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Employment Law News Fall 2021 | Volume 1, Issue 4

Welcome to the Fall Edition of **Murphy Austin's Employment Law News**,

COVID-19 updates remain at the top of California employers' minds. Yes, the California COVID-19 Supplemental Paid Sick Leave law did expire on September 30, 2021. Be sure you remove the accrual from your pay stubs. No, the federal Occupational Safety and Health Administration (OSHA) has not yet released a final rule to implement the new federal policy of mandatory vaccination or weekly COVID-19 testing for employers of 100 or more employees. We will send a **Client Alert** when we have more substantive information, so stay tuned. The state legislature did make some changes to the law on notifying employees and others about COVID-19 cases in the workplace, which I discuss in an article below.

Read on for important changes in employee arbitration agreements; how to calculate the payment due to employees for meal and rest break premiums; upcoming deadlines for CalSavers compliance (you need to know what this is); and, a piece of good news for employers facing Private Attorney General Act lawsuits.

Also – Save the Date for **Murphy Austin's Annual Year-End Employment Law Update, scheduled for the morning of Wednesday, December 8, 2021**. Details will be announced next month. We hope to see you there, whether the session is held in person or virtually.

Sincerely,

Shawn M. Joost, Of Counsel
Murphy Austin Labor and Employment Law Team

COVID-19 – NEW LAWS AND GUIDANCE

Changes in COVID-19 Notice Requirements

By Shawn M. Joost, Of Counsel

For a nice change of pace, the Legislature streamlined the requirements for COVID-19 notices. **Amendments to Labor Code section 6409.6**, which requires certain notices in the event of a COVID-19 case at the workplace, clean up confusing language in the original statute.

The original statute required that three types of notice be given if you had a COVID-19 case at the workplace: i) of a potential exposure to COVID-19, ii) of COVID-19 benefits the employee may be entitled to, and iii) the employer's cleaning and disinfection plan. But the description of who was to receive each notice was different for each type of notice, which created confusion.

The new statute provides that all three notices be given to employees "who were on the premises at the same worksite as the qualifying individual within the infectious period," which clarifies that it is the same group who receives each notice. (There are still notice requirements for the employers of subcontracted employees and employee representatives.)

The amendment also clarifies the definition of "worksite," by excluding "locations where the worker worked by themselves without exposure to other employees" and remote work locations, such as a worker's residence.

Finally, the amendment addresses the period in which you must notify the Department of Public Health in the event of an outbreak. The original law required the notice to be given within 48 hours, which was a problem if you learned about the outbreak on a Friday. The amendment provides that the notice be given within 48 hours or one business day, whichever is later. So if you learn of the outbreak on Friday, your deadline to give notice is Monday.

Cal/OSHA's Emergency Temporary Standards, which I discussed in the **Summer Edition** of this newsletter, remain in effect. **Please be sure you are complying with them, including having the up-to-date COVID-19 Prevention Plan and employee trainings required by those standards.** In addition, local orders may apply to your business. For example, although the Cal/OSHA standard does not require vaccinated employees to wear masks indoors, **Sacramento County** and **Yolo County** have indoor mask mandates.

CHANGES IN EMPLOYMENT LAW

Big Changes for Employee Arbitration Agreements

By Shawn M. Joost, Of Counsel

If you require applicants or employees to execute an arbitration agreement, you should revise your agreement form in light of a recent Ninth Circuit decision. Last year, the legislature enacted Labor Code section 432.6, which prohibits employers from requiring any applicant or employee to waive the right to any forum or procedure when pursuing Labor Code or certain fair employment claims. Essentially, this means you cannot require

an employee to sign an arbitration agreement and you cannot take action against an employee who refuses to sign one. A federal district court issued a preliminary injunction in February 2020, blocking enforcement of the law on the grounds that it conflicted with the Federal Arbitration Act. But the Ninth Circuit Court of Appeal recently reversed most of that ruling, meaning the law is now in effect (with the exception of portions prescribing criminal penalties).

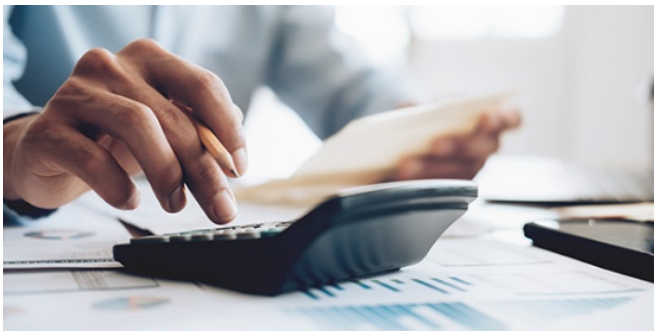
Importantly, the law does not invalidate an arbitration agreement that an employee signs. However, if employees do not sign, you cannot threaten, discriminate or retaliate against, or terminate them. We recommend that you immediately revise your arbitration agreement accordingly, and train your human resources department on this issue.

The lawsuit, *Chamber of Commerce v. Bonta*, (9th Cir. 2021) --- F.4th ---, 2021 WL 4187860, is still proceeding, and – in the end – the law may be enjoined again. However, for now, we recommend that you bring your documents and procedures in line with Labor Code section 432.6.

Surprise! You May Owe More than You Think for Break Premium Pay

By Shawn M. Joost, Of Counsel

When your employees are owed a meal or rest break premium, how much are you paying them? Until recently, the governing case law said that break premiums were owed at the employee's base hourly rate. The California Supreme Court changed all that with its decision in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, holding that meal and rest break premiums must be paid at the employee's "regular rate of pay" – the rate used to calculate overtime wages owed, rest break pay for piece rate workers, and paid sick leave rates.



The "regular rate of pay" encompasses all nondiscretionary payments, not just base hourly wages. And it does not matter that the nondiscretionary payments may be made long after the pay period with the meal or rest break violation. In *Loews,* the employer paid its employees a *quarterly* nondiscretionary incentive bonus, in addition to a base hourly wage. The amount of that bonus therefore needed to be included when calculating the employee's regular rate of pay and adjustments had to be made for payments based on that rate in the preceding quarter.

This does **not** mean that you don't pay the premium until the regular rate can be completely calculated. If you make a nondiscretionary payment once per quarter, you pay the base hourly rate as the premium in the workweek that the premium is incurred. Then, you go back at the end of the quarter and pay any additional amounts owed after the regular rate for that quarter can be calculated.

So, what are nondiscretionary payments? The California Supreme Court, quoting from the Division of Labor Standards Enforcement (DLSE) Policy and Interpretations Manual, said that they are "payments for an employee's work that are owed 'pursuant to [a] prior contract, agreement, or promise,' not 'determined at the sole discretion of the employer.'" For example, if you tell your employees they will earn an incentive bonus calculated under a set formula or earn a set piece rate, those are both types of "nondiscretionary" payments.

When do employers owe a meal or rest break premium payment? If an employee is not "authorized or permitted" by the employer to take a timely, uninterrupted meal or rest break of the required duration, then an hour's pay is owed (up to one meal break premium and one rest break premium per day). That means if you delay your employees' meal break past the start of their sixth hour of work because you need them to get an order filled, then you owe them a meal break premium because they were not permitted to take a timely meal break. If your employees worked past the start of their sixth hour of work because they wanted to meet some friends for lunch later, that was their choice, and you don't owe them a premium payment. (You should discipline them for violating your meal break policy though.)

Are you wondering what the DLSE Manual is? While it is only agency guidance and does not have the force of law, it is a helpful resource in many situations and provides the agency's interpretation on applicable statutes and regulations. You can find it **online**.

Action step: Make sure your payroll process accounts for all nondiscretionary payments to calculate the regular rate of pay and that you pay all meal and rest break premiums payments at that rate – no matter how long the intervals between the workweek when the premium was owed and the nondiscretionary payment.

FINALLY! Good News for California Employers

By Shawn M. Joost, Of Counsel

As many of you know from personal experience, California's Private Attorney General Act (PAGA) permits employees who have allegedly suffered a Labor Code violation to bring a lawsuit on behalf of themselves and other "aggrieved" employees to recover civil penalties as a "private attorney general" for the State of California. The penalties recovered are shared – 25% to the employee bringing the suit and 75% to the State.

The law permits an employee to seek civil penalties for any purported violations, even if the employee bringing the lawsuit was not affected by all of the alleged violations. As a result, employers can be faced with PAGA litigation involving every employee on a wide variety of Labor Code provisions. A recent decision from a California Court of Appeal is the first published authority on the long-simmering question of whether or not a court can require a PAGA lawsuit to be manageable or face dismissal.

In *Wesson v. Staples the Office Superstore* (2021) 68 Cal.App.5th 746, the appellate court held that a trial court has the inherent authority to ensure that PAGA claims can be fairly and efficiently tried and to strike PAGA claims that cannot be made manageable. Importantly, the appellate court determined that the employer's due process rights to litigate affirmative defenses must be considered when determining if a claim is manageable.

In *Wesson,* the plaintiff alleged that Staples had misclassified its 345 general managers as exempt employees. The general managers worked in stores and with staffs of various sizes, and each general manager's duties varied depending on the store and staff size, as well as other factors. The trial court found that Staples had a right to present evidence as to each general manager's classification and that, as such, a trial of the PAGA claim was unmanageable. The court of appeal agreed and the PAGA claim was dismissed.

EEOC Pay Data Reporting Filing Deadline Extended to October 25, 2021

By Shawn M. Joost, Of Counsel

The U.S. Equal Employment Opportunity Commission (EEOC) **extended its 2019 and 2020 EEO-1 filing deadline to October 25, 2021.** According to the agency, this will be the **final** extension. This applies to private employers with 100 or more employees and to certain federal contractors with 50 or more employees.

As a reminder, California adopted its own **pay data reporting requirements** in late 2020. Reporting was due under those requirements by March 31, 2021 and is due that date annually thereafter. The California pay date reporting requirements also apply to employers with 100 or more employees.

CHANGES IN EMPLOYEE BENEFITS

Small Employers - Are You Ready for CalSavers?
Large Employers – Are You Compliant?

By Scott E. Galbreath, Of Counsel

The law establishing California's automatic enrollment IRA program, known as CalSavers, applies **now** to employers with 50 or more employees who do not offer a retirement plan. The law will apply to employers with five or more employees who do not offer a retirement plan beginning in June 2022. Failure to comply subjects employers to penalties. CalSavers mandates that employers must automatically deduct 5% of an employee's pay and contribute it to CalSavers.

CalSavers RETIREMENT SAVINGS PROGRAM

For more detailed information, see the many articles on CalSavers in **The Benefit of Benefits blog,** courtesy of Murphy Austin's Scott E. Galbreath or contact Scott at SGalbreath@murphyaustin.com.

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*Created and curated by Shawn Joost, **Murphy Austin's Employment Law News** is a quarterly update focused on the top changes affecting California employers.*

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Dennis R. Murphy is a Partner with Murphy Austin's **Labor and Employment Law Team**. Dennis's experience commenced in 1972 and includes the representation of employers in every aspect of labor and employment law. It includes both trial and appellate advocacy and counseling. He has appeared before the United States Supreme Court, before many state and federal appellate courts, in numerous jury trials and before most of the governmental agencies that handle labor and employment issues.

Scott E. Galbreath is Of Counsel with and leads Murphy Austin's **Employee Benefits and Executive Compensation Practice Team.** He has more than 30 years of experience representing employers in ERISA, employee benefits, and executive compensation matters. Scott also produces **The Benefit of Benefits blog**, which provides information and commentary on new legislative, regulatory, and industry developments in employee benefits and executive compensation.

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