CalChamber

California Employer Update

California's Newly Revised COVID-19 ETS: What You Should Know | Employer Investment in, Attitudes Toward Remote Work
Seven Tips for Successfully Hiring New Workers in 2022 | Law in Brief: 2021 Case Law Wrap-Up

California's Newly Revised COVID-19 ETS: What You Should Know

by James W. Ward, J.D.; Employment Law Subject Matter Expert/Legal Writer and Editor, CalChamber

The Occupational Safety and Health Standards Board (OSHSB) met on December 16, 2021, to consider a second readoption of its COVID-19 Workplace Emergency Temporary Standard (ETS). After public comment and some discussion, the OSHSB — the standards-setting agency within the California Division of Occupational Safety and Health (Cal/OSHA) — did, indeed, vote to readopt the ETS with the proposed amendments. The changes took effect January 14, 2022 and will remain in place until April 14, 2022.

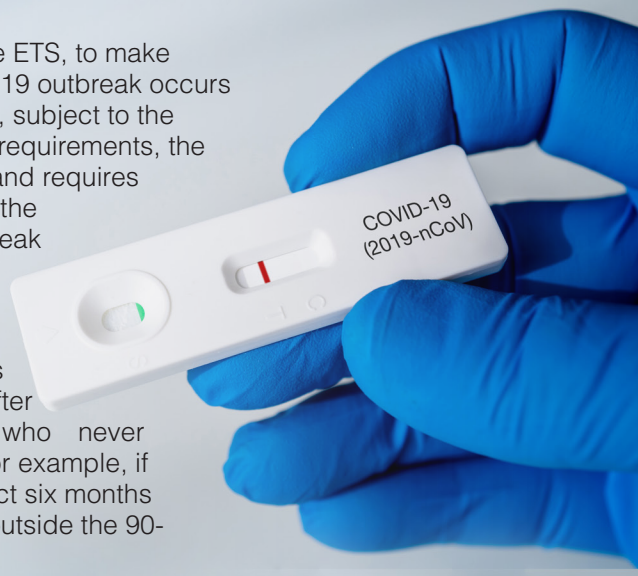
The revised ETS maintains the general ETS framework we've been working under since November 2020, which requires employers to create and implement a written COVID-19 Prevention Program addressing COVID-19-related issues in the workplace. The revised ETS makes notable changes, however, to several key areas, including testing, face coverings, vaccination, exclusion of employees after exposure and certain definitions. In general, the changes roll back some flexibility in the current ETS by, among other things, eliminating many of the distinctions between vaccinated and unvaccinated workers adopted in the June 2021 revisions.

This article highlights some of the main changes in the revised ETS, but employers should review the ETS and related guidance in detail and consult with legal counsel about making changes to their COVID-19 Prevention Programs.

Testing

Under the previous version of the ETS, employers had to make testing available to employees who had close contact with a COVID-19 case except for fully vaccinated employees and employees who had COVID-19, returned to work and remained asymptomatic.

The revised ETS removes the exception for vaccinated employees, which means that effective January 14, 2022, employers must make testing available to all employees who had a close contact in the workplace, regardless of vaccination status, except for former COVID-19 cases that returned to work per ETS criteria.



Employers were also required, under the previous version of the ETS, to make weekly testing available to exposed employees when a COVID-19 outbreak occurs in the workplace, i.e., three or more employee COVID-19 cases, subject to the same exceptions just described. Like the close contact testing requirements, the revised ETS removes the exception for vaccinated employees and requires employers to make weekly testing available to all employees in the exposed group, regardless of vaccination status, until the outbreak ends, except for former COVID-19 cases who returned to work per ETS criteria.

Employers should keep in mind that for former COVID-19 cases who returned to work, the ETS exception is limited to 90 days after the initial onset of COVID-19 symptoms or, for COVID-19 cases who never developed symptoms, 90 days after the first positive test. So, for example, if a former COVID-19 case returns to work and has a close contact six months later, the exception would not apply since the close contact is outside the 90-day window.

The revised ETS also changes the definition of COVID-19 test. Under the latest readoption, a valid COVID-19 test must be cleared, approved or authorized by the Food and Drug Administration (FDA), administered according to authorized instructions, and must not be both self-administered and self-read (e.g., at-home tests), unless they are observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy the ETS definition are those processed by a laboratory, proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is either done or observed by an employer.

This revised definition essentially makes it clear that an at-home COVID-19 test self-administered and self-read by the employee isn't valid for ETS requirement purposes unless observed by either a telehealth professional or the employer.

Face Coverings

The readopted ETS leaves many of the face covering rules in place, but it does make some notable changes.

For example, under the previous version of the ETS, there were several exemptions to face covering requirements, one of which is for employees who cannot wear face coverings due to a medical or mental health condition, or disability. Under the revised ETS, if those employees cannot wear a non-restrictive alternative, they must physically distance at least six feet from others and either be fully vaccinated or tested at least weekly for COVID-19.

Under the revised ETS, employers who screen employees indoors for COVID-19 symptoms must ensure that all employees wear face coverings, even those who are fully vaccinated.

Additionally, the revised ETS changed the definition of face covering, adding a new "light" test for face coverings made of tightly woven fabric or non-woven material. The ETS requires the face covering to be such that it doesn't "let light pass through when held up to a light source." Cal/OSHA guidance clarifies that face coverings don't need to completely block out light; eather, the new language is meant to provide an example of an acceptable face covering made from a tightly woven fabric or non-woven material.

The readopted ETS didn't change the general ETS face covering rules that allow fully vaccinated employees to go without face coverings indoors; however, as a reminder, California reinstituted a statewide face covering requirement for "indoor public settings" that has been extended through February 15, 2022, regardless of vaccination status — and the California Department of Public Health (CDPH) clarified that this requirement is intended to apply to all workplaces.

Employers also must remember that even when that order expires, some local public health orders have established face covering requirements beyond what the ETS requires.

U.S. Supreme Court Halts OSHA's General Employer Vaccine Mandate

On January 13, 2022, the U.S. Supreme Court issued an order staying the U.S. Occupational Safety and Health Administration's (OSHA) emergency temporary standards (ETS) requiring an employer with 100 or more employees to enact written workplace policies mandating full vaccination or weekly testing of its workforce.

In its opinion, the Supreme Court determined that the argument that OSHA lacked the statutory authority to issue such a broad, sweeping mandate under its emergency powers is likely to succeed at trial. As such, allowing OSHA to enforce the ETS while litigation continues would cause irreparable harm to the challengers. To avoid this harm, the Supreme Court ruled that OSHA may not enforce its ETS.

Excluding Employees from the Workplace

Another notable revision deals with excluding close contacts from the workplace. Under the June 2021 COVID-19 ETS, employers had to exclude from the workplace employees who had a close contact with a COVID-19 case, except for fully vaccinated employees who remain asymptomatic after their exposure and employees who were COVID-19 cases that returned to work and remained asymptomatic for 90 days.

Under the new revisions, however, a fully vaccinated employee who has a close contact and shows no symptoms can only remain at work if they maintain six feet social distancing in the workplace and wear a face covering for 14 days from the close contact. If they can't meet those requirements, then they must be excluded.

Similarly, former COVID-19 cases who returned to work per ETS requirements don't need to be excluded for 90 days after the initial onset of symptoms or positive test — so long as they maintain six feet social distancing in the workplace and wear a face covering for 14 days from the close contact.

Employers must provide employees who remain at work under these close contact exceptions with information about any applicable CDPH-recommended precautions for those with close contacts.

One thing that hasn't changed with these new revisions is that employers must provide exclusion pay to those excluded under the ETS — meaning the ETS requires employers to maintain the earnings, at the regular rate of pay, and benefits of employees excluded from the worksite because of a workplace COVID-19 exposure, subject to certain exceptions (such as when the excluded employee is teleworking, where the employee received disability payments or temporary disability covered by workers' compensation, or when the close contact is not work-related).

Return to Work

The return-to-work criteria for COVID-19 cases, whether symptomatic or not, remain the same; however, under the revised ETS, there are different criteria for employees who had close contacts with COVID-19 cases.

Effective January 14, 2022, the ETS provides that employees who had close contact but never developed COVID-19 symptoms can return to work after 14 days since the last close contact but may return sooner under the following circumstances:

1. The employee may return 10 days after the close contact if the employee wears a face covering and maintains six feet of separation from others while at the workplace for 14 days following the last date of close contact.

2. The employee may return to work seven days after close contact if the employee 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.

Close contacts who develop COVID-19 symptoms are still required to satisfy the return-to-work requirements of symptomatic COVID-19 cases.

Though employers should be familiar with the ETS exclusion and return-to-work requirements, they likely won't be using these time periods because recent guidance from the CDPH replaces the ETS exclusion periods, as detailed below.

CDPH Quarantine and Isolation Guidance Replace ETS Exclusion Periods

As previously reported, on December 30, 2021, the CDPH changed its guidance to shorten COVID-19 isolation and quarantine periods. This impacts the ETS through Executive Order N-84-20, signed in December 2020. The order states that the Cal/OSHA ETS exclusion and return-to-work requirements are suspended to the extent that those time periods are longer than those of the CDPH or local health guidance.

On January 6, 2022, Cal/OSHA updated its COVID-19 FAQ page to confirm that the CDPH isolation and quarantine time periods replace those contained in the revised ETS since the periods in the revised ETS are longer than those recommended by the CDPH.

The CDPH recommendations are based on three groups of individuals:

1. COVID-19 cases, i.e., those who test positive for COVID-19;

2. Close contacts who are unvaccinated or who are vaccinated and "booster eligible" but haven't received their booster yet; and

3. Close contacts who've been boosted or who've been vaccinated but aren't yet eligible for their booster.

"Booster-eligible" is determined by reference to the CDC's Booster Shot guidance, which, at the time of publication, included the major vaccines and eligibility criteria listed below.

COVID-19 Vaccine	Primary vaccination series	When is an individual booster eligible?
Moderna or Pfizer-BioNTech	First and second doses	Five months after second dose
Johnson and Johnson [J&J]/Janssen	First dose	Two months after first dose

1. COVID-19 Cases

Those who test positive for COVID-19, regardless of vaccination status, must isolate themselves according to the following:

- They must stay home for at least five days. Isolation can end after day five if symptoms either aren't present, or they're resolving **and** a diagnostic specimen (antigen test preferred) collected on day five or later tests negative.
- If they're unable to test or choose not to test, and symptoms aren't present or are resolving, isolation can end after day 10.
- If fever is present, isolation should be continued until fever resolves.
- If symptoms other than fever aren't resolving, the individual must continue to isolate until symptoms are resolving or until after day 10.
- Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings.

2. Close Contacts — Unvaccinated and 'Booster Eligible' Employees

Both unvaccinated or vaccinated and "booster-eligible" individuals who haven't yet received their booster dose — including those infected with SARS-CoV-2 within the last 90 days — and are exposed to someone with COVID-19 must quarantine; the guidance is as follows:

- Stay home for at least five days following the last contact with a COVID-19-positive person.
- Test on day five.
- Quarantine can end after day five if symptoms aren't present **and** a diagnostic specimen collected on day five or later tests negative.
- If they're unable to test or choose not to test, and symptoms aren't present, quarantine can end after day 10.
- Wear a well-fitting mask around others for a total of 10 days, especially in indoor settings.
- If testing positive, follow isolation recommendations above.
- If symptoms develop, test and stay home.

Cal/OSHA notes that employers are **not** required to exclude asymptomatic employees in this category if:

- A negative diagnostic test is obtained within three to five days after last exposure to a case;
- Employee wears a face covering around others for a total of 10 days; and
- Employee continues to have no symptoms.

If an unvaccinated employee cannot be tested as required, quarantine must continue for at least 10 days as explained above. According to Cal/OSHA, booster-eligible but not yet boosted employees don't need to be quarantined, but they must wear a face covering at work for 10 days after exposure. If an employee in this category can't be tested by day five, employers must follow the ETS and ensure the employee wears a face covering and maintains six feet of distance for 14 days following the close contact. If the employee develops symptoms, they must be excluded pending a test result.

3. Close Contacts — Vaccinated and Boosted Employees

Individuals who are boosted, or vaccinated but not yet booster-eligible, and are exposed to someone with COVID-19, are not required to quarantine, but it's recommended that they:

- Test on day five.
- Wear a well-fitting mask around others for 10 days, especially in indoor settings.
- Follow isolation recommendations above if testing positive.
- Test and stay home if symptoms develop.

If an employee in this category cannot test as required, employers should follow the ETS and ensure the worker wears a face covering and maintains six feet of distance from others for 14 days following close contact.

Cal/OSHA published a very useful fact sheet that breaks down isolation and quarantine periods into a chart. Employers should review the fact sheet and Cal/OSHA's isolation and quarantine FAQs as they revise their procedures.

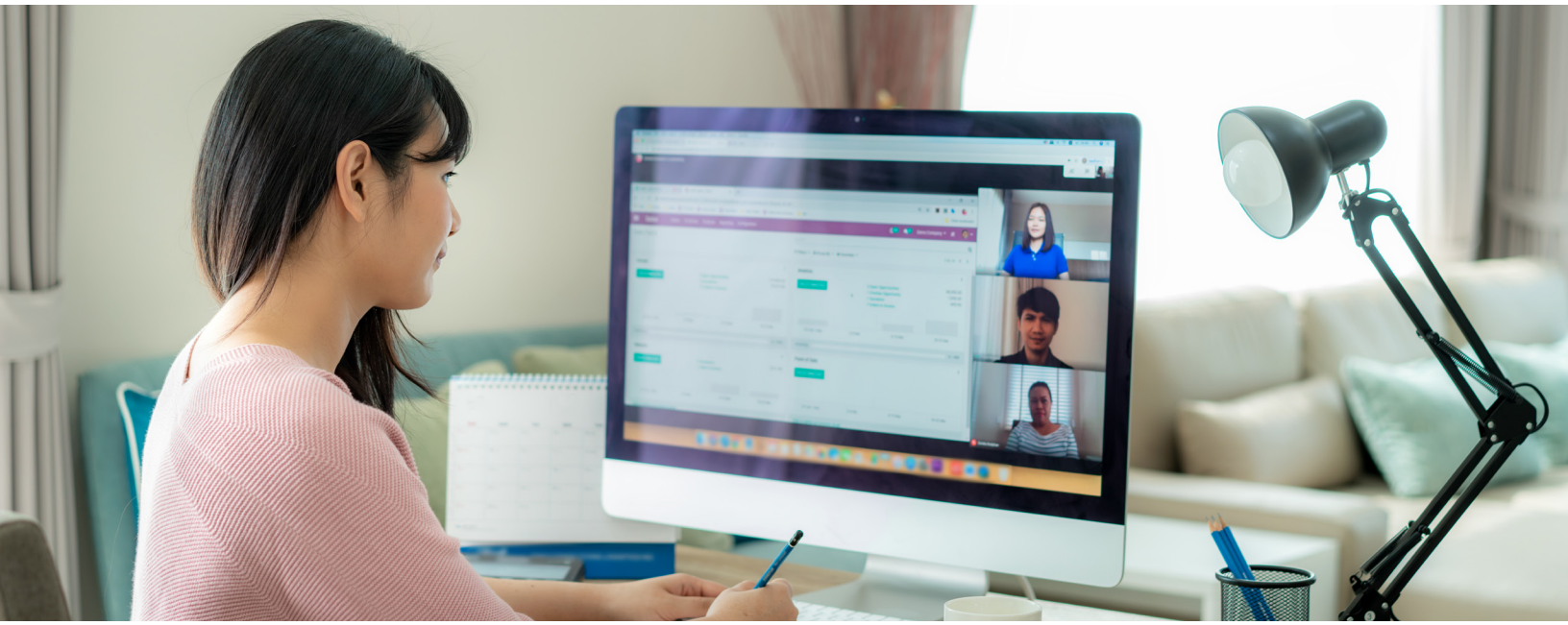
What's Next?

Employers should review the ETS changes and the new isolation/quarantine guidance in detail and work with legal counsel to adjust their COVID-19 Prevention Programs accordingly.

Cal/OSHA published a comparison draft copy of the ETS showing all the changes from the last revision, new FAQs addressing common questions about the new revisions, as well as a fact sheet highlighting some of the changes. Cal/OSHA also updated it's COVID-19 Model Prevention Program to assist employers in drafting and/or revising their own programs. Employers should continue to monitor Cal/OSHA's ETS page for updated guidance addressing their remaining questions.

The revised ETS is scheduled to remain in effect until April 14, 2022; however, Governor Gavin Newsom recently signed Executive Order N-23-21, which provides for a potential third readoption of the ETS that could keep it in effect through the rest of 2022.

On top of that, employers should continue to monitor state and local requirements related to face coverings, quarantine and isolation, and vaccines. CalChamber will continue to provide updates and resources as circumstances develop. CEU

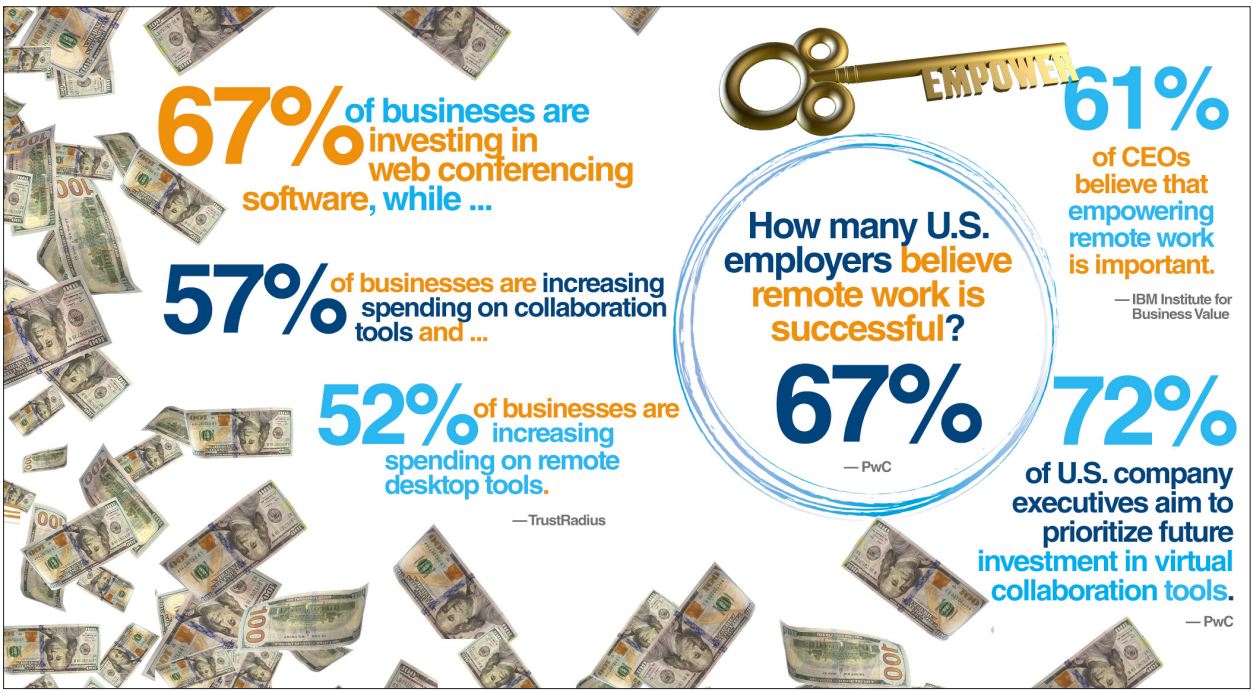


Employer Investment in, Attitudes Toward Remote Work

by Jessica Mulholland, Managing Editor, CalChamber

Remote work by employees has skyrocketed since the COVID-19 pandemic hit roughly two years — in a two-year period from June 2019 through June 2021, job searches were up 360 percent, per a Glassdoor survey. And per an analysis from Indeed and the Organisation for Economic Co-operation and Development, "the advertisement of remote work in job postings increased in almost all occupational categories since the pandemic began."

The general consensus is that remote work spurred by the pandemic is here to stay, whether it's full time or in a hybrid fashion, so here's a look at additional statistics on employer attitudes toward remote work and what they have been, and will be, investing in.



Seven Tips for Successfully Hiring New Workers in 2022

by Jessica Mulholland, Managing Editor, CalChamber

In 2021, the job market was defined by labor shortages — and in 2022, employers should expect more of the same. The reason, according to the Glassdoor Workplace Trends for 2022 report, is that "the U.S. has largely skipped the phase of the recovery where employers have a large pool of unemployed workers to hire from. Employer reliance on furloughs kept the pool of available workers relatively small throughout the pandemic."

Still, many employers are looking to fill open positions; Indeed.com alone, for instance, lists more than 730,000 open jobs in California while Glassdoor lists more than 365,000. And according to XpertHR's Survey of HR Challenges for 2022, 69 percent of employers expect their workforces to grow in 2022.

"While employers foresee challenges recruiting talent, a majority also anticipate growing their workforce," said XpertHR Head of Content Amanda Czepiel in a press release, "making the labor shortage even more of an acute pain point."

In fact, a survey by the U.S. Chamber of Commerce suggests that **the labor shortage is permanent**.

Thankfully for employers, though, a new pool of workers will be ready come late spring — and employers plan to take advantage. More specifically, employers expect to hire 26.6 percent more new graduates from the class of 2022 than they did from the class of 2021, according to the National Association of Colleges and Employers' Job Outlook 2022 report.

Employers are also expanding their talent pools by increasing remote work, meaning they can — and do — hire individuals based on skill versus location. Whether you're hiring locally or nationwide, here are seven things to keep in mind during the recruiting and hiring process.

1. Use Appropriate Language in Job Postings

Two possible concerns exist when advertising for open positions: discriminatory language and references that could create an implied employment contract.

While not a common issue, the potential to create an implied employment contract at this stage does exist — but it's easy to avoid.

Per California's Labor Code, an employment relationship that doesn't specify a duration (such as a written or oral contract that stipulates a 60-day or six-month duration) is presumed to be employment at-will — which means either employer or employee can end the employment relationship at any time, with or without cause and with or without notice.

Step-by-Step Guide

To minimize legal risk, employers should follow the proper steps when hiring a new employee. CalChamber's How to Conduct the Hiring Process offers guidance on how employers can properly recruit, interview and hire competent and trustworthy employees while also reducing their liability, protecting the at-will employment relationship and reducing their chances of being subject to negligent hiring claims.

Because California courts and the Legislature have, over time, created exceptions to this at-will presumption (finding that an implied contract exists if a job advertisement describes a secure position or seeks candidates willing to make a long-term commitment), employers should avoid stating in job postings that your organization is "seeking a long-term employee" or "looking for someone who can grow with the organization." If you don't hint at long-term employment, the relationship remains at-will.

As for discriminatory language, job postings should always avoid any language that signifies limitations or exclusions based on any protected status: race, color, national origin, religion, sex, gender, gender identity, gender expression, pregnancy, age, marital status, veteran status, sexual orientation or disability.

Say you're a restaurant looking for servers — **do not** use the term "waitress." Choose instead to hire a "food server." Likewise, appliance repair shops should advertise for a "repair person" versus a "repairman." Additionally, employers must exclude terms like "young," "recent college graduate" or "digital native," which implies the person grew up using technology.

Employers in doubt about the language in their job postings should seek legal counsel.

2. Make Sure the Job Application is Legally Compliant

While individuals typically submit resumes when applying for open positions, these often don't include the range of information included in a standardized employment application — which can better help employers evaluate a candidate's experience, skills, training and limitations.

Remember, however, that because California has specific protections that may not exist in other states — such as restrictions on inquiring about prior salary and obtaining criminal history information — it's important to use an employment application specifically crafted for California compliance.

For example, in California, employers can neither ask applicants about their salary history nor rely on salary history to determine whether to hire or how much to pay the applicant. (For more details, see No. 3, "Follow the Law When Determining Starting Salary," on page 10.)

In addition, employers with five or more employees can't ask about conviction history information on job applications or inquire about or consider conviction history at any time before making a conditional offer of employment. This means that until making a conditional job offer, employers can't:

- Include on a job application any question that seeks disclosure of an applicant's conviction history; or
- Inquire into or consider the conviction history of an applicant.

In addition, employers should refrain from asking for a Social Security number on job applications unless it's absolutely necessary for the job, and are prohibited from asking applicants to complete the Form I-9 before that person has accepted a job offer — **never include Forms I-9 with the employment application**.

Here are other things that, in general, employers shouldn't do:

- Don't use applications drafted and printed in another state (for example, where your organization is headquartered) unless you carefully review them for compliance with California laws.
- Don't ask questions that screen out applicants based on their race, nationality, religious creed, age or medical condition. For example, employers may not ask questions on either the job application or in an interview that would require the applicant to disclose any scheduling restrictions based on legally protected grounds. When questioning scheduling restrictions, for example, employers must say something like, "Other than time off for reasons related to your religion, a disability or a medical condition, are there any days or times when you are unavailable to work?"
- Don't ask an applicant when they graduated or their date of birth.
- Don't ask applicants questions regarding marital status, or if they are or plan to be pregnant.
- Don't ask for or require documentation or proof of sex, gender, gender identity or gender expression information.
- Don't require or request applicants to disclose information regarding their personal social media accounts.

CalChamber's **sample employment applications** — Long Form and Short Form — allow employers to gather a lot of pertinent information without potentially creating liability for discrimination.

3. Remember Fair Pay When Determining Starting Salary

When hiring and setting initial salary, employers must remember that, per California's Fair Pay Act, they may not pay any of their employees less than employees of the opposite sex, or of another race or ethnicity for "substantially similar work."

Substantially similar work doesn't have to be the exact same job title or even job function; it means a composite of skill, effort and responsibility that's performed under similar working conditions.

The Fair Pay Act also specifies that employers cannot use prior salary to justify any disparity in compensation, and California law prohibits asking about a job applicant's salary history (including information on compensation and benefits) or relying on an applicant's salary history to make decisions about whether to hire or how much to pay the individual. The law does, however, allow employers to ask applicants about their "salary expectation" for the position, and applicants may request the position's pay scale following their initial interview.

When navigating salaries for positions within your organization, it's best to determine the following in advance:

- Your company's budgetary requirements;
- What the job is worth;
- Seniority issues; and
- Your potential salary range for the open position.

With advance planning, you can better examine potential candidates based on their qualifications and negotiate within your company's salary requirements.

New Hire Guide

During the onboarding process, employers must provide new employees with a great deal of paperwork, including several mandatory forms and notices. CalChamber's New Hire Guide contains the forms and access to pamphlets you're legally required to provide to your new hire, as well as checklists to assist during the hiring and onboarding process.

4. Remember Minimum Wage Rates

Also keep in mind California's minimum wage rate increased on January 1, 2022 to $15 per hour for employers with 26 or more employees and $14 per hour for employers with 25 or fewer employees (which also means the minimum salary required to qualify as an exempt employee increased). And depending on the city or county where your business is located — or the locality in which your employees perform most of their work — the minimum wage may be higher per various local ordinances.

Generally speaking, California employers hiring remote out-of-state workers must comply with the minimum wage, overtime, meal and rest break, leaves of absence, and other employment laws of the state in which the employee performs most of their work. Should those out-of-state workers come to California and perform work in-state for California-based employers, California overtime provisions apply, but questions about other laws remain.

California employers should seek legal advice on any questions relating to paying out-of-state workers.

5. Keep Interviews Consistent Among Candidates

The interview process can be very telling of candidates — especially if they're taken out from behind the conference room table, given a little tour of the office or workspace, and introduced to some employees.

With remote work (and therefore remote hiring) on the rise, the tour or introductions to future coworkers may not be an option — but employers may still get some of the same insight by including team members in the video interview.

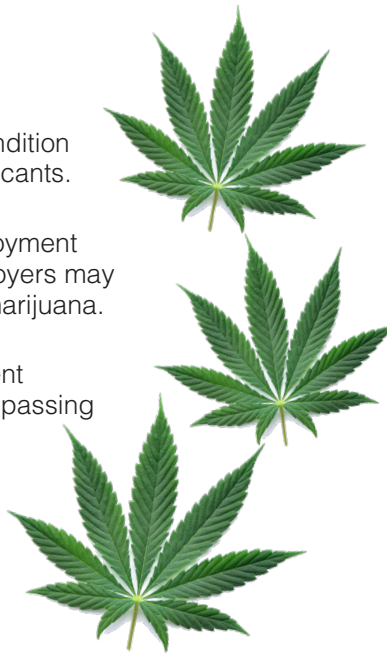
And whether interviews are done in person or online, there are certain things to keep in mind; for starters, any question prohibited on a job application (see No. 2) is prohibited in an interview.

Also important is to ensure that the interviews conducted from candidate to candidate are consistent, which means creating a list of acceptable questions — those that are strictly job-related, nondiscriminatory and don't invade the candidate's privacy — and sticking to them.

For example, employers can't ask, "Are you a U.S. citizen?" But they can ask, "If you're hired, can you verify eligibility to work in the United States?" (Just make sure that if asking this question, ask it of all candidates.) And rather than asking, "Do you have your own car?" a better way to phrase the question would be, "Do you have transportation to get to work?"

Also make sure that notes taken during interviews evaluate criteria actually necessary to perform the job.

6. Follow Drug Testing Guidelines



Most employers can require an applicant to pass a pre-employment drug test as a condition of hire (post-offer, pre-employment), and doing so is valid when applied to all job applicants.

Even though recreational use of marijuana has been legalized since 2016, pre-employment drug testing, including testing for marijuana, is still permitted in California, and employers may deny employment to an applicant if the person's drug test comes back positive for marijuana.

If the job offer is contingent on a drug test, background check or other pre-employment contingency, be sure to note in the offer letter that the offer depends on the applicant passing the test or meeting any other contingency.

7. Follow Proper *Form I-9* Protocol

Every employer, regardless of size, must verify that individuals are authorized to be employed in the United States — and faces civil and criminal penalties for knowingly hiring, referring, recruiting or continuing to employ individuals who aren't authorized to work.

To verify the individual's authorization, employers must complete a *Form I-9, Employment Eligibility Verification* — and physically examine each original Section 2 document the employee presents "to determine if the document reasonably appears to be genuine and relates to the person presenting it" within three business days of the employee's first day of work for pay, according to U.S. Citizenship and Immigration Services (USCIS).

Since the COVID-19 pandemic's onset in March 2020, however, the U.S. Department of Homeland Security (DHS) announced that it would make *Form I-9* document inspection more flexible by deferring the physical presence requirements for employers whose workforce is operating remotely due to COVID-19 precautions.

After several extensions through December 31, 2021, the DHS has again deferred the physical presence requirement until April 30, 2022.

This means **employers whose workforce is operating remotely** may inspect the Section 2 identity and employment eligibility documentation remotely — via video link, fax or email, for example — within three business days of hire. The employer **must retain copies of these documents**.

Keep in mind that this provision applies only to employers and workplaces operating remotely — no exceptions are made for employees physically present at a work location.

Once normal business operations resume, employees whose documents underwent remote verification must report to their employer **within three business days for official in-person document verification**.

After employers physically inspect the documents, they should enter "COVID-19" in the Section 2 "Additional Information" field as the reason for the physical inspection delay. They also should state "documents physically examined" followed by the date of inspection in either Section 2 or section 3, as appropriate.

Employers that qualify for and opt to use this provision "must provide written documentation of their remote onboarding and telework policy for each employee," and for employees who initially undergo remote document verification, their subsequent *Forms I-9* audits would be based on the "in-person completed date."

Employers should continue to monitor the DHS and Immigration and Customs Enforcement (ICE) websites for additional updates on the ongoing national emergency.

While remote verification is currently flexible under the limited circumstances described above, employers hiring out-of-state employees generally are still required to conduct in-person verification — which can be rather difficult since the law makes no exception for a remote employee.

One option, wrote CalChamber HR adviser Dana Leisinger pre-COVID, is to send the company's HR director to handle the matter.

"The cost of a round trip flight," she wrote, "could be significantly less than the possible penalties that might result from knowingly conducting the matter incorrectly."

Leisinger also suggested obtaining the services of either an immigration consultant or employment law attorney/firm near the new hire to complete this task.

"Bottom line," she wrote, "employers in California should make sure to have in place an internal I-9 compliance policy and that employees who are responsible for administering the program be familiar with the requirements of this form."

The current *Form I-9*, version 10/21/2019 (found on the bottom of the form), expires 10/31/2022, and is available for free on the CalChamber website.

As for *Form I-9* violations, federal penalties range from $220 to $19,242 per violation, depending on the violation, with enhancements potentially adding 25 percent to the penalty. State law also imposes fines and penalties for violations; document abuse, for instance, carries a penalty of up to $10,000 per violation. CEU

Law in Brief: 2021 Case Law Wrap-Up

by Bianca N. Saad, Vice President of Labor and Employment – Content, Training and Advice, CalChamber

While 2021 was another pandemic-filled year, busy with COVID-19-related developments, California and federal courts also had their hands full — they issued several significant employment-related decisions about hiring, wage and hours, and harassment and discrimination.

Here's a look at some of the key cases from 2021 that may affect California employers.

Hiring

Vazquez v. Jan-Pro Franchising Int'l, Inc., 10 Cal.5th 944 (2021)

In 2018, the California Supreme Court turned independent contractor classification on its head in the monumental *Dynamex Operations West, Inc. v. Superior Court* (*Dynamex*) decision. Thereafter, the newly adopted "ABC test" — used to determine whether a worker is properly classified as an independent contractor — was codified by Assembly Bill (AB) 5, signed in September 2019. Subsequently, AB 2257 made several exceptions to the law.

Under the ABC test, a worker is presumed to be an employee unless the hiring entity can establish all three of the following:

(A) The person is free from the hiring entity's control and direction in connection with performance of the work, both under the contract for the performance of the work and in actually performing the work;

(B) The worker performs work that's outside the usual course of the hiring entity's business; and

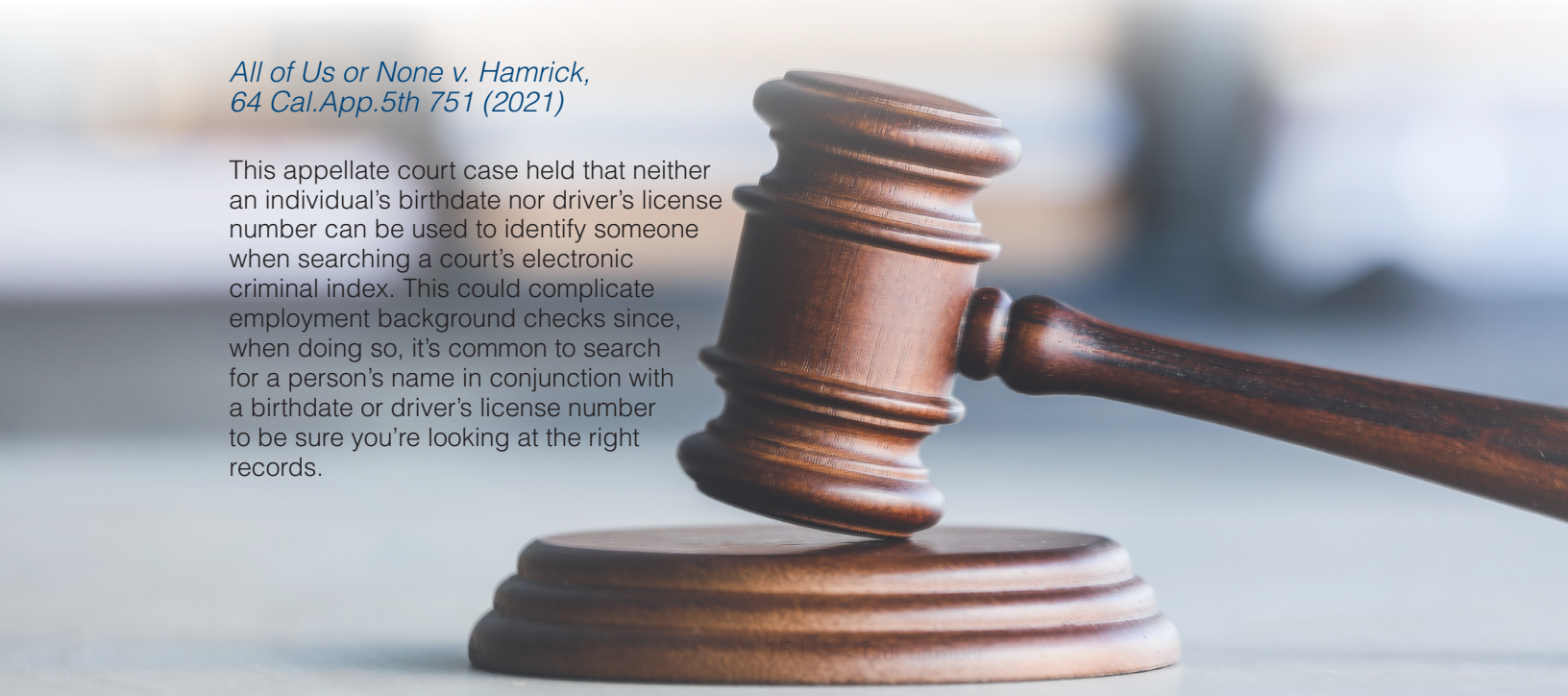
(C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Shortly after AB 5's passage, the question as to whether the *Dynamex* decision should be applied retroactively was presented to the California Supreme Court, which held that yes — the decision is indeed retroactive. In other words, the ABC test created in *Dynamex* applies to independent contractor classifications that pre-dated the decision, or more specifically, to all cases "not yet final" at the time the *Dynamex* decision was issued. The case will return to the federal court for evaluation under that standard.

Takeaway: In reaching its decision, the Supreme Court several times referenced applying the "broadest" standards for finding that workers were employees, so employers should carefully evaluate the job duties of independent contractors to ensure that they align with the ABC test. Employers who believe they may not fall under the requirements of AB 5 should consult with legal counsel.

All of Us or None v. Hamrick, 64 Cal.App.5th 751 (2021)

This appellate court case held that neither an individual's birthdate nor driver's license number can be used to identify someone when searching a court's electronic criminal index. This could complicate employment background checks since, when doing so, it's common to search for a person's name in conjunction with a birthdate or driver's license number to be sure you're looking at the right records.



The case involved the California Rules of Court, which govern how state courts go about their business — including those that specify how a court's electronic records are made available to the public, which were at issue here. These rules:

- Provide that courts maintaining an electronic index must, to the extent feasible, provide remote electronic access to those indexes; and
- Identify specific information that must be excluded from such indexes, including driver's license numbers and birthdates.

The plaintiffs in the case alleged that Riverside Superior Court violated the rules by allowing people to use an individual's date of birth or driver's license number as search criteria when searching the court's criminal records. The Riverside Superior Court argued that it didn't violate the rules because it didn't disclose the information; it just allowed individuals who already knew that information to use it as a data point to narrow their search. The trial court found no violation of the California Rules of Court, but the appellate court reversed and held that the rules prohibit the court from allowing searches of its electronic criminal index through use of an individual's birthdate or driver's license number.

Takeaway: The court's ruling could make background checks more complicated for employers. Without the ability to narrow searches by date of birth or driver's license numbers, employers conducting background checks will likely have less reliable information. Searching for the name of a particular applicant or employee may show the criminal history of someone else with the same name.

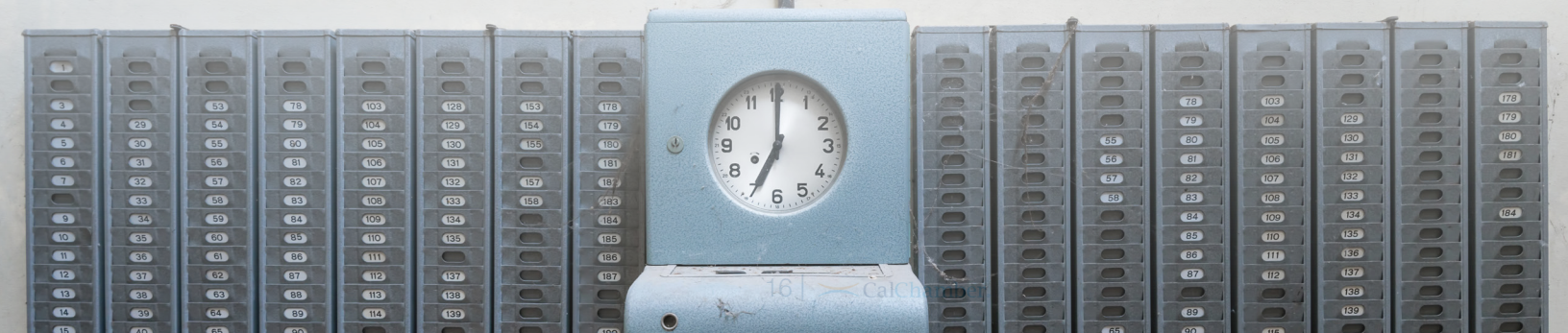
The court's ruling means employers should be ready to engage more frequently in the individualized assessment, notice and response process to resolve the problem of multiple records coming back under the same name. A petition for review of the lower court's ruling has been filed in the California Supreme Court, which hasn't yet determined whether to review the case. In the meantime, employers should review their background check procedures and consult with legal counsel to ensure they carefully comply with the individualized assessment and notice requirements of the law.

Wage and Hour

Donohue v. AMN Services, LLC, 11 Cal.5th 58 (2021)

In this wage and hour class action lawsuit, a nurse recruiter claimed that her employer failed to provide compliant meal periods, based in part on her employer's rounding practices.

More specifically, at issue was the employer's policy of rounding time clock punches, including punches for meal breaks, to the nearest 10-minute increment. For example, if an employee clocked in at 7:56 a.m., the time record was rounded forward to 8 a.m., and if the employee clocked in at 8:03 a.m., the time record was rounded back to 8 a.m. Additionally, the employer's timekeeping system would first round the punches before it determined if the punches created a potential meal period violation.



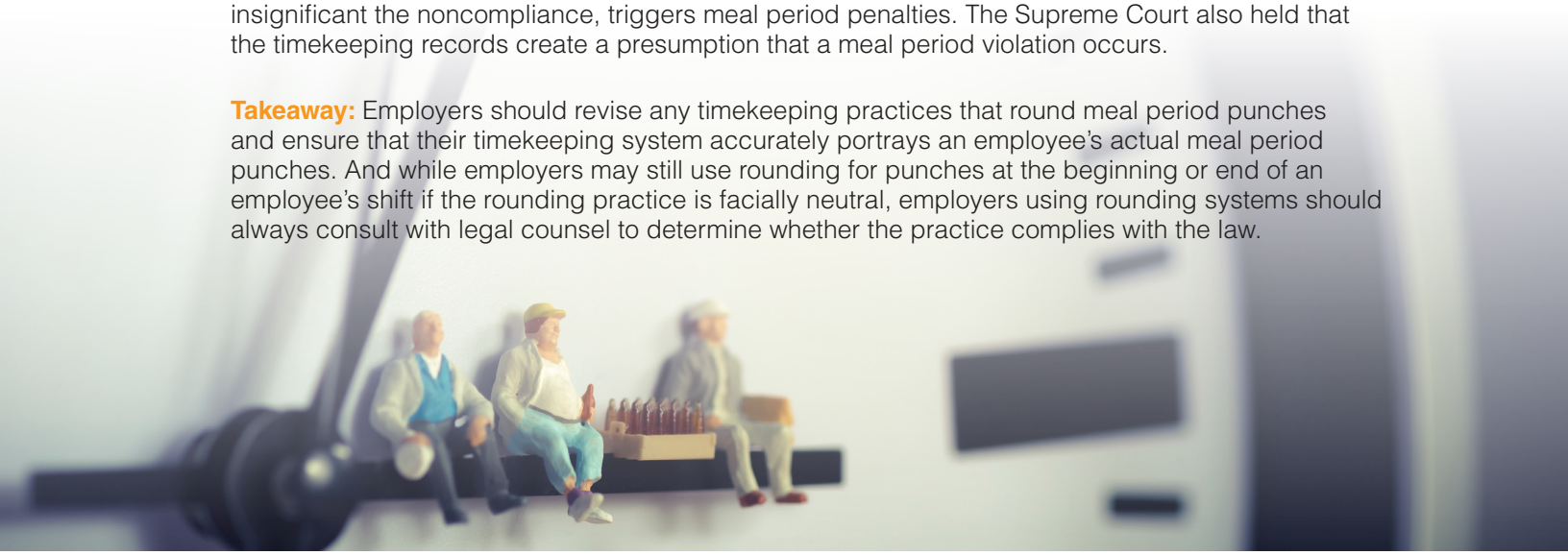
The employee argued that the employer should be liable for meal break violations based on the actual clocking records (not the rounded times) and that a rounding policy should never be applied to meal break punches.

The Court of Appeal rejected those arguments, but the California Supreme Court disagreed. The Supreme Court held that rounding, even if appropriate under 2012's *See's Candy Shops, Inc. v. Superior Court*, is not appropriate for meal periods. The *See's* case held that employers may use rounding for time punches at the beginning and the end of their shifts as long as two conditions are met:

1. The rounding procedure is fair and neutral on its face — that they round both up and down; and
2. That in practice, the employer's rounding over a period of time doesn't undercompensate employees for time actually worked.

But this method is inappropriate for meal periods in large part because of their precise time requirements: Each meal period must be at least 30 minutes in length and must start no later than the fifth hour of work. Any meal period that doesn't comply with these rules, no matter how slight or insignificant the noncompliance, triggers meal period penalties. The Supreme Court also held that the timekeeping records create a presumption that a meal period violation occurs.

Takeaway: Employers should revise any timekeeping practices that round meal period punches and ensure that their timekeeping system accurately portrays an employee's actual meal period punches. And while employers may still use rounding for punches at the beginning or end of an employee's shift if the rounding practice is facially neutral, employers using rounding systems should always consult with legal counsel to determine whether the practice complies with the law.



Ferra v. Loews Hollywood Hotel, LLC, 11 Cal.5th (2021)

Labor Code 226.7 states that when an employer doesn't provide a meal or rest break that complies with the rules, they must pay the employee one hour of additional pay at the employee's "regular rate of compensation." But a question that's been plaguing employers, human resource professionals and their employment law counsel for some time now is what that term means, exactly.

The California Supreme Court finally gave a definitive answer and held that an employee's "regular rate of compensation" for meal and rest period premium pay is the same as the employee's "regular rate of pay" for purposes of overtime pay, which may be higher than the employee's hourly rate if they receive other compensation in addition to hourly wages. (Regular rate of pay accounts for all nondiscretionary compensation in addition to any hourly wages.) The Court also clarified that its ruling applies retroactively, which means that employers who paid meal and rest break premiums at the employee's base hourly rate may face legal claims for failing to pay meal, rest and recovery break premiums at the often-higher regular rate of pay.

Takeaway: Employers should examine their premium payment practices and ensure that they're using the employee's overtime regular rate of pay when paying meal and rest break premiums. Employers should also work with legal counsel to assess the impact of the court's decision, particularly the fact that it's retroactive.

Clarke v. AMN Services, LLC, 987 F.3d 848 (9th Cir. 2021)

When nonexempt California employees work more than eight hours in a day or 40 hours in a workweek, their employers must pay them overtime at one-and-a-half times their "regular rate of pay," which as stated above, includes all forms of payment, including commissions, nondiscretionary bonuses and piece-work earnings — but it doesn't include reimbursements for expenses incurred in carrying out job duties.

In this case, a staffing agency placed nurses and technicians (collectively referred to as "clinicians") on short-term assignments and paid them an hourly rate plus a "per diem" amount. According to the staffing agency, the per diem amounts were to compensate clinicians for their mileage, food and other expenses when on assignment more than 50 miles from their homes. Traveling clinicians were not required to submit receipts or otherwise document expenses incurred in order to be eligible for the per diem.

Local clinicians who worked on assignments less than 50 miles from their homes also received the per diem, but since they didn't incur any travel expenses, those payments were included in their taxable wages and regular rate of pay. However, because AMN considered the per diems expense reimbursements for traveling clinicians, it didn't include them in those employees' taxable wage or regular rate of pay for purposes of calculating overtime. As a result, local clinicians earned a higher hourly wage than traveling clinicians — and traveling clinicians sued AMN for unpaid overtime, alleging that the per diem payments should have been included in their regular rate of pay.

The trial court ruled in favor of AMN, but on appeal, the Ninth Circuit held that AMN's per diem payments constituted compensation for hours worked, not expense reimbursements.

Takeaway: Employers using per diem payments may wish to consider alternatives, such as requiring employees to submit receipts for meals and lodging, as well as odometer readings for mileage reimbursement. Ensure that all reimbursements sufficiently compensate employees for business-related expenses and consult with legal counsel if you intend to offer a flat-rate per diem amount for any travel days.

Discrimination and Harassment

Pollock v. Tri-Modal Distribution, 11 Cal.5th 918 (2021)

In this case, the California Supreme Court clarified when a failure to promote occurs for purposes of starting the statute of limitations period under the Fair Employment and Housing Act (FEHA).

Specifically, the question at hand was: Does the failure to promote occur when the employer decides to promote someone else, or when that individual actually starts their new position?

The California Supreme Court went in an entirely different direction and held that the statute of limitations begins to run in a FEHA failure to promote case when an employee knows or reasonably should have known of the employer's decision not to promote them. So, notice to the employee of the promotion decision is what matters for statute of limitations.

Takeaway: Employers should maintain records of communications with employees regarding promotions, including letting employees know when someone else got the job.

Brown v. Los Angeles Unified School District, 60 Cal.App.5th 1092 (2021)

In this case, a former Los Angeles Unified School District (LAUSD) employee who suffered from "electromagnetic hypersensitivity" (EHS), also referred to as "microwave sickness," filed suit, alleging disability discrimination, failure to accommodate, failure to engage in the interactive process and retaliation in violation of the FEHA. The trial court dismissed the employee's complaint, but the Court of Appeal reversed, finding that the employee adequately pled that she had a physical disability under the FEHA and alleged that her employer failed to provide a reasonable accommodation for her disability — meaning the claims could proceed.

After LAUSD activated a new Wi-Fi system to accommodate the increase in iPads, Chromebooks and tablets that would be provided to its students, a middle school teacher alleged she experienced chronic pain stemming from the Wi-Fi system. After reporting symptoms — which included headaches, nausea, heart palpitations, respiratory complications, foggy headedness and fatigue — to her superiors, she was granted leave. When she returned the following week, she fell ill again within hours. Her medical provider diagnosed her with EHS.

In response to her first formal request for accommodation, her employer agreed to disconnect the Wi-Fi access points in her assigned classroom and in an adjacent classroom as an accommodation. The district agreed to use a "hardwired" computer lab with Wi-Fi turned off. A second interactive process meeting was held months later after the teacher complained that the accommodations were not adequate. She requested the district authorize further studies to evaluate and determine the best location on the campus where Brown could work with minimal exposure to Wi-Fi and radio frequencies; however, the district denied her request, insisting that the Wi-Fi system was "safe." The teacher claimed that she was ultimately forced to go out on disability leave and eventually quit, because she could not return to work without being in "crippling pain."

Takeaway: It's important for employers to remember that the definition of disability under the FEHA is much broader than under the federal Americans with Disabilities Act (ADA). This case demonstrates how important it is for employers to fully exhaust all efforts to engage in the interactive process when an employee with a disability seeks (or appears to potentially need) an accommodation. Additionally, it's worth noting that in his concurring opinion, Justice John Shepard Wiley Jr. recognized the potential implications of allowing the case to proceed and what it may mean for potential future claims alleging Wi-Fi sickness — namely that it may invite these types of claims in the future.

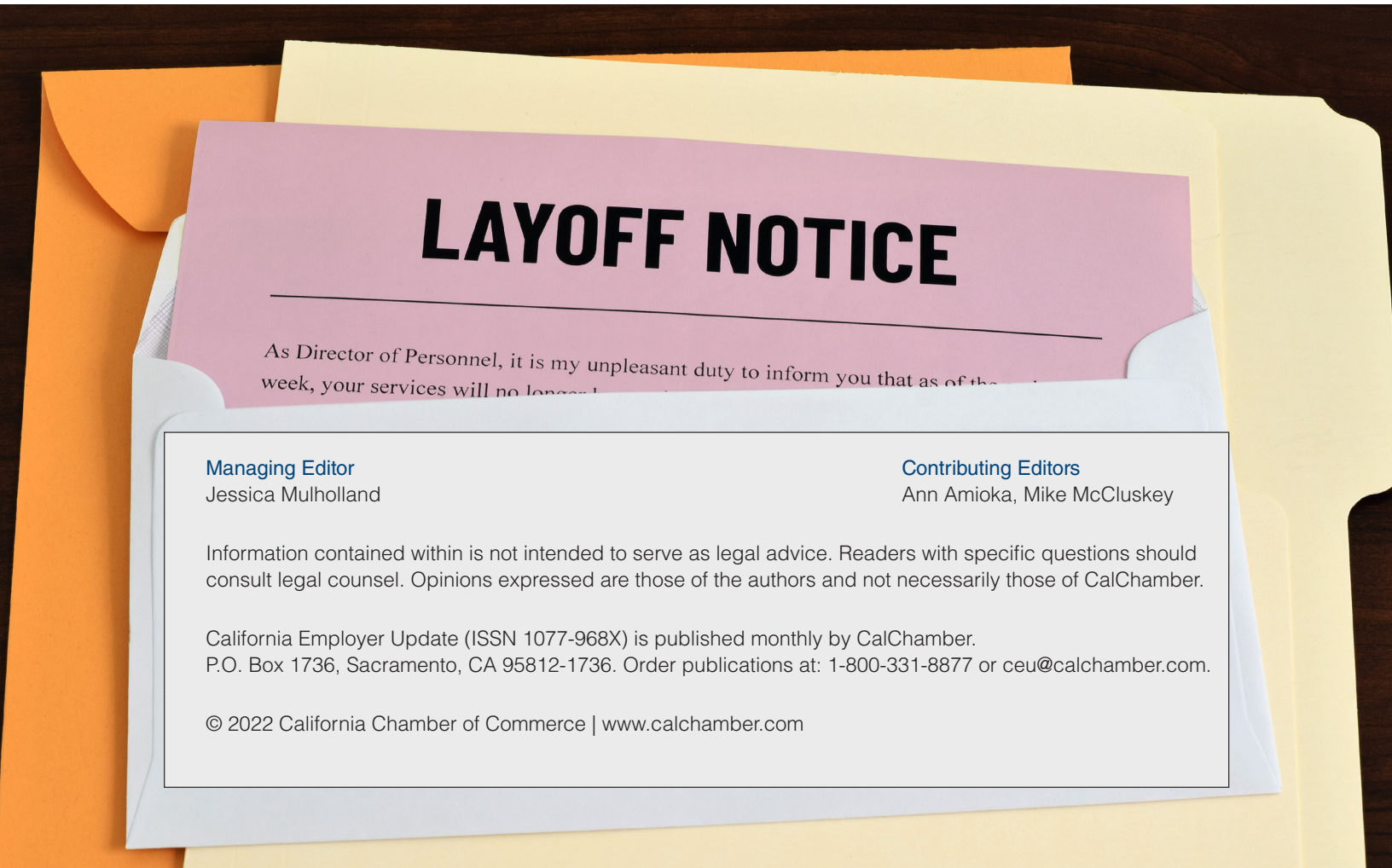
Zamora v. Security Industry Specialists, Inc., 71 Cal.App.5th 1 (2021)

This case involved an employee (David Zamora) who was on extended leave of absence as a reasonable accommodation while employed by Security Industry Specialists, Inc. (SIS). Shortly before Zamora was due to return to work, a reduction in force was implemented by his employer. Zamora was selected for layoff and his employment was terminated prior to his return. In response, he sued, alleging disability discrimination, failure to accommodate, wrongful termination and retaliation.

Zamora was one of four supervisors at his worksite included in the 10 percent nationwide reduction. SIS selected the supervisors for termination by evaluating their job performance in several categories, and Zamora ranked 16 out of 19 supervisors. Zamora later learned that two of the supervisors who ranked below him were kept on in demoted roles for SIS.

The trial court held that SIS demonstrated its decision to downsize was nondiscriminatory. However, the Court of Appeal disagreed. Despite Zamora's lengthy leave with multiple extensions, the court declined to hold that the employee was unable to perform the essential functions of his job, noting that at the time of termination, he was likely to return to work based on his doctor's final note. The court also noted that the employer could have offered the employee an additional "limited leave of absence" until a position opened up, particularly if SIS anticipated one would open up soon.

Takeaway: This case highlights the risks of terminating an employee on a lengthy medical leave of absence. When using performance-based metrics to make termination decisions, don't consider a disabled employee's leave of absence or other reasonable accommodations as part of your metrics. Additionally, always consult with legal counsel prior to terminating an employee with a disability or an outstanding workers' compensation claim. CEU



Managing Editor
Jessica Mulholland

Contributing Editors
Ann Amioka, Mike McCluskey

Information contained within is not intended to serve as legal advice. Readers with specific questions should consult legal counsel. Opinions expressed are those of the authors and not necessarily those of CalChamber.

California Employer Update (ISSN 1077-968X) is published monthly by CalChamber.
P.O. Box 1736, Sacramento, CA 95812-1736. Order publications at: 1-800-331-8877 or ceu@calchamber.com.

© 2022 California Chamber of Commerce | www.calchamber.com