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

Welcome to 2022 – where we find ourselves continuing to navigate the shifting currents of COVID-19 regulations. As you likely know by now, the federal Occupational Safety and Health Administration ("OSHA") regulation requiring employers of 100 or more employees to have a "mandatory vaccinate or test" policy was stayed by the U.S. Supreme Court and is not in effect. Whether or not Cal/OSHA promulgates a regulation requiring employers to have such a "mandatory vaccinate or test" policy, and if so, which employers would be governed by it, remains to be seen. What is certain is that Cal/OSHA's new COVID-19 regulation went into effect on January 14, 2022. Be sure to read the article below so you stay in compliance.

Don't miss important updates on employee agreements in an article by the newest member of our Labor and Employment team, **Charles Hellstrom**.

Finally, the new year is the perfect time to do your annual employee handbook update. Did you update your California Family Rights Act policy to include an employee's right to take a CFRA leave to care for parents-in-law? Did you update your handbook last January to include a CFRA policy when the law was changed to make it applicable to employers of five or more? If you missed that last year, it's critical for you to have a compliant policy in place immediately and to be sure your human resources staff knows how to implement CFRA leave.

Sincerely,

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

COVID-19 – NEW LAWS AND GUIDANCE

Revised Cal/OSHA COVID-19 Regulation – In Effect as of January 14

By Shawn M. Joost

All California employers must stay up-to-date with Cal/OSHA's COVID-19 regulations. The key changes in the **Cal/OSHA Revised Temporary Emergency COVID-19 Standard**, which went into effect on January 14, 2022, are:

Testing

Fully-vaccinated and unvaccinated employees who were a "close contact" at work of a "COVID-19 case" must be offered free testing during paid time, unless they are a recently recovered COVID-19 case, as defined. The prior rule required testing to be offered only to unvaccinated close contacts.

[Note – Don't confuse testing offered to close contacts with testing of employees with COVID-19 symptoms. You must also offer free testing during paid time to any symptomatic employee.]

Exclusion

While fully-vaccinated employees who were a close contact but remain asymptomatic still do not need to be excluded from the workplace, in order to avoid exclusion, they must wear a face covering and maintain six feet of distance from others for 14 days after the date of their last close contact. Previously, they did not need to wear a mask or socially distance.

Return to Work

Close contacts who never developed symptoms may return to work when 14 days have passed since the last known close contact, or in a shorter period of time under the following conditions:

- 10 days have passed since the last known close contact and the person wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the last date of close contact; or

- 7 days have passed since the last known close contact; the person tested negative for COVID-19 using a COVID-19 test with the specimen taken at least five days after the last known close contact; and the person wears a face covering and maintains six feet of distance from others while at the workplace for 14 days following the last date of close contact.

Certain employers, such as those in health care, are subject to different regulations.

All employers need to revise their required COVID-19 Prevention Plans to comply with the new standard.

Cal/OSHA's FAQ has been updated to reflect the new standard, and you should review the information there as well as the new standard itself.

STATE OF CALIFORNIA
CAL OSHA
DEPARTMENT OF INDUSTRIAL RELATIONS

Lots of Changes Required in Employee Agreements

By Charles R. Hellstrom

Arbitration Agreements

In the last edition of Employment Law News (Q4, 2021), we highlighted the Ninth Circuit's lifting of the injunction in *Chamber of Commerce v. Bonta*, (9th Cir. 2021) F.4th ---, 2021 WL 4187860, which allowed Labor Code § 432.6 to go into effect. This means that requiring applicants or employees to sign an arbitration agreement, or taking any adverse action against them for refusing to sign, is now a violation of the Labor Code (though the agreement itself is not voided by the statute). Further review of this decision by the Ninth Circuit is currently pending in the Supreme Court.

Another new ruling addresses the arbitration of Private Attorney General Act (PAGA) claims. The law has been clear for several years that employee PAGA claims are not subject to employee arbitration agreements. The recent decision in the case of *Najarro v. Superior Court* (2021) 70 Cal. App. 5th 871 now makes it advisable for employers to explicitly state in their arbitration agreements that the agreement does not govern PAGA claims brought by the employee.

In *Najarro,* the court decided that an arbitration agreement that did not specifically "carve out" PAGA claims was substantively unconscionable. If a court finds an agreement "unconscionable," then the agreement can be void. Employers can lessen the risk of their arbitration agreement being found void by including express "carve out" language.

Settlement Agreements

SB 331, known as the "Silenced No More Act," expands the law enacted in 2019 that prohibits settlement agreement provisions preventing the disclosure of factual information relating to *all forms* of sexual harassment and discrimination claims that are filed in a civil or administrative action.

This prohibition now applies to factual information relating to claims of harassment or discrimination based on any "protected category" that are filed in a civil or administrative action. This means that it does not apply to claims settled prior to the commencement of a formal court or agency action. Fortunately, it is permissible to require the settlement dollar amount to be kept confidential.

Non-Disparagement Agreements

Employers may not require employees to sign a non-disparagement agreement or other document that denies employees the right to disclose information about unlawful acts in the workplace, as a condition of employment or continued employment, or in exchange for a promotion, bonus, or continued employment.

A non-disparagement provision in such an agreement or document must include the following (or something substantially similar):

"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Since the statute provides this model language, we recommend that you use it verbatim rather than hope a court will agree the language you drafted yourself is "substantially similar."

Severance Agreements

You are likely familiar with the 21-day "waiting period" that employers must provide to employees when seeking a waiver of age discrimination claims. Now, all employees being offered a severance agreement must be given a waiting period. Employers must provide a "reasonable time period of not less than five business days" for an employee to consult an attorney before signing the agreement. For employees with the 21-day waiting period, the five days will run concurrently.

Employees may sign earlier but only if their signing earlier is "knowing and voluntary," meaning the employer did not induce an earlier signature by "fraud, misrepresentation, or a threat to withdraw or alter the offer," or by offering different terms to employees who sign earlier. So, for example, employers cannot offer to increase the severance payment in exchange for an earlier signature or threaten to reduce the severance payment if the employee takes the whole five days.

In addition, employers must notify employees offered a severance agreement that they have the right to consult an attorney.

These provisions do not apply to "negotiated settlement agreements" that resolve employee claims made in a lawsuit, administrative proceeding, an alternative dispute resolution forum, or an employer's internal complaint procedure.

Like employee settlement agreements, the amount of a severance payment may still be kept confidential.

Important Reminder: CalSavers Applies to Employers with More than Five Employees in 2022

By Scott E. Galbreath

Employers with five or more employees that don't offer a retirement plan must register with CalSavers by June 30, 2022 or face penalties. CalSavers announced they will begin levying penalties this month on those employers with 100 or more employees that were required to register by September 30, 2020. Read more about it in Scott E. Galbreath's the Benefit of Benefits blog article "CalSavers Begins Assessing Penalties-Threshold Number of Employees Drops to 5 on June 30."

CalSavers Begins Assessing Penalties-Threshold Number of Employees Drops to Five on June 30

The United States Supreme Court is considering whether to hear an appeal from United States Court of Appeals for the Ninth Circuit, dismissing a case brought by the Howard Jarvis Taxpayers Association claiming that CalSavers, California's mandated payroll deduction IRA program, is preempted by ERISA (See ***Happy New Year! Supreme Court Expected To Be Busy With ERISA Again In 2022***). In the meantime, the CalSavers program continues as state law. On January 12, the CalSavers Retirement Savings Board issued a press release stating that it will begin levying penalties, this month, on those employers failing to register with CalSavers by their deadline of September 30, 2020. Employers with more than 100 employees not offering a retirement program to their employees were required to register by that date. The original deadline was June 30, 2020 but it was extended due to the Coronavirus. The penalty is $250 per employee (meaning the minimum would be $25,250 for 101 employees) and will be levied in partnership with the California Franchise Tax Board. Once receiving the first notice of penalties, if the employer doesn't comply within 90 days the penalty increases another $500 (for a total of $750, or $75,750 minimum) per employee. The release says that the program has sent dozens of notifications by letter and email since it launched three years ago. It urges employers to comply now before receiving the notice of penalties and states service representatives are standing by to assist employers.

Threshold Drops. Importantly, the threshold number of employees, requiring employers to register with CalSavers if not offering a retirement plan, dropped from over 100 to over 50 with a deadline to register of June 30, 2021. Additionally, employers with 5 or more employees and no plan must register by June 30, 2022 to avoid penalties.

Registering involves employers providing CalSavers with contact information for their employees so that CalSavers can contact them about enrolling. Unless the employee opts out or changes the contribution amount, employers must withhold 5% of pay from all enrolled employees and pay it over to CalSavers. The CalSavers program then invests the contributions in Roth IRAs for each employee. The employee can opt out of a Roth IRA for a traditional IRA.

Consider Options. Because CalSavers is IRA based, the amount that can be saved by employees is much lower than in a private qualified plan such as a 401(k) plan (See ***Inflation Adjusted Plan Limits Reiterate Advantages of Employer Plan Over CalSAVERS***. Employers with more than 5 employees that don't currently provide a retirement plan should consult with an employee benefits attorney or other professional to compare adopting a private plan over registering for CalSavers. Please contact us with questions and look for our upcoming seminar/webinar on the subject.

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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Murphy Austin's Labor and Employment Law Team

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Aaron B. Silva is a Partner and Chair of Murphy Austin's **Labor and Employment Law Team**. Aaron has an extensive background defending employers before state and federal courts and several administrative boards regarding nearly all matters employment-related, including wage and hour, discrimination, harassment, ADA, OSHA, and union relations. Aaron also produces a monthly employment law podcast, **HR Legalcast**.

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.

Charles R. Hellstrom is a litigation attorney who counsels and represents clients in labor and employment matters and disputes. Charles's experience includes litigating claims under the California Labor Code and Unemployment Insurance Code in both civil litigation and administrative hearings, as well as misclassification, discrimination, and wrongful termination claims. He has also represented businesses in connection with employee misconduct, misappropriation, and embezzlement and assists businesses in revising employee handbooks and separation agreements to prevent future litigation.

Murphy Austin is a premier business law firm based in the Sacramento region with practices focused on Labor and Employment, Employee Benefits and Executive Compensation, Commercial Litigation, Insurance Coverage and Bad Faith Litigation, Appellate Law, Commercial Real Estate and Construction, Corporate and Business, Nonprofits, Public Contracts, Tax and Estate Planning. Murphy Austin attorneys place the highest value on meaningful client relationships. For more information, visit **www.murphyaustin.com.**