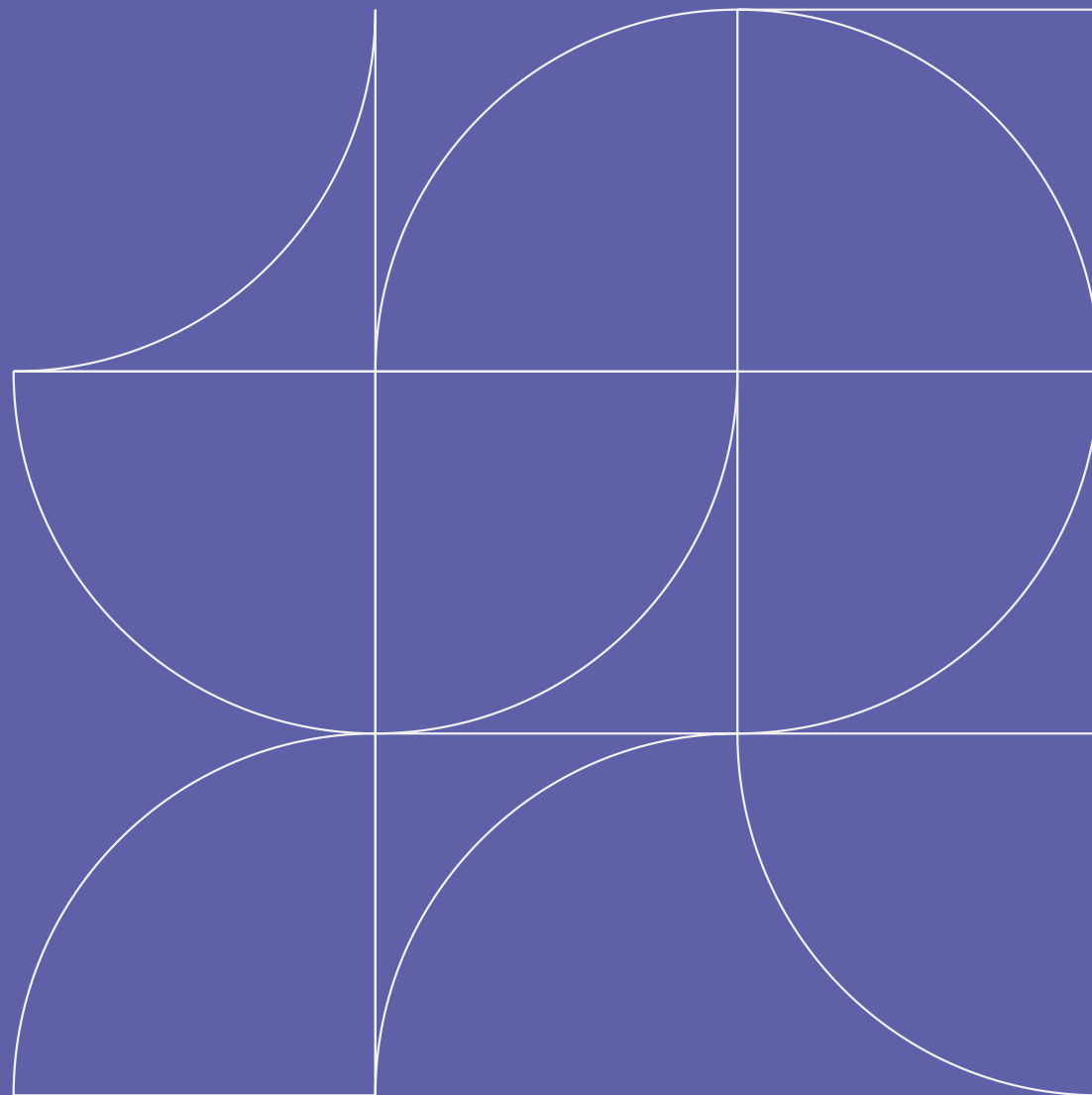
Paid Family Leave Expanded



- As of July, the paid family leave benefit is eight weeks instead of six
- Employer subjected to \$100 penalty per violation
- Bill contains an anti-retaliation provision and will also require an employer to develop and implement a policy regarding any lactation accommodations, and make it readily available to employees.

FEHA Updates

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FEHA Updates & Administrative Extensions



FEHA – Statute of Limitations Extension

- A complainant now has three years—instead of just one year—to file a complaint with the DFEH
- The law does not revive claims that had already lapsed by January 1, 2020

FEHA – Protection for Hairstyles

- The FEHA’s definition of race now extends to traits historically associated with race, such as hair texture and “protective hairstyle.”
- Examples, braids, locks, and twists

More Donation Leave

- Unpaid leave (beyond existing paid leave) is now available for organ and bone marrow donors

FEHA Updates & Administrative Extensions

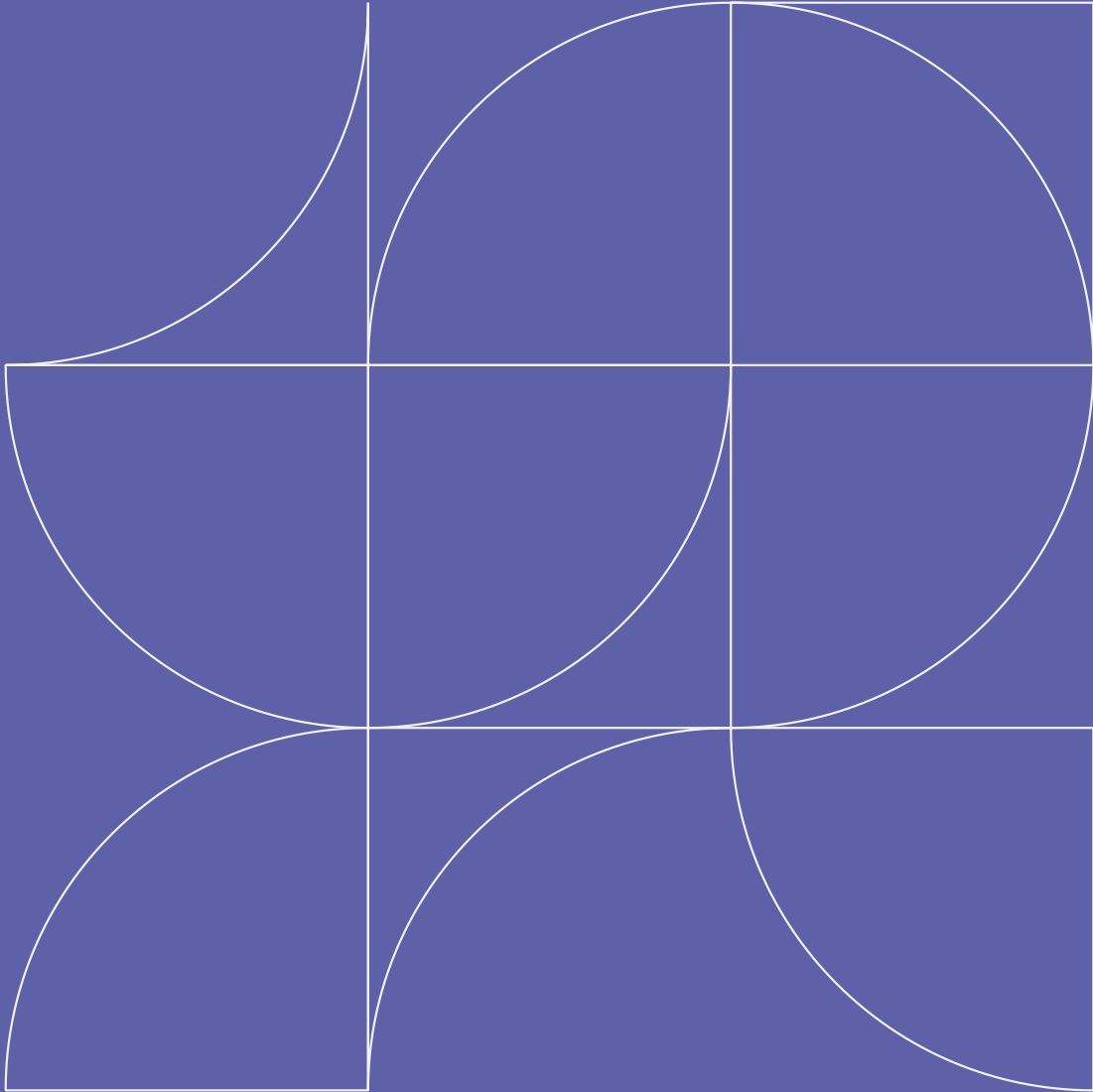
Action Items



1. Audit personnel file retention system to ensure that all personnel files are retained for at least three years.
2. Review any dress code to ensure that it is not discourage hairstyles associated with a particular ethnicity.
3. Update any bone marrow or organ donation leave policies.

California Consumer Privacy Act

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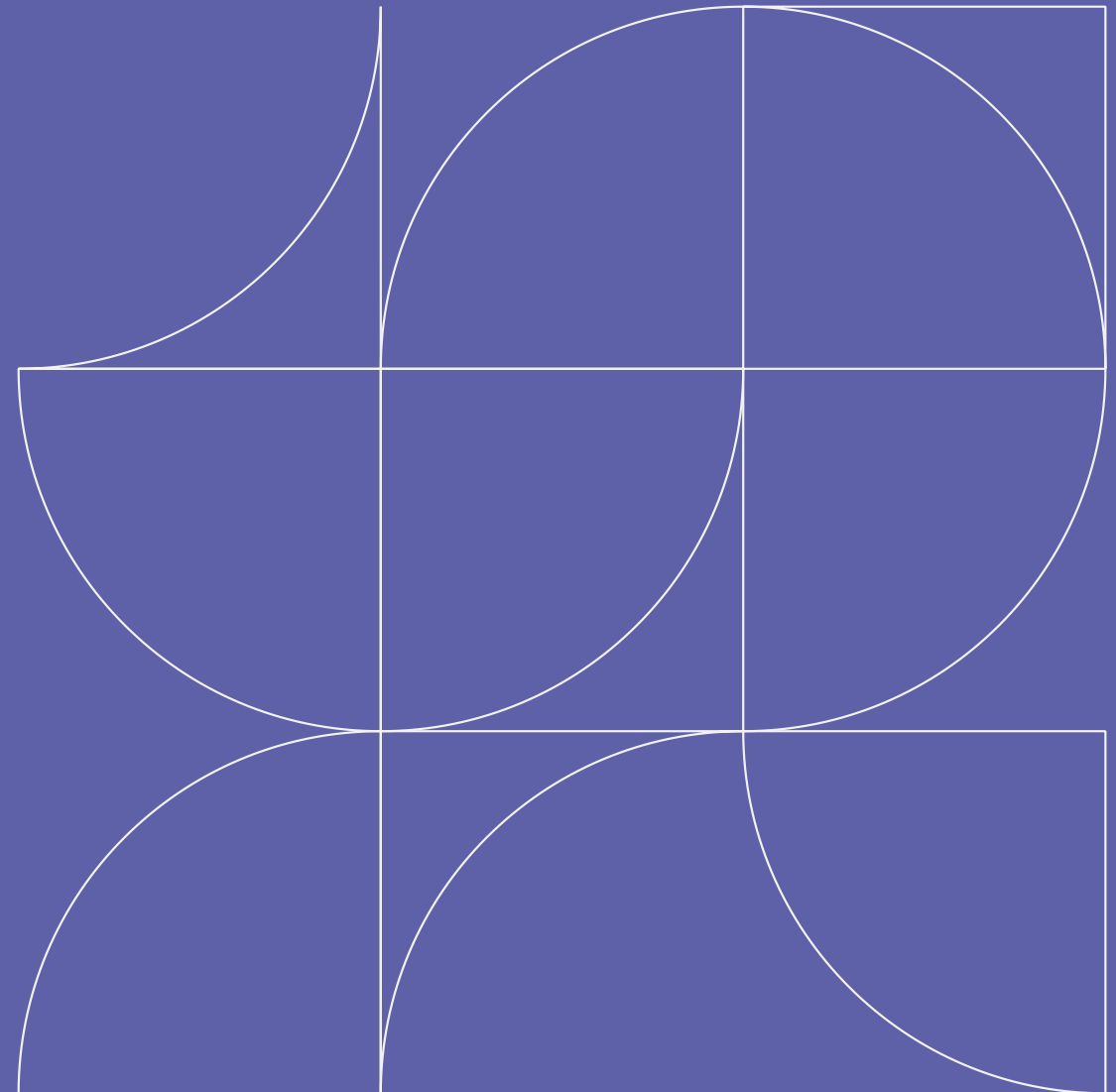
California Consumer Privacy Act



- Employee privacy policy, describing the categories of personal information to be collected and purposed
- Draft regulations include general principles to ensure the policy is not “unfair” or “deceptive”
 - Use “plain, straightforward” language.
 - Use a format that draws the employee’s attention to the policy
 - Make the policy available in languages usually used to provide notices to employees
 - Make the policy accessible to employees with disabilities
- Privacy in light of COVID-19
- Attorney General enforcement commences on July 1, 2020

New Sexual Harassment Training Requirements

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Sexual Harassment Training Requirements Expanded



Deadlines Clarified

- The deadline for non-supervisory employee training has been extended to January 1, 2021.
- Supervisors who received 2018 training need not be trained again until 2020.
- Employers still must train new hires within six months of starting a supervisory position.

Sexual Harassment Training Requirements Expanded

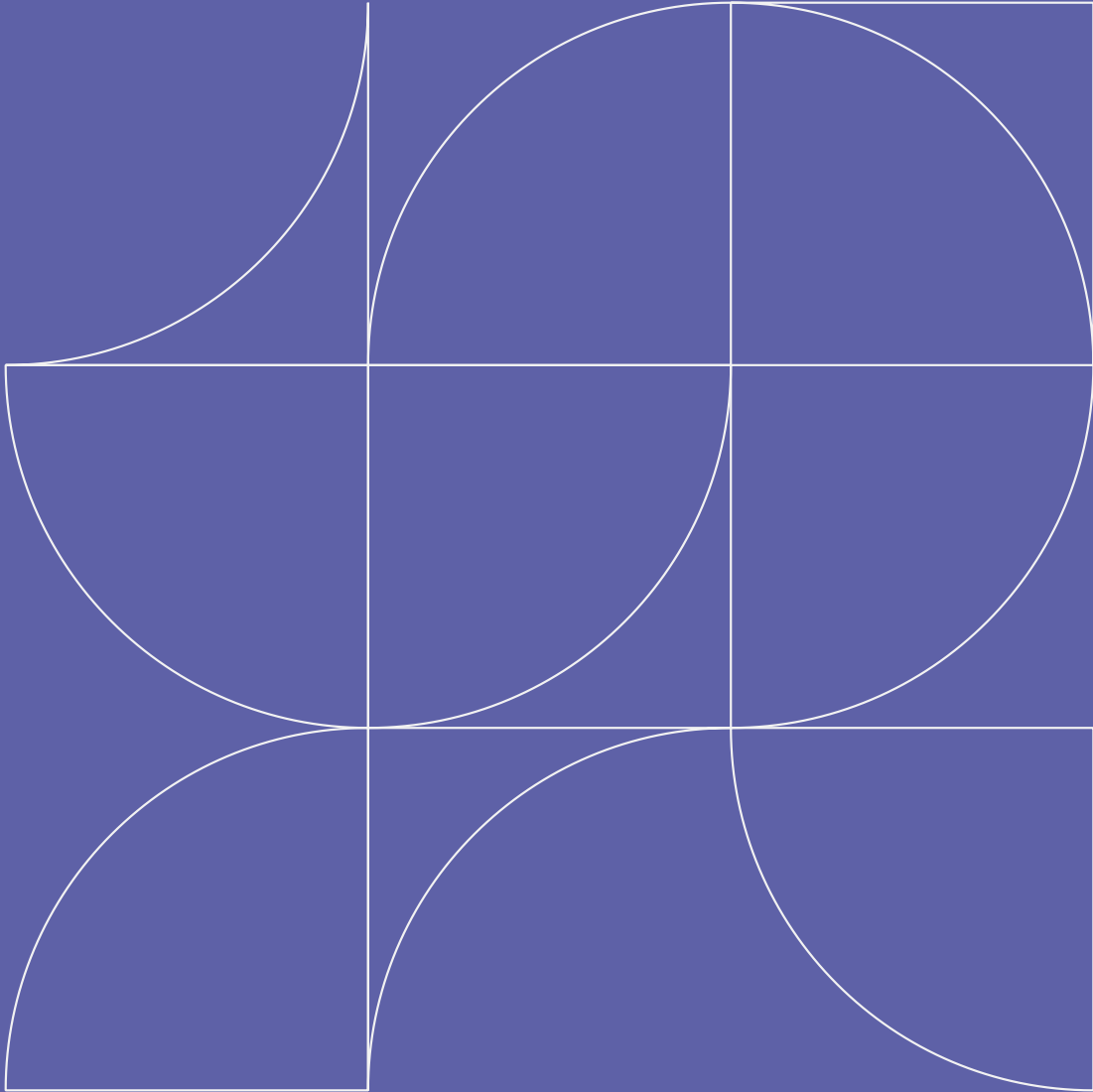


Special Industry Requirements

- Seasonal, temporary, or other employees hired to work for less than six months must begin receiving mandatory sexual harassment training by **January 1, 2021**.
- Special training provisions apply to construction industry employers employing workers pursuant to a multiemployer collective bargaining agreement.
- Further regulating sexual violence and harassment prevention training required for janitorial workers.

More Legislative and Judicial Updates

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More Legislative and Judicial Updates



Changes For Employers

- AB 673: Amendment to Labor Code § 210
 - Enables employees to seek penalties for untimely or discriminatory wage payments
 - Employees have to choose whether to recover under § 210 or under PAGA
- Regular Rate Issues
 - Premium pay for violations of provisions for meal periods, rest periods, and recovery periods need only be at base hourly rate
 - Rate at which to pay sick leave required by California law must be regular rate (often higher than base rate)

More Legislative and Judicial Updates



Limits to “Unlimited Vacation”

- Traditional Rule: Unused accrued vacation pay is due upon termination
- Some employers have made vacation “unlimited”—resulting in no accrued vacation due on termination
- April 2020 Court of Appeal decision upholds claim for unpaid vacation, where vacation plan was not unlimited in practice and where policy was not conveyed in writing
- The court identified features of a workable written “unlimited vacation” plan
 - Statement that PTO is not additional wage but rather form of flexible work scheduling
 - Description of consequences of failing to schedule time off
 - Allowing sufficient opportunity to take time off or work fewer hours instead
 - Administered fairly so it’s not a de facto “use it or lose it policy” or otherwise inequitable

More Legislative and Judicial Updates



While the California Legislature during 2019 continued to create challenges for business, the California Supreme Court occasionally rejected invitations to expand employer liability.

- Rejecting use of PAGA claims to collect unpaid wages
- Rejecting efforts to collect unpaid wages from the employer's payroll company

The Courts giveth, and the Courts taketh away...

- Employers who require employees to call in to see if they must work that day must pay for reporting time pay to employees who are ready to work and yet not given work that day
- Wage statement showing retroactive overtime pay on bonus was unlawful for failing to specify rate of pay and hours worked with respect to bonus

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Seyfarth's COVID-19 Resources



Post-Pandemic Recovery and Renewal

Planning and Executing a Strategic and Successful Return to Work

We have assembled a cross-disciplinary Recovery and Renewal team who can advise you on the current state of business impact as a result of COVID-19, and what the future holds for business. Our team of 100+ lawyers is already deeply credentialed, having advised thousands of clients on the developments of the rapidly changing pandemic across the globe. We have a deep understanding of how the pandemic is affecting businesses and industries deemed essential and non-essential, and the related legal, business, and workforce issues specific to all. Likewise, we are already helping clients build phased return-to-work plans by modeling various scenarios for how business might resume—from continued social distancing to a full engagement of their workforces in full operations.

We are ready to leverage our knowledge to help you reengage in business—and grow.

We recognize that your business is unique and the legal landscape faces unprecedented complexity. Accordingly, we employ a three-step process to prepare a comprehensive, bespoke return-to-work toolkit for our clients.

1. Review

- Investigation and audit of pre-pandemic business status quo
- Step-by-step checklist addressing business elements and pandemic
- Establish goals and overall business strategy for near, mid, and long term

2. Analysis

- Business review in the new legal and business landscape using Seyfarth's in-depth **Return to Work Treatise**
- Strategic conversations regarding return-to-work timing, business considerations, and growth opportunities
- Identification of legal landmines with strategies for minimizing risk
- **Return to Work Selection Process Guide**

3. Implementation

- Execution of custom plan for return to work: phased/all/none; employee selection; employee screening protocol; workplace safety plan; communications cascade
- Access to Seyfarth's first-in-class **Policy, Communications & Tracker Repository**
 - Positive test / confirmed Case
 - Temperature screening
 - Antibody testing
 - Social distancing
 - Face covering
 - Business travel
 - Expense reimbursement
 - Visitor self-Declaration
 - Work from home
 - FFCRA request
 - Infectious disease

- **Seyfarth's COVID-19 Resource Center**

- www.seyfarth.com/covid19

- **Sign Up For Seyfarth's Latest COVID-19 Updates**

- <https://connect.seyfarth.com/33/48/landing-pages/rsvp-blank---covid-19.asp?sid=blankform>

- **Seyfarth Post-Pandemic Recovery and Renewal**

- <https://www.seyfarth.com/services/practices/advisory/post-pandemic-recovery-and-renewal.html>

- **Seyfarth COVID-19 Webinars on Demand**

- www.youtube.com/playlist?list=PLg0AI7yn7R3cVmPQJEUtYiIEffzrSgJdv

Thank You!

