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SOUND ADVICE
FOR EMPLOYERS

NAPA COUNTY
BAR ASSOCIATION

***New Employment Law Developments Affecting Lawyers
(and their clients, too)***

Richard C. Rybicki
www.rybickiassociates.com

INTRODUCTION

Lawyers as Employers

- We've covered the issue of “lawyers as employers” over the past two years
 - Lawyers can be the worst offenders (!)
 - Don't ask about some of the cases I have seen involving lawyers
- Lawyers face the same employment-law issues as any other small-to-large business.

Topics Covered Previously

- Contractors
- Part-Time Employees
- Workers Compensation
- Equal Employment Opportunity
- Salary vs. Hourly
- Pay Calculation
- Overtime
- Meal & Rest Periods
- Reimbursements
- Paid Leave
- Benefits
- Recordkeeping
- Professional Conduct
- Other Issues Unique to the Legal Industry

Prior Presentation



<https://www.rybickiassociates.com/post/current-employment-law-issues-for-lawyers-and-other-businesses>

Topics Covered Previously

- California Family Rights Leave (5+ employees)
- “Designated Person” (sick leave & CFRA)
- Bereavement Leave
- Emergency Conditions
- CalSaver Retirement Benefits/Deductions
- Pay Scale Disclosures
- Settlement/Severance Agreements
- Non-compete – Restrictive Covenant

Prior Presentation



<https://www.rybickiassociates.com/post/navigating-part-time-employees-and-contractors>

Presentation Copy

- Copy of the PowerPoint presentation available at:

www.rybickiassociates.com/blog

- Feel free to forward questions after the program.

Minimum Wage

Minimum Wage

- Minimum wage rose to \$16.00 on January 1, 2024, for *most* employers (higher for others).
- See state wage order MW-2024 (and adjusted rates):
 - <https://www.dir.ca.gov/IWC/MW-2024.pdf>

Minimum Wage

- Other effects:
 - Salary must be at least twice the amount (starting at \$66,560) for white collar exemptions.
 - No “part time” salaried employees.
 - Meal and rest period minimum penalties increase.
 - “Unproductive time” and rest periods for piece-rate employees.
 - Reporting-time pay, split-shift pay.

Minimum Wage

- Computer Software Professionals = *exempt if paid:*
 - \$55.58 per hour, *or*
 - annual salary of not less than \$115,763.35 for full time employment and paid not less than \$9,646.96 per month.
 - <https://www.dir.ca.gov/OPRL/ComputerSoftware.htm>

Minimum Wage

- Physicians = *exempt if paid*:
 - \$101.22 per hour.
- But could also be paid \$66,560 salary on a 'salary basis'!
- **No similar hourly exemption for attorneys** (unlike federal law) or *any other* professions (except software professionals, above).

Local Minimum Wages

Minimum Wage

- Local ordinances – throughout the Bay Area:
 - Consider workers who spend some time in different jurisdictions (delivery, telecommute, etc.)
- Remember: Labor Commissioner can now recover amounts owed under *local* wage statutes!

Minimum Wage (No. Cal)

- Alameda
- Belmont
- Burlingame
- Berkeley
- Cupertino
- Daly City
- East Palo Alto
- El Cerrito
- Emeryville
- Fremont
- Foster City
- Half Moon Bay
- Hayward
- Los Altos
- Menlo Park
- Milpitas
- Mountain View
- Novato
- Oakland
- Palo Alto
- Petaluma
- Redwood City
- Richmond
- San Carlos
- San Francisco
- South San Francisco
- San Jose
- San Leandro
- San Mateo
- Santa Clara
- Santa Rosa
- Sonoma
- South San Francisco
- Sunnyvale

Local Ordinances

- Review *all* jurisdictions employees visit or work in
- Local ordinances proliferate:
 - Sick and family leave
 - Benefit contributions
 - Scheduling requirements
 - Many other varied local ordinances

Indoor Heat Regulation

Indoor Heat Regulation

- State has long regulated outdoor heat exposure, requiring specific practices (such as recovery periods) when temperatures exceed minimums.
- Careful: some “indoor areas” may be “outdoor” – covered sheds, storage, yards adjacent to buildings and lots.
- New indoor standard: 8 C.C.R. § 3396

Indoor Heat Regulation

- Indoor work areas where temperature or heat index”:
 - is at least 82 F. where there is ‘radiant heat’ or clothing cannot be removed to ameliorate heat.
 - is at least 87 F. at any time.

Indoor Heat Regulation

- Various requirements that model many outdoor heat requirements, such as:
 - Access to “cool down” areas
 - Active monitoring for heat illness
 - Proactive assessment and control measures
 - Emergency response procedures
 - Training
 - Heat Illness Prevention Plan

Indoor Heat Regulation

- Extensive guidance provided by Cal-OSHA:
 - <https://www.dir.ca.gov/dosh/heat-illness/indoor.html>
(basic guidance)
 - <https://www.dir.ca.gov/dosh/HeatIllnessInfo.html>
(comparison of outdoor and indoor requirements)
 - <https://www.dir.ca.gov/oshsb/documents/Indoor-Heat-updated-txtbrdconsider.pdf>
(regulation text)

Workplace Violence Prevention

Basic Rule

- Labor Code § 6400(a): Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.
- Labor Code § 6402: No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

Types of Workplace Violence

- Cal-OSHA focused for many years on *types* of workplace violence (as part of general safety duty):
 - Type 1: committed by a person who has no legitimate business at the worksite; includes violent acts by anyone who enters the workplace or approaches workers with the intent to commit a crime.
 - Type 2: directed at employees by customers, clients, patients, students, inmates, or visitors.

Types of Workplace Violence

- Cal-OSHA focused for many years on *types* of workplace violence (as part of general safety duty):
 - Type 3; violence against an employee by a present or former employee.
 - Type 4: committed in the workplace by a non-employee who has or had a personal relationship with an employee.

Workplace Violence Prevention

- Labor Code § 6401.9: *Specific* requirement that employers implement a workplace violence prevention plan (WVPP) by July 1, 2024.
- Generally applies to “all employers, employees, places of employment, and employer-provided housing.”

Workplace Violence Prevention

- Principal private-industry exceptions:
 - Employees **teleworking** from a **location of the employee's choice**, which is not under the control of the employer.
 - Locations with **less than 10 employees** working at the place at any given time and that are **not accessible to the public** that *do* have an Injury and Illness Prevention Plan.

Workplace Violence Prevention

- Two implications for law offices and other non-health-care employers:
 - Is your location “not accessible to the public?”
 - “Not accessible” is not defined in the new law (!).
 - Cal/OSHA Standards Board deadline for regulations: December 31, 2026.

Workplace Violence Prevention

- Two implications for law offices and other non-health-care employers:
 - Do you have **an Injury and Illness Prevention Plan?**
 - Low-hazard employers: easy to create as there is a model form providing an initial safe harbor!
 - https://www.dir.ca.gov/dosh/dosh_publications/IIPP-Model-nonhigh-hazard.html

Workplace Violence Prevention

- If not exempt, plan must include *many active components*:
 - Clearly described **names/job titles** of those responsible for implementing the plan.
 - Effective procedures for **active involvement of employees and employee representatives** in developing and implementing the plan, including, but not limited to, through their participation in identifying, evaluating, and correcting workplace violence hazards, in designing and implementing training, and in reporting and investigating workplace violence incidents.
 - **Methods to coordinate implementation with other employers**, when applicable, to ensure that those employers and employees are trained and will comply with the plan.

Workplace Violence Prevention

- If not exempt, plan must include *many active components*:
 - Effective procedures to **accept and respond to reports** of workplace violence, and to prohibit retaliation.
 - Effective procedures to **ensure compliance**.
 - Effective procedures to **communicate**:
 - **(i)** How an employee can report a incidents “without fear of reprisal.”
 - **(ii)** How employee concerns **will be investigated** and how employees **will be informed** of the results of the investigation and any corrective actions taken.

Workplace Violence Prevention

- If not exempt, plan must include *many active components*:
 - Effective procedures to **respond to actual or potential workplace violence emergencies**, including, but not limited to: alerts, evacuation and sheltering plans, and how to obtain help from staff assigned duties under the plan.
 - Procedures to **identify and evaluate workplace violence hazards**, including scheduled periodic inspections to identify unsafe conditions and work practices and employee reports and concerns..
 - Procedures to **correct workplace violence hazards** identified.
 - Procedures for **post incident response** and investigation.
 - Procedures to **review the effectiveness of the plan and revise the plan** as needed.
 - Other items or information **required by Cal-OSHA and the standards board**.

Workplace Violence Prevention

- Comprehensive recordkeeping required:
 - Detailed “**violent incident log**” based on information solicited from the employees who experienced the workplace violence, on witness statements, and on investigation findings.
 - **Detailed decryption** including who or what committed the violence, violence type, where it occurred, and various other details.
 - Detail of **response and action** taken by the employer.
 - Records of log, assessment of workplace, investigations must be kept for **five years**.

Workplace Violence Prevention

- Training required for all employees including interactive questions and answers in accessible language.
- Training required by July 1, 2024, and annually thereafter.

Workplace Violence Prevention

- Training topics:
 - The plan, how to obtain a copy at no cost, how to participate in development and implementation of the employer's plan.
 - Definitions and requirements of WVPP legal requirements.
 - How to report workplace violence incidents or concerns to the employer or law enforcement without fear of retaliation.

Workplace Violence Prevention

- Training topics:
 - Hazards specific to the employees' jobs, the corrective measures the employer has implemented, how to seek assistance to prevent or respond to violence, and strategies to avoid physical harm.
 - The violent incident log and how to obtain copies of records.
 - An opportunity for interactive questions and answers with a person knowledgeable about the employer's plan.

Workplace Violence Prevention

- More clarity: Cal/OSHA Standards Board further regulations (December 31, 2026).
- Good Guidance: Cal-OSHA now has both *guidance* and *model plans* in place for review:
 - Guidance: <https://www.dir.ca.gov/dosh/Workplace-Violence/General-Industry.html>
 - Model plan (non-healthcare): https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.dir.ca.gov%2Fdosh%2Fdosh_publications%2FModel-WPV-Plan-General-Industry.docx&wdOrigin=BROWSELINK

Ergonomic Safety?

Ergonomic Safety?

- Is there a requirement for ergonomic safety in offices?
- Not formally: various proposals have been made, but no regulation at either federal or California levels (prior federal standards were blocked).
- Safety is left to the basic duty to maintain a safe workplace and not to allow employees to work in a non-safe place.

Ergonomic Safety?

- California has a requirement once *multiple repetitive motion injuries* (“RMI”) have been caused in the workplace (8 C.C.R. § 5110).
- Requires a **program designed to minimize RMIs including:**
 - **Worksite evaluation** of each job, process, or operation of identical work activity.
 - **Control of exposures** that caused RMIs: correct or minimize to the extent feasible, including . work station redesign, adjustable fixtures or tool redesign, and administrative controls, such as job rotation, work pacing or work breaks.
- Requires **training on the employer's program**, exposures which have been associated with RMIs, symptoms and consequences of injuries caused by repetitive motion, importance of reporting symptoms and injuries to the employer, and methods used by the employer to minimize RMIs.

Ergonomic Safety?

- Guidance:
 - OSHA Guidance: <https://www.osha.gov/ergonomics>
 - OSHA will provide industry-specific guidelines.
 - *See, e.g.:* OSHA/DOL “eTool” for computer workstations:
 - <https://www.osha.gov/etools/computer-workstations/>

Paid Sick Leave

Paid Sick Leave

- SB 616: Effective January 1, 2024
 - Minimum amount of annual leave allotment increased.
 - Certain other changes for employees previously excluded or limited.

Review - Who is Covered

- Most private employers regardless of size.
- All public employers regardless of size.
- Certain exception for unionized employees.

Review - When Eligible?

- **30-Day Rule** (eligibility)
 - Employee who works 30 days for an employer.
 - Within a year from “commencement of employment.”
 - “Works” probably means “on the payroll” – not actual working days.

Review - When Eligible?

- **90-Day Probation** (use of leave)
 - Employee does not have a right to *use* leave until 90 days of employment.
 - This is not “within a year” – example: seasonal employees who work 60 days a year will become eligible to *use* leave after they return for a second year.

Basic Rule – “Accrual” (1:30)

- Requires at least 1 hour per 30 worked (0.033).
- Commencing at the start of employment (as above).
- Accrual rate *has not* changed.

Employers Have Other Options

- Employers can change some requirements if they have a “**paid leave**” or **paid time off policy**.”
 - The policy probably needs to be *written* due to the law’s recordkeeping requirements.
 - Plus: written policy avoids *ambiguity* and provides *notice* to employees.

Modified Rule – “Accrual”

- While employers may adopt or keep other types of accrual schedules
- **Revised:** Schedule must result in:
 - 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment, and
 - 40 hours by the 200th calendar day of employment.

Requirements – “Accrual”

- Accrued hours **carry over** from year to year
 - **Revised:** Employer may limit accrual to 80 hours or 10 days;
 - **Revised:** Employers may cap annual usage at 40 hours or 10 days.
- Accrued hours **need not** be paid on termination.
 - *But:* If employee returns within one year, unused sick leave must be **reinstated**.

REVISED “Up Front” Option

- Employer policy may provide time “up front” so long as it is at least **40 hours or 5 days**.
- Labor Commissioner: suggests this is at least 40 hours for all employees, and more for employees working over eight hours per day (e.g., 50 hours for ten-hour shift workers).
- May be granted on any of the schedules allowed for employer policies (anniversary year, calendar year, other 12-month period).

REVISED Policy Requirements

- No less than 40 hours or 5 days of paid sick leave, or **equivalent paid leave or paid time off.**
- Available each:
 - year of employment (from anniversary date),
 - calendar year, or
 - 12-month basis (fiscal year, benefit year).

REVISED Policy Requirements

- Leave may be used for **the same purposes** and **under the same conditions** as mandated sick leave
- Policy must:
 - Match the accrual, carry over, and use requirements of mandated sick leave, *or*
 - Provides ***up front*** at least 40 hours or 5 days of equivalent paid time off.

REVISED Accrual and Carryover

- With its own policy, an employer may:
 - **Limit use of leave** to 40 hours or 5 days per year .
 - **Limit carryover of leave** by capping *accrual* at 80 hours or 10 days.
 - **No carryover** into subsequent years is required if the employer grants up-front leave.

Review: Basic Rules

- Leave may be used for employee or family member illness, preventive care or diagnosis, care or treatment of an existing health condition, or for specified purposes if employee is a victim of domestic violence, sexual assault or stalking.
- Family members include the employee's parent, child, spouse, registered domestic partner, grandparent, grandchild, sibling or designated person.
- No minimum required use above two hours.
- Reasonable notice required if known or as "soon as practical" if not.
- No certification may be required unless reasonable evidence of abuse.

Further Information

- Labor Commissioner advice:

https://www.dir.ca.gov/dlse/paid_sick_leave.htm

- Fact Sheet:

<https://www.dir.ca.gov/covid19/outreach-files/Right-to-Paid-Sick-Leave-English.pdf>

Hourly Employee Notice

Labor Code section 2810.5

- Also known as the “wage theft” notice.
- Given to non-exempt hourly employees at hire.
- *Do not forget to use it* – it ensures that employers have considered wage rates, overtime, commission or incentive terms, and workers compensation compliance.

Labor Code section 2810.5

- DLSE discussion:
 - www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html
- Our discussion:
 - <https://www.rybickiassociates.com/post/don-t-forget-new-hire-notices>
 - Note: current form contains additional information for certain employers.

Noncompete Agreements

Noncompete Agreements

- California law has long prohibited “restrictive covenants” or “covenants not to compete.”
 - Business & Professions Code §16600 *et seq.*
- Restriction is a **fundamental public policy** – state courts have refused to recognize agreements executed in other states *and* judgments entered in other states.
- Employee attorneys have brought suits for wrongful failure to hire, interference with contract, etc.

Noncompete Agreements

- Potential issues:
 - **Actual non-compete agreements** accidentally imposed by *unknowing employers* or *employers from out of state*.
 - **Limited non-compete agreements** that may be construed as non-competes: restrictions on solicitation, misclassified contractor agreements, etc.

Noncompete Agreements

- New Requirements: B.P.C. § 16600.5:
 - Creates **private right of action** for injunctive relief, fees and costs consequential damages
 - Formerly enforceable only via *Tameny actions* and some tort claims (e.g., interference)

Noncompete Agreements

- New Requirements: B.P.C. § 16600.1:
 - Current and former employees employed after January 1, 2022, **must be notified** by February 14, 2024, that any prior the restrictive covenant no longer applies.
 - Must be an **individualized written communication**
 - Failure to notify is a violation tat can be pursued under Section 16600.5
 - (initial employment or continued employment after 01/22?)

Noncompete Agreements

- Additional development:
 - Nationwide ban on restrictive covenants adopted by Federal Trade Commission.
 - Regulation was and may again be stayed in litigation.
 - Likely to be viewed favorably by *either* administration in 2025 and beyond.

Noncompete Agreements

- FTC Guidance:
 - Final Rule:
 - www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf
 - Agency Guidance:
 - www.ftc.gov/legal-library/browse/rules/noncompete-rule

Will be useful when employers attempt to enforce out-of-state.

Retaliation

SB 497: Whistleblower Protection

- This is a *dynamite* new law. It may affect employers in similar (but different ways) that the Private Attorneys General Act (PAGA) (!)
- It is a type of law consistently vetoed by past governors but signed into law this year.
- Creates a *presumption* of liability requiring employers to prove their innocence. (Labor Code §§ 98.6, 1102.5, 1197.5)

SB 497: Whistleblower Protection

- Labor Code section 98.6 and 1197.5 – which prohibit many claims and complaints about wages, working conditions, or off-duty conduct – amended to create a *presumption of retaliation*.
- Adverse action within 90 days of any complaint or protected conduct is *presumed* to be a violation.
- Employers will bear the burden of proof on damages and \$10,000 civil penalty.

SB 497: Whistleblower Protection

- Argument will be made that employees have a private right of action for lost wages, benefits, and reinstatement.
- Will also be alleged as a basis for public policy wrongful termination claims.
- May also be collected by the Labor Commissioner.

SB 497: Whistleblower Protection

- Practical guidance:
 - Ensure care when investigating workplace complaints regarding wages and conduct as well as discrimination and harassment.
 - Be mindful of the 90-day “temporal proximity” standard.
 - Gather facts to establish whether any complaints were *actually made*.

SB 497: Whistleblower Protection

- Text of the law at:
 - <https://legiscan.com/CA/text/SB497/id/2844685>
- Look for further guidance from the Labor Commissioner and the courts

CONCLUSION

Topics Not Covered

- Specific Local Ordinances (state and local)
- Arbitration Agreements
- PAGA Reform

Think Like an Employer

- Firms with one employee covered by a wide array of law: wages, meal/rest periods, harassment, leaves of absence, safety, retaliation, employee benefits
- Firms with several employees covered by an even wider set of laws.
- Find a good industry resource or a California-specific human resources provider such as HRCalifornia.

RYBICKI & ASSOCIATES, P.C.

LABOR AND EMPLOYMENT ATTORNEYS

QUESTIONS?

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LABOR AND EMPLOYMENT ATTORNEYS

THANK YOU!

Richard Rybicki

rrybicki@rybickiassociates.com

10 Executive Court

Suite 204

Napa, CA 94558

(707) 222-6361

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