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Employment Law Updates and Legal Best Practices

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Agenda

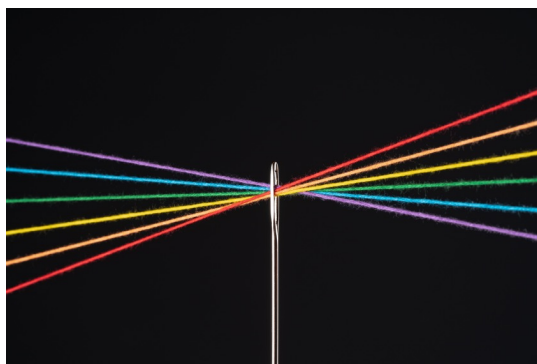
- New federal guidance and executive orders
- Pregnant Workers Fairness Act
- California regulations regarding the use of AI in employment decisions
- Wage and hour compliance updates and reminders
- Return to office policies
- Political speech in the workplace
- Additional updates
- Questions

New Federal Guidance and Executive Orders

- EEOC recently confirmed a third commissioner and now has a quorum
- Acting Chair Andrea Lucas's stated priorities:
 - "Rooting out unlawful DEI-motivated race and sex discrimination"
 - Protecting American workers from "anti-American national origin discrimination"
 - "Defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces"
 - Protecting workers from religious bias and harassment

Updates to EEOC Priorities, Guidance, and Regulations

- EEOC has removed guidance from prior administrations from its webpage:
 - Resources related to the U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision (finding that Title VII prohibits discrimination based upon sexual orientation and gender identity)
 - Pages regarding LGBTQ worker protections
 - Information about how the use of Artificial Intelligence tools can result in unlawful discrimination



Updates to EEOC Priorities, Guidance, and Regulations

- Focus on Diversity, Equity, and Inclusion programs:
 - Supports hostile environment claims if DEI training becomes “so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive”
 - Identifies protected conduct as “objecting to or opposing discrimination related to DEI” or engaging in “reasonable opposition to a DEI training”
 - Examples of “DEI-related disparate treatment”:
 - Access to training (including leadership development programs)
 - Access to mentoring, sponsorship, or workplace networking/networks
 - Internships/fellowships; and
 - Selection for interviews, including placement or exclusion from a candidate “slate” or pool

What Does This All Mean?

- Underlying laws have not changed
 - Title VII continues to prohibit discrimination based on race, color, religion, sex, or national origin
 - *Bostock* decision confirms that “sex” includes gender identity and sexual orientation
- However, the EEOC’s enforcement priorities have changed
 - Likely to accept and investigate claims of discrimination against majority groups premised upon DEI efforts; concerns related to employers’ recognition of more than two genders; religious discrimination; discrimination against American-born workers; and retaliation for raising concerns about these issues

Pregnant Workers Fairness Act

PWFA requires employers with at least 15 employees to accommodate known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

Key differences to prior law:

- Accommodation of pregnancy-related limitations, not just disabilities
- Temporarily excuses performance of essential job functions
- Specific accommodations are expressly deemed reasonable under most circumstances
- Places limits on employers obtaining supporting medical documentation

Pregnant Workers Fairness Act

Temporarily Excuses Performance of Essential Functions

- Accommodation of employees who cannot perform their position's essential functions is still required if:
 - any inability to perform an essential function is temporary;
 - the essential function could be performed in the near future (generally defined as within the next 40 weeks); and
 - the inability to perform the essential function can be reasonably accommodated.
- Employers need not excuse an employee from performing essential job functions if doing so would constitute an undue hardship.

Infertility Treatment

Changes to health insurance plans to cover the diagnosis and treatment of infertility:

CIC § 10119.6
HSC § 1374.55
Effective: July 1, 2025

- Large group health plans required to provide coverage for both diagnosis and treatment of infertility, including in vitro fertilization (IVF).
- Small group health plans required to offer coverage for the diagnosis and treatment of infertility.
- Prohibits group health plans from putting higher fertility care costs on a patient than the plan would put on other types of care.
- Expands the definition of infertility to include an inability to reproduce, either as an individual or with a partner, without medical intervention.

CRD Regulations on Use of AI in Employment Decisions

- Newly issued CRD regulations address use of AI in employment decisions, confirming that such technology can result in adverse impact based on protected characteristics
- Examples:
 - AI analyzing tone of voice, facial expressions, or physical characteristics may have adverse impact based on race, national origin, gender, or other characteristics
 - Computer-based tests, questions, puzzles, or games intended to measure skill, dexterity, or reaction time may have adverse impact on employees with disabilities

Private Attorney General Act (PAGA) Reform + Wage & Hour Issues

- PAGA reform:
 - Reduces potential penalties for employers who “take all reasonable steps” to comply with the law
 - Eliminates certain types of “double dipping” penalties
 - Limits individual standing to pursuit of relief for only those employees who are allegedly aggrieved by same labor code violation.
 - Trial court can limit scope of claims and evidence
 - More robust “right to cure” process
- Recent CA Supreme Court case law (*Naranjo v. Spectrum Security Services Inc.*):
 - Employer is not liable for inaccurate wage statements when it had a good faith and reasonable belief that the issued statements were accurate

Payment for All Time Worked & Timekeeping Procedures

- Must Compensate Employees for *all time* worked
 - California (unlike federal law) does not allow for the “de minimus” defense (*Troester v. Starbucks Corp.*)
 - E.g., COVID-19 screenings, schedule checking on phones, traditional donning and doffing procedures, etc.
- California Expected to Soon Rule – No Time Rounding
 - *Camp v. Home Depot* – CA Court of Appeal cast doubt on previously accepted neutral time rounding procedures (currently under CA Supreme Court Review)
 - *Donahue v. AMN Services* – CANNOT round meal breaks (must be 30 minutes minimum)

Return to Office Policies

- Return to Office Risks
 - Wage and hour – schedule change, break enforcement, mandatory events
 - Reasonable accommodation of disabilities
 - Local ordinances (i.e. San Francisco, Berkeley) regarding flexible work arrangements
 - Breach of contract claims (if offered fully remote work)
 - Safety requirements – Injury & Illness Prevention Policy; Workplace Violence Prevention Plan
 - Morale concerns
- Best Practices
 - Predictability/notice – written policy, advance notice
 - Consistency – equal enforcement
 - Carrot vs. stick – incentives for employees to come to office vs. discipline

Political Speech in the Workplace

- Legal protections:
 - California Labor Code Sec. 1101 prohibits forbidding or preventing employees from participating in politics or controlling/directing political activities or affiliations of employees
 - California Labor Code Sec. 1102 prohibits adverse action based on political views
 - National Labor Relations Act protects political advocacy with a nexus to the employees' "interests as employees"
- Employers can restrict employees from using employer equipment, resources, and facilities for political activities (but must be neutral and consistently enforced)
- When political speech becomes abusive, harassing, disruptive, or offensive, carefully consult with counsel to determine next steps

Social Media Guidance

Ninth Circuit's reminder to employers re addressing complaints about social media activity:

- Off-premises conduct impacting the workplace remains actionable
- A prompt, thorough investigation and remedial measures are required
- Title VII requires analysis of the “totality of the circumstances,” including posts that may not directly target the plaintiff
- Evidence of other coworkers engaging with social media content is also relevant

Okonowsky v. Garland
No. 23-55404;
Jul. 25, 2024



Broader Protections for “Crime” Victims and Other Court Obligations (AB 2499)

- AB 2499 expands protections for victims by:
 - (1) Expanding the types of “crimes” that are covered by the statute;
 - (2) Expanding the reasons an employee victim can be absent from work without repercussion;
 - (3) Moving the statutory framework under the FEHA, which allows for CRD enforcement and employer accommodations obligations; and
 - (4) Including a new notice provision.

What Obligations Does AB 2499 Impose on Employers?

- Protected Absences:
 - Jury Duty
 - Court Duty (Witness Duty)
 - Absences by victims to obtain court relief for themselves or a child
 - Employers with 25+ employees also cannot retaliate against employees (1) who seek certain non-court relief and (2) whose family members are victims
 - Family member: Remember CA designated person
 - Notice, Certification, and Confidentiality
 - Limits:
 - 12 weeks when an employee is the victim
 - Usually 10 days when a family member is a victim
- Reasonable Accommodations
- Entitled to Use Accrued Sick Leave / Paid Time Off

What Action Should Employers Take in Response to AB 2499?

- No Discrimination or Retaliation Against Employees For:
 - Status as a victim
 - Requesting a reasonable accommodation
 - Requesting protected time off
- Employer Action Items
 - Training
 - Handbook Update
 - Notice Provisions (Model Notice July 1, 2025)



Rounding Out The 2025 New Employment Laws: SB 1100

- SB 1100: Unlawful to state that an applicant must possess a driver's license
 - Exception
 - Employers should:
 - Double-check all hiring materials and other policies that reference need for driver's license
 - Train HR recruiting staff



Looking Ahead to 2026

- SB 294: Workplace Know Your Rights Act – requires notice to employees of certain workplace rights (workers' compensation, immigration inspections, unions)
- SB 513: Personnel records productions now must include education/training records
- SB 617: WARN Notice – additional information required to be included
- SB 642: Pay equity law now includes all forms of pay, such as benefits, bonuses, stock, etc.
- SB 464: Expanded pay data reporting (adds new job categories)
- SB 590: Expanded PFL benefits to care for designated person
- SB 648: Labor Commissioner authorized to enforce violations of laws prohibiting employers from taking or withholding employees' tips/gratuities

Questions



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