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Employment Law News Spring 2022 | Volume 2, Issue 2

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

In this issue, we share information on a new COVID-19 law and a major change in the law governing employee arbitration agreements. If you are thinking that is what we covered in the Winter Edition – you're right. But there are changes again this quarter on these important subjects.

California employment law is a tricky landscape to navigate. So, we also compiled a brief list of mistakes that we see clients making in the hopes that it may help some of you to avoid them.

Finally, some employers have been so busy managing the constantly-changing COVID-19 landscape that conducting required sexual harassment prevention training fell off their radar. So just a reminder that all employers with five or more employees must provide one hour of training to nonsupervisory employees and two hours to supervisory employees. Training must be provided within six months of hire or promotion and at least every two years thereafter. (Gov't Code § 12950.1.)

Sincerely,

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

COVID-19 – NEW LAWS AND GUIDANCE

Return of Supplemental COVID-19 Paid Sick Leave

By Shawn M. Joost

The new supplemental paid sick leave law for COVID-19 became effective February 19, 2022 and applies to employers with more than 25 employees. The new law has significant differences from the prior law.

You may be familiar with the basic law, but have you checked to be sure that the supplemental leave is on your pay stubs? Have you displayed the **required poster**? The Department of Industrial Relations has issued a **helpful Frequently Asked Questions**, providing useful information and detail for situations that commonly arise.

Under the new law, employees are provided with two "buckets" of sick leave. Employees may have up to 40 hours, depending on the number of hours they regularly work, when the employee is unable to work and is:

- Subject to isolation or quarantine;
- Experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Caring for a family member who is subject to isolation or quarantine;
- Caring for a child whose school or place of care is closed due to COVID-19 on the premises;
- Attending an appointment for vaccinations for themselves or a family member; or
- Caring for themselves or a family member experiencing symptoms after vaccination.

Employees may have up to an additional 40 hours if they or the family member they are caring for tests positive for COVID-19. Employers may request documentation of the test results and need not pay the additional sick leave unless the documentation is provided.

Note that the first "bucket" of hours need not be used up before the employee can use some of the second "bucket" of hours.

The law is retroactive to January 1, 2022. As such, if employees were unable to work for a covered reason from January 1 through February 19, they may request retroactive payment. Please note, this includes former employees too. The law expires on September 30, 2022.

CHANGES IN EMPLOYMENT LAW

End of Forced Arbitration of Sexual Assault and Sexual Harassment Claims

By Charles R. Hellstrom

Following quickly on the heels of several changes affecting the enforceability of employee arbitration agreements from last fall (which I wrote about in the Winter Edition), Congress recently created an option for employees to opt out of arbitration agreements in cases of sexual assault or sexual harassment. Employers should update their employee arbitration agreements accordingly.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445) continues the recent trend of chipping away at the enforceability of employee arbitration agreements, now at the national level.

The broad takeaway from the new law is that individuals bringing sexual assault and sexual harassment claims who entered into arbitration agreements or class/collective action waivers before their claims arose now have the option to reject those agreements and instead bring those claims in court or through a class/collective action.

However, the law's language has some ambiguities that make its breadth unclear:

- The law exempts "cases" and not "claims" from arbitration, which raises the question of whether courts will split certain claims from a case into two separate venues, with sexual assault/harassment claims staying in court while other claims go to arbitration. Otherwise, the entire case may be kept in court, so long as the dispute includes at least one sexual assault/harassment claim.

- The law exempts from arbitration claims that "relate to" sexual assault or harassment. But without further definition of "relate to," it remains to be seen whether a claim that remotely involves issues of sexual assault or harassment (e.g., discrimination, retaliation) must be litigated in court, just as those which directly assert those claims.

- The law applies to claims that "arise or accrue" after March 3, 2022, which leaves an open question as to when a claim "arose or accrued" and consequently, whether the claim would be subject to arbitration.

Some other key facets of the new law:

- The law only applies to arbitration agreements entered into before the sexual assault/harassment claims "arise or accrue." Parties remain free, however, to mutually agree to arbitration after a claim has been asserted.

- Only courts (not the arbitrators themselves) can decide whether the law applies to the dispute and whether the arbitration agreement governing the dispute is enforceable. This is the case regardless if the arbitration agreement grants the arbitrator the power to determine whether the claims are subject to arbitration.

These uncertainties created by the new law will have to be tested by the courts, and those rulings will help shed light on its scope and impact on employers.

Common Mistakes We'd like to See Employers Avoid

While not a scientific survey, here are some mistakes that we commonly see employers make. Even though they might seem small, they can result in significant exposure. Review your policies and practices for the following:

1. Do you have all of the items required by **Labor Code section 226(a)** on your pay stubs? There are nine enumerated items. If you use a piece rate, you also need the additional items listed in **Labor Code section 226.2**.

2. Are your non-exempt employees recording their meal break times? Make sure they are accurately recording the actual daily times. The law requires this, and having a time keeping system that makes it difficult is not a defense.

3. Are you providing the required notices to employees when they may have rights to a family or medical leave under FMLA or CFRA? The employer has a duty to provide notice even if the employee does not ask for the leave.

4. Do you have written agreements with all employees who are paid by commission? Such agreements are required by **Labor Code section 2751**, which has specific requirements.

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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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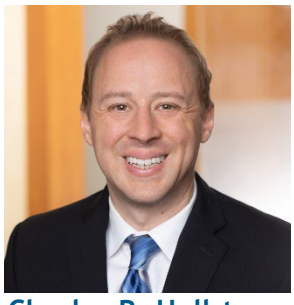

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Murphy Austin's Labor and Employment Law Team

Shawn M. Joost is a Partner with Murphy Austin's **Labor and Employment Law Team**. Shawn advises companies in all areas of employment law, including employment classification, employee termination, leave decisions, wage and hour matters and drafting effective and enforceable employment policies, and executive employment agreements.

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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.

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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.**