



December 10, 2020

# Hot Topics in California Employment Law: Key Changes and Developments for 2021

*Eric Kauffman, Partner*

*Wendy Lazerson, Partner*

*Kate Roberts, Partner*

*Galit Knotz, Counsel*

# Program Agenda

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- New Laws
- Update on 2019 Statutes
- Noteworthy Cases
- COVID-19



## Corporate Boardroom Diversity (AB 979)

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- Publicly held corporations with principal executive offices in California must have at least one director from an “**underrepresented community**” on its board by end of 2021
- By the end of 2022, covered corporations will be required to have two directors from an underrepresented community (if corporation has more than four but fewer than nine directors); or three directors from an underrepresented community (if the corporation has nine or more directors)
  - Similar to SB 826 (gender diversity), which has so far withstood legal challenge (and spawned similar legislative efforts in other states – IL, MD, PA)
  - An individual from an underrepresented community includes: “**an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender**”

## Pay Reporting (SB 973)

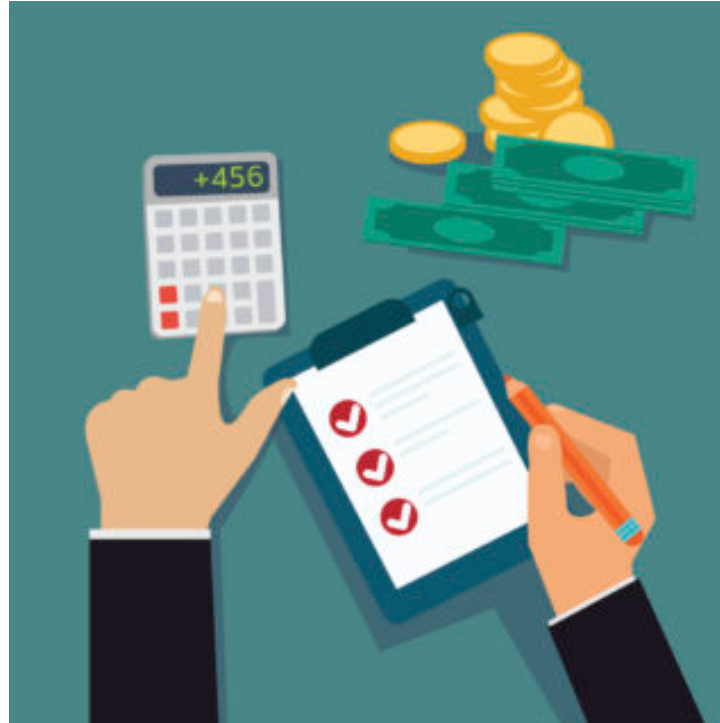
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- Starting on March 31, 2021, certain California employers will be required to submit annual information on their employees' pay data job category and by gender, race and ethnicity to the state's Department of Fair Employment and Housing (DFEH)
- The law applies to employers:
  - (a) with 100 or more employees (including employees residing in or outside of California); and
  - (b) that must file an annual Employer Information Report (EEO-1) under federal law
- Employers must submit an annual report to the DFEH that includes the number of California employees (employers would count individuals by looking at a single pay period of their choosing between October 1 and December 31 of the calendar year preceding March 31):
  - By race, ethnicity, and sex
  - In each of the 10 job categories in the federal EEO-1 report
  - Whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics Survey (using W2 income)

## Pay Reporting (SB 973) Cont.

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- Employers with multiple establishments must submit a report for each establishment and a consolidated report that includes all employees
- Expecting a California-specific form



# New Laws Requiring Handbook Revisions

## Significant Expansion of CFRA (SB 1383)

- Goes into effect January 1, 2021
- Now applies to employers with **5 or more employees**
- Repeals New Parent Leave Act
- Major expansions:
  - Expands covered family members
  - Provides military exigency leave
- Other changes
  - Spouse employees
  - “Key employees”
- Interaction with FMLA



## New Laws Requiring Handbook Revisions Cont.

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- AB 2992 – ***Expanded Protections for Crime Victims*** (amending Labor Code §§ 230, 230.1) (Jan 1, 2021)
  - Expands the rights to victims of domestic violence, assault and stalking to employees who
    - are general crime victims in general, or
    - whose immediate family member died due to a crime
  - Other leave applicable to employers with 25 or more employees
- AB 2017 – ***Sick Leave and Kin Care***
  - Went into effect in September
  - Employees, not employers, get to choose whether time off to take care of an ill family member is designated as sick leave
- ***Paid Family Leave Expansion***
  - SB 83 (in effect): Up to 8 weeks of coverage
  - AB 2399 (Jan. 1): PFL wage replacement for new reasons covered under CFRA



## Other New Statutes

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- AB 2143 – Revision of No Rehire Provisions in Settlement Agreements (Jan. 1, 2021)
  - Adds an additional exception to AB 749 relating to “criminal conduct”
- AB 1947 – Revision of California’s Whistleblower law (Labor Code § 1102.5)
  - Went into effect in October
  - Two main changes:
    - Reasonable attorney’s fees to a prevailing plaintiff
    - Longer limitations period





# Minimum Wage

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- State Minimum Wage
  - Increases to \$14 per hour (if employer has 26 employees or more)
- Local Minimum Wage
  - Cities and counties including Los Angeles, San Diego, San Francisco, Alameda, Santa Clara, and Sonoma all have their own minimum wage ordinances
  - Some counties (Hayward, San Carlos) delayed minimum wage increases temporarily
- Exempt Classifications
  - New salary threshold of **\$58,240** (if employer has 26 employees or more)



# Minimizing the Impact of *Dynamex*

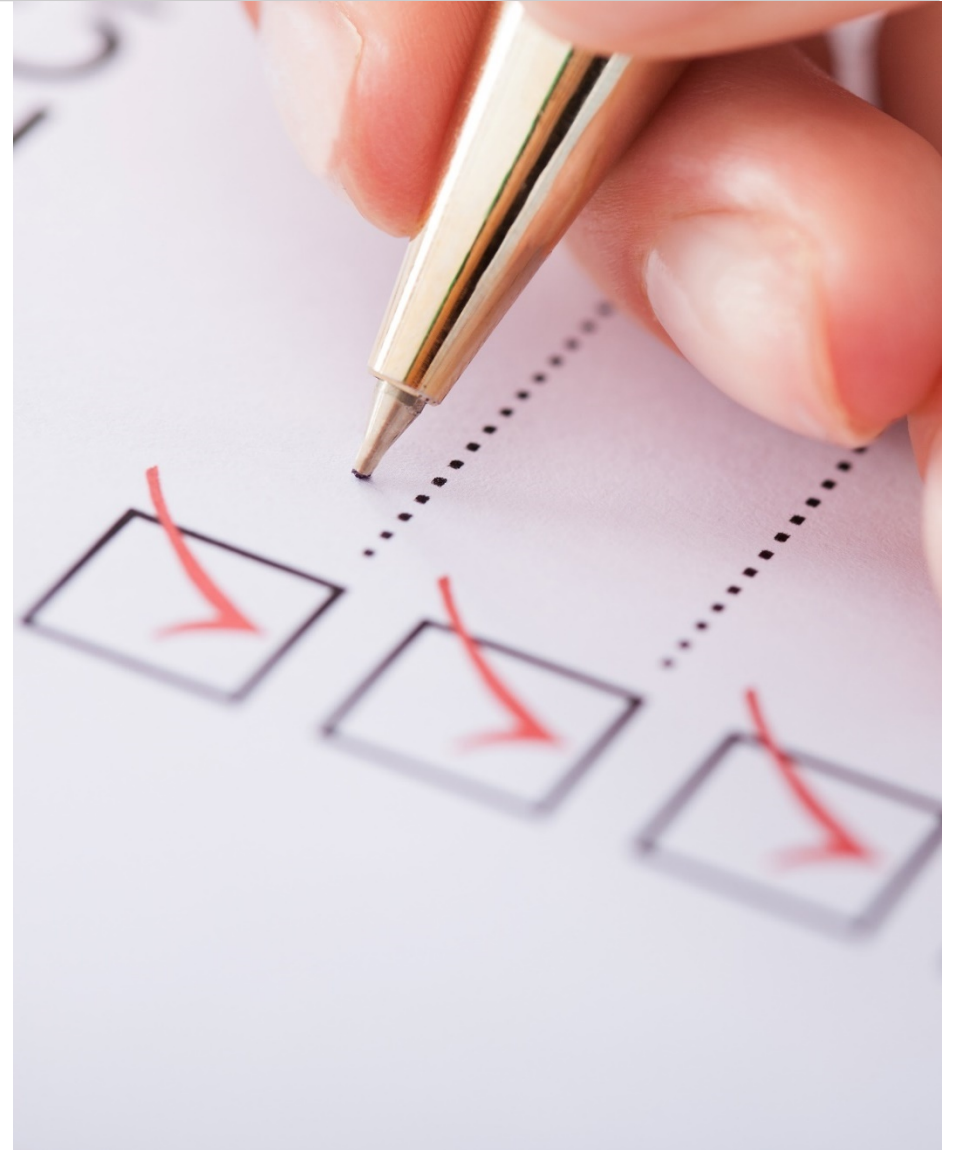


- April 30, 2018 → *Dynamex* decided
- September 18, 2019 → AB-5 is signed (codifying “ABC Test” (Labor Code § 2750.3))
- 2020 → This year we have seen efforts to minimize the impact of AB-5

## AB-5 (Labor Code § 2750.3) and the “ABC Test”

### The “ABC Test” is a tough standard:

- A. The hiring entity does not control or direct the performance of work
- B. The person performs work outside the usual course of the hiring entity’s business
- C. The person is customarily engaged in an independently established trade, occupation, or business



## AB-5 (Labor Code § 2750.3) – The Original Exceptions

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When enacted, AB-5 created 57 statutory exceptions to “ABC Test,” which include:

### **Occupational exemptions**

- Doctors (physicians, surgeons, dentists, podiatrists, veterinarians, psychologists)
- Professionals (lawyers, insurance brokers, architects, engineers, private investigators, or accountants)
- Financial services (accountants, securities broker-dealers, investment advisors)
- Real estate agents
- Repossession agencies
- Direct-sales persons
- Commercial fishermen
- Individuals providing driving services for motor clubs

### **Professional services exemption**

- Marketing, human resources administrator, travel agents, graphic designers, grant writers, fine artist)

### **Job referral agency exemption**

- Businesses that refer customers to providers for 16 listed services

### **Construction industry exemption**

- Subcontractors in the construction industry

### **Business-to-Business exemption**

- Work performed by sole proprietor, partnership, LLC or corporation (under specified conditions)

## AB-2257 (Labor Code §§ 2775 to 2787) – Clarifies and Expands Exemptions

Signed into law on September 4, 2020 (repealed Labor Code § 2750.3 and added 53 new exemptions) →

- **Adds** recording industry exception for musical performers and those working in related areas such as promoters
- **Adds** more specific occupations (e.g. international exchange visitor program workers, amateur umpires, newspaper distributors)
- **Adds** more professional services (e.g., content contributors, appraisers and home inspectors, registered professional foresters)
- **Adds** “Single-Engagement” business-to-business contracting relationships (contracts between individual businesspersons for a “single-engagement event”)
- **Changes** criteria for business-to-business exemption (making it easier to satisfy)
- **Expands** referral agency exemption
- **Adds** miscellaneous exemptions (e.g. data aggregators, manufactured housing salespersons)

**READ THE STATUTE! IT IS DETAILED AND SPECIFIC...**



## Who Did Not Get Exemption?



Transportation

Franchising

Uber, Lyft, and other  
app-based gig economy  
businesses

Motion picture and  
television industry

## Transportation:

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- *People v. Cal Cartage Transportation Express, LLC*, No. B304240, 2020 WL 6791475, at \*6 (Cal. Ct. App. Nov. 19, 2020)
  - On November 19, 2020, California Court of Appeals declared that motor carriers are not exempt from AB-5 under the doctrine of federal preemption by virtue of the Federal Aviation Administration Authorization Act (FAAAA)
- But federal courts may have a different view . . .
  - January 16, 2020 decision in *California Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1158 (S.D. Cal. 2020), federal district court granted CTA's preliminary injunction on the grounds that AB-5 is preempted by the FAAAA because the ABC test has more than a "tenuous, remote, or peripheral" impact on motor carriers' prices, routes or services
  - Decision is currently on appeal to the Ninth Circuit

Whether federal law preemption applies is an open question.



## Franchising:

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- Litigation on issue of whether “ABC Test” applies to franchising relationships:
  - Currently pending: *International Franchise Association et al. v. State of California et al.*, Case No. 3:20-cv-02243 (S.D. Cal. Nov. 17, 2020) involves suit filed by franchise groups challenging AB-5 because control is essential part of franchising and ABC test is incompatible with FTC’s Franchise Rule and federal Lanham Act.
  - *Patel v. 7-Eleven, Inc.*, Case No. 1:17-cv-11414-NMG, at 22-23 (D. Ma. Sept. 10, 2020) (Dkt. 169) in putative class action alleging misclassification of franchisees violated Massachusetts’ wage and hour laws, federal district court held that FTC’s regulatory regime governs over the “ABC test” used in Massachusetts to classify workers.

Whether federal law preemption applies is an open question.

## “Gig Worker” Litigation

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- *People v. Uber Technologies, Inc.*, No. CGC-20-584402, 2020 WL 5440308 (Cal.Super. Aug. 10, 2020): Judge Ethan Schulman finds that drivers “are central, not tangential, to Uber and Lyft’s entire ride-hailing business” and therefore qualify as employees. Issued injunction against Uber and Lyft to halt misclassification as independent contractors, staying order for 10 days to allow defendants to appeal.
- *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 (2020), *as modified on denial of reh'g* (Nov. 20, 2020): Appeals court affirmed Judge Shulman’s injunctive order. Following passage of Prop 22, Uber and Lyft asked appellate court to reconsider its ruling, arguing that with passage of Prop 22, it is inconsistent with California law. Appeals court denied motion for reconsideration, leaving interpretation of Prop 22 to trial court.

## “Gig Contractors” – Proposition 22

- Exempts app-based transportation and delivery drivers from AB-5 and creates a “hybrid” category of worker – the “gig contractor” – entitled to specified benefits:
  - Minimum wage guarantee
  - Limits on working more than 12 hours in a 24-hour period
  - Health care subsidies
  - Occupational accident insurance
  - Discrimination and sexual harassment training

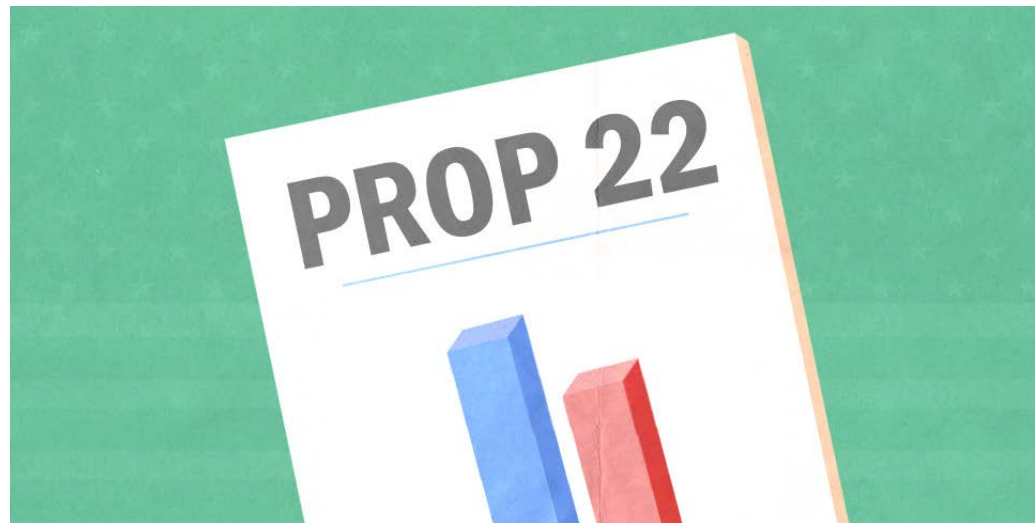
**NOTE** that benefits generally based on “engaged time” (e.g., time from which a driver accepts a rideshare/delivery request to when the driver completes request). Waiting time, time spent on cancelled requests, or on rides the driver abandons is “unengaged time.”



## Proposition 22 – Future Considerations

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- “Poison pill” requirement of 7/8ths vote of Assembly and Senate to amend means that Prop 22 will be very difficult to change
- Retroactivity of Prop 22 is unclear
- Uber pushing for similar legislation across the United States (and globally)



## Moving Forward

- What further exemptions or amendments will be made to AB-5?
- President-Elect Biden favors a federal version of “ABC Test”
- California Supreme Court recently heard oral argument in *Vazquez v. Jan-Pro Franchising Int’l, Inc.*, Cal., No. S258191 to determine whether *Dynamex* applies retroactively to pre-2018 classification decisions
- Ninth Circuit to decide whether state can enforce “ABC Test” against motor carriers
- Litigation underway to determine whether AB-5 applies to franchise model



## Federal Developments – FLSA

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- U.S. Department of Labor Proposed Rule – proposed a rule to clarify federal law on the definition of independent contractor status
  - Adopts more employer-friendly “economic reality test”
  - Uses combination of five “core factors” and “additional guideposts”
- Inside Sales Exemption
  - There are different definitions for the inside sales exemption under CA and federal law and must satisfy both
  - This is an exemption from overtime only; not from other rules that apply to nonexempt employees
  - As of May 2020, FLSA’s lists for what is and what is not a “retail or service establishment” has been withdrawn



## Arbitration Agreements

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- AB-51 became effective on January 1, 2020
- Lawsuit was filed prior to the effective date (*Chamber of Commerce of the USA, et al. v. Becerra, et al.*, Case No. 2:19-cv-02456-KJM-DB)
  - The court granted a preliminary injunction on the grounds of FAAA preemption
  - On February 20, 2020, the Court's Order was appealed
- Currently, enforcement of statute is enjoined - stand by
  - This may change, but likely in the distant future









## California Consumer Protection Act (CCPA) – Update

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## Brief Overview – What Is the CCPA?

The CCPA is a far-reaching data protection and privacy regime that grants consumers new rights over data collected about them and creates new mechanisms for enforcing those rights.

	Effective as of January 1, 2020.		Broad privacy policy disclosure requirements.
	CCPA applies to certain for-profit entities doing business in California.		Private cause of action for data breaches with damages permitted without proof of harm (although companies are given a chance to cure violations).
	Grants consumers rights to, among other things, access, delete, or stop the sale to third parties of data collected about them.		California Attorney General authorized to enforce provisions with statutory fines of up to \$7,500 per violation.

Enforcement of the Act will begin in July 2020. However, the Act was effective as of January 1, 2020.

# CCPA and Proposition 24 – Employer Obligations Unchanged

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- Employer impact
  - For personal information of employers, job applicants, employer must:
    - (1) provide notice at or before point of collection of what is collected and purposes for collection;
    - (2) guard against data breaches
- Moratorium on employee data until **January 1, 2023**
  - Proposition 24 extends applicant/employee exemption to January 1, 2023 (could be made permanent in upcoming legislative session)
  - NOT a complete moratorium
  - Data collected solely for purposes of employment
- Compliance efforts should be focused on:
  - Providing notice
  - Maintaining reasonable security measures



## Noteworthy Cases

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- *Kim v. Reins International* (CA Supreme Court)
  - If an employee-plaintiff accepts money to settle and dismiss individual wage and hour claims, the employee still has standing to bring a PAGA suit
  - Claim preclusion does not apply
- *McPherson v. EF Intercultural Foundation, Inc.* (CA Court of Appeals)
  - Unlimited vacation policies must really be unlimited, both in policy and practice
  - If employer administers them similar to accrued vacation, then there is risk a court will require them to pay out accruals upon termination
- *Jennifer Sansone et al. v. Charter Communications Inc. et al.* (9th Circuit)
  - Court ruled employees should have been paid vacation upon merger
  - The employees were technically terminated because it was “wholly impossible” for them to keep employment with the company

# COVID-19

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- Things are changing yet again
  - New stay-at-home orders in California and other states as cases spike
  - CDC has rolled back quarantine period from 14 days to 10 after close contact exposures
  - Some state and local health departments are following suit but it's not uniform → these are the mandatory orders while the CDC is guidance
- Vaccines
  - The EEOC and CDC have not yet weighed in on employer-mandated vaccines
  - If employers are able to require their workers to get vaccinated for COVID-19, they will still need to address:
    - Reasonable accommodations for health reasons
    - Religious objections
    - Union bargaining
  - We are continuing to analyze the situation and will provide additional client alerts and advice as things develop

# COVID-19 Reporting Requirements/Worker's Comp

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- AB 685 (January 1, 2021)
  - Provide written notice within one business day to employees & subcontractors who may have been exposed
  - Upon outbreak (3 or more cases within 14 days), notify the local health department within 48 hours
  - Similar requirements are already in place under CalOSHA temporary orders effective Nov. 30, 2020
- SB 1159 (September 17, 2020) addresses worker's comp issues related to COVID-19
  - Presumption in favor of employee when there is a workplace outbreak (defined as 4 or more cases, or 4% of workforce depending on size, or if worksite was closed due to infection risk)
  - Must notify claims administrator after each positive case of COVID-19
  - Can help rebut the presumption by demonstrating employer safety measures or employees' independent risk of exposure
  - Executive Order N-62-20 applies to workers who contracted COVID-19 between May 6 and July 5

# COVID-19 Sick Leave

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- California Emergency Paid Sick Leave (AB 1867)
  - Applicable to employers with 500+ employees nationwide (FFCRA covers 500 or less with some exclusions)
  - Up to 80 hours of COVID supplemental paid sick leave for qualifying reasons
    - Subject to COVID-19 isolation or quarantine order
    - Advised to isolate/quarantine by a health care provider
    - Prohibited from working by hiring entity due to health concerns
  - Currently set to expire December 31, 2020 (unless FFCRA is extended)
- Local Sick Leave Laws
  - San Francisco
  - Los Angeles





# Cal/OSHA COVID-19 Emergency Standards

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- Very specific requirements
  - COVID-19 Prevention Program
    - Written plan to provide employees with training on procedures, communication plans, cleaning, etc. - model is available on website
  - Tracking cases
    - Keep list of employees who have tested positive. Provide employees with a redacted copy. Provide health department, DIR, etc. with unreacted copy upon request.
  - Testing (free & during work hours)
    - 1 case: provide testing to anyone potentially exposed
    - 3 or more cases over 14 days: provide testing weekly until no new cases for 14 days
    - 20 or more cases over 30 days: provide testing twice each week until no new cases for 14 days
  - Paying employees
    - Employees exposed at work must be paid for their time in quarantine
    - Do not require a negative test to return to work
- More guidance forthcoming?
- Enforcement?



# COVID-19 Trends

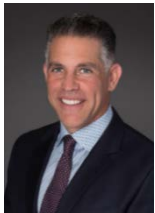
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- Trends in case law
  - Failure to provide PPE/work from home
  - Failure to accommodate
  - Whistleblower/free speech
  - WARN Act violations
  - FFCRA
- Other issues
  - Commuting to work
  - Reimbursement policies
  - Vaccines

QUESTIONS?

THANK YOU FOR JOINING US

# Speaker Biographies



## Eric Kauffman

Partner, Private Equity; M&A;  
Labor, Employment and Immigration  
[eric.kauffman@sidley.com](mailto:eric.kauffman@sidley.com)  
San Diego; Century City  
+1 310 595 9780

ERIC KAUFFMAN focuses his practice on corporate employment matters, providing strategic support to the technology and life sciences sectors and their private equity and venture capital sponsors. He routinely advises clients on a wide array of issues, including transactional matters, mergers and acquisitions (both buy-side and sell-side), financings, spinoffs and divestitures and equity structuring. Eric also has significant experience handling executive compensation arrangements, workforce structuring, hiring and terminating employees, proprietary information and trade secret protection, workplace investigations, C-level and manager training and general employment counseling.



## Wendy Lazerson

Partner, Labor, Employment and Immigration  
[wlazerson@sidley.com](mailto:wlazerson@sidley.com)  
Palo Alto; San Francisco  
+1 650 565 7065

WENDY LAZERSON is the co-chair of Sidley's Labor and Employment international practice group and a partner in Sidley's San Francisco and Palo Alto offices. She also serves on the firm's COVID-19 Task Force. Wendy is a recipient of the BTI Client Service Award for excellence in service to clients. Clients turn to Wendy to handle their most challenging matters regardless of venue, due to her reputation as a thoughtful, pragmatic and strategic thinker. Wendy represents employers in litigation matters involving employment disputes such as discrimination and retaliation class actions and individual claims, sexual harassment, whistleblowing, wage and hour, trade secret theft, and PAGA. Wendy represents clients based in China and other foreign countries with U.S. subsidiaries and employees. Wendy regularly leads workplace investigations involving allegations of improprieties in the C Suite, including sexual harassment, violation of workplace policies and financial improprieties. Wendy's role counseling clients compliments her litigation practice. She also trains workforces with regard to legal compliance and best practices to proactively avoid employee claims. Wendy has a long record of success obtaining arbitration awards, defense verdicts, summary judgment and defeating class certification. Wendy is comfortable in front of a jury, a judge or an arbitrator.

In addition to practicing law, Wendy is the local chair on the Committee for the Retention and Promotion of Women. Wendy regularly speaks on topics of interest and has published many articles with thought leadership. Wendy has received many honors and awards reflecting her recognition by peers and clients, including *Daily Journal* as a Top Labor & Employment Lawyer (2020); *Chambers USA* as a "Notable Practitioner" (2019, 2020); BTI Client Service All-Star award (2017); *The Best Lawyers in California* (2015 – 2020); *The Best Lawyers In America* for Litigation — Labor and Employment (2016 – 2021); *Best Lawyers* in Northern California (2016 – 2020); *Super Lawyers* for Northern California — Employment and Labor (2008 – 2020); *San Francisco Magazine* as a Top Lawyer in Northern California (2013 – 2020); and *Benchmark Litigation* as a "Labor and Employment Star" (2020).

Wendy earned her J.D. with distinction and honors, graduating *cum laude* from Union University, there winning the Trustee Prize awarded to the person ranked second in the graduating class. She attended Boston University and received her B.A. with honors from Binghamton University. She was invited to Law Review and to clerk for the Appellate Division of the New York State, Second Department.

# Speaker Biographies



**Kate A. Roberts**

Partner, Labor, Employment and Immigration  
[kate.roberts@sidley.com](mailto:kate.roberts@sidley.com)  
Los Angeles  
+1 213 896 6039

KATHERINE A. ROBERTS is a partner in Sidley's Los Angeles office and practices in the Labor, Employment and Immigration group. Kate's experience extends to all aspects of employment litigation, counseling and labor relations. She routinely handles wage and hour class and collective actions involving state and federal overtime exemptions, meal and rest period claims and claims under the California Private Attorney General Act (PAGA). Kate also defends employers against claims of discrimination, harassment, wrongful termination, failure to accommodate and other causes of action arising under state and federal law. Kate partners with her clients to complete efficient, timely factual investigations and legal evaluations to help them make informed decisions about litigation strategy and deployment of resources.

Kate has extensive experience representing management in traditional labor matters arising under the National Labor Relations Act including negotiating and administering complex collective bargaining agreements, guiding employers targeted by strikes and other job actions, handling union representation and decertification elections, advising clients on union avoidance, defending employers against unfair labor practices and representing management in grievance arbitrations. In addition, she regularly counsels healthcare, waste/recycling, retail, media and performing arts clients on labor relations issues.

Kate serves as co-chair for the Committee on Retention and Promotion of Women of Sidley's Greater Los Angeles offices. She also is former Diversity Committee chair of Sidley's Greater Los Angeles offices and remains an active member of the committee.

Prior to law school, Kate was a reporter and editor for *The Associated Press*. She earned her J.D. from the University of Wisconsin Law School and both a B.S. and M.S. from Northwestern University.



**Galit A. Knotz**

Counsel, Labor, Employment and Immigration  
[gknotz@sidley.com](mailto:gknotz@sidley.com)  
Los Angeles  
+1 213 896 6019

GALIT KNOTZ focuses her practice on labor and employment matters including class and representative actions, wage and hour issues, discrimination, harassment and wrongful termination. She has experience representing clients in the retail, food service, financial services, communications and entertainment industries, and has provided counsel on compliance issues.

Galit served as an extern to the Honorable R. Gary Klausner of the United States District Court, Central District of California. She earned her J.D., *cum laude* from Cornell Law School, where she was Note Editor of the *Cornell International Law Journal*. Galit received her B.A. in English, with honors, from the University of California, Berkeley.

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