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HR CONSIDERATIONS FOR CALIFORNIA EMPLOYERS IN 2023 AND BEYOND

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2023 SW&M Hybrid Legal Update Seminar

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California Legislature is Back to Normal

- First "return to normal" year for the legislature since the start of the COVID-19 pandemic.
- No disruption in legislative process or limits on introduction of new bills.
- California has continued its path of expanding workers' rights with new labor and employment laws.
- California Department of Fair Employment and Housing (DFEH) is now the California Civil Rights Department.

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CALIFORNIA LAWS

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AB 2188 – Employment Discrimination and Cannabis

- Prohibits an employer from taking adverse action based on:
  1) An employee's use of cannabis off the job and away from the workplace; or
  2) A drug-screening test that found the employee to have nonpsychoactive cannabis metabolites in their hair, blood urine, or other bodily fluids
     - An effort to try to move employers away from metabolites testing
     - Adverse action based on THC – positive test results is still permitted

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AB 1949 – Bereavement Leave

- Five days of bereavement leave upon the death of a family member.
- Unpaid, but an employee can use accrued paid time.

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AB 1949 – Bereavement Leave (cont.)

- Applies to employers with **5 or more** employees.
- Applies to employees who have been employed for **at least 30 days** prior to the leave.
- Family member is spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.
- Days of leave **need not be consecutive** and must be completed **within 3 months** of the death of the family member.

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AB 1949 – Bereavement Leave (cont.)

- If you provide less than five days of **paid** bereavement leave, you must provide additional unpaid days (ex. 3 paid days + 2 additional unpaid days).
- Employer can ask for **documentation** to be provided within 30 days of the first day of the leave (death certificate, published obituary, written verification of death, burial or memorial service from a mortuary, etc.).
- Anti-retaliation and confidentiality provisions.
- CBA exemption if expressly provides for equivalent bereavement leave.

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AB 1041 – CFRA/PSL "Designated Person"

- Expands CFRA and PSL to allow employees to take a leave for a "designated person."
- Employers can limit workers to having one designated person per 12-month period.

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AB 1041 – CFRA/PSL "Designated Person" (cont.)

- CFRA – anyone related by blood or the **"equivalent of a family relationship"**.
  - Can you challenge this? Probably an uphill battle.
- PSL – just says "designated person" but **does not define**.
- Under both laws the designated person can be designated at the time the employee requests leave (but again can limit to one designated person per 12-month period).

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SB 1162 – Pay Transparency

- Makes changes related to providing pay scale information to current employees and including in job postings.
- Also makes changes to pay data reporting requirements.

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SB 1162 – Pay Data Reporting Provisions

- Expands upon SB 973 from 2020
- **NEW!** Requires employers that have 10 or more employees hired through labor contractors to also report pay data on those employees.
- **NEW!** Expands pay data reporting to include median and mean hourly rate.
- **NEW!** Enacts civil penalties ($100/$200 per employee) for failure to report pay data.
- **NEW!** Changes report submission data from March to second Wednesday of May beginning in 2023.

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SB 1162 – Pay Scale Information

- Part of a growing trend of state and local legislation requiring pay scale information in job postings.
- Current or pending requirements in CO, WA, New York, NYC and other jurisdictions.

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Current California Law

- Labor Code Section 432.3.
- No use of salary history.
- An employee, upon reasonable request, shall provide the pay scale for a position to an applicant for employment.
- "Pay scale" means a salary or hourly wage range.
- "Reasonable request" means a request made after an applicant has completed an initial interview with the employer.

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Current California Law (cont.)

- Labor Code Section 232
  - No **discharge or retaliation for disclosing their wages**.
  - No waiver or other document denying the right to disclose wages or otherwise require employee refrain from disclosing wages.

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Current California Law (cont.)

- Labor Code Section 232.5
  - No **discharge or retaliation for discussing or disclosing information about working conditions.**
  - No waiver or other document denying the right to discuss or disclose information about working conditions or otherwise require that employee refrain from disclosing information about working conditions.

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SB 1162 – Current Employees

- An employer, upon request, shall provide the pay scale for the position in which the employee is currently employed.
- **This applies to employers of all sizes.**

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SB 1162 – Job Postings

- An employer with 15 or more employees shall include the pay scale for the position in any job posting.
- An employer with 15 or more employees that engages a third party to announce, post, publish or otherwise make known a job posting shall provide the pay scale to the third party. The third party shall include the pay scale in any job posting.

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SB 1162 - Applicants

- This is in addition to the job posting requirement.
- Maintains the requirement for employers of **any size** to provide the pay scale for a position to an applicant upon reasonable request.
- Eliminates the language that this means after an applicant has completed an initial interview.

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SB 1162 – Definition of "Pay Scale"

- "*Pay scale*" means the salary or hourly ranges that the employer **reasonably expects to pay** for the position.
- "*Job posting*" is not defined in the law nor has DIR provided guidance.

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SB 1162 – New Recordkeeping Requirements

- Must maintain records of the **job title** and **wage rate** history for each employee for the duration of employment **plus three years.**
- Records shall be open to inspection by the Labor Commissioner.
- If an employer fails to keep records, there shall be a **rebuttable presumption** in favor of the employee's claim.

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SB 1162 - Enforcement

- Civil Penalty of $100 to $10,000 per violation.
- For a first violation, no penalty shall be assessed upon demonstration by the employer that all job postings for open positions have been updated to include the pay scale as required.
- Labor Code Section 432.3 allows a "person who claims to be aggrieved" to file a complaint with the Labor Commissioner or a civil action for injunction relief and other relief.

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SB 1044 – Retaliation and "Emergency Conditions"

- Prohibits an employer, in the event of an **"emergency condition"**, from taking adverse action against an employee for refusing to report to, or leaving, a workplace or worksite because the employee has a "reasonable belief" that the workplace or worksite is unsafe.
- An **"emergency condition"** is defined to mean: (1) conditions of disaster or peril caused by natural forces or a criminal act; or (2) an order to evacuate a workplace, worksite, a worker's home, or the school of a worker's child.

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SB 1044 – Retaliation and "Emergency Conditions" (cont.)

- **"Emergency condition"** does not include a health pandemic, so SB 1044 will not be applicable to employees that claim the worksite is unsafe due to COVID-19.
- An employee's belief that the workplace is unsafe is **"reasonable"** if a person under similar circumstances would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.

Take Note: Does <u>not</u> apply to employees of a "depository institution."

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SB 523 – FEHA: Reproduction Health Decision-Making

- Adds "reproductive health decision-making" to the list of protected categories under the Fair Employment and Housing Act.
  - Definition: includes a decision to use or access a particular drug, product, or medical service for reproductive health.

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Some Big Bills *Did Not* Move

- AB 1651 – Labor's big "privacy" bill.
- AB 1993 – Employer vaccine mandates.
- AB 2182 – Employment discrimination based on "familial responsibilities".
- AB 2932 – Four-day workweek.
- SB 1189 – Biometric information (like Illinois BIPA).

Stay Tuned! – These Could Come Back in 2023!

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KEY 2022 CALIFORNIA COURT DECISIONS

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Camp v. Home Depot, U.S.A. Inc. 2022 WL 13874360 (Oct 24, 2022)

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Camp v. Home Depot, U.S.A. Inc. 2022 WL 13874360 (Oct 24, 2022)

- Home Deport used the "Kronos" electronic timekeeping system, which recorded, to the minute, the time that employees punched in and out for their shifts. At the end of each shift, Home Depot applied a quarter-hour rounding to each employee's total shift time.
- Home Depot moved for summary judgment on the grounds that the policy was neutral on its face and neutral as applied in conjunction with past California cases. The lower court granted the ruling.

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Camp v. Home Depot, U.S.A. Inc. 2022 WL 13874360 (Oct 24, 2022)

- The California Court of Appeal, citing to more recent cases, reversed the lower court and found that founding was impermissible.
  - Focused on court cases indicating you have to pay to the minute.
  - Focused on access to better technology that eliminates the need for rounding.
  - Focused on how the employer was able to capture the exact amount of time worked.

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Camp v. Home Depot, U.S.A. Inc. 2022 WL 13874360 (Oct 24, 2022)

- The Camp case reminds employers that rounding policies shall be scrutinized and that a review of such policies should be done immediately.
- Companies with electronic timekeeping should pay close attention to this ruling and consider eliminating rounding policies.

Takeaway: Rounding practices likely to go away!

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Johnson v. WinCo Foods, LLC 37 F.4th 604 (9th Cir. 2022)

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Johnson v. WinCo Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- WinCo Foods required successful job applicants to take a mandatory drug test before they could begin their employment. WinCo paid the drug testing facility's fee, but applicants were required to pay for the travel expenses associated with said drug testing and were not reimburse for their time.
- Johnson sued on behalf of himself and a class of WinCo employees, seeking reimbursement for the time and travel expenses required to take the test arguing that they were employees when they took the drug test.
- **Issue:** Whether WinCo is required to reimburse job applicants for the time and travel expense associated with completing a mandatory drug test as a condition of employment.

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Johnson v. WinCo Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- **Holding: Johnson and other WinCo applicants were not employees at the time they were required to undergo mandatory drug testing. As such, WinCo is not required to compensate for the time and travel expenses associated with mandatory drug testing**.
- Although WinCo exercised control over the mandatory drug testing, the Court found that control over a drug test as part of the job application process is not control over the performance of the job. Therefore, the applicants were not yet employees when they underwent drug testing.
- Applying principles of California contract law, the Court held that WinCo job applicants did not become employees until they satisfied the condition of passing the pre-employment drug test. Accordingly, the drug test was a condition precedent to employment, and applicants were not entitled to reimbursement.

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Johnson v. WinCo Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- Takeaways:
  - Employers are not required to compensate job applicants for time and expenses spent taking drug tests as a condition precedent to employment.
  - The fact that employers control the manner in which certain activities take place, such as job interviews, background checks, and drug testing, *does not* convert applicants into employees for purposes of compensation.
  - To avoid being required to reimburse for expenses such as drug testing, employers must emphasize that these activities are conditions precedent to a contingent job offer, either orally or in writing. For example, in *WinCo Foods* the Hiring Manager of WinCo was required to tell applicants that the pre-employment drug test was a condition of WinCo's contingent job offer.

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Herbert v. Barnes & Noble, Inc. 78 Cal. App 5th 791 (2022)

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Herbert v. Barnes & Noble, Inc. 78 Cal. App 5th 791 (2022)

- Vicki Hebert applied to work for Barnes & Noble in 2018. During the application process, Barnes & Noble's consumer reporting agency emailed Herbert a link to a website that displayed Barnes & Noble's consumer report disclosure.
- Herbert alleged that Barnes & Noble willfully violated the federal Fair Credit Reporting Act (FCRA) by providing job applicants with a disclosure that included extraneous business-to-business language that was unrelated to the topic of consumer reports.
- Barnes & Noble filed a motion for summary judgment asserting that the "extraneous information" was included in the disclosure due to an inadvertent drafting error that resulted from a "miscommunication" between its employees, its outside counsel, and its consumer reporting agency.
- ***Issue: Whether a reasonable jury could find that Barnes & Noble's alleged FCRA violation was willful.***

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Herbert v. Barnes & Noble, Inc. 78 Cal. App 5th 791 (2022)

- Holding: The Court of Appeal reversed a grant of summary judgment to Barnes & Noble, holding that a jury could conclude that the violation was willful.
- The "extraneous information" constituted a willful violation because it violated an unambiguous provision of the FCRA; at least one of the company's human resources employees was aware of the extraneous information in the disclosure; the company may not have adequately trained its employees on FCRA compliance; and/or the company may not have had a monitoring system in place to ensure compliance with the FCRA.

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Herbert v. Barnes & Noble, Inc. 78 Cal. App 5th 791 (2022)

- Takeaways:
  - 15 U.S.C. §1681(b)(2)(a) clearly and unambiguously prohibits a prospective employer from including terms on a disclosure form in addition to those mandated by the FCRA.
  - Generally, "willfulness" under the FCRA presents a question of fact properly reserved for the jury; as such, it is an inappropriate ground for a motion for summary judgment.
  - "Willfulness" under the FCRA incudes *reckless* statutory violations, in addition to knowing statutory violations.
  - It is unclear whether a FCRA defendant may invoke the advice-of-counsel defense to try to rebut a showing of willfulness; however, even in contexts where an advice-of-counsel defense is recognized, a defendant's good faith reliance on the advice of counsel is not a complete defense, but only one factor for consideration".

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Meza v. Pacific Bell Telephone Co 79 Cal. App. 5th 1118 (2022)

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Meza v. Pacific Bell Telephone Co 79 Cal. App. 5th 1118 (2022)

- Pacific Bell is a telecommunications corporation that had an incentive program for employees whereby each month, employees earned "points" that could be exchanged for merchandise based on the achievement of specified metrics. The points, which were a form of bonus, were earned over the course of an entire month, and the bonus amounts was not known until the close of that month. Accordingly, Pacific Bell calculated the overtime true-up after the close of the month and reflected it in the next month's first wage statement.
- Meza sued Pacific Bell, alleging that certain entries in Pacific Bell's wage statements violated the statutory requirements of California Labor Code § 226(a)(9) by failing to include the "rate" and "hours" attributable to Pacific Bell's lump sum overtime true-up payments.
  - Overtime true-up: additional overtime wages owed based on performance bonuses earned in earlier periods.

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Meza v. Pacific Bell Telephone Co 79 Cal. App. 5th 1118 (2022)

- **Holding: The statutory requirements of California Labor Code § 226(a)(9) do not require that employers list the "rates" and "hours" from prior pay periods underlying an overtime true-up calculation on an employee's wage statement. Thus, Pacific Bell's wage statements compiled with the requirements of § 226.**
  - This holding is consistent with the Ninth Circuit's interpretation of § 226(a)(9) in *Magadia v. Wal-Mart Associates, Inc.* 999 F 3d 668 (9th Cir. 2021).
- The Court of Appeal found that none of the variables involved in the overtime true-up calculation, such as the hours worked or rates of pay, related to the pay period when payment was actually issued. As such, these variables did not need to be listed on wage statements.

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Meza v. Pacific Bell Telephone Co 79 Cal. App. 5th 1118 (2022)

- Takeaways:
  - California Labor Code § 226(a)(9) does not require an employer to list the hours and rates from *prior* pay periods next to is calculations of an overtime true-up payment on an employee's wage statement.
  - The California Supreme Court has repeatedly held that an employer's obligation to provide information in connection with § 226 is limited to the pay period in which a statement was issued.
  - The California Legislature did not include a requirement in § 226 that employers include the hours and rates from prior pay periods on wage statements. **Caution:** if the Legislature amends the language of § 226 to include such a requirement, employers must comply accordingly.

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

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

- Moriana filed a Private Attorneys General Act (PAGA) action despite having entered into an arbitration agreement with her former employer, Viking River Cruises. In this agreement, Moriana agreed to waive her right to bring a class, collective, or PAGA representative action.
- Viking River moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her other representative PAGA claims. Applying the I*skanian* rule, the California courts denied the motion, holding that PAGA waivers are not enforceable and PAGA claims cannot be split into arbitrable "individual" claims and non-arbitrable "representative" claims.
- **Issue:** Whether the Federal Arbitration Act (FAA) preempts the rule invalidating contractual waivers of the right to bring a representative action under PAGA as set forth in *Iskanian*.

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

- **Holding:** The FAA allows the division of PAGA actions into individual and representative claims through an agreement to arbitrate; accordingly, Viking River was entitled to compel arbitration on Moriana's individual PAGA claim.
- The Supreme Court also concluded that a plaintiff's ability to bring representative PAGA claims is tethered to maintaining their own individual claims in the action. Therefore, if a plaintiff is ordered to arbitrate their individual PAGA claim, they would lack standing to continue pursuing representative claims in court. As such, a court would be required to dismiss the representative PAGA claims.

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

- Takeaways:
  - The FAA preempts any state law discriminating on its face against arbitration – for example, a law prohibiting the arbitration of a particular type of claim.
  - Nothing the FAA establishes a categorical rule mandating enforcement of PAGA waivers.
  - Sotomayor Concurrence: Emphasized that California courts have the last word on defining and interpreting PAGA. Additionally, the California Legislature can modify the scope of statutory standing under PAGA at any time.

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Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

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Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- Spectrum Security Services provides secure custodial services to federal agencies, such as transporting and guarding prisoners and detainees who require outside medical attention. Gustavo Naranjo worked as a guard for Spectrum.
- Naranjo was suspended and later fired after leaving his post to take a meal break, in violation of a Spectrum policy that required custodial employees to remain on duty during all breaks.
- Naranjo filed a class action on behalf of Spectrum employees, alleging that Spectrum had violated state meal break requirements under the Labor Code and other applicable wage orders. Naranjo sought "premium pay" for each day on which Spectrum failed to provide employees a legal compliant meal break.
- **Issue:** *Whether extra pay for missed meal and rest breaks constitute "wages" that must be reported on statutorily required wage statements during employment and paid within statutory deadlines when an employee leaves the job.*
- **Secondary Issue:** *What rate of pre-judgment interest applies to amounts due for failure to provide meal and rest breaks.*

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Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- **Holding:** Meal and rest break premium pay constitute wages for purposes of waiting time penalties. Thus, any premium pay this is not timely paid is subject to statutory waiting time penalties.
- An employer's obligation to provide an accurate and itemized wage statement includes an obligation to report premium pay for meal or rest break violations.
- The pre-judgment interest rate for claims alleging meal and rest break violations is the 7% default rate set by the California Constitution, not the 10% contractual rate set by statute.

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Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- Takeaways:
  - Meal and rest break premium constitutes wages. Therefore, premium pay must be paid within the statutory time limits when an employment relationship ends.
  - California Labor Code § 226 requires employers to provide an accurate itemized wage statement reporting all amounts earned and owing, not just amounts actually paid to the employee. For purposes of § 226, an employee who remains on duty without a break has "earned" premium pay. Therefore, failure to report premium pay on wage statements supports monetary liability for employers under § 226.

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FEDERAL LAW DEVELOPMENTS

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FTC Proposed Rule on Non-Compete Agreements

- FTC Proposed Rule on January 5, 2023.
- Would prohibit non-compete clauses with employees, independent contractors, interns and volunteers.
- ***"a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."***

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FTC Proposed Rule on Non-Compete Agreements

- Would also ban *de facto* non-compete clauses.
  - Broadly drafted non-disclosure agreements.
  - Contractual term requiring worker to repay training costs if worker terminates employment within a specified period when the required payment is not reasonably related to the costs incurred by the employer.

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Rescission and Notice of Rescission

- Appears to nullify any existing agreements within six (6) months from the date the rule takes effect.

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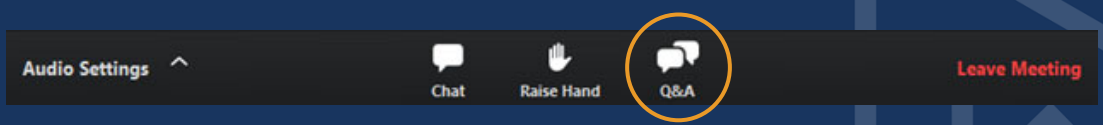
QUESTIONS?

Please click the Q&A button on the bottom of your Zoom window to open the Q&A window;

Enter your question into the Q&A box, then click Send.



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