HR 300:
COMPLIANCE IS COMPLICATED

2017 Floyd, Skeren & Kelly LLP Employment Law Conference

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INTRODUCTION

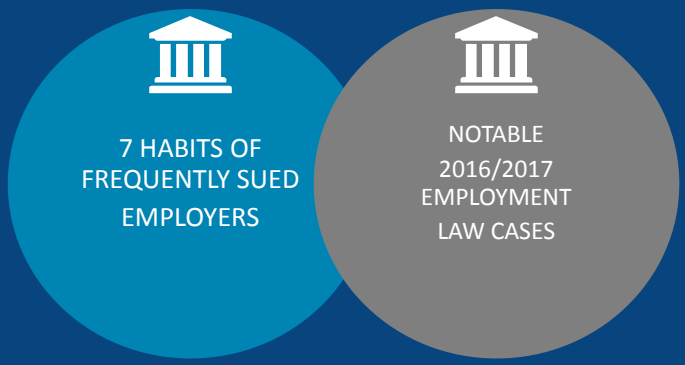
Welcome!

Human Resources (People Management) is challenging due to complex federal, state and local laws, which often overlap, and which contain numerous provisions that employers must understand and follow. Further, the law is constantly evolving and changing. Every day there are new cases interpreting and expanding the scope of these laws. Every year numerous new employment related laws are passed.

HR administrators must stay on top of these developments to ensure compliance. Failure to do so exposes the company to significant liability, depending on the violation.

This presentation will examine key laws, key cases, and key trends to watch for, while providing practical advice along the way…

AGENDA



2017 PROPOSED LEGISLATION

SB 63- "NEW PARENT LEAVE ACT"

- S.B. 63 requires employers with 20-49 employees to offer unpaid, job-protected parental leave ("baby bonding" time) to new parents.
- Currently, only employers with 50 or more employees in a 75-mile radius must provide eligible workers up to 12 weeks of parental leave in the first year after the birth or adoption of a child.

AB 5- "OPPORTUNITY TO WORK ACT"

- Existing law, with certain exceptions, establishes 8 hours as a day's work and a 40-hour workweek, and requires payment of prescribed overtime compensation for additional hours worked.
- AB 5 requires an employer with 10 or more employees to offer additional hours of work to an existing nonexempt employee who, in the employer's reasonable judgment, has the skills and experience to perform the work, before hiring an additional employee or subcontractor. Similar legislation recently passed in San Jose, which is in effect as of March 13, 2017.

AB 168- JOB CANDIDATES SALARY HISTORY

- A.B. 168 would prohibit employers from asking about a job candidate's salary history until after a conditional employment offer is made.

AB 1565- RAISES CALIFORNIA'S MINIMUM EXEMPT SALARY THRESHOLD

- AB 1565 requires that an executive, administrative, or professional employee is exempt from overtime only if they perform exempt duties and earn a monthly salary of $3,956 (or $47,472 annually) or twice the state minimum wage, whichever is higher.

SUMMARY OF KEY 2017 EMPLOYMENT RELATED LEGISLATION

SB 3- MINIMUM WAGE INCREASE

- SB 3 increases California's minimum wage each January until 2022 (or 2023 for companies with less than 26 employees).
- The minimum wage in California is $10.50 per hour beginning January 1, 2017. SB 3 does not bar other counties or cities in California from enacting their own minimum wages that may be higher than the state's minimum wage increase, and many cities have already enacted such ordinances.

SB 501-WITHHOLDING

- Reduces the prohibited amount of an individual judgment debtor's weekly disposable earnings, subject to levy, under an earnings withholding order from:
- (1) Exceeding the lesser of 25% of the individual's weekly disposable earnings, or,
- (2) 50% of the amount by which the individual's disposable earnings for the week, exceed 40 times the state minimum hourly wage, or applicable local minimum hourly wage, if higher, in effect at the time the earnings are payable.

SB 1063- WAGE EQUALITY ACT

- SB 1063 extends the protections of the CPFA to compensation disparity based on race or ethnicity. If there is a wage differential the employer must demonstrate that specific, reasonably applied factors account for the entire wage differential, including:
- A seniority system;
- A merit system;
- A system that measures quality or quantity of production; or,
- A bona fide factor other than sex, race or ethnicity, such as education, training or experience.

SB 1063- WAGE EQUALITY ACT CONTINUED…

- An employer relying on a "bona fide factor" must ensure that such factor(s):
- Is not based on or derived from a difference in compensation that is based sex, race or ethnicity,
- Is job related, and
- Is consistent with a "business necessity"
- The bona fide factor(s) that the employer relies on must also account for the entire wage differential.

AB 488- FEHA EXPANSION

- California AB 488 revises the definition of "employee" under the California Fair Employment and Housing Act (FEHA) which currently excludes individuals with disabilities that have special licenses to work at nonprofit agencies, day programs or rehabilitation facilities at less than the state minimum wage.
- Effective January 1, 2017, the FEHA will include these workers in the "employee" definition, thereby providing offer anti-discrimination, harassment and retaliation protections to these individuals.

AB 1066- AGRICULTURAL WORKERS AND OVERTIME

- Pursuant to California AB 1066, California agricultural workers will be eligible for overtime pay after eight hours of work per day. Currently, agricultural workers are only eligible for overtime pay after ten hours of daily work.
- By 2022, all agricultural workers, including those employed at facilities with 25 employees or fewer, will be entitled to overtime pay if they work more than eight hours in a day.

AB 1676- AMENDMENT TO THE FAIR PAY ACT

- AB 1676 amends California's Fair Pay Act (CFPA), (which makes gender-related pay disparities discriminatory under law), to prohibit California employers from requesting an applicant's salary history to justify any pay disparities.

AB 1843-JUVENILE CONVICTION RECORDS

- As of January 1, 2017, pursuant to California AB 1843, California employers are prohibited from asking job applicants to disclose any past juvenile convictions. There are some exceptions. For example, if a job applicant is applying for a job at a health facility and the crime committed was a felony or misdemeanor involving controlled substances or sex crimes.

AB 2535- ITEMIZED WAGE STATEMENTS

- AB 2535 amends Labor Code Section 226 to clarify that employers are not required to track and log hours worked by exempt employees on their itemized wage statement.

AB 2899- BOND FOR APPEAL Of LABOR COMMISSIONER RULING

- Pursuant to AB 2899, employers who contest a Labor Commissioner ruling that they failed to pay the minimum wage must post a bond equal to the unpaid wages, excluding penalties.

MEASURE E- SAN JOSE OPPORTUNITY TO WORK ORDINANCE

- San Jose voters in November 2016 approved Measure E, which is in effect as of March 13, 2017. Employers with at least 36 employees must offer more hours to their part-time employees before hiring additional workes, provided the extra hours do not trigger overtime pay.
- More information: http://www.sanjoseca.gov/index.aspx?nid=5360

HIRING

NEW DEVELOPMENTS IMPACTING HIRING

- New I-9 Form;
- New FEHA background check regulations;
- Los Angeles "Ban the Box legislation";
- H1-B Visas;
- Pre-employment drug testing (implications of Proposition 64);
- Fair Pay Act Expansion.

I-9 VERIFICATION

- **New-** Revised I-9 Form;
- **Key New Law** - (AB 622) 2016 California legislation on E-Verify that restricts the use of E-Verify by employers:
  - Employers may not use E-Verify at a time or manner not required by federal law to check status of existing employee or applicant who has not received an offer of employment.

NEW: EMPLOYERS SHOULD REVIEW FORM I-9 FOR SOCIAL SECURITY NUMBER "GLITCH"

- If an employer used Form I-9 that was downloaded between November 14 and November 17, 2016, the employer should review them to ensure employees' Social Security numbers appear correctly in Section 1.
- There was a "glitch" when the revised Form I-9 was first published on November 14, 2016. Numbers entered in the Social Security number field were transposed when employees completed and printed Section 1 using a computer. For example, the number 123-45-6789 entered in the Social Security number field would appear as 123-34-6789 once the form printed. Employers using a Form I-9 that contains this glitch should download and save a new Form I-9 at uscis.gov/i-9.

NEW- H1-B VISA EXPEDITED PROCESSING SUSPENDED

- Effective April 3, 2017, the expedited processing option for H-1B visas has been suspended. H1-B visas, which are in high demand and often take six months for approval, provide a system for permitting employers to bring in skilled foreign workers (especially in the tech field).
- The premium processing alternative guaranteed that documents would be reviewed within 15 days, at a cost of approximately $1,200. President Donald Trump is accusing businesses of abusing the H-1B system.

WAGE AND HOUR

KEY WAGE AND HOUR COMPLIANCE ISSUES

- Failure to properly classify employees as exempt from overtime;
- Failure to provide meal and rest periods as required;
- Failure to create a system that enables a company to prove meal and rest periods were made available as required;
- Failure to understand what *Brinker* did and did not do;
- Failure to provide premium pay if meal and rest periods are not provided as required;
- Failure to include the required information on pay stubs.

MINIMUM WAGE

- **Key Trend:** Minimum wage is increasing around California and around the country; employers must prepare for this;
- **Key New Law (2016)-** SB 3 - Minimum wage increase in California. Specifically, the state's minimum wage will increase by 50 cents in each of the next two years (to $10.50 in 2017 and $11 in 2018) before increasing by $1 for each of the remaining four years until it reaches $15 in 2022. Small businesses with 25 or fewer employees will have an additional year before having to raise the minimum wage of their workers.
- Beginning in 2023, California's minimum wage will be tied to the Consumer Price Index and rise up to 3.5 percent each year.

OFF-THE-CLOCK WORK

- **Key Trend -** This is a common allegation supporting costly wage and hour class actions;
- **Consider:** How will you prove an employee did not work off-the-clock? (e.g. employees checking emails after hours or clocking out and continuing to work?)
- **Consider:** What policies and procedures do you have in place to ensure off-the-clock work is not occurring?

EMPLOYEE CLASSIFICATION

- **Key Consideration:** Are your employees properly classified?
- "Salaried" does not equate to "exempt"
- **Key Pending Legislation -** March 17, 2016 - House and Senate Republicans introduced legislation calling for DOL's proposed rule to increase federal exempt salary threshold (from $455 to $913 per week, which annualizes to $47,476-up from $23,660 per year) to be stopped or at least delayed. On November 22, 2016, a federal judge in Texas blocked the DOL's overtime rule from taking effect on December 1, 2017, by issuing a preliminary injunction preventing the rules from being implemented on a nationwide basis. The DOL has appealed. There is some discussion about an increased federal salary threshold to about $33,000, under the Trump Administration.

REST PERIODS

- **Key Consideration:** If necessary, how will you show employees took their rest periods?
- **Key Case -** ***Rodriguez v. E.M.E., Inc.,*** recent California appellate court decision which held rest breaks cannot be combined, they must be taken on either side of the meal period.
- **Key Case-** ***Augustus*** and the $90 million dollar judgment.

SUMMARY OF *AUGUSTUS* FACTS

- A Company required security guards to keep their pagers and radio phones on, even during rest periods, and to remain vigilant and responsive to calls when needs arose, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations.
- Plaintiffs sued The Company, alleging the company failed to provide the rest periods as required. The Company offered evidence that class members regularly took breaks uninterrupted by service calls. The trial court granted summary judgment for plaintiffs, finding The Company liable and awarding approximately $90 million in statutory damages, interest and penalties, but the Court of Appeal reversed, and plaintiffs appealed to the California Supreme Court.

IN *AUGUSTUS*, WHAT DID THE CALIFORNIA SUPREME COURT SAY ABOUT REST PERIODS?

- "[D]uring rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time."
- "[W]e liberally construe the Labor Code and wage orders to favor the protection of employees."
- "It would be difficult to cast aside section 226.7's parallel treatment of meal periods and rest periods and conclude that employers had completely distinct obligations when providing meal and rest periods. What makes sense instead is to infer that employers' responsibilities are the same for meal and rest periods."

IN *AUGUSTUS*, WHAT DID THE CALIFORNIA SUPREME COURT SAY ABOUT REST PERIODS?

- "[C]an an employer satisfy its obligation to relieve employees from duties and employer control during rest periods when the employer nonetheless requires its employees to remain on call? The answer, we conclude, is no."
- "[E]mployees must not only be relieved of work duties, but also be freed from employer control over how they spend their time."
- "Because rest periods are 10 minutes in length…they impose practical limitations on an employee's movement. That is, during a rest period an employee generally can travel at most five minutes from a work post before returning to make it back on time. Thus, one would expect that employees will ordinarily have to remain onsite or nearby. This constraint, which is of course common to all rest periods, is not sufficient to establish employer control."

AUGUSTUS TAKE-AWAY

- During rest periods employers **must** relieve employees of all duties and relinquish control over how employees spend their time, in the same manner as during meal periods.

MEAL PERIODS

- An uninterrupted, 30 minute meal period must be provided no later than the end of the employee's 5th (5.0) hour of work- preferably by 4 hours and 59 minutes;
- Remember- A second meal period must be provided no later than the end of an employee's 10th (10.0) hour of work;
- Meal Period Waivers- (first meal period) if employee will not work more than 6 (6.0) hours (in writing, signed by the employee, mutual consent of employer and employee); (second meal period) is permissible if the first meal period is not waived and employee does not work more than 12 (12.0) hours;
- Employees must be permitted to leave the premises during their meal period.

PREMIUM PAY

- If an employer fails to provide an employee a meal or rest period as required (e.g. the employee is asked to work through all or part of a meal period) the employee is owed one additional hour of pay if the meal period is not provided, and one additional hour of pay at the employee's regular rate of pay if one or both of the rest periods is not provided.
- Premium pay is owed in addition to pay for the time actually worked. Employers must avoid impeding or in anyway discouraging an employee from taking their meal or rest periods.
- However, if an employee voluntarily works through all or part of a meal or rest period, the employer must pay for the time worked, if the employer knew or reasonably should have known the employee worked, but premium pay is not owed.

ON-DUTY MEAL PERIOD

An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the employer and employee an on-the-job paid meal period is agreed to. The written agreement must state that the employee may, in writing, revoke the agreement at any time.

The test of whether the nature of the work prevents an employee from being relieved of all duty is an objective one. An employer and employee may not agree to an on-duty meal period unless, based on objective criteria, any employee would be prevented from being relieved of all duty based on the necessary job duties.

WHAT IS A PAGA LETTER?

- California adopted a novel approach to enforcing the Labor Code when it enacted the Private Attorneys General Act of 2004 ("PAGA") codified in Cal. Lab. Code § 2698, et seq. This law allows a private citizen to pursue civil penalties on behalf of California's Labor and Workforce Development Agency ("LWDA") provided its notice and waiting procedures are followed.
- The State of California receives 75% of any recovery and the employee receives the other 25%. The attorney is entitled to attorney fees for acting on behalf of California's Attorney General.
- The aggrieved employee must notify LWDA and employer in writing (PAGA letter). The notice must include the specific labor code provisions that allegedly were violated and the facts to support the accusation

ITEMIZED WAGE STATEMENT REQUIREMENTS

- Labor Code Section 226, requires nine categories of information be displayed on every wage statement issued to California employees.
- Gross wages earned;
- Total hours worked (nonexempt employees);
- Number of piece–work units earned and the applicable piece rate;
- All deductions;
- Net wages earned;
- Dates of the period paid;
- Name of the employee and the last four digits of his or her social security number;
- Name and address of the legal entity that is the employer;
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rates.
- (Also must include amount of accrued paid sick leave/PTO)

NEW (2016)-FAIR PAY ACT

- The Fair Pay Act (Cal. Lab. Code § 1197.5) significantly broadens existing law against gender pay inequality;
- Permits pay comparison of employees of different genders who have "substantially similar positions," for example a housekeeper and janitor;
- Comparison can be to employees in different geographical locations of the company;
- The new law significantly changes the standard for pay equity claims in California, and imposes a new burden of proof on employers to justify pay differentials;
- Companies should undertake an internal review of their compensation policy and structure for all positions; analyzing the skill, effort and responsibility required; as well as seniority, merit, quantity and/or quality of work.

LEAVES OF ABSENCE

LEAVE OF ABSENCE TRENDS

- **Increases in available paid leaves, especially for family and/parental leave, or wage replacement for leaves, such as:**
- **Paid Sick Leave Ordinances providing more days, including Oakland, Emeryville, San Francisco, Los Angeles, San Diego and Santa Monica.**
- **SB 63- "New Parent Leave Act"**
- **School and Child Care Activities Leave**
- **AB 908-Paid Family Leave**
- **San Francisco's Paid Parental Leave Ordinance**
- **San Francisco's Family Flex Time**

FOUR KEY LEAVES

- **Leave as an Accommodation (FEHA/ADA)**
- **Family and Medical Leave (FMLA/CFRA)**
- **Pregnancy Disability Leave (PDL)**
- **Paid Sick Leave (PSL)**

LEAVE AS AN ACCOMMODATION

- Leave of absence for disability may be a reasonable accommodation if it is effective in enabling the employee to recover sufficiently and return to work and does not pose an undue hardship on the employer.

EXTENDED LEAVE AS AN ACCOMMODATION

- This may require multiple extensions of a leave of absence and/or extended leaves of absence (See *Higgins-Williams v. Sutter Medical Foundation*, 237 Cal.App.4th 78 (2015); however, an employer does not have to provide indefinite leaves of absence;
- This type of accommodation is very challenging for employers and can pose significant risk if not implemented correctly, especially if there are overlapping obligations under other statutes such as FMLA/CFRA or work injury related leave;
- Management must be trained on an employer's obligations for extended leave;
- No specified length of time for extended leave- it requires an individualized assessment.

FAMILY AND MEDICAL LEAVE

- Employers must be sure to use required forms:
  - Notice of Eligibility and Rights and Responsibilities
  - Medical Certification
  - Designation Notice
- Employers should use a cover letter - *Graziadio v. Culinary Inst. Of America*, 2016 U.S. App. Lexis 4861.

PREGNANCY LEAVE

- New pregnancy DFEH notice: "Your Rights and Obligations as a Pregnant Employee" (Notice A and B are no longer used);
- Duty to accommodate;
- How much leave must be provided? (PDL, FMLA/CFRA, FEHA Accommodation)- Can be more than 7 months of unpaid leave for pregnancy disability and baby bonding, depending on eligibility.

NEW-PAID SICK LEAVE UPDATED FAQ

- On March 29, 2017, the California Labor Commissioner issued an updated frequently asked questions (FAQs) about paid sick leave, addressing three important areas of the paid sick leave law:

- Grandfathered PTO Plans
- Rate of Pay
- Discipline and Paid Sick Leave

PAID SICK LEAVE FAQ-QUESTION ONE

- "If my employer already had a paid time off plan that employees could use for paid sick leave before this law went into effect in 2015, was my employer required to provide *additional* sick days in response to the new law?

- No. The statute has provisions that allow for what are commonly referred to as "grandfathered" paid time off plans. Basically, in very general terms, and as described in more detail in additional FAQs below, if at the time the law went into effect in 2015, an employer already had an existing paid leave policy or paid time off plan, and if that existing policy or plan made an amount of paid leave available that could be used for at least as many paid sick days as required under the new law, and that could be used under the same conditions as specified in the new law, or that had conditions *more favorable* to employees, (i.e., that provided *more* sick days than created under the new law, or that had a *more* favorable accrual rate, etc.), the employer is allowed to continue to use that existing paid time off plan in order to satisfy the paid sick leave requirements of the new law."

PAID SICK LEAVE FAQ-QUESTION TWO

- **"If my employer is providing paid sick days through an existing (grandfathered) paid time off policy, does the new law change the rate of pay my employer is required to pay for days that I take off under the existing paid time off policy for reasons *other than* a paid sick day?"**
- **"No, the paid sick leave law addresses only the rate of pay that must be paid for time taken off as paid sick leave; it does not address or impact the rate of pay for paid time off taken for other purposes, such as vacation time or personal time…In practical terms, this means that an employer may compensate employees under an existing paid time off plan for vacation or personal holiday time, during employment, at a "base rate" of pay, whereas time taken as paid sick leave must be paid at a higher regular rate of pay (determined for the workweek or by a 90-day average), as described above."**

PAID SICK LEAVE FAQ-QUESTION THREE

- **"Can my employer discipline me for taking a paid sick day or for using paid sick leave for part of a day to go to a doctor's appointment?"**
- **"In general, no, an employer may not discipline an employee for using accrued paid sick leave. Depending on the circumstances, however, the issue may be more complex and may require more analysis."**

PAID SICK LEAVE FAQ-ANSWER TO QUESTION THREE CONTINUED

- **"If an employee has an absence that would otherwise violate the employer's attendance policy, and if the absence was for a reason not covered under the paid sick leave law, the employer is not required to allow the employee to use paid sick leave for that absence, and it is not a violation of the law for the employer to give an "occurrence" for such absence."**
- **"If an employee has an unscheduled absence that would otherwise result in an "occurrence" under an employer's attendance policy, and if the employee elects to use accrued paid sick leave for only part of the unscheduled absence (for example, if the employee is absent for a full eight-hour day of work, but elects to use only four hours of his or her accrued paid sick leave for the absence [which the employee is allowed to do], the employer would be allowed to give an "occurrence" (or 1/2 of an "occurrence") for the one-half day of unscheduled absence for which no paid sick leave was used. Only time that is properly taken as accrued paid sick leave is protected from disciplinary action."**

NEW-SCHOOL AND CHILDCARE ACTIVITIES LEAVE

- **SB 579(2016) expands school activities leave to include time off from work for child care emergencies; school emergencies; finding, enrolling, and reenrolling a child in school or with a child care provider;**
- **"Eligible employees" is expanded to include employees who are step-parents, foster parents, or stand in loco parentis to a child;**
- **The employee, if requested by the employer, must provide documentation from the school or licensed child care provider as proof that he or she engaged in child-related activities.**
- **If more than one parent of a child is employed by the same employer at the same worksite, at any one time, entitlement to a planned absence for that child applies only to the parent who first gives notice to the employer.**

VOTING TIME OFF

- Employees may take up to two hours of leave, without loss of pay, to vote in a statewide election, if the employee does not have sufficient time outside of work to vote.
-
- Employers must also post this requirement in a conspicuous place in the workplace, frequented by employees, at least 10 days prior to every statewide election.

AB 908-PAID FAMILY LEAVE

- On April 11, 2016, Governor Brown signed AB 908 into law.
- This new legislation provides that beginning in 2018, California's paid family leave (PFL) program will pay employees, depending on their salary, up to 70% of their weekly normal earnings, up from 55%.
- Paid family leave provides employees who are entitled to leave to care for a specified family member, with up to 6 weeks of wage replacement.
- Paid family leave is a program provided for under California's Unemployment Insurance Code and is administered by the Employment Development Department.

SAN FRANCISCO-PAID PARENTAL LEAVE ORDINACE

- **Key Law AND Trend- San Francisco's new *Paid Parental Leave Ordinance*, effective in 2017**
- **Employers must make-up the difference between California's paid family leave (PFL) benefits and full salary, providing 100% pay for all six weeks of leave for most employees. Currently, due to a new 2016 law, employees receive up to 70% of their weekly normal earnings of their salary.**
- **Employees must have been employed by their employer for at least 180 days before starting the leave period to be eligible for the top up benefit.**
- **The ordinance applies to all employers who regularly employ 50 or more employees, regardless of location and will be phased-in; employers with 20 employees or more must comply after January 1, 2018.**

SAN FRANCISCO-FAMILY "FLEX TIME" ORDINANCE

- **The San Francisco Board of Supervisors passed the "Family Friendly Workplace Ordinance" on October 8, 2013. The citywide law became operative on January 1, 2014. This ordinance gives certain employees the right to request a flexible work arrangement and gives the employer the right to refuse for legitimate business reasons.**
- **FFWO requires that employers with 20 or more employees allow any employee who is employed in San Francisco, has been employed for six months or more by the current employer, and works at least eight hours per week on a regular basis to request a flexible or predictable working arrangement to assist with caregiving responsibilities.**
- **A covered employer under the FFWO is an employer with 20 or more employees anywhere.**

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A1 need to add info
Author, 5/11/2016

DISABILITY MANAGEMENT

KEY EMPLOYER MISTAKE IN MANAGING DISABILITY

- Failing to distinguish an employee's WC permanent disability rating from an employer's obligations under FEHA/ADA/FMLA/CFRA.
- Often, when an employer learns that an injured employee has received a high WC permanent disability rating (e.g. 100%) the employer decides that the employee is unemployable and therefore does not conduct an interactive process to discuss reinstatement/possible accommodations/alternative vacant positions, as required by law.
- *Cuiellette v. City of Los Angeles*=$1.5 million.

INTERACTIVE PROCESS

- The interactive process must be initiated once a qualified individual with a disability requests an accommodation or the employer becomes aware of the need for an accommodation;
- Be aware of triggers for an interactive process in workers' compensation cases;
- Employers must realize this is an ongoing process; rarely will there be just one interactive process consultation; there must be follow-up and adjustments to accommodations, if appropriate, which require additional interactive process consultations;
- The interactive process should be documented and the employee should sign the interactive process form; all documents must be treated as confidential medical records.

REASONABLE ACCOMMODATION

- What is a reasonable accommodation? Any modification or adjustment to a worker's job or the work environment that enables the employee to perform the essential functions of the job.
- Examples include:
  - Modified work schedules
  - Leaves of absence
  - Making facilities accessible
  - Acquiring or modifying equipment
  - Changing tests
  - Providing interpreters
  - Reassignment to a vacant position
  - Teleworking

LATHAM v. CAMBRIA COMPANY LLC
Case No. SA CV 16-0561-DOC (PLAx).

- Robert Latham, a former employee of Cambria Company LLC, sustained injuries to his shoulder while participating in a beer drinking game, which occurred while he was attending a work related seminar. Latham was temporarily accommodated with an alternative position but Cambria terminated him after expiration of FMLA/CFRA leave.
- Latham then sued for numerous causes of action including disability discrimination, failure to accommodate, failure to engage in the interactive process, and wrongful termination.

REMEMBER- 2012 AMENDED FEHA DISABILITY REGULATIONS

KEY POINT:

- An employer is not required to provide indefinite leave.
- However, anytime an employer becomes aware of the need for an accommodation because a disabled employee has exhausted leave under WC law, FMLA/CFRA, PDL, or any other federal/state law or employer policy, and the employee is requesting additional medical leave as an accommodation, the employer must conduct an interactive process to determine if additional leave can be provided without causing an undue hardship.

PREVENTING DISCRIMINATION, HARASSMENT AND RETALIATION

LITIGATION TRENDS

- **Retaliation** claims (e.g. OSHA v. Wells Fargo $5.9 million; EEOC v. American Dental Association $1.9 million).
- **Disability discrimination** claims (EEOC v. Georgia Power $1.5 million)
- **Sexual harassment** claims (e.g. Fox News- $20 million; $2.9 million, $13 million)
- **Age discrimination** claims (e.g. EEOC v. Texas Roadhouse $12 million)
- **Religious discrimination** claims (e.g. EEOC v. Abercrombie Fitch approximately $50k)
- **Gender discrimination** claims (e.g. EEOC v. Cintas Corp., 1.4 million; DOL v. Google)

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NEW-REQUIREMENTS FOR ANTI-DISCRIMINATION, HARASSMENT AND RETALIATION POLICIES

- In addition to distributing the DFEH-185 brochure on sexual harassment, employers must develop a harassment, discrimination and retaliation prevention policy that meets the following requirements:

1. Is in writing;
2. Lists all protected categories under the FEHA, including gender expression and gender identity;
3. Indicates that the law prohibits coworkers, third parties, and supervisors and managers, from engaging in prohibited conduct;
4. Creates a complaint process that ensures confidentiality, timeliness, impartial and fair investigations, tracking for progress, options for remedial actions.
5. Provides a complaint process that offers multiple sources for reporting complaints such as:
   - Direct communication, either orally or in writing, with a designated company representative, such as an HR manager or EEOC officer and/or,
   - Anonymous complaint hotline; and/or,
   - Access to an ombudsperson; and/or,
   - Identification of the Department of Fair Employment and Housing, and the U.S. Equal Employment Opportunity Commission (EEOC) as additional sources for employees to file complaints.

NEW REQUIREMENTS FOR ANTI-DISCRIMINATION, HARASSMENT AND RETALIATION POLICIES

- 6. Requires supervisors to report all complaints to a designated company representative, such as a human resources manager;
- 7. Indicates that the employer will conduct a fair, timely, and thorough investigation;
- 8. Indicates that confidentiality will be maintained to the extent possible;
- 9. Indicates that appropriate remedial measures shall be taken;
- 10. Indicates that employees will not be retaliated against for making complaints or participating in a workplace investigation;
- 11. Employers shall disseminate the policy by one or more of the following methods:
  - Providing a copy to all employees with an acknowledgment form for signature;
  - Sending the policy via e-mail with an acknowledgment form;
  - Posting the policy on the company's intranet with a tracking system;
  - Reviewing the policy at the time of hire.

NEW REQUIREMENTS FOR AB 1825 SEXUAL HARASSMENT TRAINING

- AB 1825 - Employers must now maintain a record of sexual harassment trainings, which are required every two years for managers and supervisors, including:
  - Date of training;
  - Sign in sheet;
  - Copy of all certificates of attendance or completion;
  - Type of training;
  - Copy of all written or recorded materials used as part of the training;
  - Name of the individual conducting the training.
- The documentation must be maintained for a minimum of two years.
- For interactive electronic trainings such as webinars, the trainer must keep copies of all training materials for two years.
- There are also new requirements on the required qualifications for a trainer.

NEW- EEO-1 REPORTING AND PAY DATA

- The EEO-1 is an annual report filed that must be filed annually (by September 30th) by most federal contractors and other private employers (with at least 100 employees). Employers must tally and report their employee numbers by job category and then by sex, race, and ethnicity (Hispanic or Latino).
- On September 29, 2016, the EEOC announced approval of a revised EEO-1, starting with the 2017 report, to collect summary pay data from employers, including federal contractors and subcontractors, with 100 or more employees. Summary pay data for private employers subject to Title VII jurisdiction will go to the EEOC.

NEW- WHAT ARE THE EEO-1 "PAY BANDS"?

The EEO-1 pay bands track the 12 pay bands used by the Bureau of Labor Statistics for the Occupation Employment Statistics survey as follows:

(1) $19,239 and under;
(2) $19,240 - $24,439;
(3) $24,440 - $30,679;
(4) $30,680 - $38,999;
(5) $39,000 - $49,919;
(6) $49,920 - $62,919;
(7) $62,920 - $80,079;
(8) $80,080 - $101,919;
(9) $101,920 - $128,959;
(10) $128,960 - $163,799;
(11) $163,800 - $207,999; and
(12) $208,000 and over.

Employers will count the number of employees they have in each pay band for each job category. If no employees are in a job category or pay band, employers will leave the cell blank. The employer will then enter this data in the appropriate columns of the EEO-1 report based on the sex and ethnicity or race of the employees. For more information go to www.eeoc.gov

KEY STEPS FOR REDUCING LIABILITY

- Implement an "Anti-Discrimination, Harassment and Retaliation Policy" in writing, signed and acknowledged by all employees, that is consistently enforced;
- At a minimum, annual training of all employees;
- Open-door policy that is truly "open-door";
- Clear complaint procedures; timely response to complaints;
- Anonymous reporting service;
- Trained investigators who conduct timely, fair, and objective investigations;
- Proper documentation;
- Termination Risk Assessment BEFORE termination- team approach (Severance and Release Agreements).

KEY HR POLICIES AND FORMS

5 KEY HR POLICIES

1. ANTI-DISCRIMINATION, HARASSMENT AND RETALIATION POLICY
2. ARBITRATION AGREEMENT
3. ACCOMMODATION/INTERACTIVE PROCESS POLICY AND PROCEDURES
4. MEAL AND REST PERIOD POLICY
5. FAMILY AND MEDICAL LEAVE POLICY AND PROCEDURES

MOST IMPORTANT WORKPACE POLICY

A COMPLIANT AND UP-TO-DATE EMPLOYEE HANDBOOK

25 KEY HR FORMS

1. APPLICATION
2. ARBITRATION AGREEMENT
3. COBRA NOTICE
4. DISCIPLINARY/COUNSELING NOTICE
5. EMPLOYEE COMPLAINT FORM
6. EMPLOYEE HANDBOOK
7. FMLA/CFRA FORMS
8. I-9 FORM
9. INTERACTIVE PROCESS CONSULTATION
10. INVESTIGATION REPORT
11. JOB DESCRIPTIONS
12. LEAVE OF ABSENCE REQUEST
13. MEAL PERIOD WAIVER
14. MEDICAL CERTIFICATION
15. NEW EMPLOYEE REPORT- FORM DE-34
16. OFFER LETTER
17. OSHA LOG 300
18. OVERTIME REQUEST
19. PERFORMANCE EVALUATION
20. PERSONNEL RECORDS REQUEST
21. PREGNANCY FORMS- REQUIRED NOTICES
22. PREMIUM PAY FORM
23. SEVERANCE AGREEMENT AND RELEASE
24. TERMINATION LETTER/EXIT INTERVIEW
25. WORK COMP NOTICES

SEVEN HABITS OF FREQUENTLY SUED EMPLOYERS

SEVEN BAD HABITS

Failure To Properly:

- Document
- Create compliant Company policies
- Enforce meal and rest periods
- Understand "at-will"
- Accommodate disabled workers
- Respond to discrimination and harassment complaints
- Follow federal and state mandatory leave laws

NOTABLE 2016/2017 EMPLOYMENT LAW CASES

CASTRO-RAMIREZ v. DEPENDABLE HIGHWAY EXPRESS 246 Cal. App. 4th 180 (2016)

- **Facts:** Plaintiff alleged that when DHE hired him to work as a truck driver in 2010, he told DHE he had a disabled son who required kidney dialysis on a daily basis and he (plaintiff) was responsible for administering the dialysis. Plaintiff requested work schedule accommodations that his supervisor granted, which permitted him to attend to his son in the evening. However, a new supervisor, denied the accommodation and he filed suit.

- **Court's Decision:** Pursuant to FEHA, the employer can be liable for "associational" disability discrimination-the employee does not have to be disabled.

CUIELLETTE V. CITY OF LOS ANGELES 194 Cal. App. 4th 757 (2009)

- WC laws and the FEHA/ADA have different standards for defining a disability and for determining whether or not an employee can work.

- For example, a 100 percent permanent disability rating in a workers' compensation case does not mean, under the FEHA/ADA, that an employer can refuse an employee's request to return-to-work, or to remain on the job.

- This is because the employee is protected by the FEHA/ADA, and the employer must comply with the provisions of these laws in considering return-to- work requests and other issues.

EEOC V. ABERCROMBIE & FITCH STORES, INC. 135 S. Ct. 2028 (2015)

- **Facts:** This case involved an employer's refusal to hire a woman who wore a hajib in an interview, although she did not raise the need to wear the hajib during the initial interview, because she thought she would not be hired. Her ability to wear a hajib required an accommodation, because Abercrombie's dress code did not permit head scarfs/hats. The job applicant sued for religious discrimination and Abercrombie defended by arguing it could not have discriminated because the applicant did not request an accommodation.
- **Holding:** Is actual knowledge of the needed accommodation required to show religious discrimination? No, because under the disparate treatment doctrine:
  - An employer may not fail to hire based upon religious practices.
  - Plaintiff need only show motivating factor.
  - Title VII does not impose a knowledge requirement.

EEOC V. TEXAS ROADHOUSE (2017)

- Texas Roadhouse, a national, Kentucky-based restaurant chain, will pay $12 million and furnish other relief to settle an age discrimination lawsuit brought by the EEOC.
- The EEOC had filed suit seeking relief for a class of applicants the EEOC charged had been denied front-of-the-house positions, such as servers, hosts, server assistants and bartenders, because of their age, 40 years and older. As part of the settlement, Texas Roadhouse will change its hiring and recruiting practices. The EEOC's lawsuit alleged that Texas Roadhouse violated federal law by engaging in a nationwide pattern or practice of age discrimination in hiring hourly front-of-the-house employees.

KILBY v. CVS PHARMACY INC. 63 Cal. 4th. 1 (2016)

- The California Supreme Court was called upon to interpret language in the Industrial Welfare Commission wage orders which says: "Working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."
- Interpreting the Wage Order, the Court held: "If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for."
- The Court also held that whether seating is "reasonably required" is always a question of fact involving a "totality of the circumstances approach."

MENDOZA V. NORDSTROM, INC. 778 F. 3d 834 (2015)

- Pending before the California Supreme Court: Whether under California law an employee can waive his or her right to a day off, or opt to shift his or her rest day from week to week.
- For example, a worker who takes a day off on Monday of one week, then on a Friday the following week would work for 10 days straight, but still have a day off in each workweek, versus only working 6 of 7 consecurive days (Labor Code sections 551 and 552).

OSHA v. WELLS FARGO (2017)

- OSHA has ordered Wells Fargo Bank N.A. to compensate and immediately reinstate a former bank manager who lost his job after allegedly reporting suspected fraudulent behavior to superiors and a bank ethics hotline.
- The manager, who had previously received positive job performance appraisals, was allegedly abruptly dismissed from his position at a Wells Fargo branch in the Los Angeles area after he reported separate incidents of suspected bank, mail and wire fraud by two bankers under his supervision. He was allegedly told he had 90 days to find a new position at Wells Fargo, and when he was unsuccessful, he was terminated.
- In addition to reinstatement, back pay, compensatory damages, and attorneys' fees must be paid at about $5.4 million.

RODRIGUEZ V. E.M.E., INC. Case No. B264138 [2016 Cal. App. LEXIS 315]

- Facts: Employees working an 8-hour shift were provided a combined 20-minute rest break that either preceded or followed a 30-minute meal break. The plaintiff filed suit alleging that "a single, combined rest period" violated California's IWC Wage Order No. 1, which applies to the manufacturing industry. The employer argued that its practice complied with the Wage Order because employees received the required 20 minutes, in total, of rest period time, and that the employees preferred a 20-minute rest break, which increased productivity. The trial court had granted summary judgment in favor of the employer, ruling that its practice of providing a combined 20-minute rest period before or after the meal break was lawful. The appellate court disagreed and reversed.
- Court's Decision: "Rest breaks in an eight hour shift should fall on either side of the meal break, absent factors rendering such scheduling impracticable."

CONCLUSION

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