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Tools to Take on the Legal Landscape of Today

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SUMMIT

Minimum Salary/Minimum Wage Updates

- CA Minimum Wage increases each year: likely to be \$16.50 but verify
 - Note that proposition 62 current pending would result in greater increase.
- Local Ordinances: There are over 35 local minimum wage ordinances throughout California. Employers are required to comply with the higher of the state or local minimum wage that applies to them. However, local minimum wages do NOT require higher minimum salaries for exempt employees.
- Don't forget exempt employees!

Workplace Violence Prevention Program

Effective July 1, 2024

1) Written Plan:

employers must update their existing injury and illness prevention programs (IIPP) to include workplace violence prevention plans (WVPPs) that comply with the new Labor Code section 6401.9.

2) Reporting Channel

offer a reporting channel for incidents and threats of violence, maintain logs.

3) Trainings

train on the plan once per year.

Exemptions include:

- 1) health care facilities and employers covered by California's existing workplace prevention standard for the healthcare industry;
- 2) facilities operated by the Department of Corrections and Rehabilitation;
- 3) certain law enforcement agencies;
- 4) teleworkers; and
- 5) places of employment that are not accessible to the public and have fewer than 10 employees working at a location at a given time.

Federal – EEOC Guidance on AI Use in Employment Selection

- “Algorithmic decision-making tools” broadly defined
- Examples of covered AI:
 - Resume scanners
 - Employee monitoring software (e.g., keystrokes)
 - “Chatbots”
 - Video interviewing software
 - Testing software that provides “job fit” scores
- Employers responsible for adverse impact caused by AI
- Measuring adverse impact (four-fifths rule “rule of thumb”)
- Human should make ultimate hiring or employment decision

AI in the workplace

- *Mobley v. Workday* (N.D. Cal. 2024)
 - Plaintiffs challenging Workday's AI-powered applicant screening tools
 - Vendors using AI can be directly liable for employment discrimination
 - Motion to dismiss. Merits not yet addressed.
- *Raines v. US Healthworks Medical Group* (Cal. Supreme Court 2023)
 - Pre-employment screenings conducted by third party health services providers.
 - Such third party "agents" can be directly held liable for discrimination.

Neither case would absolve the direct employer of liability.

AI in the workplace

- Proposed modification to CA employment regulations
- Use of AI in hiring may violate existing anti-discrimination laws
- “Automated-Decision System”
- Applies to recruiting, screening, hiring, and employment actions
- Recordkeeping requirements
- Outsourcing to third party recruiter not a defense

Indoor heat regulations

- Heat Illness Prevention in Indoor Places of Employment
- Applies to most indoor workplaces, such as restaurants, warehouses, and manufacturing facilities
- For indoor workplaces where the temperature reaches 82 degrees Fahrenheit, employers must take steps to protect workers from heat illness. Some of the requirements include providing cool water, rest, cool-down areas, and training.

Drug testing

- In 2022, the CA Legislature passed AB 2188, which prohibits employers from discriminating against or disciplining employees for off-duty cannabis use (effective January 1, 2024)
- SB 700, passed in 2023, expands upon these protections and makes it unlawful to request information from an applicant or employee about prior cannabis use
- Employers still permitted to test employees for impairment and maintain a drug-free workplace, but requires testing for current impairment rather than historic use

Workplace Drug Testing

- Can test pre-employment
- Can test with reasonable suspicion
 - Example: after serious accident
 - Trained observations
- Can not test randomly except in specific circumstances (e.g. safety-sensitive position).
- Note: local ordinances may apply

Free Speech in the Workplace

- The First Amendment generally applies to governmental actors, but private employers still must comply with the NLRA, which protects employees' right to engage in concerted activity related to their working conditions.

Free Speech in the Workplace

- Several states, including California, provide additional protections for speech, off-duty conduct, and political affiliations and beliefs for private-sector employees.
- Employers are prohibited from retaliating against employees based on political beliefs expressed outside the workplace.
- Labor Code Section 1101 and 1102.
- Labor and Workplace Development Agency

Free Speech in the Workplace

- Employer strategies for maintaining positive, productive workplaces include:
 - developing and updating workplace speech policies,
 - providing training and education related to maintaining a respectful and inclusive work environment,
 - encouraging respectful dialogue, and
 - promptly monitoring and addressing issues.

CPRA

- The California Privacy Rights Act (CPRA) provides comprehensive regulation of the personal information (PI) of California residents.
- PI includes any “information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.”

CPRA

- The California Privacy Rights Act applies to all California resident consumers, including job applicants and employees, and it also applies to business-to-business transactions.
- Companies that collect personal information from California resident consumers and have annual gross revenues in excess of \$25 million companywide are required to comply with the CPRA.

CPRA

- Implementing reasonable security measures to protect PI from unauthorized access, exfiltration, and/or theft.
- Putting in place procedures to promptly and properly respond to data breaches.
- Preparing, posting and distributing CPRA notices to California resident consumers. “Consumer” is defined as “a natural person” residing in California, including job applicants, employees, the beneficiaries and emergency contacts of employees, independent contractors, owners and members of the board of directors.

CPRA

- Putting in place a Consumer Access Request procedure so that consumers, including employees, can exercise their rights under the CPRA. This involves verifying and responding to requests to disclose, delete, and correct PI, requests to limit the distribution of PI, and the right to opt out of the sale or sharing of PI.
- Employees can sue their covered employers for data breaches, and under certain circumstances, employees can bring a class action-type lawsuit.

CPRA

- Businesses are required to provide a notice that includes a description of the categories of PI collected, the business purpose for collecting it, how long the PI is retained, and the categories of third parties to whom the PI is shared and or sold.

CPRA

- Proposed Amendments to Cal. Consumer Privacy Act (CCPA)
- Automated decision-making technology (ADMT)
- Applies to all consumers, including employees
- Pre-use notices
- Right to opt out
- Requests to access information
- Risk assessments

Questions?

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