July is the New January

New State Laws Do Not Take the Summer Off

July 19, 2022





Today's Webinar Host

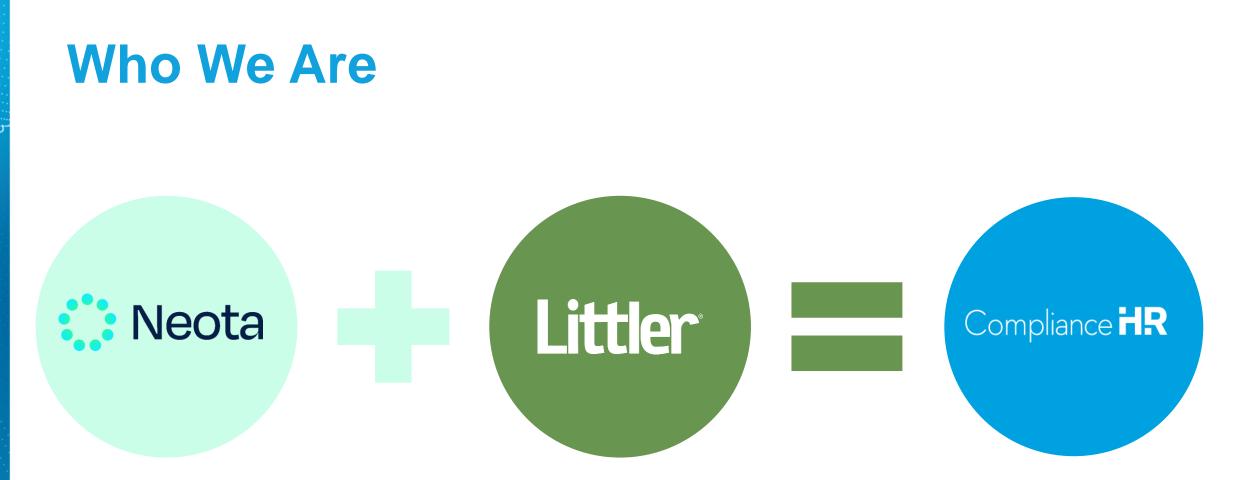
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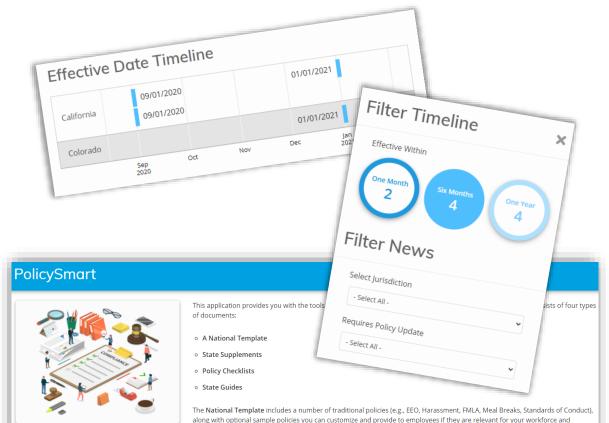
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along with optional sample policies you can customize and provide to employees if they are relevant for your work operations (e.g., Workplace Bullying, Holidays, Personal Appearance and Grooming).

There is a **State Supplement** to that National Template for every state and the District of Columbia. In the State Supplements you will find policies that carefully track state and locality-specific distinctions from those general, national policies. In the state materials, you will find addenda that identify the protected categories under state EEO laws, state-specific meal break, predictive scheduling, lactation accommodation and leaves of absence policies. We also provide policies tracking sick leave, lactation accommodation and predictive scheduling requirements for major municipalities, which are localities with 100,000 or more residents.

The State Supplement policies are drafted to comprehensively track statutory requirements, while also identifying places for customization. Throughout the templates, you will see comments intended for the policy drafter. These comments may explain why specific language appears, signal updates made within the last year or provide context or background information to help you customize the policy.

Policy Revisions by State



States with new labor and employment laws between 7/1/21-11/1/21

PolicySmart™ - Bi-Monthly Report

PolicySmart

Policy News and Updates

Click on the links below to access summaries of legal developments added to PolicySmart within the last month:

- National

- President Biden Issues Executive Order on Non-Competes View Post
- Tracking of COVID-19 Related Legislation (Pending and Enacted), Regulations and Guidance View Post
- · How do we Know Which State's Laws Govern the Leaves and Benefits for our Wandering Workers? View Post
- May We Ask Our Employees About Their COVID-19 Vaccination Status? View Post

Arizona

- Arizona Passes Law on Sealing Criminal Offense Records View Post
- New Arizona Law Addresses COVID-19 Vaccine-Related Requirements in the Workplace View Post

California

- California Supreme Court Finds that Meal and Rest Break Premiums Must be Paid at the Employee's Regular Rate of Pay <u>View Post</u>
- Los Angeles Mayor Revises Existing, and Issues New, Order Requiring Paid Sick Leave for Absences Related to COVID-19 Vaccines <u>View Post</u>
- Santa Clara County, California Phases Out Vaccination Benchmarking Mandate View Post
- Marin County, California Requires Small Employers to Provide Supplemental Paid Sick Leave--Includes Notice
 Requirement <u>View Post</u>
- California Adopts Final Temporary Standards for COVID-19 Prevention View Post

Colorado

- New Colorado Law Requires Health Plans to Cover Annual Mental Health Wellness Exams View Post
- New Colorado Privacy Act Aims to Give Consumers Control Over Personal Data View Post
- Colorado Passes Law Allowing Hiring Preference for Veterans <u>View Post</u>
- Colorado Supreme Court Finds Policies Requiring Forfeiture of Earned Vacation Unlawful View Post

Developments Taking Effect This Month

To help keep you on track, below is a reminder of previously enacted laws taking effect this month. Click on the links to access the PolicySmart summary and any policy related template materials.

Alabama

Alabama Law Establishes New Test for Independent Contractor Classification (effective 07/01/2021) View Post

Arizona

New Arizona Law Addresses COVID-19 Vaccine-Related Requirements in the Workplace (effective 07/01/2021)
 <u>View Post</u>

Arkansas

- Arkansas Amends Law on Multiple Employer Welfare Agreements (effective 07/30/2021) View Post
- Arkansas Clarifies Direct Sellers are Independent Contractors (effective 07/30/2021) View Post
- Arkansas Amends Law on Firearms in the Employer's Parking Lot--Includes Updated Policy (effective 07/29/2021) <u>View Post</u>

Colorado

- New Colorado Law Requires Health Plans to Cover Annual Mental Health Wellness Exams (effective 07/06/2021) View Post
- Colorado Amends Law on Child Support Income Withholding Obligations (effective 07/01/2021) View Post

Connecticut

 Connecticut Places New Recall and Retention Obligations on Certain Hotels, Lodging Houses, Food Service Contractors, and Building Services Enterprises (effective 07/14/2021) <u>View Post</u>

Florida

New Florida Law Prohibits Requiring COVID-19 Vaccine Documentation (effective 07/01/2021) View Post

Illinois

Chicago Passes Wage Theft Ordinance--Includes Notice Posting Requirement (effective 07/05/2021) View Post

Indiana

New Indiana Law Allows Employees to Request a Pregnancy Accommodation--New Policy Included (effective 07/01/2021) View Post

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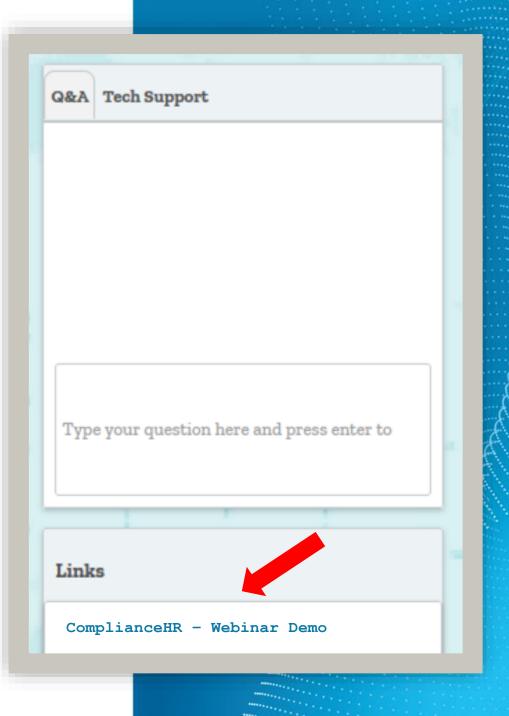
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Today's Presenters



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Agenda

- 1. Contingent Workforce (AB 5 updates)
- 2. Wage and Hour Update (Naranjo, PAGA, local ordinances, Hospitality)
- 3. NLRB Update
- 4. Health and Safety Laws (COVID, etc.)
- 5. Protected Leaves
- 6. Anti-Discrimination Laws (Cannabis, Hair)
- 7. Stop WOKE Act
- 8. What's in the Hopper? (Wage Transparency laws)

Contingent Workforce



AB 5: Independent Contractor Test

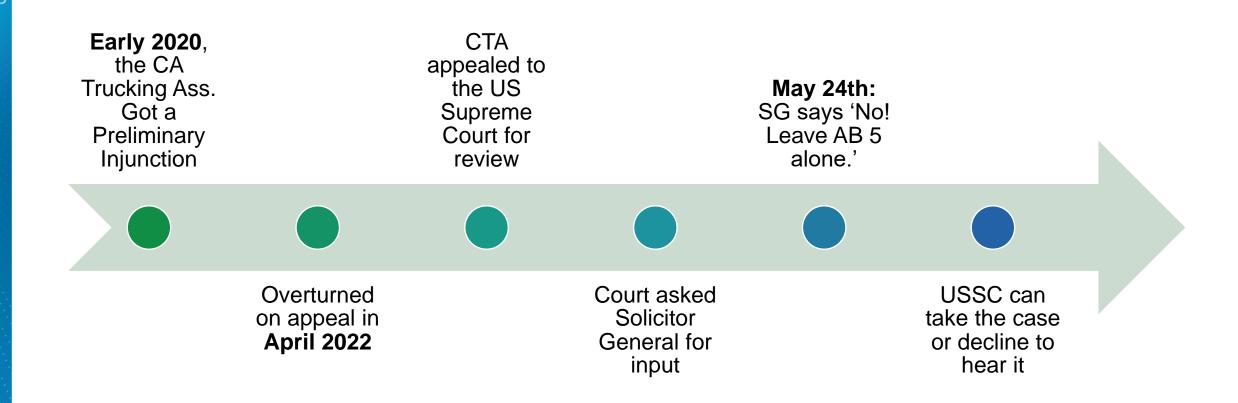
A 2018 CA Supreme Court Decision was "codified" into state law in 2019: The "ABC" test.

The ABC Test: Workers are presumed employees unless:



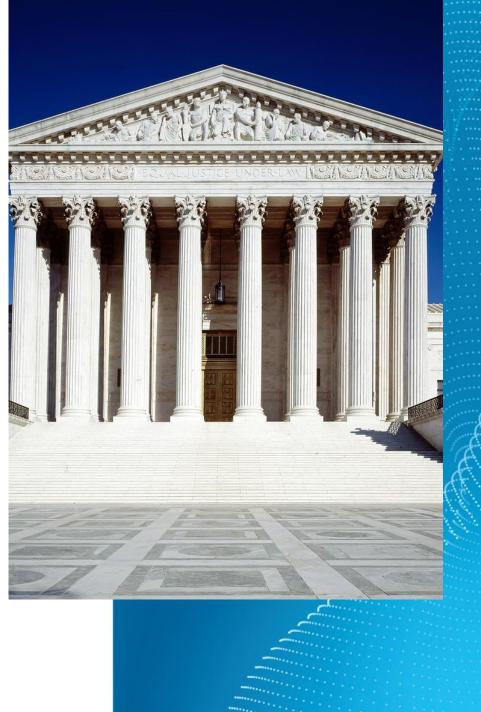
- A That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- **B** That the worker performs work that is outside the usual course of the hiring entity's business; and (problematic: sets an almost impossible standard for most motor carriers using IC owner-operators)
- **C** That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Legal Challenge to AB 5



U.S. Supreme Court Declines to Hear AB 5

- On June 30th, Supreme Court has declined to review a challenge to this controversial California law aimed at reclassifying owner-operators as motor carrier employees.
- By declining to hear a challenge to AB 5, the high court sent a clear message to the trucking industry.
- Now that an injunction at the federal district court level has been lifted, the law is immediately enforceable.
- CTA says most drivers, if forced to be reclassified, will opt to leave their jobs — further exacerbating the driver shortage.



Contingent workforce updates

- Florida SB 542: During a public health emergency, certain actions taken by an employer cannot be used against them in a civil case by an employee claiming they have been misclassified as a contractor
- Seattle, WA: Council Bill No. 120069: (The "Pay Up" Bill) New labor standards requirements for contractors: requires hiring entities to provide notice of terms/conditions of the contract, wage information with each wage payment.
 - The bill creates new disclosure and documentation requirements for any business hiring an independent contractor as well as for app-based workers.

Wage and Hour Updates



Naranjo v. Spectrum Security Services

Spectrum Security Services transports prisoners to medical appointments or other custodial facilities.

Naranjo left his guard post for a meal break in violation of a Spectrum policy that required employees to remain on duty during all meal breaks.



You may only have this policy if there is a written agreement that on the job meal periods are agreed to.

Naranjo v. Spectrum, cont'd.

- Naranjo filed a class action for labor code violations.
- Violation: employers who unlawfully deny their employees a meal or rest period must pay employee an additional hour of pay at their regular rate of pay (LC 226.7)
- Court certified a class action for meal break, related issue of timely payment of wages, and wage statement violations.
- Court awarded judgment and 10% interest



Both sides Appealed



- Naranjo appealed because the court did not find the failure to pay wages at termination a "willful violation"
- Spectrum appealed on all other bases
- Court of Appeal agreed Spectrum violated the meal break law, but disagreed with the trial court that failure to pay the premiums results in violations of <u>wage</u> <u>statement</u> law and <u>timely payment of wages</u> law.
- Court of appeal reduced rate of prejudgment interest from 10 to 7%.

California Supreme Court Decision: 5/23/2022

- Missed break premium pay is "wages" subject to the Labor Code's timely payment and reporting requirements
- Missed break premium pay can support section 203 waiting time penalties
- Missed break premium pay can support section 206 wage statement penalties.
- 7% applied as prejudgment interest since it is the default constitutional rate.





What's the Impact?

- This decision tacks on two potential and costly penalties for violations of Section 226.7.
- Employers must vigilantly enforce compliant meal and rest breaks and ensure that when employees are denied meal or rest breaks, proper premiums are paid.
- Employers should consider requiring employees and supervisors to review and confirm the accuracy of all timesheets before submittal. If they did not have this opportunity and there was no valid waiver or on-duty agreement, employers must pay the premiums owed.
- Double check with payroll administrators and third-party payroll processors to find out (a) whether their system flags for review or automatically generates premiums for missed meals/rest breaks; and (b) confirm that wage statements reflect any premiums paid for the pay period.

California PAGA Updates: What's PAGA?

- Private Attorneys' General Act of 2004 (PAGA): civil penalties for labor code violations can be pursued by employees and the labor commissioner
- Can be brought individually or as a class
- Notification requirements: to employer and Labor and Workforce Development Agency
- \$100 penalty applies to initial violation, \$200 after first violation
- Employees get 25%, the state gets 75%, attorneys get fees.



Required Notice Filings are UP

- In January, there were 494 Notices filed with LWDA
- In May, there were 537
- Daily average was 15.94 in January
- May it was 17.32



PAGA Challenge

- Trade group (CABIA) sued the state alleging that it violates the state constitution's separation of powers by taking enforcement authority meant for the executive branch and giving it to private individuals.
- The LWDA has so many filings it cannot investigate them lack of resources
- 99% of filings are ignored and not investigated

CABIA's Challenge Fails

"...every individual that commences a PAGA action is empowered to prosecute claims as the state's proxy and bind the state to the resulting judgment simply by sending a letter to the LWDA, which the LWDA admits sits in a proverbial stack on a shelf that nobody looks at."

A unanimous Appellate District in Santa Ana on June 30th ruled: <u>PAGA does not</u> <u>violate the constitutional separation of powers</u> because it bars workers from suing until they have notified the state of their claims and officials have passed on filing their own lawsuit.

Local Ordinances: The Trend that's here to stay

- Los Angeles Municipal Code, Art.2, Ch28, Section 182
 - "Regarding workplace security, workload, wage and retention measure for hotel workers ordinance."
 - Personal Safety Alarms for Hotels with 45 or more rooms
 - New quota limits on room cleaning for hotels with 45 rooms or more (max square footage permitted to be cleaned)
 - New cause of action to enforce local ordinance: plenty of penalties
- San Francisco Ordinance No.220022: Requires employer to provide paid public health emergency leave to employees

NLRB Updates

NIONS IN L LABOR TIONS ARD



NLRB News: Filings are UP!

- During the first six months of Fiscal Year 2022 (October 1–March 31), union representation petitions filed at the NLRB have increased 57% (up to 1,174 from 748 during the first half of FY2021.)
 - A representation petition is filed by employees, unions, or employers with an NLRB Field Office to have the NLRB <u>conduct an election</u> to determine if employees wish to be represented by a union.
- Unfair labor practice charges have increased 14% (from 7,255 to 8,254.)
 - An unfair labor practice charge is filed by any member of the public with an NLRB Field Office if they believe an employer or union has violated the National Labor Relations Act.

NLRB Updates

- President Biden released his <u>FY2023 budget</u>, which requests \$319.4 million for the NLRB—a 16% increase.
- NLRB General Counsel Jennifer Abruzzo will be asking the Board to find "captive audience" meetings to be unlawful and violate the NLRA
 - * Ensure employees are aware attendance is not required.
- Abruzzo asked the Board to adopt a requirement that an employer recognize and bargain with a union that claims majority support.



The Starbucks Election:

A Learning Lesson



NLRB Issues Complaint against Starbucks

Facing a union organization drive in its stores, Starbucks was issued a complaint by the NLRB Board on May 6, 2022.



The complaint asserts that Starbucks:

- interfered with, restrained and coerced employees seeking to unionize by allegedly closing stores
- 2. enforcing policies against employees supporting unionization and
- reduced compensation for and terminating union-supporting employees.

NLRB Complaint Process



- Charges can be filed by unions, employers, individual employees, and any other person and can allege wrongdoing by any other party to the employment relationship.
- Once charges have been received, the regional office **investigates** the allegations through the receipt of evidence (affidavits from parties and witnesses.)
- If that investigation results in the regional office finding that the charge allegations have merit, then a **complaint is issued** against the offending party.
- Regions almost always give the charged party the opportunity to settle a case after a merit determination is made, and before a complaint issues.

Takeaways

- The complaint against Starbucks is further evidence of the Board's increased activity and enforcement.
- Regional offices are finding more merit to charges and there are more matters going to Complaint (and ultimately trial).
- The Board's General Counsel has released multiple memoranda calling for increased enforcement and stricter interpretations of the Act.
- Board is more frequently pursuing 10(j) relief, which is where the Board pursues an injunction against an offending party to obtain relief before the charges in the complaint are resolved pursuant to a full hearing.
- June 8th Littler got a Victory and beat an injunction!
- The Board's General Counsel has issued a specific memorandum announcing increased pursuit of 10(j) injunctive relief in charges related to union organizing campaigns.

What CAN E'or do during an organizing campaign?

Facts

 employers can share facts with their employees regarding their rights in opposition to unions, the costs of unions, changes stemming from unionization, etc.

Listen

employers are able to
 listen to their employees
 regarding their support or
 opposition to unionization;
 the employer cannot
 solicit grievances against
 the union

Opinions

 employers can express to employees why the employer feels a union is not in their employees' best interests

Prohibited Activities During Campaigns



Threats

Interrogate

Promises

Surveillance

No Retaliation



Employers are prohibited from:

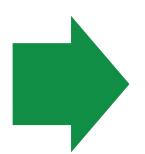
- imparting discipline against employees for supporting the union
- 2. this includes
 - transfers,
 - layoffs,
 - termination,
 - adverse work assignments
 - or otherwise punishing employees for supporting unionization

Health and Safety Laws



California SB 114: Covid Sick Leave (January – September)

First things first – this law only applies to employees, not independent contractors.



The law is only in effect for 2 1⁄2 more months! (Unless it's extended again!)

The Basics

- SB 114 Went into effect on February 19, 2022
- Employers with 26 or more employees must provide up to 80 hours of paid sick leave
- If unable to work or telework due to Covid-19 qualifying reasons
- Applies to employees who are caring for a sick child*, parent, spouse, registered domestic partner, grandparent, grandkid, or sibling.

*Biological, adopted, foster child, stepchild, legal ward, or child to whom the employee stands in loco parentis.

SB 114: Three Reasons for Paid Sick Leave

1.Caring for Self

- 2.Caring for a family member
- 3. Vaccine related care



BATCH 1: 40 Hours

Subject to quarantine or isolation per a CDPH Order, CDC, or local health officer (stay at home orders do not count)

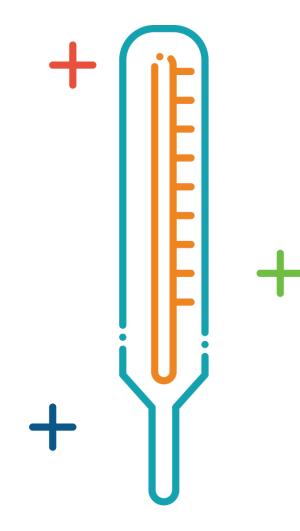
• Caring for a family member subject to the above

Advised by a healthcare provider to quarantine

• Caring for a family member advised to isolate

Experiencing symptoms and seeking diagnosis

Caring for a child whose school/daycare is closed or unavailable for Covid-19 reasons on premises

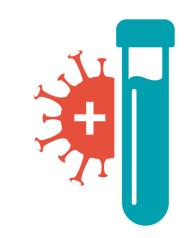


Batch 2: 40 More Hours

Positive test results- any old test will do! No test standards. Up to 40 hours if employee tests positive or is caring for a family member who tests positive. May be required to prove through documentation or positive result for employee or family member.

If sick leave is being used for employee illness, the employer can require the employee to test 5 days after the initial positive. Must provide tests to the employer.

But – we know positive results can last up to 90 days!



Covid-19 Laws Enacted

- Georgia just implemented a law to prohibit state and local governments from mandating Covid-19 "vaccine passports." (Georgia SB 345)
- Illinois: Authorizes employer to take any measure or impose any requirement intended to prevent contraction or transmission of Covid. (Illinois SB 1169)
- Virginia extended the presumption that a death/disability due to Covid-19 is an occupational disease/disability to 12/31/22.

Smoke and Heat Protections

<u>Oregon</u> Final Rule re Employee Exposure to Wildfire Smoke (OAR 437-002-1080): Requires employers to implement wildfire smoke training for employees who may be exposed to dangerous AQI levels. Notification requirements for when AQI at worksite exceeds specified levels. (Washington enacted a similar law)

Washington Emergency Rule re Heat Exposure for Outdoor Workers: Requires employers to protect outdoor workers from the dangers of high heat, expands access to shade and rest breaks. (WAC 292-62-09520).

Protected Leaves of Absence



More Employee Benefits ~ in Connecticut

Lots of activity in Connecticut:

- Reproductive Health: Connecticut enacted a protection for persons receiving and providing reproductive health care services. (HB 5414).
- Employees get 2 hours of unpaid leave to vote in special elections (SB 361)
- Domestic Violence Issues: prohibits discrimination against a victim, requires an employer to accommodate; mandatory posters. (SB5)



Paid Leaves are Trending Nationwide

- Maryland has created a *paid* family and medical leave program that provides employees with 12 weeks paid leave (MD SB 275, HB8, eff. 1/1/2025)
- New Mexico enacted a <u>paid</u> sick leave law: 1 hour for every 30 hours worked (NM HB 20)
- Delaware now has a <u>paid</u> family and medical leave program that provides employees with up to 12 weeks paid leave (SB1, eff. 1/1/26.)

June 7th Election: Ordinance Created

San Francisco Ordinance No.220022: Requires an employer to provide paid public health emergency leave to employees.

 PHE is a local or statewide health emergency related to any <u>contagious</u>, <u>infectious</u>, or <u>communicable disease</u> declared by San Francisco or California health officials (e.g., COVID-19), or An <u>air quality emergency</u> when the Bay Area Air Quality Management
District issues a Spare the Air Alert. PHEL will be in addition to paid leave employers offer or provide employees (e.g., San Francisco paid sick leave) at the beginning of a "public health emergency"

Anti-Discrimination Laws



Hairstyle Discrimination and CROWN Acts

- "CROWN" Act: Create a Respectful and Open World for Natural Hair.
- More states are passing CROWN Acts prohibiting discrimination in employment based on hair texture or hairstyle.
- First passed by CA in 2019, at least 17 states have now passed these laws.



Maine LD 598 (SP 237)

- "Race" includes traits associated with race, including hair texture, Afro hairstyles and protective hairstyles.
- Protective styles: braids, twists, and locks.



Tennessee SB 136 (HB204) General Rule

- Employers cannot adopt policies that do not permit employees to wear braids, locs, or twists;
- Part of the cultural identification of the employee's ethnic group; or
- A physical characteristic of the employee's ethnic group.



Tennessee SB 136 (HB204) - Exceptions

A public safety employee if it would prevent the employee
from performing essential
functions of the employee's
job requirements during the
course of employment. A policy that an employer must adopt to adhere to common industry safety standards, to maintain reasonable safety measures, or to comply with federal or state laws, rules, or regulations relative to health or safety.

CROWN Acts Nationwide

- <u>Federal</u>: The CROWN Act passed in the House last September, but it stalled in the Senate.
- <u>States</u>: Currently, at least 17 states have passed CROWN Acts or variations.
- Local: More than ten cities have passed the CROWN Act in states where it has not yet become law.

Stop WOKE Act



Florida HB 7

- Stop WOKE Act: The Stop the Wrongs to Our Kids and Employees Act
- The law restricts the content public and private employers with 15 or more employees can use in workplace trainings.
- Specifically, the Act prohibits employers from teaching eight concepts based on race, color, sex and national origin.

Subjecting any individual, <u>as a condition of employment</u>, membership, certification, licensing, credentialing, or passing an examination, to training, instruction, or any other <u>required</u> activity that espouses, promotes, advances, inculcates, <u>or compels such individual to</u>
 <u>believe</u> any of the following concepts constitutes discrimination based on race, color, sex, or national origin:

- Moral Superiority: Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin
- Conscious or Unconscious Implicit Bias is Real: An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously

- Identity Privilege is Real: An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.
- Being "Colorblind" is Not Okay: Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.

- An Individual is Responsible for the Sins of their Ancestors: An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.
- Affirmative Action is Okay: An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

- Feelings of Guilt for Past Actions of Others: An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.
- Merit-Based Virtues are Racist or Sexist and Facilitate Oppression: Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.

Stop WOKE Act: Unclear Provisions

- The law provides that it does not prohibit discussion of these ideas "as part of a course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts."
- How broadly will courts interpret this provision?
- Where an employer raises these issues in the course of workplace training (whether as to diversity initiatives or other anti-harassment policies), to what extent may they be held to "endorse" these concepts?

Stop WOKE Act: Challenges and Current Status

- April 22, 2022 Ten minutes after signed into law, five individuals filed a lawsuit in the Northern District of Florida seeking a preliminary injunction against the new law on First Amendment grounds.
- June 27, 2022 A federal judge (NDFL) denied a request to enjoin the provisions of the Act.
- The law became effective on July 1, 2022.
- The court's decision means that an employer's diversity, equity and inclusion (DEI) training
 materials must refrain from sending any messaging to employees that could be construed as
 requiring employees to believe in concepts like privilege, oppression, and inherent biases
 that are based on race, color, national origin or sex.

What's in the Hopper?



SB 1162 Disclosures: Pending Bill

Pay data must be submitted to contain the **number of employees** by race, ethnicity and sex in these job categories:

Executive or senior level officials and managers	First or mid-level officials and managers	Professionals	Technicians	Sales Workers
Administrative support workers	Craft workers	Operatives	Laborers and helpers	Service Workers

SB 1162: Pending Bill

Employers must supply the following information:

1.1. Number of employees by race, ethnicity, and sex in the above ten categories (employer to create a "snapshot");

2. Within each of the above job categories, for each combination of race, ethnicity and sex, the mean and median hourly rate (using W-2s);

3. Number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in the Occupational Employment Statistics Survey (using W-2s);

4. The total number of hours worked by each employee counted in each pay band during the reporting year; and

5. For employers with multiple establishments, there must be a separate report covering each establishment.

New York Follows California's Lead on Wage Transparency

- Ithaca Ordinance No. 2022-03: Unlawful discriminatory practice to advertise job, promotion or transfer without stating min/max hourly or salary for the position in the advertisement.
- Westchester County Ordinance No. 2022-119: same as above
- New York City Int. No. 0134-2022: Amends the city wage transparency law to clarify positions for which pay range must be provided; establishes private right of action for employees.

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