



HR Considerations for California Employers in 2022 & Beyond

Cristina Miller | Partner

SW&M 2022 Legal Update Seminar – 2/17/2022

1



Disclaimer

These materials were prepared by the attorneys of Styskal, Wiese & Melchione, LLP. Although this presentation was prepared with care, it is not designed to be a complete or definitive analysis of the law in this area. Moreover, this presentation was prepared with the understanding that it reflects the authors' perception of the state of the law as of this date. Furthermore, the information contained in this presentation is not intended to constitute and should not be received as legal advice and does not in any way create an attorney-client relationship.

If you have any questions, or require further information on these materials, please do not hesitate to call our office at (818) 241-0103.

2

2

COVID Legal Developments

California Supplemental Paid Sick Leave (SB 114)

3

3

SPSL (2.0)

- It's back (again!)
 - Applies to employers with 26 or more employees
 - Two categories of up to 40 hours each of leave
 - Retroactive to 1/1/2022 and set to expire 9/30/2022

4

4

Category 1 of SPSL

- Up to 40 hours of SPSL if the EE is unable to work or telework for any of the following reasons:
 - Quarantine or isolation
 - Advice from a healthcare provider
 - Attending vaccine or vaccine booster appointment*
 - Vaccine symptoms*
 - Experiencing COVID-19 symptoms
 - Caring for a family member
 - School closure due to COVID-19 on site

*ER may limit SPSL to 24 hours unless EE provides verification from health care provider that additional time is needed

5

5

Category 2 of SPSL

- Up to 40 hours of SPSL if EE or family member (for whom the EE is providing care) tests positive for COVID-19
 - Caveats:
 - ER may require documentation of positive test for EE or family member
 - If EE does not provide documentation, SPSL is not required (BUT, be mindful of other leave rights!)

6

6

Request for Leave

- ER must make SPSL available for immediate use upon:
 - Written request; or
 - Oral request
- This means ER cannot require EE to provide the request in writing (email is included)!

7

7

How much leave is available?

- Full-time EEs receive 40 hours for each Category of SPSL
- EEs who work less than “full-time” are entitled to the number of hours that the EE regularly works in one normally scheduled week

What about variable schedules?

8

8

What is the rate of pay?

- EEs must be compensated based on their “regular rate of pay”
- SPSL may be capped at \$511 per day and \$5,110 in total for each EE

9

9

Paystub Requirements

- EE’s paystub must show the amount of SPSL that the EE has used
- Note: This is different than the 2021 SPSL

10

10

SPSL 2.0 and Cal/OSHA Exclusion Pay



- ER cannot require that an EE use the “exclusion pay” under Cal/OSHA ETS
- What does this mean?
 - ERs should track COVID-19 cases and close contacts in the workplace to determine if exclusion pay is applicable

11

11



Updates to Cal/OSHA ETS & Workplace Guidelines

12

12

Workplace Guidelines – What is the latest?



- CDC updated isolation and quarantine guidance – 12/27/2021
- CA DPH updated isolation and quarantine guidance – 1/8/2022
- Cal/OSHA updated FAQs now align ETS with CA DPH (for now)
- Key workplace considerations:
 - COVID positive case
 - Close contact (exposure)
 - Vaccine status (“fully vaccinated” or “up to date”)

13

13

Key Definitions



- “Close contact” – being within 6 feet of a COVID-19 case for cumulative total of 15 minutes or more in any 24 hour period.
- “High risk exposure period” – 2 days before symptoms or test and at least 10 days after test or symptoms appeared.

14

14

The Latest CA DPH Requirements



- **Exclusion Requirements for Employees Who Test Positive (Applies to all employees regardless of vaccination status):**
 - Employees who test positive for COVID-19 must be excluded from the workplace for at least 5 days.
 - Isolation can end and employees may return to the workplace after day 5 if symptoms are not present or are resolving, and a diagnostic specimen collected on day 5 or later tests negative.
 - If an employee is unable or chooses not to test and their symptoms are not present or are resolving, isolation can end and the employee may return to the workplace after day 10.
 - If an employee has a fever, isolation must continue and the employee may not return to work until the fever resolves.
 - If an employee's symptoms other than fever are not resolving, they may not return to work until their symptoms are resolving or until after day 10 from the positive test.
 - Employees must wear face coverings around others for a total of 10 days after the positive test, especially in indoor settings.

15

15

Employees Who are Exposed to Someone with COVID-19 (Quarantine)



- **Applies to employees who are unvaccinated or fully vaccinated but not boosted:**
 - Employees must be excluded from the workplace for at least 5 days after their last close contact with a person who has COVID-19.
 - Exposed employees must test on day 5.
 - Quarantine can end and exposed employees may return to the workplace after day 5 if symptoms are not present and a diagnostic specimen collected on day 5 or later tests negative.
 - If an employee is unable or chooses not to test and does not have symptoms, quarantine can end and the employee may return to the workplace after day 10.
 - Employees must wear face coverings around others for a total of 10 days after exposure, especially in indoor settings.

16

16

Modified quarantine allowed for fully vaccinated and asymptomatic employees:

- EE is not required to be excluded from work if:
 - A negative test is obtained within 3-5 days after last exposure;
 - EE wears a face covering for 14 days; and
 - EE does not have/develop symptoms

17

17

What about Boosters?

- EEs who are boosted (aka “up to date”) and asymptomatic with a close contact do not need to quarantine if they:
 - Test on day 5 with a negative result; and
 - Wear face coverings for 10 days after exposure.

18

18

Testing



- Antigen tests are recommended (PCR are ok)
- At-home tests are not acceptable for ETS

19

19

Exclusion Pay



- COVID positive EEs and those with a “close contact” with a COVID-19 case must be excluded from the workplace.
- Originally 10 days, but need to follow the updated CA DPH rules (for now)
- Exclusion pay applies even for asymptomatic EEs able to work
- Exclusion pay is not required where the ER demonstrates that close contact is not work-related.

Takeaway: Contact tracing and exposure management is critical for exclusion pay eligibility!

20

20

When Do Employers Have to Pay for Testing?



- Health insurance must cover the cost of at-home COVID tests as of 1/15/2022
- Cal/OSHA ETS on ER paid COVID testing
- CA Labor Code 2802 – ER pays for “necessary” costs incurred by EE

Bottom line: Best defense is to pay for COVID testing and time for tests.

21

21



Other CA Law Updates

New California Laws

22

22

Settlement Agreement Restrictions (AB 331)



- Expands prohibition on non-disclosure provisions within settlement agreements to workplace harassment or discrimination not based on sex
- Now covers claims of harassment, discrimination or retaliation based on any protected class (previously only applied to sex-based claims)
- Applies to agreements entered into on or after January 1, 2022

23

23

Settlement Agreement Restrictions (AB 331) (cont.)



- If settlement agreement includes a non-disparagement clause, the agreement must also include the following language:
 - “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”

24

24

Settlement Agreement Restrictions (AB 331) (cont.)



- Additional requirements for settlements agreements:
 - Must notify employee that he/she has right to consult with an attorney
 - Provide employee with a reasonable time period of not less than 5 business day to do so
- Action – Update Settlement/release/severance agreement templates

25

25

Electronic Documents (SB 657)



- Allows required postings to be emailed to employees
 - Need to attach the document
- Employers must still post all required notices in the physical workspace
 - Unclear on whether this applies to notices required by federal law (e.g., FMLA)?

26

26

Criminalization of Wage Theft (AB 1003)



- Wage theft is now “Grand Theft” under the California Penal Code!
 - Defined as intentional theft of wages in excess of \$950 from any one employee or \$2350 from 2 or more employees, by an employer in any consecutive 12-month period
- Includes independent contractors with the meaning of employee

27

27

Arbitration Agreements in California: Update on AB51



- AB 51 passed in 2019 and would prohibit mandatory arbitration agreements
- Prior to January 1, 2020 enactment, temporary restraining order issued to prevent AB 51 from taking effect
- September 15, 2021, Ninth Circuit panel reversed, in part, lower court’s holding that AB 51 was preempted by FAA
- U.S. Chamber of Commerce petitioned Ninth Circuit for re-hearing *en banc* to appeal the decision

28

28

Arbitration Agreements in California: Update on AB51 (cont.)



- What does this mean for employers?
- Class action Complaints and PAGA actions

29

29



Key California Court Decisions

30

30

Donohue v. Amn Services, LLC – Rounding on Meal Periods



- California Supreme Court decision (February 25, 2021)
- Rounding meal period time prohibited
- Must provide at least 30 minutes
- Court noted that California laws “set precise time requirements for meal periods... infringing on meal periods by even a few minutes cannot be reconciled...”

31

31

Takeaways



- Precise clocking in and out are a must!
- Top class action and PAGA litigation risk
- Train your managers

32

32

Magadia v. Wal-Mart – Paystubs and PAGA



- Ninth Circuit reversed a \$120m award against Walmart (May 28, 2021)
 - Employer may make retroactive lump-sum payments to employee's overtime rate to factor non-discretionary bonus payments without showing "hourly rate" on the employee's wage statement.
 - Employee does not have standing to bring PAGA claims in federal court for alleged Labor Code violations that the employee did not suffer themselves.

33

33

Ferra v. Loews Hollywood Hotel, LLC – Meal Period Premium



- California Supreme Court decision held that the premium payment for a late or missed rest or meal period is to be paid at the employee's "regular rate of pay"
- Not base hourly rate or straight-time pay

34

34

Ferra v. Loews Hollywood Hotel, LLC – **Meal Period Premium** (cont.)


- Why?
 - California law uses term “regular rate of compensation” in context of premium payment
 - “Regular rate of pay” is used for over-time calculation statute
- What?
 - California employers must now factor bonuses and other non-discretionary compensation into the break premium rate of pay
 - Retroactive!!!

35

35

Questions?

Please use the Q&A function at the bottom of your Zoom screen to submit your questions.

- 
- 1) Click the Q&A button on the bottom of your Zoom window to open the Q&A window
 - 2) Enter your question into the Q&A box, then click **Send** (you can select **Send Anonymously** if you do not want your name attached to your question)
 - 3) If the host replies via the Q&A, you will see a reply in the Q&A window. The host may also answer your question live (out loud). You will see a notification in the Q&A window if the host plans to do this



36


36



**Thank
you!**

Contact Us:

Styskal, Wiese & Melchione, LLP
550 N. Brand Blvd, Suite 550
Glendale, CA 91203

 (818) 241-0103

 www.swmlp.com

 Cristina.Miller@swmlp.com

 <https://tinyurl.com/swm-linkedin>

37