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GOLDEN RULES FOR THE GOLDEN STATE MID-YEAR LEGAL UPDATE

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DISCLAIMER

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

Roadmap

- Some good news for employers in recent court cases
- Accommodations and Disability Claims
- Handbook Policies
- What is on the Horizon?

RECENT CASELAW AND SOME GOOD NEWS FOR EMPLOYERS

Recent Cases

- Prospective Meal Period Waivers (*Bradsbery v. Vicar Operating, Inc.*)
  - California Court of Appeal affirms enforceability of written, prospective meal period waivers
    - Labor Code s. 512 provides employees with 30-minute duty-free meal period after 5 hours of work; employee working shift of no more than 6 hours may "waive" the meal period by mutual consent
    - Can a standing, written waiver signed at the beginning of employment ("blanket" waiver) be valid and enforceable?
      - Plaintiffs' firms have been challenging and claim that per-meal period waiver is required
      - Unsettled area of law
      - Meal period violations have been significant source of wage and hour claims

Recent Cases

"I hereby voluntarily waive my right to a meal break when my shift is 6 hours or less. I understand that I am entitled to take an unpaid 30-minute meal break within my first five hours of work; however, I am voluntarily waiving that meal break. I understand that I can revoke this waiver at any time by giving written revocation to my manager."

Recent Cases

- **Holding**: Prospective meal period waivers are permissible as long as they are not "unreasonable" or "coerced"

- A win for CA employers on this issue . . . but still need to follow best practices

Best Practices

- Must be in writing and signed
- Must state that EE is free to refuse to sign or revoke the waiver at any time **without fear of retaliation**
- For long-term EEs, consider having a new waiver signed periodically
- For new EEs, ensure that EEs understand that they are free to sign the waiver and the revocation rights **without fear of retaliation**
- Court's opinion applied to the "less than six hours" shift and not the second meal period waiver
- Do not include waivers "buried" in other documents (e.g., the handbook)

FMLA Certifications – *Perez v. Barrick Goldstrike Mines, Inc.*

Facts:

- In Perez, the employer challenge an employee's FMLA medical certification using non-medical evidence without obtaining a second medical opinion.
- The employer's investigation, including surveillance, found no evidence of a crash or injury and suggested the employee faked his condition to work on personal projects.
- The employee was terminated and sued, claiming wrongful termination and FMLA violations.
- A jury ruled in favor of the employer

FMLA Certifications – *Perez v. Barrick Goldstrike Mines, Inc.*

- **Court's Ruling:** The Ninth Circuit held that employers are not required to seek a second opinion to challenge an FMLA medical certification and can rely on non-medical evidence.

- **Impact on Precedent:** The decision partially overruled Sims v. Alameda-Contra Costa Transit Dist. (1998) and aligned the Ninth Circuit with other federal circuits on this issue

- **Takeaway for Employers:** Employers should carefully review medical certifications and, when appropriate, use non-medical evidence to assess the validity of an employee's claimed condition under the FMLA

*CA employers: This is a positive decision, but limited to FMLA and federal law.

Arbitration Agreements and Sexual Harassment Cases

Doe v. Second Street Corp.

FACTS:

- Plaintiff alleged a co-worker sexually assaulted her in 2019 while working at a hotel restaurant and claims management failed to prevent further harm after it was reported multiple times.
- She was terminated in May 2022 and subsequently sued her employer for sexual harassment, hostile work environment, retaliation, wage violations, defamation, and other employment-related claims.
- The hotel requested to compel arbitration based on their employee handbook policy and argued Plaintiff's claims accrued before the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) took effect on 3/3/22.
- Plaintiff argued her sexual harassment claims accrued in May 2022 when she was discharged

Arbitration Agreements and Sexual Harassment Cases

Doe v. Second Street Corp.

CONCLUSION:

- **Broad Scope of EFAA –** The court emphasized that the **EFAA applies to the entire case**, not just sexual harassment claims, precluding arbitration of all claims.
- **Precedent & Employer Impact –** The decision aligns with *Liu v. Miniso Depot CA, Inc.*, reinforcing that **any sexual harassment claim can invalidate arbitration for an entire case**.
- **Key Takeaway for Employers –** Employers should be aware that arbitration agreements **may not be enforceable** in cases involving sexual harassment or assault claims

Non-Compete and Non-Solicitation Clauses

Employers need to consider state laws on non-compete and non-solicitation clauses

- Generally, where allowed, non-compete clauses must be "reasonable" i.e., geographic area, time period, and scope. But an increasing number of states have laws addressing non-compete clauses and some non-solicitation clauses

Non-Compete and Non-Solicitation Clauses

California's expansive non-compete and non-solicitation rules (eff. 1/1/24)

- Non-compete clauses have been void since 1872, with limited exceptions
- New laws likely prohibit most non-solicitation clauses (clients and employees)
- Private right of action for violations
- Valid non-compete under other state law will not be enforced in CA
- Required specific notices to current and former employees by 2/14/24

What about trade secrets?

Non-Compete and Non-Solicitation Clauses

- **Trade Secret Protection** – carefully craft agreements to focus on trade secret protections
  - What is a trade secret?
    - Information that is not disclosed outside of an obligation of confidentiality
    - Derives economic value from not being generally known

    *credit unions have a unique opportunity to enforce trade secret protections due to field of membership restrictions as well as federal and state laws protecting member non-public personal information

Non-Compete and Non-Solicitation Clauses

- Will require reasonable efforts by the employer to actively protect customer/member information
  - Limit access to the files/information to only those who need it
  - Implement agreements for those who have access, including third parties (mortgage and commercial loan officers and investment advisors)
  - Leveraging existing policies on protection of NPI and confidential information will be key to support enforcement of NDAs and non-solicitation restrictions

Wage & Hour Disputes

Nondiscretionary Bonus and the Regular Rate of Pay

- What is a *nondiscretionary bonus*?
- A nondiscretionary bonus is one that is promised or expected, often based on performance, productivity, or attendance, and is paid under a contract, policy, or agreement
- Hint: If it is tied to and/or related to the employee's and/or the credit union's overall performance, then it is nondiscretionary
- Examples: attendance bonus, Saturday branch shift pay, MSR incentives for loan or insurance product sales

What may be “discretionary”

- Gifts: birthday, holiday
- Reimbursements
- Vacation or holiday pay
- Benefit contributions
- California court cases and Labor Commissioner rulings will generally take pro-employee argument that a bonus is nondiscretionary
- “Flat sum” bonus and “production” bonus have different formulas for calculating the RROP
- These are very common claims in PAGA actions and Class-Action litigation!

Accommodation and Disability Claims

Always expanding leave rights for employees

- FMLA
- PWFA
- ADA
- CFRA
- PDL
- FEHA

What is getting employers sued?

Terminating employees who have exhausted job-protected leave

- If an employee takes FMLA/CFRA leave for his/her/their own serious health condition and the employee is unable to return to work at the end of the 12-weeks, the employee may be entitled to additional time off as a reasonable accommodation under the ADA/FEHA /PWFA

- If the employee is unable to return to work due to a work-related injury, denying leave time may also give rise to a claim for discrimination under Labor Code §132a, which prohibits discrimination and retaliation against employees who have sustained work-related injuries and/or filed a workers' comp claim (and these are generally not covered by EPL insurance coverage!)

What is getting employers sued?

- Employee's FMLA/CFRA or other disability notice (aka "off work notice") has expired and employer has not received any communication
- Employer should proactively communicate with employee to request status of leave and need for extended leave of absence … and document it using the same communication methods (e.g., email, text and always via regular mail)

- Do not assume the employee has "resigned" under "no-show" policies; must consider extenuating circumstances!

What is getting employers sued?

Placing burden on employee to find or apply for another job

- The duty to reasonably accommodate a disabled employee may require that the employer offer the employee an open alternative position for which the employee is qualified
- Policies that provide a limited amount of time (e.g., 30 days) to apply for an alternative position, and the employee will be terminated if he/she/they are unable to secure another position within that time may likely violate ADA/FEHA
- At least one CA court opinion has said that the employer has the obligation to *proactively advise* the disabled employee of any current open positions or any positions that the employer knows will be become open
- Simply telling an employee to look at current posted job openings is likely not sufficient under current CA case law

Handbook Policies

Employees and Delinquent Accounts

- Common across banking employers to have provisions in their employee policies addressing employee's delinquent loan accounts, excessive overdrafts or NSF

- But, employers must be very cautious about taking any adverse employment action based on an employee's delinquency or other negative account status

Employees and Delinquent Accounts

- Several federal and state laws such as the Fair Debt Collection Practices Act and the California Rosenthal Fair Debt Collection Practices Act have strict rules on the ways a creditor can pursue debt collection
- Federal Bankruptcy Law prohibits a private employer from terminating or discriminating against an employee who has filed for bankruptcy protection
- Violations of the federal Bankruptcy laws and FDCPA and Rosenthal Act can be very expensive
- Be very cautious when taking action based on this type of policy and be sure to consult with counsel

What is on the horizon?

The 2025-2026 California Legislative Session is active!

- Artificial intelligence and workplaces
- At least 30 bills introduced addressing AI in some form
- Limits on "workplace surveillance"
- Changes to Pay Transparency laws (aka "Keeping up with Colorado")

Key Bills to Watch

- **SB 642 [Pay Transparency]:** Would require pay scales in job ads have a "good faith" estimate of the pay scale. Note, prior versions of the bill require that pay scale to be no more than 10% above or below the mean pay rate within the salary or hourly wage range.

- **AB 1018, SB 7 and SB 420 [AI]:** Would regulate the development and deployment of automated decision systems to make employment-related decisions, including hiring, promotion, performance evaluation, discipline, termination and setting pay and benefits. AB 7 has also been called the "No Robo Bosses" Act.

- **AB 1331 [Workplace Surveillance]:** Would place limits on workplace surveillance, including devices used for video or audio recording, electronic work pace tracking, location monitoring, electromagnetic tracking, and photoelectronic tracking. Impact on surveillance of private, off-duty areas, employee residence or personal vehicle.

Key Bills to Watch

- **AB 692 [Prohibition on "Stay-or-Pay" Agreements]:** Would, for any contracts entered into on or after 1/1/2026, make it unlawful to require a worker to enter into a contract as a condition of employment that does any of the following:
  - Requires the worker to pay a "debt" if the worker's employment ends.
  - Authorizes the ER, training provider or debt collector to resume or initiate collection or end forbearance of the debt.
  - Imposes any penalty, fee or cost on the EE.
  - What is a debt under the proposed bill? "Any money or property due for employment-related costs, education-related costs, or a consumer financial product or service."
  - Note "worker" includes EEs and independent contractors, freelance workers, interns

NEW OFFERING: HR COMPLIANCE AUDITS

SW&M is now conducting comprehensive HR audits to help California employers proactively address exposure under the Private Attorneys General Act (PAGA). Our audits focus on a variety of key risk areas to identify and resolve potential violations before they become costly litigation:

- Job Application and Hiring Practices
- Employee Personnel and Other Records
- Wage and Hour Practices (including Meal and Rest Break Compliance)
- Timekeeping Practices
- Wage Statement Review
- Corrective Action (Disciplinary Process)
- Termination Practices and Policies
- Employee Handbook and Policies
- Employee Training

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