# The Performance Review

## Episode 23

## Greenberg Traurig, LLP

Ryan Bykerk (00:00):

All right, everyone. Welcome back to another episode of The Performance Review podcast. This year, as we've done in years past, we're going to be looking ahead to 2024. We're going to talk a little bit about the legislative changes that have happened and we're going to talk about a couple of the cases that came down. As is really always the case with these episodes in which we look ahead, we're going to cover this at pretty high level. There are a lot of different resources out there that you can look for. A number of our colleagues have written on this subject and offered webinars that go into a little bit more depth than we're going to be able to here, but we wanted to take this opportunity just to give an update to everyone about what's happened and what things look like going into 2024.

Philip Person (00:34):

You're spot on there. We're giving that high level summary for our listeners. Everything the listeners want to hear about. A few jokes, a good time, and how we recap and look at what 2024 is going to bring for us. Let's start off with some wage increase legislation that just came out. Starting January 1st, 2024, effect of that date the minimum wage has changed in California. It is now $16 an hour. What that really means for a lot of us is, when we're looking at those thresholds for the California exemptions, for most of them they're going to be changing. So now it's $66,560 a year as a salary for it to apply.

(01:16):

If you want to break that down by month, that's $5,546. Don't forget the $0.67. And $1,280 a week. But there's also a change in that the minimum wage for fast food workers. That change is going to take effect April 1st and that is going to be $20 an hour. And that's going to cover for those national fast food chains that operate over 60 limited service restaurants nationally. There's some exclusions there, bakeries that produce bread and those restaurants and grocery stores, so look out for those exceptions there. As well as there's also a change for the healthcare workers. Their minimum wage for covered healthcare workers, it varies. It can change, and it's going to go up to $18 or $25 an hour depending on the type of healthcare facility. So that's a big change as well. And as we talked about the salary exemptions, for them, the monthly salary has to be no less than 150% of the applicable healthcare workers' minimum wage or 200% of the applicable minimum wage, whichever is greater. So those are the major changes about the wage increase that we should be aware of going forward.

Ryan Bykerk (02:26):

Yeah. It's a good call out. It's easy to remember the minimum wage part, but it is that salary basis that'll get you in trouble if you're not paying attention. So let's look at, there's a couple new laws about time off benefits that we want to look at. The first one is SB 616, which deals with expansions to paid sick leave. Most of the law here is the same, but there has been an extension or an increase in the amount of paid sick leave that's available. Used to be the greater of three days or 24 hours, and now it's the greater of five days or 40 hours.

(02:54):

So that's probably the big thing to keep in mind. There are also changes to the maximum accrual caps that track with those changes you're going to want to be aware of. There are a couple of expansions as well in SB 616 whereas, in the past, employees subject to a CBA didn't have really much of any protections under this law. But there has been a slight change now. Employees subjected to a CBA now do actually get some benefits from Labor Code Section 246.5. Those employees, for the first time now, cannot be required to find a replacement when they're taking sick leave, and they have certain protections against discrimination and retaliation that employers should be aware of.

(03:32):

The next paid sick leave law that's worth knowing about is SB 848. This one deals with reproductive loss leave. What it does is it makes it unlawful for employers to deny a request by an eligible employee to take up to five days of reproductive loss leave. That applies to reproductive loss events, which can be miscarriages, failed surrogacies, stillbirth, unsuccessful assisted reproduction, a number of other things. So just one to keep in mind. If employees come to you looking for this kind of leave, there is now protection for that kind of leave under California law

Philip Person (04:04):

And as we leave 2023 and we go into 2024, and we're here now, a lot of companies are talking about reduction in forces. And we'll have some episodes coming out on that. But some new laws also went into affect for when you're screening and hiring new employees. One of those is SB 700, and that is a prohibition against the inquiries relating to cannabis use. Specifically that employers, they can't request information for job applicants relating to their prior cannabis use.

(04:35):

It prohibits the employer from using that information or obtaining that information relating to criminal history about the applicant's or the employee's prior cannabis use unless the employer is permitted to do so under the state's Fair Chance Act or other state or federal laws. The other thing to look at with screening is that the California Fair Chance Act has been amended.

(05:00):

It's going to have a general broader definition of employer and applicant, and generally that act, it requires that you can't use the criminal history of an applicant's when you're giving an offer. You have to give the conditional offer first, and then afterwards you can look at the criminal history. So there's some changes there. So also look out for that when you're doing your employment screening.

Ryan Bykerk (05:21):

The next couple of laws that we want to look at deal with restrictive covenants. And if you've operated in California or listened to this podcast for any length of time, you know that restrictive covenants are frowned upon under California law. And these new laws just continue along that same trajectory. The first of them is SB 699, effective January 1st, 2024. That's going to add section 16600.5 to the Business and Professions Code that provides that a contract with these non-compete agreements is void and unenforceable, regardless of where and when that contract was signed.

(05:52):

I emphasize the word contract. There's some suggestion there that it's not just the non-compete terms that would be void but maybe the contract itself. SB 699 also makes it a civil violation to enter into a contract with an employee that includes an unenforceable, non-compete provision. So just something to

keep in mind. This is all pretty consistent with what California law has been over the last few years, but there's starting to ramp up the pressure. Also is AB 1076. This again is sort of in the same vein. It codifies existing law that construes non-compete provisions as void under 16600. It also contains an important provision for employers to think about. Employers have to notify any current or former employees who were employed after January 1st, 2022 that any non-compete covenant contained within an agreement that that current or former employee signed is void. And those notices have to be provided by February 14th, 2024. So a nice Valentine's Day present for your current and former employees.

Philip Person (06:49):

So going from the lovely Valentine's Day present for employers that they have to think about not just on Valentine's Day but a little bit further is taking effect July 1st, 2024. We have SB 553. It's actually in effect now, but what it requires is that your injury prevention program, it must now include a workplace violence prevention plan by January 1st, 2024. What does that mean? That means you have to maintain a log of any workplace violence incidents, providing the training on the plan, and record keeping. Workplace violence hazard identification, evaluation, and correction, violence incident logs, and other things have to be maintained by the employer now as part of that injury prevention program that has the Workplace Violence Prevention Plan in it.

Ryan Bykerk (07:41):

Yeah, and that one, I think maybe you said this, Philip, but that one gives us until July 1, 2024. So you've got a little bit of ramp up right now to get that done. But certainly not something to wait until the last minute on.

Philip Person (07:54):

Certainly.

Ryan Bykerk (07:55):

Well, and now for just a couple of miscellaneous legislative updates that didn't fit neatly into the foregoing categories. So we'll just hit a couple of these. SB 497 expands whistleblower retaliation rights. Effective January 1, 2024 there's going to be a rebuttable presumption of retaliation if an employee is disciplined or discharged within 90 days of engaging in an activity protected under the Labor Code or the Equal Pay Act. This is something that more or less is how most employers operated generally. It's just now there's an official rebuttable presumption that applies. So just something to keep in mind.

(08:28):

And then AB 636 makes some amendments to the Wage Theft Notice. California employers well know that you have to get out the 2810.5 Notice. This one just adds a couple of new provisions. Specifically one of them is information on any federal or state emergency or disaster declaration in the county or the counties in which these employees are going to be working. And there are also some information that has to be provided about federal visas for agricultural employees. So if you have agricultural employees, make sure to check this one as well.

Philip Person (08:56):

And because we're such a great podcast, we're not just going to give you the legislative updates but we're also going to talk about the case law you should be aware of going into 2024, and how that may affect employers and those who represent the employers. Let's make that shift now and let's start with

some of the wage an hour cases that you may want to know and to be cognizant of, and just implement some different practices.

(09:22):

But looking at Woodworth versus Loma Linda University Medical Center, that case involved a registered nurse who brought a class and PAGA claims against the medical center, alleging various wage an hour claims and violations, including the failure to pay all wages based on the medical center's rounding policy and failure to provide accurate wage statements. The interesting part about that, in most of those rounding cases, is the medical center policy rounded all the employees' time punches down to the nearest 10th of an hour. We had the battle of experts there, where the medical center submitted a declaration showing that 51.4% of the employees were overpaid. The plaintiff's experts stated otherwise in saying that 67.6% of the employees were underpaid.

(10:13):

There's a whole history and context of the background, the procedural posture, other rounding cases. I suggest that you tune into our colleague's webinar on that. But just from a high level, the holding there is that the trial court order granting summary adjudication in favor of the medical center's rounding policy was reversed. What you should be aware of is that the court acknowledged that there's a shift in case law regarding rounding and agreed with the split there or the shift there, that these rounding violations were something that the employer could be liable for. The medical center appeal regarding the PAGA manageability issue was affirmed and the court of appeals stated that the trial court abused its discretion in denying certification on the standalone wage statement class.

(11:02):

Another case we should highlight for you is the Hartstein V. Hyatt Corp case. That's a ninth circuit case that involved a certified class of approximately 7,000 employees that were laid off in 2020, some period between March and June. The plaintiff claimed that their unused vacation time was paid late and that they were entitled to the value of free hotel rooms, something that many of us want. Summary judgment was granted to the hotel and the plaintiff appealed.

(11:39):

The key holding to take away from here is that, for the vacation pay, the hotel's actions were understandable in light of the uncertainty during that time period, but an indefinite furlough was a discharge, and therefore the hotel violated the prompt payments provision of the Labor Code. As far as the hotel rooms, what I said that everybody wants, is under the plain language of 29 CFR section 778.224 regarding the other similar payments. Complimentary hotel rooms provided to employees were excludable from the regular rate calculation, even though they operated similar to non-discretionary bonuses. So that's a few cases that I wanted to highlight for folks here.

Ryan Bykerk (12:27):

Yeah. And moving out of the wage an hour area specifically, although so many of these cases touch on wage an hour, I wanted to highlight a couple dealing with arbitration specifically. The first one is actually one that listeners to this podcast will be very familiar with, because I think, Philip, you and I have probably talked about this one every single year for the last, I don't know how long. So yeah, this is Chamber of Commerce V. Bonta, which is just the latest installment in the AB51 Saga. AB51 was signed by Governor Newsom and it was set to go into effect back in January 1, 2020.

(13:00):

As we've mentioned in prior podcasts, this is a type of bill that governor Jerry Brown had actually vetoed I think a couple of different times. But when Newsom signed it, it was going to go in effect January 1, 2020. The US Chamber of Commerce moved for a preliminary injunction, and that was granted in December, 2019 on the basis that AB51 was preempted by the FAA, because what AB51 did was it disfavored the formation of arbitration agreements because it prohibited employers from entering into contracts with arbitration provisions as a condition of employment.

(13:32):

What ended up happening in that one is that the matter, it was enjoined, so it never went into effect. It went up to the ninth circuit. The ninth circuit initially found that the district court was wrong and that AB51 was in fact not preempted, but the chamber filed a petition for a hearing en banc and the ninth circuit, once they heard it en banc, ultimately ended up concluding that, no, there was in fact preemption, and the ninth circuit withdrew its prior opinion and ended up finding that AB51 expressly disfavors the formation of arbitration agreements and is therefore preempted.

(14:03):

So that case at least puts the AB51 fight to bed for now. It wouldn't surprise me if we see another similar piece of legislation in the future, but for now that's the end of the road on that one. The next arbitration decision is Adolph V. Uber Technologies.

(14:17):

There is so much to say on this one. We are not going to say it all. Really just, at the end of the day, the question posed in the Adolph V. Uber case was simply whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations actually sustained by the plaintiff, whether that person maintains statutory standing to pursue those same PAGA claims arising out of events on behalf of other employees.

(14:45):

The court ended up finding that a plaintiff who files a PAGAA action with individual and non-individual claims does not lose standing to litigate those non-individual claims in court, simply because the individual claims have been ordered to arbitration. If you practice in the arbitration space at all or in the PAGA space at all, this one's worth pulling and reading if you haven't already done so 20 times by now. So Adolph V. Uber. One of the big ones this year.

Philip Person (15:12):

20 times might be an underestimate there.

Ryan Bykerk (15:15):

That's right.

Philip Person (15:15):

You probably have that printed out and plastered to your wall, and you read that every day before you start your day.

Ryan Bykerk (15:22):

That's right.

Philip Person (15:23):

So let's shift now to some of the PAGA cases. You mentioned the Bonta case, which I think you're right. We probably talked about that in our first year podcasting and maybe our first episode. I don't know. But it seems like we talk about that case a lot. It just keeps on going. Another case is Estrada, which I can't remember if we've talked about it on the podcast or we talked about it offline, but Ryan, you and I certainly have talked about this case, so let's talk about it now for our listeners. It's the Estrada V. Royalty Carpet Mills Inc. And some background here is that, in that case, the plaintiff claimed meal period violations in a punitive class and PAGA action.

(16:06):

And it was two classes, 157 individuals that were certified went to a bench trial where the judge decertified the class, citing that the class treatment was not appropriate given the volume of the individualized issues. Relief was awarded to four plaintiffs. It was later dismissed, the non-individual PAGA claims, due to what we've been arguing for years, and what has been an issue on a lot of these employment PAGA cases is unmanageability.

(16:34):

Going into that then, then it went to appeal, that the plaintiff successfully argued that PAGA contains no manageability requirement. Now, this is in conflict with Wesson V. Staples, which is on the other side of the manageability issues. So there's a split in authority. It's now up to the California Supreme Court that granted review to decide whether the courts have inherent authority to strike or limit PAGA claims that would prove unmanageable at trial.

(17:03):

Oral argument is set to be heard on November 8th, so stay tuned. It was heard on November 8th, I should say. And that the decision now that we need to stay tuned for is expected in February 2024. Hopefully this podcast is released by then and you could get to listen to this, and maybe we'll do an update later. Another point that we should raise, and I want to put a big star here, is that the California Fair Pay and Employer Accountability Act, which is going to be on the ballot in November 2024, if approved, it would replace PAGA with alternative enforcement mechanisms.

(17:42):

Employees would be entitled to receive 100% penalties collected, attorney's fees would be prohibited, and penalties doubled for willful violations. This is something that would be a dramatic shift to how PAGA's applied and how these claims are going to be resolved. So that's something to look forward to on the November ballot.

Ryan Bykerk (18:03):

That'll be an interesting one, so we'll be keeping an eye on that one and, yeah, probably do an episode on that when the time gets a little bit closer. So another couple of decisions that, these aren't California specific but we thought it's important to at least mention these. There are a couple of big NLRB decisions this year. The first one of them was McLaren McComb. And that case deals with severance agreements. And this is a place where employers can get into trouble if they're just recycling the old severance agreements they've been using for years.

(18:28):

That decision held that severance agreements with broad confidentiality and non-disparagement provisions are unlawful to the extent they have a chilling effect on the exercise of NLRA rights, so discussing the terms of the severance or prior employment. So make sure that you dust off your

severance agreement, take a look at that, and make sure you're not running afoul of the holding of that case.

(18:50):

There was also the Stericycle Inc. and Teamsters Local 628. These deal... and we see shifts in this anytime the board shifts a little bit, and this one is no different. This is another issue I think we talked about on a couple podcasts, or a couple year-end podcasts ago. Employee handbook policies that have a, quote, reasonable tendency to dissuade workers from engaging in organizing activities violate the NLRA.

(19:14):

So that's another thing, too, where if you just recycle your handbook year over year, or if you just are not updating it, this would be a good year to update it. Make sure that your handbook policies don't dissuade workers from engaging in organizing activity. The next one, and our colleagues who focus on labor specifically as distinct from employment would hunt us down if we didn't mention this one, it's the Cemex Construction Materials Pacific case.

(19:36):

This is a big one. Came down in August of the past year. What it does is it adopts a new election standard. So an employer confronted with a union's claim of majority status has to either recognize and bargain with the union or file a board petition seeking an election. That the failure to do so constitutes an unfair labor practice. So if you have union talk or if this issue starts to come up, make sure you talk to a labor attorney specifically, because the rules have changed in this space and you just want to be careful to make sure that you're armed with the most up-to-date knowledge.

Philip Person (20:09):

Another case that I want to talk about, which is the way we want to end the podcast and we end every podcast, is with our crazy employment story. It's a very brief one. One that I was not involved with, just pulled up and read publicly filed cases. It was one involving a former aide of a state senator. And the complaint there was that the state senator required this aide to dress up as a leprechaun during the St. Patrick's Day parade.

Ryan Bykerk (20:44):

Okay.

Philip Person (20:45):

The aide took offense to that and filed a charge or a complaint with that state's Division of Human Rights and stated that his basic human rights were violated and that the leprechaun outfit was not befitting of a grown man. I don't think anybody took that to heart. I don't think he had an actionable claim there. I'm trying to remember if it was flat out dismissed, but it certainly was a colorful claim that we have to realize that, if you require your employees to dress up as leprechauns, you could have them try to bring an action against you.

Ryan Bykerk (20:46):

Okay.

Philip Person (21:29):

It may not be a recognizable claim, but it certainly is entertaining that an employer is requiring people to dress as leprechauns for St. Patrick's Day.

Ryan Bykerk (21:39):

Wow. These are the hard-hitting updates you need to know moving into the new year. So if you're an employer, please just don't do that. I'm trying to think of the benefit to the employer that would cause someone to do that, but I'm coming up a little empty. Anyway, well, thank you, Philip. That's fantastic. Good to know.

Philip Person (21:58):

That concludes our start of the year podcast for The Performance Review. But as usual, if you have any comments, questions, ideas for topics you want us to discuss, feel free to email us at theperformancereview@gtlaw.com. And we look forward to seeing you on our next episode.