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Presented by

RYAN L. EDDINGS

Littler Mendelson, P.C.
5200 North Palm Avenue,
Suite 302
Fresno, California 93704
(559) 244-7533
reddings@littler.com

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Agenda

- Wage and Hour Issues
- Pay Data Reporting Issues
- COVID-19 Issues
- Sexual Harassment and Mandated Reporter Training
- H-2A Issues
- Immigration
- Workplace Safety
- Farm Labor Contractors
- Labor Law Issues

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Wage and Hour Issues

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Minimum Wage

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Minimum Wage

Date	Minimum Wage for Employers with 25 Employees or Less	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	$10.00/hour	$10.50/hour
January 1, 2018	$10.50/hour	$11.00/hour
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	**$13.00/hour**	**$14.00/hour**
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	$15.00/hour

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Minimum Wage - Local

- Local Minimum Wages:
- Berkeley ($15.75)
- El Cerrito ($15.61)
- Emeryville ($16.84)
- Los Angeles ($15.00 & $14.25)
- County of Los Angeles ($15.00 & $14.25)
- Mountain View ($16.30)
- Oakland ($14.36)
- Palo Alto ($15.65)
- Richmond ($15.21)
- San Francisco ($16.07)
- San Jose ($15.45)
- Santa Clara ($15.65)
- Santa Monica ($15.00 & $14.25)
- Sunnyvale ($16.30)
- Pasadena ($15.00 & $14.25)
- San Diego ($14.00)
- Malibu ($15.00 & $14.25)

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Minimum Wage - Local

- Local Minimum Wages:
- San Mateo ($15.62)
- San Leandro ($15.00)
- Los Altos ($15.65)
- Cupertino ($15.65)
- Milpitas ($15.40)
- Belmont ($15.90)
- Redwood City ($15.62)
- Alameda ($15.00)
- Daly City ($15.00)
- Fremont ($15.00 & 13.50)
- Sonoma ($15.00 & $14.00)
- Petaluma ($15.20)
- Menlo Park ($15.25)
- South San Francisco ($15.24)
- Novato ($15.24, $15.00 & $14.00)
- Santa Rosa ($15.20)

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Minimum Wage - Local

- Local Minimum Wages:
- Half Moon Bay ($15.00)
- Hayward ($15.00 & $14.00)
- San Carlos ($15.24)
- Burlingame ($15.00)

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Overtime

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FLSA & California Wage Orders

- Under the FLSA, employees who are employed in agriculture as that term is defined in the FLSA are exempt from the overtime pay provisions
  - "Agriculture" meaning essentially work performed "on the farm"
  - "Off the farm" work is not exempted
- California Employers are subject to both the FLSA and California Wage Orders
  - California requires both daily and weekly overtime premiums, depending on the specific wage order at issue

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California Wage Orders

- Four primary Wage Orders address agriculture
  - Wage Order 4 (professional, technical, clerical, mechanical and similar occupations)
  - Wage Order 8 (industries handling produce after harvest)
  - Wage Order 13 (preparing agricultural products for market on the farm)
  - Wage Order 14 (agricultural occupations)

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California Wage Orders

- Wage Order 14
- Agricultural occupations covered by Order 14 are related to:
  - the maintenance of soil, buildings and machinery which constitute the basic farm facilities,
  - and to the cultivation and handling of farm commodities up through harvest, including field packing and transportation to the place of first processing or distribution.

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California Wage Orders

- Wage Order 8 and 13…
- Order 8 applies to similar operations on the farm if they include:
  - 1. Handling any agricultural products, other than the grower's own after harvest or
  - 2. Any packing of a purchased crop or
  - 3. Cooperative warehousing, cooling, grading, sorting, packing, ginning, etc., or
  - 4. Preparing any product for distribution except for the farmer's own product.

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California Wage Orders

- Wage Order 8 and 13…
- Activities under Order 13 must be performed:
  - 1. On the farmer's own crop
  - 2. In a permanent structure or on a moving packing plant (lettuce, carrots, dry onions)
  - 3. In preparation for market (*i.e.* distribution)

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California Wage Orders
Current Law – Wage Orders 4, 8, & 13

- Under Wage Orders 4, 8, and 13, employers must pay overtime premiums for work in excess of 8 hours per day or 40 hours per week.
- Must also pay overtime premiums for work performed on the seventh consecutive day of work in a workweek.

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California Wage Orders
Current Law – Wage Order 14

- As of January 1, 2021, under Wage Order 14, employers with 26 or more employees must pay overtime for work in excess of 8.5 hours per day
  - 45 hours per week
- Overtime premium for first 8 hours of work on the seventh consecutive day in a workweek
- Double time for work in excess of 8 hours on the seventh consecutive day in a workweek

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California Wage Orders
Current Law – Wage Order 14

- As of January 1, 2022, under Wage Order 14, employers with 25 or fewer employees must pay overtime for work in excess of 9.5 hours per day
  - 55 hours per week
- Overtime premium for first 8 hours of work on the seventh consecutive day in a workweek
- Double time for work in excess of 8 hours on the seventh consecutive day in a workweek

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Schedule for Wage Order 14

Schedule for Changes to Daily and Weekly Hours After Which Agricultural Workers Receive Overtime Pay

Effective date for employers with **26 or more** employees:	Effective date for employers with **25 or fewer** employees	Overtime (1.5x regular rate of pay) required after the following hours per day / hours per workweek:
Jan. 1, 2019	Jan. 1, 2022	9.5 / 55
Jan. 1, 2020	Jan. 1, 2023	9 / 50
Jan. 1, 2021	Jan. 1, 2024	8.5 / 45
Jan. 1, 2022*	Jan. 1, 2025*	8 / 40

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Schedule for Wage Order 14

- The law looks to the level of control exercised over the employee's wages, hours, or working conditions.
- Employees of a staffing agency or labor contractor are covered by the minimum wage law. The statute does not specify how to count employees when a worker is employed pursuant to an agreement with a staffing agency or a labor contractor.
- If the staffing agency or labor contractor has more than 25 employees during a pay period, including workers that it dispatches to various worksites, it should apply the higher minimum wage to each of its employees during that pay period.
- An employer who obtains workers through a staffing agency, labor contractor, or other arrangement should aggregate and count such workers, along with other direct hire workers, as employees for purposes of determining the applicable minimum wage rate.

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Changes in Staffing Levels?

- During the year, an employer may have fewer than 26 employees during some pay periods and 26 or more employees during other pay periods. An employer with 26 or more employees at any time during a pay period should apply the large-employer minimum wage to all employees for that pay period.
- The Labor Code and employment contract law require employers to notify workers in advance of the terms of their compensation (please see next question for further detail on notice requirements). If an employer's workforce falls below 26 employees the employer does not need to automatically lower their minimum wage rate. However, if an employer decides to reduce the wage rate because their workforce falls below the threshold of 26 employees, they must notify the affected employees in advance before reducing their wages. The employer would also have to raise the wage rate if new hires or returning workers brought the workforce back up to 26 or more employees.

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What about previously excluded employees?

As of January 1, 2019, for employers with 26 or more employees (or January 1, 2022, for employers of 25 or fewer employees)

- Irrigators
- sheepherders, and
- licensed crew members on commercial fishing vessels

who were previously excluded from overtime protections under Wage Order 14 are entitled to receive overtime pay according to the same phase-in timetable.

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Day of Rest

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Overtime for Agricultural Workers Act of 2016 – Day of Rest

- Some provisions of the law went into effect January 1, 2017
- Most importantly, the law removed the exemption for Ag employees to California's requirement that employees be provided one day's rest in seven

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Overtime for Agricultural Workers Act of 2016 – Day of Rest

- California Supreme Court addresses the one day's rest in seven requirement in 2017
- *Mendoza v. Nordstrom, Inc.*
  - Employees entitled to one day of rest within the employer's defined workweek, rather than one day in every seven days on a rolling basis
  - Clarified that the exemption in Section 556 applies only when the employee never exceeds six hours of work on any day in the workweek.
  - Concluded that an employer "causes" an employee to go without a day of rest when it is by the employer's request or inducement. However, the employer is not prohibited from allowing the employee to work a seventh day if the employee is aware of their right to take a day of rest but makes a free and knowing waiver of that right.

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On Call Pay

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On-Call Check-In Now Requires Reporting Time Pay

Employers who require nonexempt employees to check in to find out whether they must report to work that day must pay those employees "reporting time" under the applicable wage order.

When an employee calls in but is

- not put to work or
- furnished less than half of their usual or scheduled day's work,

they may be entitled to reporting time pay, whether or not they actually reported to work

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Ward v. Tilly's, Inc.

Ward v. Tilly's, Inc. is a Court of Appeals Decision that addressed the employer's policy of requiring employees to call in to a store two hours before on-call shifts to find out of they have to work.

Court of Appeals agreed that requiring employees to call in was "report[ing] for work." The Court rejected the employer's argument that reporting to work means physically reporting to the job site.

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What is Reporting Time Pay?

- Each workday an employee is required to report to work, but is not put to work or is furnished with less than half of his or her usual or scheduled day's work, he or she must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at his or her regular rate of pay.
- If an employee is required to report to work a second time in any one workday and is furnished less than two hours of work on the second reporting, he or she must be paid for two hours at his or her regular rate of pay.

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Are there any Exceptions to Reporting Time Pay?

- No reporting time pay is due:
- When the employer's operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue.
- When public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system.
- When the interruption of work is caused by an Act of God or other cause not within the employer's control, for example, an earthquake. (Mechanical failures are not deemed to be outside the employer's control)

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What about PG&E?

- PG&E and other California utilities implemented power outages in 2019 intended to mitigate wildfire risk caused by downed power lines due to excessive wind conditions
- Because PG&E (and other California utilities) is a public utility, no reporting time pay is owed if the power supply is interrupted by the utility

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Piece Rate Compensation Plans

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Piece Rate Compensation Plans

- Many ag employees are paid on a piece rate basis
- A piece rate must be based on an ascertainable figure paid for completing a particular task or making a particular piece of goods.
  - Ex: $0.25 per vine to prune and tie after harvest
- The piece rate earned must equal or exceed the state's minimum wage for all hours worked

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AB 1513 – Piece Rate Workers

- Rest breaks
  - Generally, employers must authorize and permit a net 10-minute paid rest period for every four hours worked or major fraction thereof
  - Taken near the middle of the four hour shift
- Non-productive time
  - Nonproductive time" is defined as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." California Labor Code § 226.2

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AB 1513 – Rest Periods

- Employers must compensate piece-rate employees separately for rest and recovery periods at a regular rate that is no less than the higher of:
  - "An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods"
  - The applicable minimum wage rate (defined as "the highest of the federal, state, or local minimum wage that is applicable to the employment").

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AB 1513 – Non-Productive Time

- Employers must pay employees for "other nonproductive time" at an hourly rate that is not less than the applicable minimum wage.
- Employers may determine the amount of an employee's other nonproductive time either through actual records or the employer's reasonable estimates for each pay period.

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CalSavers

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SB 1234

- In 2016, Governor Brown signed Senate Bill 1234 requiring the state's Secure Choice Retirement Savings Investment Board to begin development of a workplace retirement savings program, known as CalSavers, for private sector workers whose employers do not offer a retirement plan.
- **Employer Requirements:**
  - Every California employer must participate in CalSavers if it has:
  - No retirement plan
  - More than five full or part-time employees (with at least one employee in California).

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CalSavers

- Plan Mechanics
- After an eligible employer registers, CalSavers implements an automatic contribution feature, meaning eligible employees are automatically enrolled in CalSavers 30 days after their hire/eligibility date unless the eligible employee affirmatively opts out.
- Automatic contributions start at 5 percent of annual compensation, and increase by 1 percent per year, up to a maximum of 8 percent unless the employee elects otherwise.
- Employees may opt out at any time

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CalSavers

Employer Responsibilities

1. Registering as a covered employer or certifying as to its exempt status.
2. Remitting participating employee contributions.
3. Updating its account by adding new employees who are eligible for enrollment and removing former employees who are no longer employed.
4. There is no employer contribution requirement under CalSavers, nor are any fees charged to the employer for registering

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CalSavers

Employer Prohibitions

1. Employers may endorse CalSavers or encourage or advise employees on whether to participate,
2. Employers may not dictate how much (if any) to contribute or provide investment help.

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CalSavers

Any employer with at least five employees that doesn't already offer a workplace retirement savings vehicle will be required to either (i) begin offering one via the private market or (ii) provide their employees access to CalSavers. After CalSavers opens for enrollment, employers subject to the mandate can register for CalSavers at any time and will be required to comply pursuant to the following deadlines:

Size of Business	Deadline for Compliance
Over 100 employees	September 30, 2020
Over 50 employees	June 30, 2021
5 or more employees	June 30, 2022

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CalSavers

Employers with fewer than five employees (or already offers its employees a retirement plan) are not subject to the CalSavers mandate.

Note that employers that already sponsor their own retirement plans may receive notices that they must register for CalSavers when in fact they are exempt and need not register or participate.

Employers may simply register online (https://www.calsavers.com/), upload their employee roster to enable enrollment of all employees; designate their payroll services provider to facilitate transactions (if applicable); and transmit the payroll contribution to the program's third-party administrator. Employers will not contribute to or manage investment funds, or be required to offer financial advice to their employees. Participating employee contributions will be submitted via payroll deduction.

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Pay Data (EEO-1 and SB 973)

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EEO-1 Form

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EEO-1 Form

In May 2020, in response to the ongoing COVID-19 pandemic, the EEOC announced that EEO-1 reporting for 2019 **and** 2020 would be delayed to March 31, 2021.

*this is for Component 1 data **only**

Component 1 data relates to job categories sorted by race, ethnicity and gender.

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What about Component 2?

The EEO-1, Component 2 form requires that employers collect extensive employment data organized by 12 pay bands that range in salary from about $19,000 to more than $208,000 a year, divided across 10 job categories. Employers then must divide this information up in accordance with the same racial, ethnic and gender groupings previously used when submitting demographic data in earlier EEO-1 forms.

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EEOC Abandons Component 2

On February 10, 2020, a federal court hearing a challenge to the collection of Component 2 data ordered the issue closed.

The EEOC has stated that it does not intend to collect Component 2 data in the future.

As a result, there is no ongoing duty to report Component 2 data to the EEOC

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SB 973

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SB 973

As of January 1, 2021, certain California employers must now collect and submit compensation data to the California Department of Fair Employment and Housing (DFEH)

Purpose of the law is to address pay inequities based on gender, race, and ethnicity.

Deadline to submit the data is March 31, 2021

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SB 973

Which employers are covered?

- Any employer with 100 or more employees and who must file a federal EEO-1 Report
- SB 973 does not clarify if the reporting requirements applies only to employers with 100 or more employees in California, or 100 or more employees overall.

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SB 973

What Must be reported?

- Reports the number of employees by race, ethnicity, and sex in the same EEO-1 job categories.
- Must include previous year W-2 earnings and hours worked for all employees
- Must be submitted in a searchable and sortable format.
- Must submit information based on an employee workforce snapshot taken from the end of any pay period between October 1st and December 31st. The snapshot must include all employees who were active during that pay period.
- W-2 income data will be reported by tallying the number of employees in each of the job categories and categorizing their pay in pay bands as established by the Bureau of Labor Statistics in the Occupation Employment Statistics Survey

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COVID-19 Issues

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COVID-19 Paid Sick Leave

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Multiple Laws

1. Families First Coronavirus Response Act – applied to employers with fewer than 500 employees. Expired December 31, 2020. Option to continue through March 31, 2021.
2. California Executive Order N-51-20 – Food sector workers working for companies with 500 or more employees nationwide. Expired when state wide stay at home order lifted.
3. Labor Code section 248 – Food sector workers working for companies with 500 or more employees nationwide. Expired December 31, 2020.
4. Labor Code section 248.1 – basically covers any employer not covered by the FFCRA (*e.g.*, more than 500 employees, health care providers, *etc.*) Expired December 31, 2020.

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Cal/OSHA Emergency Temporary Standards

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Cal/OSHA Emergency Temporary Standards

Cal/OSHA implemented Emergency Temporary Standards (ETS) in December 2020. The ETS require Employers to do the following:

1. Prepare a written COVID-19 Prevention Program
2. Respond to COVID-19 Outbreaks (3 or more)
3. Respond to Major COVID-19 Outbreaks (20 or more)
4. Make Modifications to Employer-Provided Housing
5. Make Modifications to Employer-Provided Transportation

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Cal/OSHA Emergency Temporary Standards

Written COVID-19 Prevention Program (may be part of IIPP):

1. System for communicating to employees
2. Identify and evaluate COVID-19 hazards
3. Investigate and respond to COVID-19 Cases in the workplace
4. Corrective policies for addressing COVID-19 hazards
5. Training and Instruction to Employees
6. Physical Distancing
7. Face Coverings
8. Partitions, cleaning, ventilation, etc.
9. Reporting, record keeping, and access
10. Exclusion of COVID-19 cases
11. Return to work criteria

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ETS COVID-19 Outbreaks

Three or more COVID-19 Cases in an exposed workplace within a 14 day period

If there is a COVID-19 Outbreak, the employer must:

1. Immediately test all employees in the exposed workplace present during the 14 period.
2. Testing done on the clock, during employee's normal working hours
3. Continue weekly testing until no new COVID-19 cases in a 14 day period
4. Immediately determine if workplace factors contributed to the COVID-19 outbreak
5. Notify local health department within 48 hours of three or more COVID-19 cases in the workplace

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ETS Major COVID-19 Outbreaks

20 or more COVID-19 Cases in an exposed workplace within a 30 day period

If there is a COVID-19 Outbreak, the employer must:

1. Immediately test all employees in the exposed workplace present during the 30 period.
2. Testing done on the clock, during employee's normal working hours
3. Continue twice weekly testing until no new COVID-19 cases in a 14 day period
4. Immediately determine if workplace factors contributed to the COVID-19 outbreak
5. Notify local health department within 48 hours of three or more COVID-19 cases in the workplace

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ETS Housing

Applies to any employer-provided housing. Employers must:

1. Prioritize shared housing (household -> same crew -> strangers only when no other options)
2. Implement physical distancing controls (six feet between residents and beds, ensuring proper ventilation, etc.)
3. Provide face coverings to all residents along with use information
4. Clean and sanitize all housing units, kitchens, bathrooms, and common areas at least once per day
5. Encourage residents to report COVID-19 symptoms
6. Provide testing to residents who have been exposed
7. Isolate COVID-19 cases and exposures

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ETS Transportation

Applies to any employer-provided transportation. Employers must:

1. Prioritize shared housing (household -> same crew -> strangers only when no other options)
2. Implement physical distancing controls (three feet in all directions)
3. Provide face coverings to all passengers and drivers along with use information
4. Clean and sanitize high-contact surfaces before each trip, driving surfaces between each driver, and provide sanitizing materials
5. Keep windows open if possible
6. Screen all passengers and drivers

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ETS Exclusion Pay

For employees excluded as COVID-19 Cases and COVID-19 Exposures, the ETS requires that Employers continue and maintain an employee's:

1. Earnings
2. Seniority, and
3. All other employee rights and benefits, including the employee's right to their former job status

Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation

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ETS Exclusion Pay

On January 8, 2021, the DIR clarified that exclusion pay is required where the "employee is able and available to work." So exclusion pay is available only to employees who are prevented to work because of exposure.

Employees who are unable to work because of their own COVID-19 symptoms are ineligible for exclusion pay.

Employees unable to work due to COVID-10 symptoms may be eligible for Worker's Compensation Benefits and/or State Disability Insurance benefits

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ETS Exclusion Pay

Q: How long does an employee with COVID-19 exposure, or who tests positive for COVID-19 from the workplace, receive pay while excluded from the workplace?

A: An employee would typically receive pay for the period the employee is quarantined, which could be up to 14. If an employee is out of work for more than a standard quarantine period based on a single exposure or positive test, but still does not meet the regulation's requirements to return to work, that extended quarantine period may be an indication that the employee is not able and available to work due to illness. The employee, however, may be eligible for temporary disability or other benefits.

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ETS Exclusion Pay

Q: The ETS states that an employer is not required to provide exclusion pay if the employer can establish that an employee's COVID-19 exposure was not work related. What does that mean?

A: The ETS does not require employers to pay workers who are excluded from work under section 3205(c)(10) if the employer can show that the employee's COVID-19 exposure was not work related. In such circumstances, employers may have other legal or contractual payment obligations, but pay and benefits are not mandated by section 3205.

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Sexual Harassment and Mandated Reporter Training

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Continued Sexual Harassment Training Obligations

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2021 - #MeToo Continues

- Sexual Harassment in the workplace continues to be a pressing issue
  - For the organization
  - For the employee
- Numerous corporate executives involved
  - Former CBS CEO Les Moonves lost a $120 million severance package due to allegations of sexual misconduct
  - Fox News founder Roger Ailes was terminated for sexual harassment

CBS FOX NEWS

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What does this have to do with Ag?

In low-wage work in industries such as agriculture, night-shift janitorial work, and domestic work, sexual harassment, assault, and even rape are serious problems

Why?

- Isolated positions
- Immigration status
- Migratory population
- Language barriers
- Cultural shame and fear
- Male supervisors

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What does this have to do with Ag?

- Estimated 3 million farmworkers in the US
- 21% are female (630,000)
- One study found 90% of female farmworkers said sexual harassment is a major workplace problem
- Another found 75% of female farmworkers reported sexual abuse

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Senate Bill 1343

- Anti-harassment training starting in 2020
- Since 2005, employers with at least 50 employees have been required to train and educate all supervisors in the prevention of sexual harassment.
- Senate Bill 1343 lowers the number of employees to five and includes non-supervisors in the mandate.
- Deadline to comply is December 31, 2020
  - This was **not** continued due to COVID-19

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Senate Bill 1343 – the basics

Employers with at least 5 employees must provide:

- at least 2 hours of sexual harassment prevention training to all supervisory employees; and
- at least 1 hour of sexual harassment prevention training to all non-supervisory employees within 6 months of hiring.
- The training must be provided once every two years.

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Senate Bill 1343 – Temps

Employers must also provide sexual harassment prevention training to temporary or seasonal employees within:

- 30 calendar days after the hire date, or
- within 100 hours worked if the employee will work for less than six months.

In the case of a temporary employee employed by a temporary services employer to perform services for clients, the training must be provided by the temporary services employer, not the client.

- Confirm this with your staffing agencies

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Senate Bill 778

On August 15, 2019, Governor Newsom signed SB 778, which updates SB 1343.

Employers still must provide:

- minimum of 2 hours of training and education regarding sexual harassment to all supervisory employees
- And at least 1 hour of training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position.

SB 778 permits employers who have provided training to an employee in 2019 to offer a "refresher" training to that employee two years thereafter (rather than the January 2021 deadline). This will avoid forcing employers who have already provided compliant training from having to do so twice in a single two-year period.

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Senate Bill 778

- However, SB 778 does not apply to employers who provided training in 2018.
- Employers with five or more employees who provided training in 2018 must provide sexual harassment prevention training and education by January 1, 2021, and thereafter once every 2 years.

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Mandated Reporter Training

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AB 1963

Effective January 1, 2021

Human Resources employees of business with five or more employees that employ:

1. Minors
2. Adult employees who supervise minor worker

Are considered to be mandatory reporters under the California Child Abuse and Neglect Reporting Act (CANRA).

As a result, AB 1963 requires (1) specific training for these Human Resources employees and (2) a signed acknowledgment of their mandated reporter duties at the time they begin their employment

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AB 1963

Who is a "Human Resource Employee?"

AB 1963 takes an expansive view to be any employee designated to receive complaints within the organization—even if those lacking a title reflecting a "human resource" position—as well as those people having supervisory responsibility for any minors employed, now have responsibilities to report known or suspected abuse.

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AB 1963

What training is required?

It is a four hour training covering topics such as the reason for reporting, what constitutes child abuse, what needs to be reported, when you need to report, and where you need to report. No specific time frame to complete the training. Training is freely available at:

https://www.mandatedreporterca.com/training/general-training

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AB 1963

What happens if a mandated reporter doesn't report known or suspected abuse?

If a mandated reporter fails to report known or reasonably suspected child abuse or neglect, then the individual is guilty of a misdemeanor punishable by up to six months in jail or a $1,000 fine, or both.

Mandated reporters can also be sued for damages, especially if the minor-victim or another minor is further victimized because of the failure to report.

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H-2A Issues

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H-2A Wages

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H-2A Guest Worker Program

H-2A Guest Worker Program allows employers to hire workers from other countries on temporary work permits for agricultural jobs that last ten months or less

Requirements:

- Employers must obtain a temporary labor certification from the Department of Labor
- Employers must demonstrate that (1) the job is of a temporary or seasonal nature; that there are not enough U.S. workers who are "able, willing, qualified and available to perform work at the place and time needed" and (2) the wages and working conditions of workers in the United States will not be "adversely affected" by the importation of guest workers

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H-2A Guest Worker Program

- Wages must be at least the higher of: (a) the local "prevailing wage' as determined by DOL and state agencies; (b) the state or federal minimum wage, or (c) the "adverse effect wage rate" (AEWR) the average wage of nonsupervisory field and livestock workers as determined by a USDA survey
- Workers who complete half the season at an H-2A program employer must be reimbursed for the transportation and subsistence costs associated with traveling to the place of employment. Those who complete the full season must be paid for their transportation costs of returning home
- H-2A employers must provide housing for their workers at no cost to the worker. The housing must meet federal and state safety standards
- Employers soliciting H-2A workers must provide workers' compensation insurance for occupational injuries (but not health insurance coverage)

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H-2A Guest Worker Program – AEWR 2021

- Effective December 20, 2019, the new rates are:

State	2020 AEWR	2019 AEWR	Increase
Arizona	$12.91	$12.00	7.6%
California	$14.77	$13.92	6.1%
Colorado	$14.26	$13.13	8.6%
New Mexico	$12.91	$12.00	7.6%

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H-2A Guest Worker Program – AEWR 2021

In November 2020, the U.S. Department of Agriculture issued a final rule to go into effect on December 21, 2020 holding that wages based on the USDA Farm Labor Survey will freeze for 2020, 2021, and 2022. So the AWER from 2020 would remain in effect in 2021

Starting in 2023, and annually thereafter, the DOL will adjust the H-2A program's "adverse effect wage rates" by the percentage change in the Bureau of Labor Statistics' Employment Cost Index for wages and salaries for the preceding 12-month period for the majority of jobs under the H-2A program.

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H-2A Guest Worker Program – AEWR 2021

The UFW then sued the United States Department of Labor in federal court in Fresno. The UFW sought a preliminary injunction preventing the DOL from freezing wages under the H-2A program.

On December 23, 2020, the Court issued a preliminary injunction, stopping the DOL from freezing H-2A wages.

The Court ordered both parties to submit a proposed order within 14 days that includes deadlines for the DOL to set the 2021 adverse effect wage rate. This has been done. The DOL will publish the **new rates on or before February 25, 2021**.

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H-2A Modernization

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H-2A Modernization

On January 15, 2021, the DOL issued a final rule designed to modernize the H-2A Program. The Final Rule:

1. Requires electronic filing of job orders and application
2. Permits small employers that cannot offer fulltime work to H-2A employees with an opportunity to participate in the H-2A by permitting small employers to file a single application and job order
3. Permits the ability to stagger entry to workers over a 120-day period, permitting a single applicable to have different start dates
4. Enhances standards for rental housing and public accommodations

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Immigration

 Proprietary and Confidential 91

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No Match Letters

 Proprietary and Confidential 92

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SSA No Match Letters

- The Social Security Administration continues to send no-match letters to employers.
- The *SSA Retirement, Survivors and Disability Insurance Employer Correction Request* notifies the recipient that the employer reported X number of employee names and Social Security Numbers (SSN) on Form W-2 for tax year 2018 of which some fraction of those numbers did not match SSA's records
- Does not include a list of names of employees with mismatched SSNs

 Proprietary and Confidential

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SSA No Match Letters

- The new notice advises employers to proactively retrieve the employees' names on the Employer Report Status feature of the Business Services Online (BSO).
- To begin using BSO, you must create a one-time registration process by going to www.socialsecurity.gov/bso/bsowelcome.htm. The letter goes on to say that SSA provides a free Social Security Number Verification Service (SSNVS) through BSO that allows employers to verify employees' names and SSNs prior to filing your annual W-2 submissions.
- BSO and SSNVS should not be confused with E-Verify, which is an online immigration employment eligibility verification tool of the U.S. Department of Homeland Security (DHS), the use of which remains voluntary under federal and California law.

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SSA No Match Letters

- Ignoring the no-match letter is not recommended as Immigration and Customs and Services (ICE) routinely reviews how employers address no-match issues. Failure to take the steps outlined in the letter could be a factor in ICE finding the employer knowingly hired unauthorized workers and could subject the employer to fines of up to $10,000 per worker and incident.
- A no-match letter makes no statement about the employee's immigration status. Under federal and California law, it is improper to reverify an employee's Form I-9 or terminate the employee based solely on a no-match letter. However, the Immigration and Custom Enforcement (ICE) have stated that an employer's failure to adequately follow-up on no-match letters could constitute evidence of or contribute to an employer's constructive knowledge of an employee's unauthorized status.

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SSA No Match Letters – Employer Response

- Do not take adverse action against an employee based on a no-match letter
- Register with the SSNVS system to retrieve the list of nonmatching names and SSNs. The employer should then check its records to determine whether the discrepancy results from a typographical or clerical error in the company's record or in its communication to SSA. If such an error is found, the employer must correct the record, inform SSA by filing a Form W2-C within 60 days of receipt of the no-match letter, and then verify that the corrected record has resolved the discrepancy. The employer should document the manner, date, and time of the verification.
- Finally, if there is no clerical error, the employer should then ask the employee to confirm the accuracy of the information against his or her own Social Security card. If the employee states that the company record is incorrect, or the employee maintains that the record is correct, ask the employee to reach out to SSA to resolve the issue.

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New I-9 Forms

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New I-9 Forms

On January 31, 2020, U.S. Citizenship and Immigration Services (USCIS) issued a new Form I-9. This form should be used as of January 31, 2020. The new Form I-9 has an expiration date of October 31, 2022.

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 10/31/2022

 Proprietary and Confidential

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AB 450

 Proprietary and Confidential

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AB 450 – Immigrant Worker Protection Act

- As of January 1, 2018, employers may not voluntarily consent to an immigration enforcement agent entering a non-public area at a place of employment unless the agent provides a judicial warrant
- Employers may provide access only if the agent provides a judicial warrant issued by a court and signed by a judge
- Penalizes employers for the reverification of the employment eligibility of a current employee "at a time or in a manner not required by [federal law" (Up to $10,000)

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AB 450 – Immigrant Worker Protection Act

- Employers must provide each current employee notice of any upcoming inspections of I-9 records or other employment records within 72 hours of receiving an Notice of Inspection

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AB 450 – Immigrant Worker Protection Act – notice to employee

- Notice must be posted in the language the employer normally communicates with its employees and contain:
  - the name of the agency conducting the inspection
  - the date the employer received the NOI
  - the nature of the inspection, and
  - a copy of the NOI.

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AB 450 – Immigrant Worker Protection Act – notice to employee

The DLSE prepared a sample notice in English and Spanish, which is available on the DLSE's website:

NOTICE TO EMPLOYEE
Labor Code section 90.2

Effective January 1, 2018, except as otherwise required by federal law, section 90.2(a)(1) of the California Labor Code requires employers to provide notice to current employees of **any inspection of I-9 Employment Eligibility Verification forms or other employment records** conducted by an immigration agency by posting a Notice, in the language the employer normally uses to communicate employment-related information to the employee, within 72 hours of receiving notice of the inspection.

Name of the Immigration Agency Conducting the Inspection (more than one box may be checked, as appropriate):

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AB 450 – Immigrant Worker Protection Act – Post Inspection

After an inspection, employers must provide any affected employees and any representatives with notice of:

- a description of any and all deficiencies or other inspection results related to the affected employee;
- the time period for correcting any deficiencies identified by the immigration agency;
- the time and date of any meeting with the employer to correct the deficiencies; and
- notice that the employee right to be represented during any scheduled meeting with the employer.

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AB 450 – Immigrant Worker Protection Act – Post Inspection

- Post inspection notice must be provided within 72 hours of the employer's receipt of the immigration agency's results of inspection
- Employers must provide this notice by hand at work, if possible, or otherwise via both mail and email
- Provide a copy to the employee's representative (e.g., labor union)

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AB 450 – Federal Response

- ICE's Acting Director Thomas Homan responded by announcing that the agency planned to increase significantly the number of worksite-related investigations it initiated nationwide during 2018.

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AB 450 – *US v. State of California*

- March 6, 2018 – United States sues California in Federal Court in Sacramento
- Asks Court to invalidate AB 450 completely on grounds that AB 450 is preempted by federal immigration law
- July 4, 2018, the Court issued a preliminary injunction blocking parts of AB 450, but not the entire law
- April 19, 2019, the Ninth Circuit Court of Appeals affirmed the preliminary injunction.

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AB 450 – *US v. State of California*

Provision Enjoined:

- Prohibiting agent to enter nonpublic areas
- Prohibiting agent to access records
- Prohibiting employers from reverifying employment eligibility outside of manner of federal law

Provision Still in Effect:

- Pre-Inspection Notice to Employees
- Post-Inspection Notice to Employees

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Workplace Safety

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Workers' Compensation

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SB 1159

For employers of five or more, SB 1159 creates a rebuttable presumption that an employee contracted COVID-19 in the workplace if:

1. Employee tests positive for COVID-19
2. Within 14 days of working at the workplace
3. On or after July 6, 2020
4. During a period of an "outbreak"

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SB 1159

For purposes of this new law, an "outbreak" is when, within 14 days, any of the following occurs at a place of employment:

1. The employer has 100 employees or fewer at a specific place of employment, and four employees test positive for COVID-19.
2. The employer has more than 100 employees at a specific place of employment, and 4% of the workforce at that place test positive for COVID-19.
3. A specific place of employment is ordered to closed because of COVID-19.

Specific place of employment is open to interpretation

112

AB 2043

AB 2043 requires Cal/OSHA to disseminate information on best practices for COVID-19 infection prevention in English and Spanish, together with other awareness and prevention measures, targeted at and to be easily understood by agricultural employees from various ethnic and cultural backgrounds.

These provisions expire when the Governor or Legislature terminate the state of emergency.

AB 2043 went into effect immediately upon the Governor's signing, on September 28, 2020.

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Night Work

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Adopted Night Work Rules

On January 1, 2020, California finally adopted night work rules to improve filed lighting and worker visibility for agricultural operations taking place between sunset and sunrise.

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Adopted Night Work Rules

Headlights for Trucks: Trucks must be equipped with a head light illuminating at least 50 feet ahead.

Rear Lighting for Self-Propelled Equipment: A rear light is required for self-propelled equipment (e.g. tractors, harvesters), in addition to the existing requirement for a front light illuminating at least 50 feet.

Area Lighting: Area lighting must illuminate at least 30 inches above the floor/ground where an employee may walk or work and must be positioned to minimize glare.

Task Lighting: Illumination levels for task lighting shall be measured at the task/working surface, in the plane in which the task/work surface is present.

High Visibility Clothing: The employer must provide and require workers to wear high visibility clothing (e.g. vests, shirts, or other).

Pre-Shift Safety Meetings: Supervisory employees shall conduct a safety meeting at the beginning of each shift to inform employees of the location of the restrooms, drinking water, designated break areas, nearby bodies of water, and high traffic areas at each specific job site. If employees cannot name where these areas are located during a Cal/OSHA inspection, the training will be considered inadequate.

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Adopted Night Work Rules

Operations, Areas, Tasks	Minimum Illumination Required
Meeting, meal, and rest areas	3 foot-candles
Outdoor agricultural operations (except where otherwise specified), such as walkways, restrooms, storage areas	5 foot-candles
Task lighting for agricultural operations that involve the use of tools that can potentially cause cuts, lacerations, or punctures	10 foot-candles
Task lighting for maintenance work on equipment	20 foot-candles

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First Aid Kits

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Workplace First Aid Kits

- Increased Cal/OSHA citations relating to First Aid kits in 2019
- 8 CCR § 3400 specifies that first aid supplies must be made available to all employees on every job
- Subsection (c) further states that a physician must *approve* the contents of a first aid kit in the workplace
- Does not specify the exact contents of a kit.
- This requirement is frequently overlooked by employers

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Workplace First Aid Kits

- Can be obtained by contacting the occupational health clinic used for workplace injuries and asking the medical professional to inspect.
- Once a medical professional inspects the first-aid kit, a letter is created acknowledging that the workplace first-aid kit is adequate.
- Other keys to compliance
- First-aid supplies must be adequate and made available to all employees on every job including after hours and weekends.
- First-aid materials shall be kept in sanitary and usable condition preferably in a wall mounted cabinet or a mobile case or duffle bag.
- Frequent inspections shall be made of all first-aid materials with particular attention to items with expiration dates.
- First-aid materials shall be replenished as necessary.

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Heat Standards

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Establish a Heat-Illness Prevention Program

- California imposes specific rules for employees who work outside.
- Develop and implement an effective written heat illness prevention plan that include emergency response procedures
- Train all employees and supervisors on heat illness prevention
- Must comply with Cal/OSHA Heat Illness Prevention Standard and Injury and Illness Prevention Standard

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Establish a Heat-Illness Prevention Program

- Provide enough water for employee to drink at least 1-quart / hour, and encourage them to do so
- Provide access to shade when temperatures exceed 80 degrees or upon request.
  - Encourage employees to take a cool-down rest in the shade for at least 5 minutes.
- When temperatures reach 95 degrees or above, ensure that employees take a minimum paid ten minute net preventative cool-down rest period every two hours unless the preventative cool-down rest period coincides with a meal or rest period required by Industrial Welfare Commission Wage Order 14

123

Establish a Heat-Illness Prevention Program

- Closely observe all employees during a heat wave and any employee newly assigned to a high heat area.
- For those employees who are not accustomed to the high temperatures, allow for lighter work, frequent breaks or shorter hours so they can adapt to the new conditions.

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Heat Illness Prevention - Example

- The California Department of Industrial Relations (DIR) cited a typical example of a violation in which inspectors found farmworkers harvesting crops in 90-degree weather without adequate shade, single-use drinking cups or hand-washing facilities.
- The employer was fined $24,500.
- Employers might pay up to $25,000 for each serious health and safety violation.

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Farm Labor Contractors

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Labor Code § 2810

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Farm Labor Contractors

Many agricultural employers rely heavily on farm labor contractors to provide labor

Often the harvest period is short and it is critical to remove the crop from the field as soon as possible

- Permits large influx of temporary workers
- Multiple employers are negotiating to ensure their own crop is harvested

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Farm Labor Contractors

- Because of the temporary and transitory nature of the workers and past behavior by employers and Farm Labor Contractors, federal and stage agencies heavily regulate Farm Labor Contractors

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Farm Labor Contractors

- In California, Farm Labor Contractors are regulated by the California Labor Code and the Division of Labor Standards Enforcement ("DLSE")
- Employers utilizing Farm Labor Contractors must verify the FLC through the DLSE
- https://www.dir.ca.gov/dlse/License_Verification.html

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Farm Labor Contractors

- Prior to 2015, the employer was responsible for the conduct of its FLC only of the employer was deemed a "joint employer" or the employer was paying the FLC so little that it should have known laws were being violated
- As of 2015, employers in California will be responsible for a FLC's violations, even if the employer had no knowledge of the FLC's conduct

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Farm Labor Contractors

- Labor Code section 2810(a) makes an employer liable it knows or should know that the FLC lacked sufficient funds to comply with all applicable laws.
  - Only applies to non-union employers (section 2810(b))
- Labor Code section 2810(d) provides some relief to employers

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Farm Labor Contractors - § 2810

- Labor Code § 2810(d) provides a rebuttable presumption where FLC agreement:
  - Is in writing
  - Contains Name, address, and telephone number of the employer and the FLC
  - Contains a description of the labor or services to be provided and a statement of when those services are to be commenced and completed
  - Contains the FLC's tax ID numbers
  - Contains the FLC's workers' compensation carrier's name, address, and telephone number, and policy number

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Farm Labor Contractors - § 2810

- Labor Code § 2810(d) provides a rebuttable presumption where FLC agreement (con't):
  - Contains the vehicle identification number of any vehicle owned by the FLC and used for transportation in connection with any service provided pursuant to the contract, as well as the number of the vehicle liability insurance policy that covers the vehicle, and the name, address, and telephone number of the insurance carrier.
  - Contains the address of any real property to be used to house workers in connection with the contract
  - Contains the total number of workers to be employed under the contract, the total amount of all wages to be paid, and the date or dates when those wages are to be paid

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Farm Labor Contractors - § 2810

- Labor Code § 2810(d) provides a rebuttable presumption where FLC agreement (con't):
  - Contains the amount of the commission or other payment made to the FLC for services under the contract.
  - Contains the total number of persons who will be utilized under the contract as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations
  - Contains the signatures of all parties, and the date the contract or agreement was signed

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AB 1897

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Farm Labor Contractors AB 1897

- An employer obtaining employees from a FLC for use "within the client employer's usual course of business" shares with the FLC "all civil legal responsibility and civil liability for all workers supplied by that labor contractor" who are paid incorrectly or are not provided workers comp insurance
- So if, for example, the FLC deems workers to be independent contractors and a government agency deems them employees, the employer will be jointly responsible for any damages

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Farm Labor Contractors AB 1897

- What the employer knew or did is irrelevant
- Just being an employer doing business in California is sufficient to justify imposing liability
- Since the employer will be strictly liable for the FLC's mistakes, it will be vitally important to
  - ensure that the FLC is following the law and
  - require the FLC to indemnify the employer against these types of claims

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Vista Santa Rosa Inc. – An Example

- In July 2018, Labor Commissioner cited a large farm labor contractor for failing to timely provide 1,374 farmworkers with their final paychecks.
- The FLC is alleged to have regularly waited at least 3 days to pay seasonal farmworkers their final pay, instead of on the last day of work.
- In addition to the farm labor contractor, the Labor Commissioner found 8 of its clients jointly liable under California Labor Code section 2810.3

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Vista Santa Rosa Inc. – An Example

- What's the exposure?
- Assume 3 days of waiting time penalties, at $12 per hour (minimum wage), 8 hours per day, for 1,374 employees:
- $12 x 8 hours x 3 days x 1,374 = $395,712

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Farm Labor Contractors AB 1897

Employer's Options:

- 1. Include a provision in the contract allowing the employer to audit the FLC's records regarding compliance with wage and hour laws and workers' comp insurance coverage. At the very least, require the FLC to prove that it has workers' compensation insurance and who's covered.
- 2. Pay close attention to whether the FLC is and remains financially viable.

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Farm Labor Contractors AB 1897

- Options (con't):
  - 3. Include strong indemnification language. The FLC should acknowledge that it is solely responsible for compensating its employees correctly and for providing their workers' compensation coverage and that it will hold the employer harmless if it fails to do so.
  - 4. If you have contracts going back years with the same FLC, they often become a mass of agreements, amendments, and addendums that make it hard to determine what terms apply. Clean those up so that someone can determine each party's obligations more easily.

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Farm Labor Contractors AB 1897

- Options:
  - 5. Consider requiring the FLC to purchase employment practices liability insurance and name the employer as an additional insured.
  - 6. Consider requiring the contractor to be bonded.

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Labor Law Issues

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Union Access Cases

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Union Access Case

- United States Supreme Court to hear *Cedar Point Nursery v. Hassid*
- Under California's Agricultural Labor Relations Act (ALRA), union organizers have the right to enter private property to recruit employees. Farms must allow labor organizers onto their property three times a day for 120 days each year
- Question is whether such union access constitutes an unconstitutional "taking" of private property under the Fifth Amendment.

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Union Access Case

- The Federal district court rejected the argument
- A divided 3-justice panel of the Ninth Circuit Court of Appeals upheld the ruling,
- A group of eight judges dissented from the majority's opinion in a subsequent denied petition for rehearing by the full panel of the Ninth Circuit. The dissenting judges agreed with the plaintiffs that the rule constituted a taking because it granted the union an easement to access and use the employer's land in furtherance of a governmental purpose. The dissenting judges would have ruled the ALRB's access rule unlawful as an unconstitutional taking of the employer's property without just compensation in violation of the 5th Amendment.

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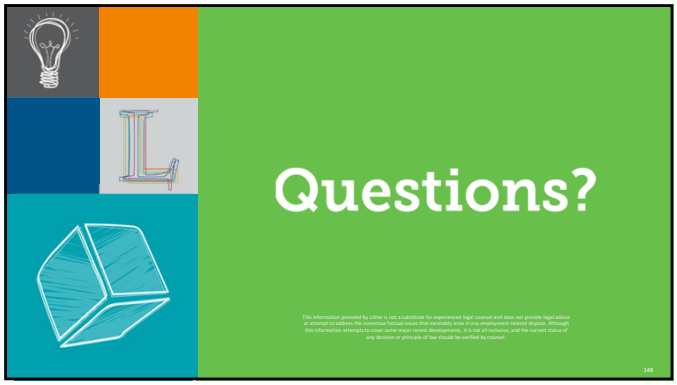

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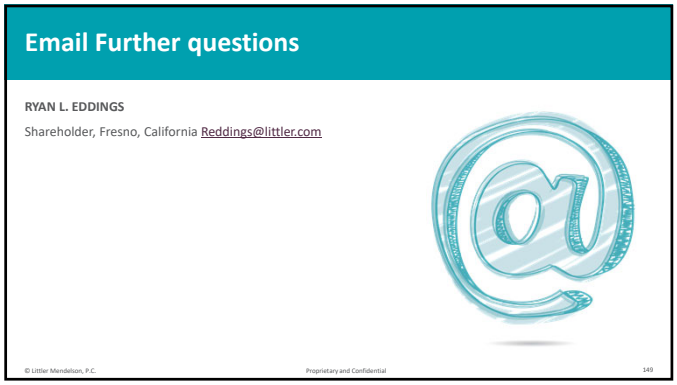

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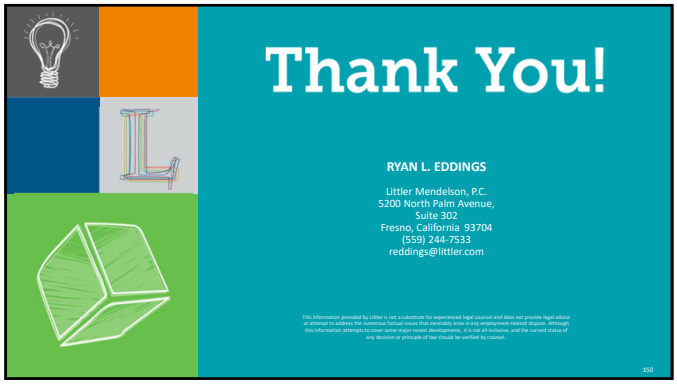

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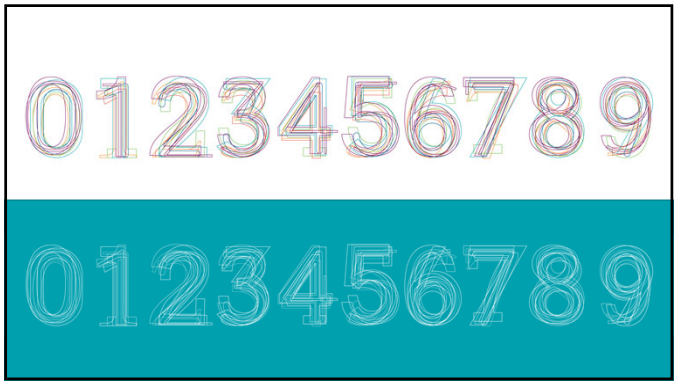

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