

# Navigating California Compliance

September 15, 2022

**Littler**<sup>®</sup>

Compliance **HR**

# Today's Webinar Host

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# Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:  
Deliver expert guidance in a fraction of time and cost as traditional methods



## **Frustrated by the ever-changing employment and labor law policies?**

- With hundreds of new labor and employment laws and ordinances taking effect over the next year, many organizations feel overwhelmed navigating these changes.
- There have been 50 employment law changes in CA alone in the last year

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



### **Navigator Onboarding**

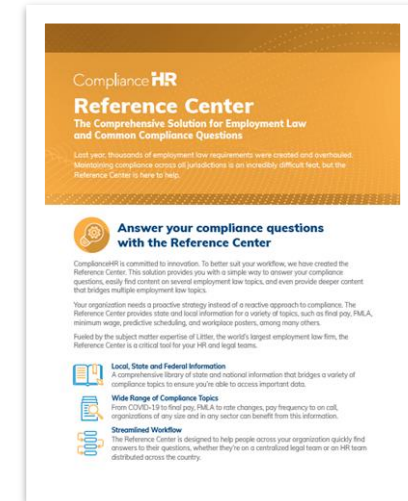
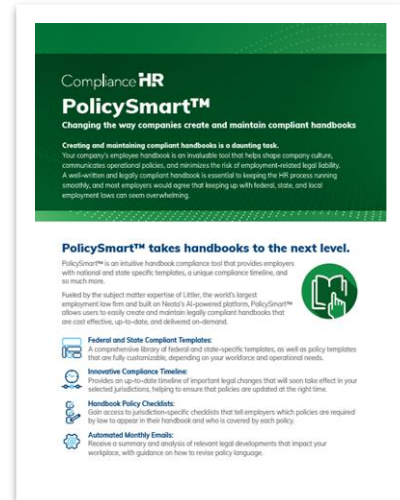
Assemble and produce legally compliant onboarding documents



### **Navigator Leave**

Reduce the risk and administrative burden of leave management

# Compliance Essentials



PolicySmart provides you with:

- Federal and state compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

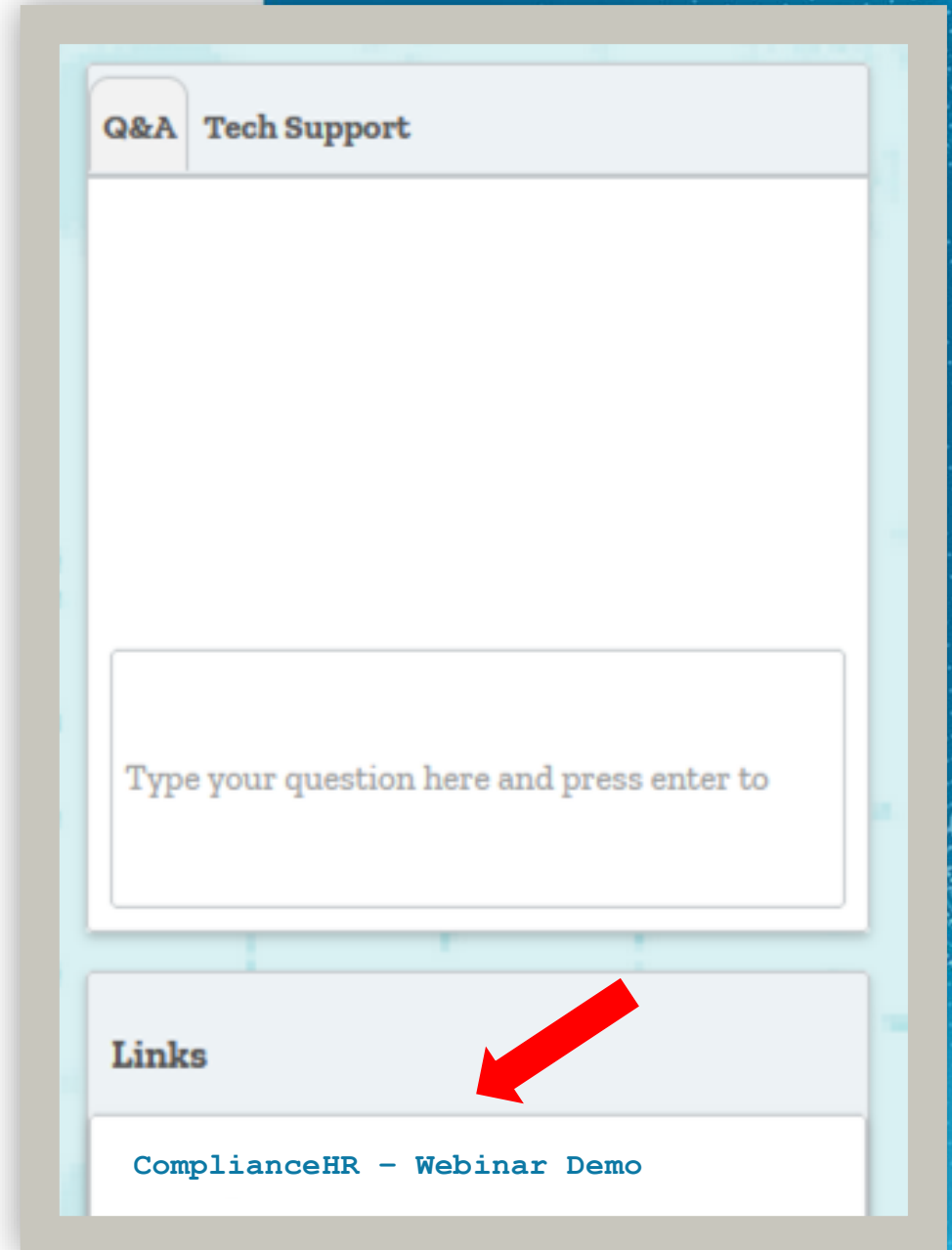
- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
  - COVID-19, final pay, FMLA, rate changes, and more

When coupled, these two solutions provide you with comprehensive compliance program support

# Register for a Navigator Suite Demonstration

## Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



# Presented by:

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# Agenda

1. Independent Contractors (AB 5 Status)
2. App based drivers (Prop.22)
3. Covid Sick Leave extension (again!)
4. Warehouse Quotas
5. Wage and Hour update
6. Wage Transparency
7. Drug Testing: Cannabis
8. Other updates



# Independent Contractor Test AB 5



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# AB 5: Independent Contractor Test

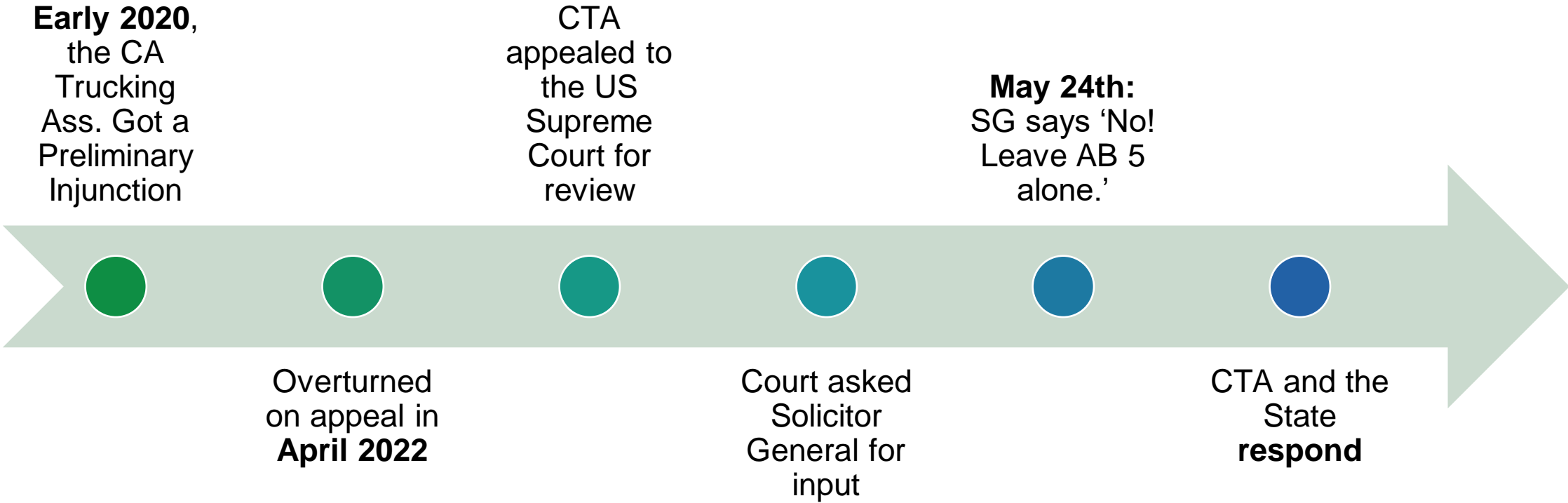
A 2018 CA Supreme Court Decision was “codified” into state law in 2019: The “ABC” test.

The ABC Test: Workers are presumed employees unless:



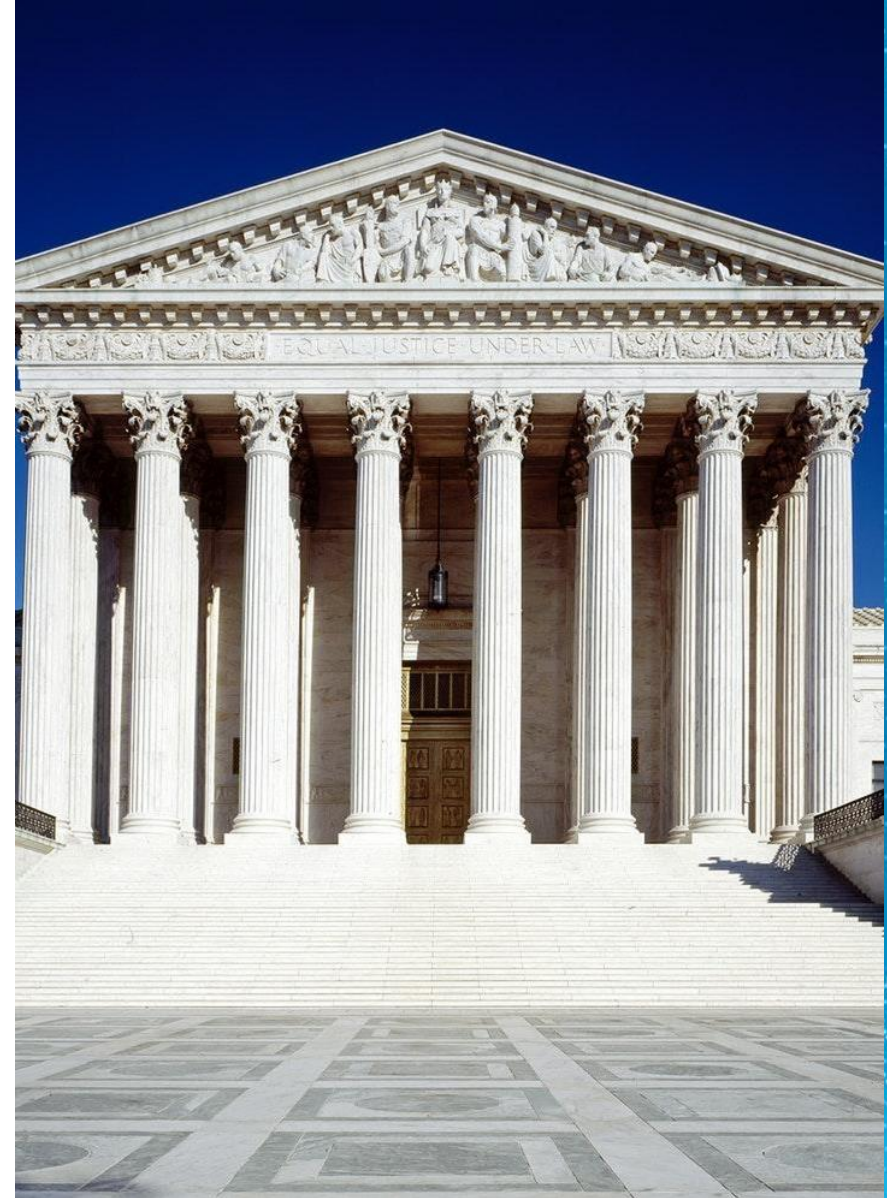
- **A** That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- **B** That the worker performs work that is outside the usual course of the hiring entity’s business; 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 30<sup>th</sup>, 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.



# The “B” Prong

- It is the “B” prong of the test that is troublesome for motor carriers because leased contract drivers are in the same business as motor carriers (i.e., violating the “B” prong.)
- This matters because if drivers are employees of a carrier (and not contractors) then they’re eligible for significant benefits like minimum wage, overtime pay, unemployment, etc.

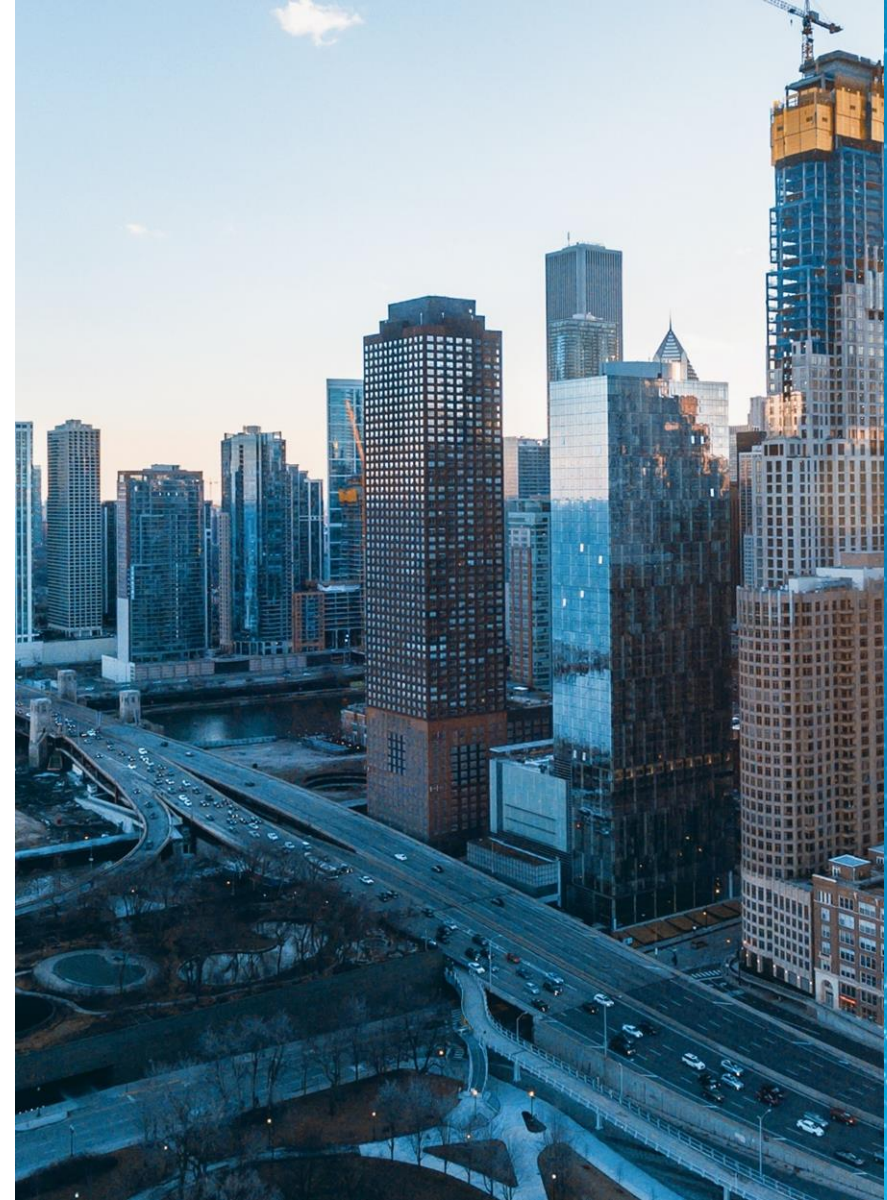
Motor carriers heavily rely on owner-operators to haul freight – especially to and from California ports. Since the U.S. Supreme Court didn’t take the CTA’s case, then it’s likely that independent truck drivers would become employees of a motor carrier.

CA Trucking Ass. vs. Bonta (996 F.3d 644, 9th Circ. 2021.)

# What's Next?

# Business to Business Exemption

- What is the B2B exemption?:
  - If an IC acting as a sole proprietor or a business entity (e.g., partnership, limited liability company, limited liability partnership, or corporation) contracts to provide services to another such business, the *Borello* test applies to the determination of employment status twelve criteria are satisfied.





# The B2B criteria:

1. IC is free from control;
2. **IC Providing services to the contracting business, not its customers;**
3. A written contract specifying: services, payment amount (any applicable rate of pay), the due date for payment;
4. **IC has a business license or registration;**
5. IC maintains a business location (can be IC's home);
6. **IC customarily provides the services as part of an independent business;**
7. **IC can contract with other businesses to provide the same services without restrictions;**
8. **IC advertises and holds itself out to the public to provide the services others;**
9. IC provides its own tools, vehicles, and equipment to perform the services;
10. **IC can negotiate its own rates;**
11. Consistent with the nature of the work, IC can set its own hours and location of work;
12. IC is not providing work for which a license from the Contractors' State License Board is required.

# Proposition 22 Unconstitutional



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# Proposition 22: App Based Drivers

- App based drivers: DoorDash, Instacart, Lyft, Uber, etc.
- Prop 22 exempted them from AB 5
- Won 58% of the Vote! (\$200 million from app companies)
- So what happened?



# The Union Sued

- SEIU (Service Employees International Union) and 4 employees of Apps sued the State
- Argued the Prop is unconstitutional
- Sought a direct review to the California Supreme Court
- CSC rejected direct review
- Sued in Alameda County Superior Court

# Superior Court Challenge

Alameda Judge rules two sections of Prop 22 unconstitutional:

- Limits the power of Legislature
- Violates “single subject” rule
- Now the entire Prop is unenforceable



“Protect App-Based Drivers and Services” Coalition appealed.

# Deals are being made...

- Instacart is up first: Reached a deal with State's Office of Business and Economic Development
- \$21 Million "California Competes Tax Credit" (please stay in CA, we will pay you)
- Instacart must hire 1,155 new FT employees (avg 130k/year), invest in office space, TI, equipment as part of its expansion in San Francisco to accommodate growth.
- Anticipate other deals to come...

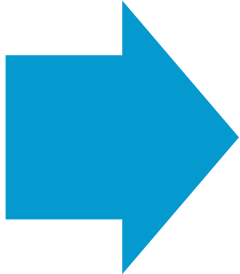
# COVID-19 Sick Leave



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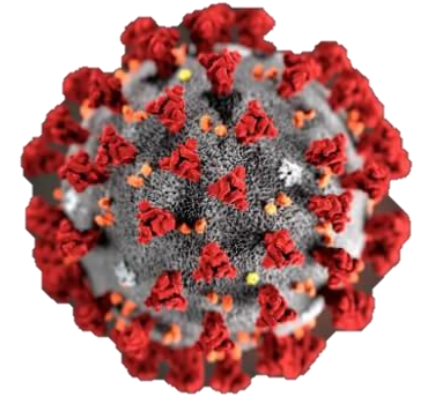
# SB 114: Covid Sick Leave (January – September... now December)

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



The law was  
supposed to  
expire in  
September but  
a new bill  
extended this  
leave again





# The Basics

- SB 114 Went into effect on February 19, 2022; AB 152 extended until December 31
- 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.

# The Details

This time it's prorated based on length of service and awarded in two batches.  
(Last time it was one 80 hour single batch)

## Full-time employees:

- If scheduled to work 40 hours per week in the 2 weeks preceding the leave date, employee entitled to 40 hours.

## Part-time employees:

- Fixed weekly schedule: Entitled to number of hours normally scheduled for one week, not to exceed 40 hours.
- Variable Schedule: Entitled to 7 times the avg. number of hours worked each day (based on the 6 preceding months), not to exceed 40 hours. If new employee (less than 6 months), then the total length of their employment is used to calculate hours. If 7 days or less, the total number of hours worked is used.

# 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)

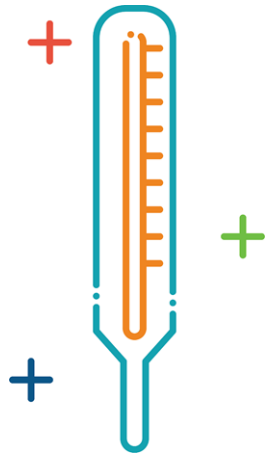
- Caring for a family member subject to the above

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!



# Just a few more rules ...



Employee cannot be forced to exhaust other forms of leave before taking Covid-19 Sick Leave



Sick leave payments must be made no later than the payday for the next regular payroll period after the leave was taken.



There are posting requirements ~ emails are ok for staff not coming into office regularly.



There are wage statement requirements (just like SB 95), but it is slightly different

# AB 152: Awaiting Governor's Signature

The bill extends the COVID-19 paid sick leave sunset in [SB 114](#) from September 30, 2022, to December 31, 2022. Please note that this is an extension for workers to use the leave, it is not a new round of leave.

## Changes in AB 152

1. Grants for small businesses to offset the costs of the leave; and
1. The ability to require a worker to take an additional COVID test after the 5th day from when they first tested positive.

# AB 701: Warehouse Quotas

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# Why enact a bill to regulate quotas?

Warehouse Distribution Center (WDC) employees have a high rate of injury and illness.

Quotas prevent employees from obtaining full benefit of minimum wage if a quota is increased to make up for impact of a minimum wage increase.



# What disclosures are required?



As of January 1, 2022, employers must provide a written description of each quota an employee is subject to – within 30 days of hire.



Must include the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.



A covered employer may not take adverse employment action against an employee for failure to meet any quota that has not been disclosed in writing to the employee as required by the law.

# Who must abide by this law?



Employers who “directly or indirectly control” 100 or more non-exempt employees at a single site.

A WDC that employs 1,000 or more employees at one or more sites in California.

Employees provided by staffing agencies are covered if the employer controls the terms and conditions of their employment.

# Examples of Quotas



Processing a required number of packages in a specific amount of time, such as 200 packages per hour



Clearing all incoming or outgoing inventory within a single shift



Having to clear all packages from a conveyor belt based on belt speed



Filling a certain number of containers in a specific time or in one work shift

# Existing Employees



Employees now have the right to request a copy of any quota, as well as the most recent 90 days of the employee's own personal "work speed data."



Employers are required to comply with such requests as soon as practicable, but no later than 21 calendar days from the date of the request.

# Cannot Interfere with other rights



An employee cannot be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities (including reasonable travel time to and from bathrooms), or compliance with occupational health and safety standards.

Nor may a quota be so high that if an employee takes meal and rest breaks, goes to the bathroom, or attempts to exercise their rights under occupational health and safety standards, they will fail to meet the quota.

# Wage and Hour

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# *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



# 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

- In January, there were 494 Notices filed with LWDA (15.9/day)
- In May, there were 537 Notices filed (17.3/day)
- In June, there were 456 filings (15.2/day)
- In July, there were 446 filings (14.39/day)
- 2022 Sum total so far...3,220 filings (15.19/day)



# 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



“...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.”



- PAGA traffic in superior courts is astounding – cases are filed daily



# 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: [PAGA does not violate the constitutional separation of powers](#) because it bars workers from suing until they have notified the state of their claims and officials have passed on filing their own lawsuit.
- On July 15, 2022, CABIA submitted a [petition for rehearing](#).

# What's the next Move?

- The Secretary of State recently announced that the California Fair Pay and Employer Accountability Act has qualified for the **2024 ballot**, with nearly 1 million signatures submitted in support of PAGA reform.
- The proposition seeks to repeal PAGA and eliminate the Labor Commissioner's authority to contract with private organizations or attorneys to assist with enforcement actions. The proposition proposes instead that the state provide more funding to the Labor Commissioner to enforce Labor Code violations.
- Workers under this system would be able to get their claims handled without having to hire a private attorney to engage in a lengthy and costly lawsuit.

# Viking River Cruises

On June 15, 2022, the U.S. Supreme Court issued its much-anticipated decision

The United States Supreme Court's decision in [Viking River Cruises v. Moriana](#) will dramatically impact employers' rights to enforce arbitration agreements related to claims under California's Private Attorneys General Act (PAGA). This decision, which is a significant win for employers with interests in California, will allow employers to compel arbitration of a PAGA plaintiff's individual PAGA claims. In addition, because a PAGA plaintiff bound to arbitrate lacks standing to prosecute claims on behalf of other aggrieved employees, the remaining PAGA claims must be dismissed.

# CA Supreme Court to Address PAGA Manageability

Royalty Carpet Mills, 2022 Cal. LEXIS 3533 (June 22, 2022), the California Supreme Court granted defendant's petition to review, and will answer the following question:

“Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act (Lab. Code, § 2698 et seq.) will be manageable at trial, and to strike or narrow such claims if they cannot be managed?”

# Wage Transparency

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# Wage Transparency Bill: SB 1162

- Sitting on the Governor's Desk
- Applies to CA employers with 100 or more employees
- Staffing agencies with 100 or more employees



# 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.



# Must Disclose Pay Scale in New Job Openings

- SB1162 amends the Labor Code to require an employer (upon request) to provide the “pay scale” for a position:
  1. to an applicant for employment, and
  2. for an employee’s position in which they are employed.
- An employer must now also include the pay scale for a position they post, so long as the employer has 15 or more employees.
- As defined in this new statute, the “pay scale” is specifically defined as “the salary or hourly wage range that the employer reasonably expects to pay for the position.”

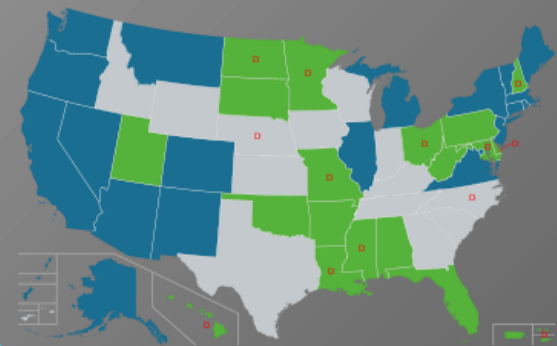
# Labor Code Penalties

Enforcement will occur through three methods:

1. A civil penalty of \$100 per employee will be assessed on an employer who fails to file the required report for the first offense, and \$200 per employee for subsequent violations. Penalties are payable to the Department of Fair Employment and Housing (DFEH).
2. ~~The DFEH will publish deidentified reports on their website about the data disclosed to them from companies complying with SB 1162. There is a timed scale of publishing this data online.~~
  - *Bill was gutted of actual transparency last minute!*
3. PAGA: These requirements are also subject to PAGA, which contains a 33 day right to cure period.

# Cannabis Use Off-Duty

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# AB 2188: Cannabis Discrimination

- New prohibition against discrimination based on off duty cannabis use (Maybe)
- Sitting on Governor's Desk

It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment based on:

- The person's use of cannabis off the job and away from the workplace; and
- An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.

# Where is this coming from?

- Well, this IS California
- THC is metabolized and turns into “nonpsychoactive” cannabis metabolite
- This metabolite is often found in employees for weeks but has no correlation to impairment



# Drug Free Workplace?

Employees still cannot be impaired on the job, or use cannabis on the job

Obligation of the employer to maintain a drug and alcohol free workplace still applies

Still may only use cannabis if 21 and up. What if nonpsychoactive ingredients are found in employee younger than 21?

Some scientists say marijuana stores for weeks or longer in the body and can have longer-term effects on a person's perceptions and behavior.



# Some Exceptions Apply

## Currently does not apply to:

- Construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, or repair work,
- a person licensed under the Contractors State License Law or an employee performing work in similar or related occupations or trades (Other carve outs might be negotiated...)



# Recent Amendments in the Senate

- Clarify that the prohibition on discrimination in employment based upon cannabis use that is off the job and away from the workplace **does not prohibit an employer from discriminating in hiring, or any other term and condition of employment, or otherwise penalizing a person based on valid preemployment drug screening conducted through methods that do not screen for non-psychoactive cannabis metabolites.**
- Nothing in the bill affects the rights or obligations of an employer specified by [federal law or regulation](#).
- Exempts from the bill applicants or employees hired for positions that require a [federal government background investigation or security clearance](#), as specified.
- The bill does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment.
- Effective date of January 1, [2024](#) – we get one year to prepare for implementation



# SB 1044: Pending Law

In the event of an emergency condition, an employer shall not do either of the following:

1. Take or threaten adverse action against any employee for refusing to report to, or leaving, a workplace within the affected area because the employee feels unsafe.
2. Prevent any employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety. (Amazon tornado case)

# SB1044 Amendments

- Narrows the bill so that it only applies to “emergency conditions,” which are conditions of disaster or extreme peril to the safety of persons or property or an order to evacuate (which is specifically already illegal to require work in under a recent bill prohibiting work in an evacuation area). It therefore no longer applies to states of emergency.
- Acknowledges that any existing health and safety regulations and employer compliance are relevant in considering whether a reasonable person would feel unsafe if the employee is aware of them or has received mandated training (ex., the wildfire smoke and heat regs all require training on such regs)
- Exclusion for employees providing public access to services like energy or water
- Excludes employees whose primary duties include assisting members of the public evacuate during an emergency
- Exempts several groups from cell phone provision, including bank employees and employees operating specific equipment
- While there is PAGA exposure under the bill, they have also added a right to cure provision.

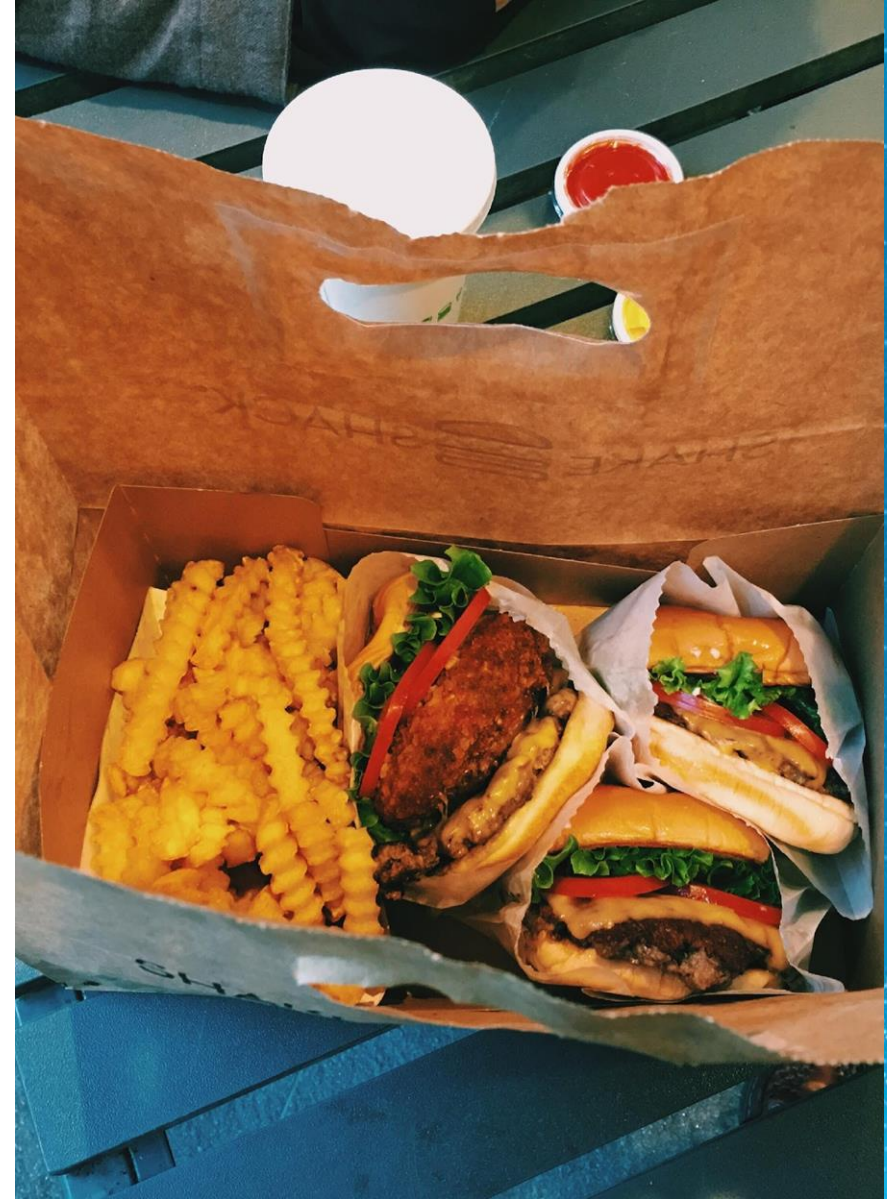
# Other New Developments



# AB257 Fast Food Council

## AB257: New Council Sets Rules for an Entire Industry

- New form of government over an entire sector
- Fast food restaurants with 100 or more establishments
- Council members appointed by Governor
- Can raise wages up to \$22/hour
- Sets “working conditions” regulations
- SEIU
- Signed by Governor on Labor Day



# Local Wage and Employee Protection Ordinances

- San Francisco, Long Beach, Los Angeles and Glendale
- Hotel Worker Pay and Protection Ordinances
- Health Care Worker Pay and Protection Ordinances
- Petitions are circulated and presented to City Council
- City Council can adopt or allow a special election
- Paid sick leaves

# Local Ordinances: The CA Trend

June 7th Election: 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 contagious, infectious, or communicable disease declared by San Francisco or California health officials (e.g., COVID-19), or
- An air quality emergency 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”

# Other Bills to Watch: On the Governor's Desk

- AB1041: Amends CFRA to add a “Designated Person” – an employee may take leave to care for any individual related by blood or who is the equivalent of a family relationship
- AB1788: Hotels: Establishes a cause of action by a prosecutor against hotels for failing to report sex trafficking
- AB1949: Employers with 5 or more employees will be required to provide 5 days unpaid bereavement leave
- SB931: Deterring union membership requires PERB to impose civil penalties and AF's for deterring public ee's from exercising bargaining rights



# Did you make 42 changes to your employee handbook this year?

In order to have a compliant handbook in California (ONLY), your handbook should have been updated with **42 new or revised policies** this year!





# Do you pay your employees minimum wage? Do they take sick leave?

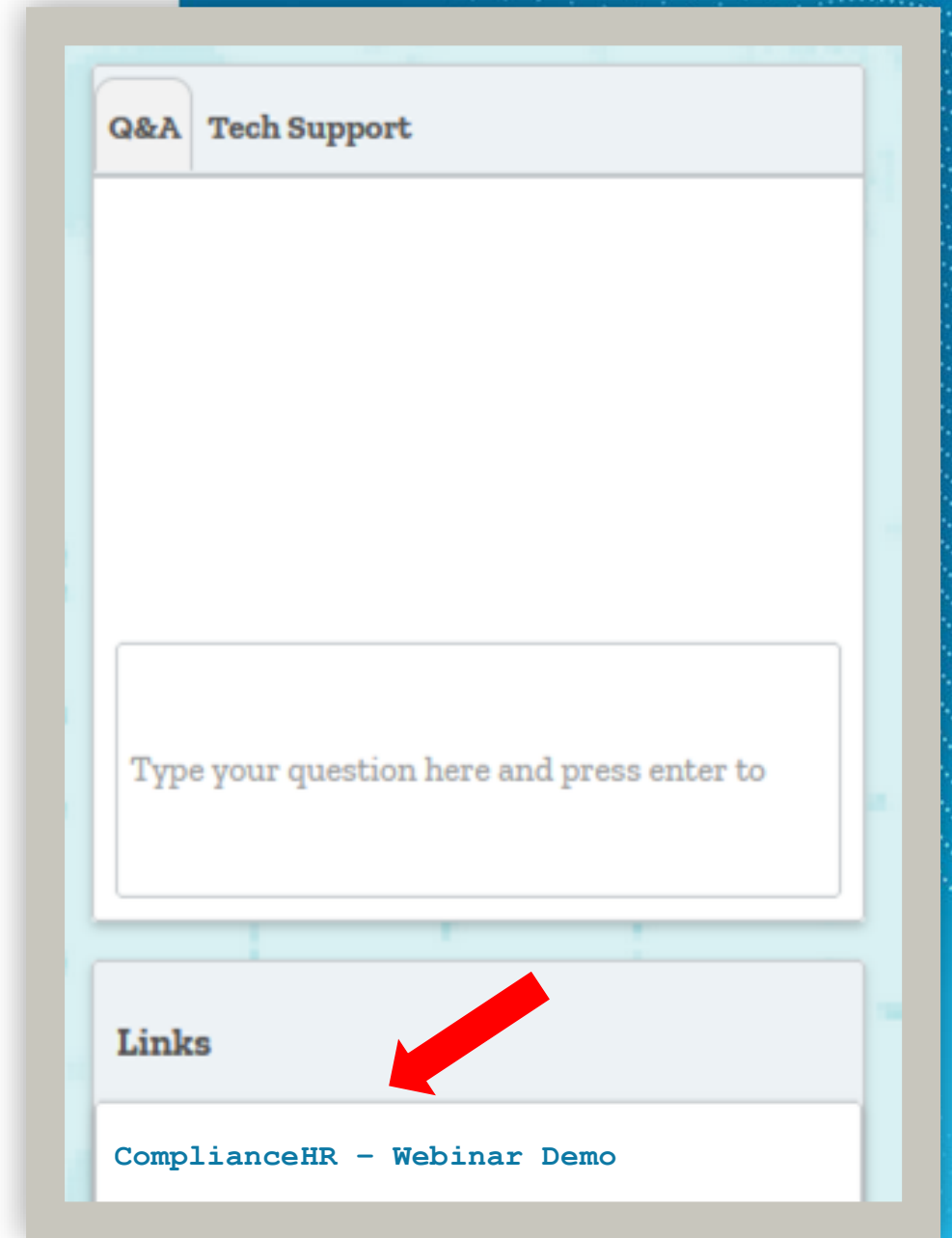
- California has 40 different minimum wage requirements
- California has 8 different sick leave policies across the state



# Last Chance to Register

## Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



# Questions?

Please add any additional questions to the Q&A box

# Thank you!

To register for a demonstration of the Navigator Suite, please email [demo@compliancehr.com](mailto:demo@compliancehr.com) or submit the form on our website: [Compliancehr.com/webinar-demo](https://compliancehr.com/webinar-demo)