

Welcome back to **HRLCS 2021!**



HR LEADERS COMPLIANCE SUMMIT

February 11, 2021 | *Day #3*



HR LEADERS

COMPLIANCE SUMMIT

We are thrilled to have you attending this year's
HR Leaders Compliance Summit!

HRLCS 2021 is an expanded virtualization of a longstanding on-site gathering of **Acrisure Agency Partner** offices and the transformational **HR professionals** they support.

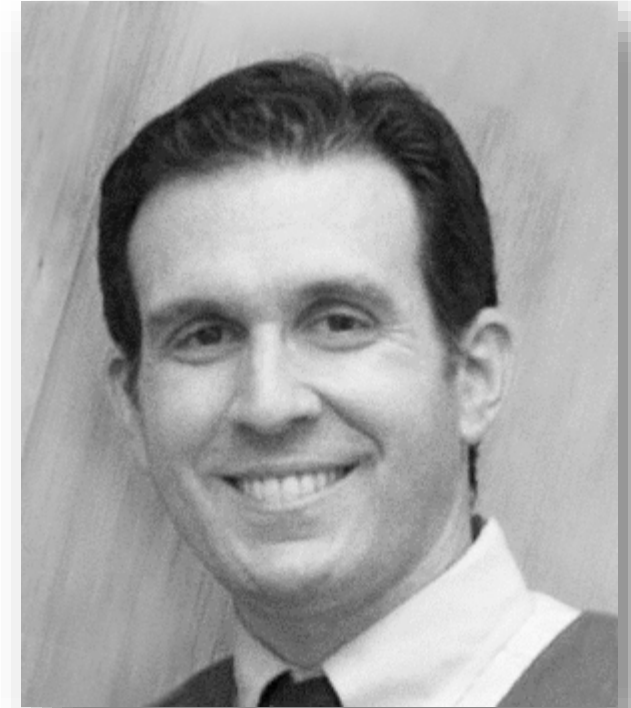
"MC" & Featured Speaker

Jeremy Hertz, JD, SPHR, SHRM-SCP

Acrisure Compliance Solutions

- Sr. Deputy General Counsel
- Director of HR Consulting

Jeremy's main focus is to consult with Acrisure Agency Partners and their clients on employee benefits and Human Resources-related matters including the Affordable Care Act, FMLA and other forms of employee leave, ADA, COBRA, Wage and Hour, and all forms of discrimination, harassment and retaliation issues. He also trains client and industry groups, and actively participates in the marketing and sales process to prospective clients.



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Others You Will Hear From Today



Andrea Robinson

Welcome & Introduction

Acrisure Agency Partner



Daniel F. Pyne III

Featured Speaker

Hopkins & Carley



Shirley Jackson

Featured Speaker

Hopkins & Carley



Dawn Alvarez

Q & A Moderator

Acrisure Agency Partner



Brad Urhausen

Event Production

Acrisure Employee Benefits



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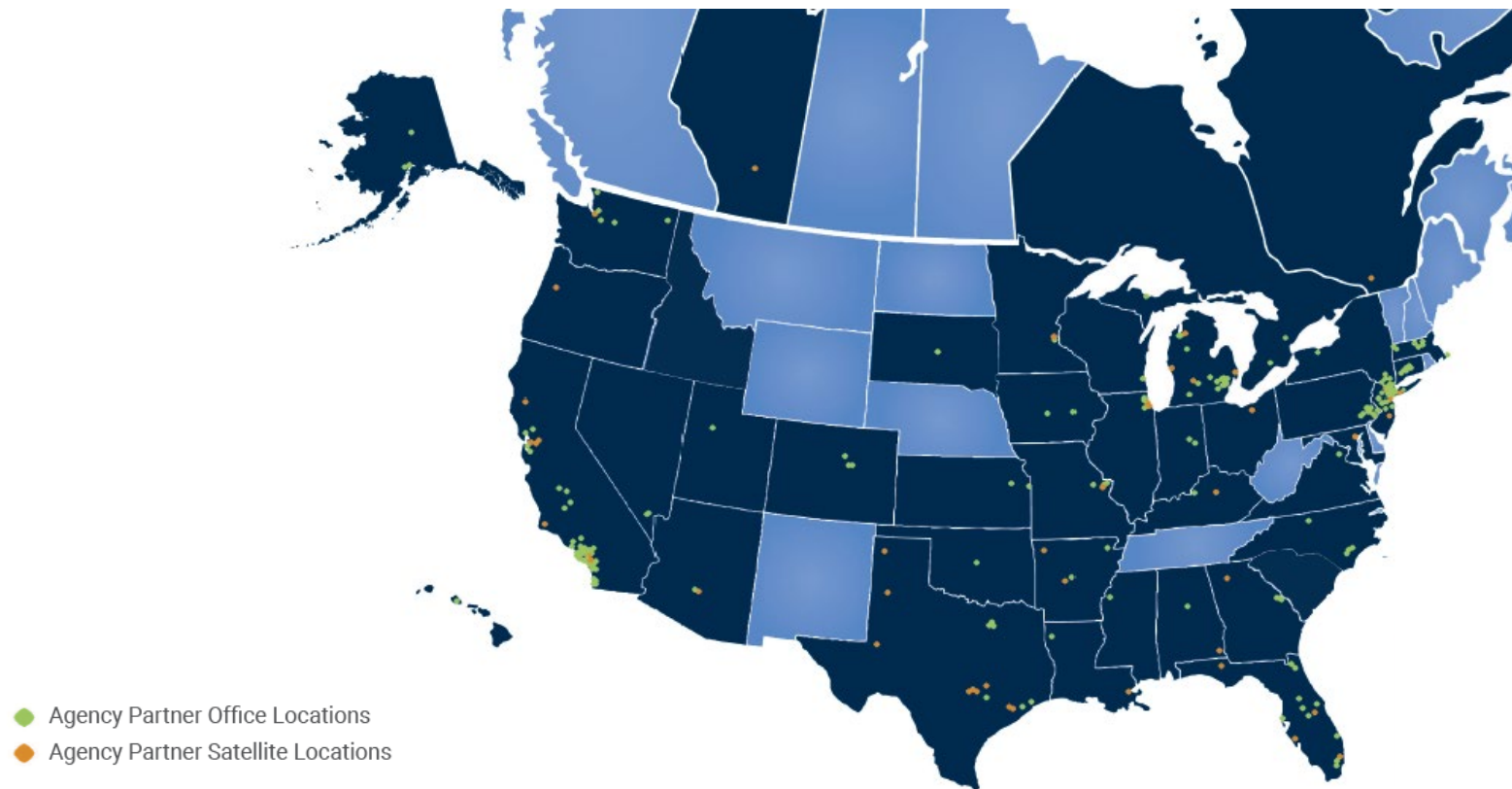
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February 11, 2021

General sessions for CA attendees*

(Please note that all times are PST)

7:45am – 8:00am

Virtual Lobby
Sponsor Showcase

8:00am – 9:20am

General Session
California Employer
Compliance
Considerations for
2021

9:20am – 9:30am

Coffee Break
Sponsor Showcase

9:30am – 10:45am

General Session
California Employer
Compliance
Considerations for
2021

*Pre-approved by SHRM/HRCI for 2-hours of continuing education credit each day!

General Session

COVID-19: A New Challenge for California Employers

Presented by Daniel F. Pyne III and Shirley Jackson (Hopkins & Carley)



HR LEADERS
COMPLIANCE SUMMIT

February 11, 2021



Disclaimer:

The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.

COVID-19: A New Challenge for California Employers

Where Do We Start?

- Many laws may apply - both old and new
- Need to comply with all laws that apply, not just one
- Approach the issue chronologically

COVID-19: A New Challenge for California Employers

Notice Obligations

- Notify employees, contractors and union of exposure if:
 - Employee or contractor at worksite is infected with COVID, ordered to isolate, or died due to COVID
 - Notice obligation not limited to “close contacts”
 - Definition of “worksite”
- Notify government agencies of infections
- Notify workers’ compensation insurer of infections if applicable

COVID-19: A New Challenge for California Employers

Notice Obligations

- What must be reported to employees and union?
 - Existence of exposure
 - Do not disclose name(s) of infected employee(s)
 - Potential COVID benefits
 - COVID safety plan
- When is the report due?
 - SB 685- within one business day
 - County- within four hours
 - Cal-OSHA- follow local rule



COVID-19: A New Challenge for California Employers

Special Rules Following an “Outbreak”

- “Outbreak” is defined as three or more cases within two weeks from different households
- Notice to local health department within 48 hours
- Report number of cases, names, contact info, job titles, workplace location
- Testing- immediate for all employees in exposed workplace, and weekly until none test positive
- Send infected employees and those in close contact with infected employees home



COVID-19: A New Challenge for California Employers

CDC COVID-19 Testing Overview

- Two kinds of tests:
 1. A **viral test** tells you if you have a current infection.
 2. An **antibody test** might tell you if you had a past infection.
- Considerations for who should be tested:
 1. Symptoms of COVID-19
 2. Close contact (within 6 feet for a total of 15 minutes or more) with someone with confirmed COVID-19
 3. Engaged in COVID-19 high risk activities (e.g., travel, attending large social or mass gatherings, or being in crowded indoor settings)
 4. Asked or referred to get testing by healthcare provider, local or state health department



COVID-19: A New Challenge for California Employers

Employer Testing Duties

Cal/OSHA Emergency Temporary Standards

- If **potential work-related exposure** to COVID-19:
 - Offer testing to an employee at no cost and during working hours. [Cal/OSHA ETS § 3205(c)(3)(B)(4)]
- If there is an **outbreak** (*3 or more positive cases within 14 days*):
 - Provide testing to all exposed employees twice: (1) immediately; and (2) one week later.
 - Thereafter, all employees remaining at the workplace must continue to be tested at least weekly until there are no more positive cases for a 14-day period. [Cal/OSHA ETS § 3205.1(b)]
- If there is a **major outbreak** (*20 or more positive cases within 30 days*):
 - Provide testing twice a week to “all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace.” [Cal/OSHA ETS § 3205.2(b)]
- All testing provided at no cost and during working hours.



COVID-19: A New Challenge for California Employers

New CDC Quarantine Guidance

Departure from the standard 14 days:

- No symptoms (whichever is sooner):
 - 10 days without testing
 - 7 days after receiving negative test result
- Post-Quarantine:
 - Watch for symptoms for 14 days
 - Symptoms = immediate self-isolation + contact Health Care Provider/Authority
 - Standard safety measures (mask + social distancing + handwashing, etc.)



COVID-19: A New Challenge for California Employers

Employer Quarantine Duties

Cal/OSHA Emergency Temporary Standards

Employers shall **exclude** from the workplace:

- Employees with a positive COVID-19 test;
- Employees subject to a COVID-19 related order to isolate issued by a local or state health official; or
- Employees with COVID-19 exposure. [Cal/OSHA ETS § 3205(c)(10)(A), (c)(11)]
 - “COVID-19 exposure”: within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the “high-risk exposure period,” *regardless of face masks*. [Cal/OSHA ETS § 3205(b)(3)]



COVID-19: A New Challenge for California Employers

Employer Quarantine Duties (continued)

Santa Clara County Public Health Department

Employers shall **exclude** from the worksite:

- Employees with COVID-19 symptoms (arrival or during workday);
- Employees with a positive COVID-19 test; or
- Employees who had close contact with COVID-19 positive person.
 - “close contact”: within 6 feet of the infected person for at least 15 minutes (continuous or repeated short-duration interactions) at any time beginning 2 days before the infected person had symptoms or tested positive, *regardless of face masks*.



COVID-19: A New Challenge for California Employers

Leave and Pay Rules

- Relevant laws:
 - FFCRA
 - SB 1867
 - Traditional state sick leave
 - City of San Jose sick leave
 - Cal-OSHA



COVID-19: A New Challenge for California Employers

Senate Bill 1867

- Covered employers- private businesses with 500 or more employees, and employers of first responders
- Covered employees- employees required to stay home by government order, doctor's order, or their employer due to COVID
- Benefit provided- 80 hours of paid leave, to a maximum of \$511 per day (special rules for part-time employees)



COVID-19: A New Challenge for California Employers

City of San Jose

- City ordinance applies to businesses with facilities in San Jose
- Employees must work at least two hours in San Jose, and be unable to telecommute, to be eligible
- Provides up to 80 hours of paid sick leave
- Does not apply if the employer already provides at least 80 hours of paid leave
- Ordinance in effect through June 30, 2021



COVID-19: A New Challenge for California Employers

Cal-OSHA

- Regulation enacted in November 2020 requires employers to “maintain an employee’s earnings, seniority, and all of the employee’s rights and benefits” when the employee is prevented from working by COVID-19
- Employer can apply normal sick leave benefits and benefits from other sources to satisfy the obligation
- Pending litigation challenges Cal-OSHA’s right to require paid sick leave



COVID-19: A New Challenge for California Employers

How Does Workers' Compensation Fit In?

- Senate Bill 1159 creates a presumption that employees who contract COVID-19 during an outbreak at their employer's worksite are eligible for workers' compensation benefits
 - "Outbreak" is four or more cases at worksite if employer has 100 or fewer employees at a worksite, and 4% of the employees
- Employers can rebut the presumption with evidence that they took steps to prevent COVID-19 infection, evidence of employee's risk of infection outside the workplace, and other evidence
- Employees must use COVID-related sick leave prior to receiving workers' compensation benefits

COVID-19: A New Challenge for California Employers

Priority and Sequencing of Leave

- Generally exhaust special COVID-related leave prior to other forms of paid leave
- Employer cannot dictate the form of leave taken by the employee



COVID-19: A New Challenge for California Employers

Return to Work Criteria

Cal/OSHA Emergency Temporary Standards

For the employee with a **positive COVID-19 test**:

- No COVID-19 Symptoms: not allowed to return to the workplace until –
 - Minimum of 10 days have passed since the date of specimen collection of first positive COVID-19 test. [Cal/OSHA ETS § 3205(c)(11)(B)]
- COVID-19 Symptoms: not allowed to return to the workplace until –
 1. At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
 2. COVID-19 symptoms have improved; and
 3. At least 10 days have passed since COVID-19 symptoms first appeared. [Cal/OSHA ETS § 3205(c)(11)(A)]



COVID-19: A New Challenge for California Employers

Return to Work Criteria (continued)

Cal/OSHA Emergency Temporary Standards (continued)

For the employee with **COVID-19 exposure**:

- Excluded from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case. [Cal/OSHA ETS § 3205(c)(10)(B)]



COVID-19: A New Challenge for California Employers

Return to Work Criteria (continued)

Santa Clara County Public Health Department

For the employee with **COVID-19 symptoms only** (not tested):

1. Instruct worker to get tested for COVID-19 as soon as possible.
2. If negative COVID-19 test, employee should remain at home until at least 24 hours after fever resolves (if any) and improvement of other symptoms.

For the employee with a **positive COVID-19 test**:

1. 10 days from the date they tested positive; and
2. If symptomatic, 24 hours after resolution of fever without the use of fever-reducing medication and improvement in any other symptoms.



COVID-19: A New Challenge for California Employers

Return to Work Criteria (continued)

Santa Clara County Public Health Department (continued)

For the employee with **close contact**:

1. Instruct worker to stay home for 10 days, starting the last day.
2. Asymptomatic close contacts may discontinue quarantine after Day 10 from last exposure (even if test negative), but should continue monitoring symptoms for full 14 days.



COVID-19: A New Challenge for California Employers

Vaccine Issues

- Can employers require employees to be vaccinated?
 - Generally yes, if lack of vaccination would create a direct threat to others in the workplace
 - Exceptions
 - Disability
 - Religion
- Can employers be held liable if they do not require vaccination of their employees?



COVID-19: A New Challenge for California Employers

What About Employees Who Are Just Afraid, or At High Risk?

- Fear of COVID, by itself, does not entitle an employee to a leave of absence
- Being in a high-risk category, by itself, does not entitle an employee to leave
- A doctor's note makes a difference
- Employers should not rush to termination with employees who decline to work because they are afraid or at high risk



General Session

Non-COVID Legal Developments for California Employers

Presented by Daniel F. Pyne III and Shirley Jackson (Hopkins & Carley)



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California Employer Compliance Considerations for 2021

AB 2257- Defining the Issue and Its Importance

- The distinction between employees and independent contractors is relevant to-
 - Payroll taxes
 - Eligibility for overtime
 - Eligibility for benefits
 - Application of employment laws
- Misclassification disputes are extremely common and can lead to substantial liability

California Employer Compliance Considerations for 2021

What Are the Rules Now?

- ABC test is the default standard
- Hiring party must show:
 - **A:** Worker is free from control and direction
 - **B:** Worker performs work outside the usual course of hiring party's business
 - **C:** Worker is customarily engaged in independent occupation or business of the same nature
- ABC test is applicable retroactively



California Employer Compliance Considerations for 2021

Exceptions to the ABC Test

- Business-to-business contracts
- Certain contracts for professional services
- Certain specific occupations
- “Single engagement” contracts
- Referral agencies
- Music
- ... and Proposition 22



What is the Significance of the Exceptions?

- If an exception applies, the worker does not automatically qualify as a contractor
- When an exception applies, the worker's classification is determined under the traditional multi-factor test
- Many workers who fall under an exception still will not qualify as contractors

California Employer Compliance Considerations for 2021

What Should Employers Do Now?

- Audit existing contractor classifications under attorney-client privilege
- Address misclassifications strategically
 - Consider all relevant circumstances, including the number of misclassified contractors, whether they still work for the company, whether they should have been exempt or non-exempt, and whether they worked significant overtime
- Review and update contractor agreement templates as necessary

California Employer Compliance Considerations for 2021

California Family Rights Act (CFRA)

What is the CFRA?

- CFRA = California
- FMLA = Federal
- Allows employees to take unpaid, job-protected leave for specified family and medical reasons
- CFRA has closely mirrored FMLA rights...

but now with greater divergence



California Employer Compliance Considerations for 2021

CFRA Changes #1 and #2 of 7

Which employers are covered?

Previously...

- CFRA = 50 employees within a 75-mile radius

Now...

- CFRA = **5 employees, no geographic radius**
- FMLA = 50 employees within a 75-mile radius



California Employer Compliance Considerations for 2021

CFRA Change #3 of 7

Who is included as a “family member”?

Previously...

- CFRA = Employee's parent, child, spouse or domestic partner

Now...

- CFRA = Employee's parent, child, spouse or domestic partner, **and grandparents, grandchildren, and siblings**
- FMLA = Employee's parent, child, spouse (but not necessarily domestic partner*)



California Employer Compliance Considerations for 2021

CFRA Change #4 of 7

Additional reasons for leave?

Previously...

- CFRA = No covered active duty or call to covered active duty coverage

Now...

- CFRA = Allows leave for "qualifying exigency" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the U.S. armed forces.
- FMLA = Does the same thing and more.



California Employer Compliance Considerations for 2021

CFRA Change #5 of 7

Two parents working for the same company?

Previously...

- CFRA = Parental leave was collective and limited to one parent at a time.

Now...

- CFRA = Each parent can get separate 12-week entitlements for bonding with a child following birth, adoption, or placement of a foster child, and both *may* elect to take leave at the same time
- FMLA = Parental leave remains collective and limited to one parent at a time.



California Employer Compliance Considerations for 2021

CFRA Change #6 of 7

“Key Employee” Exception?

Previously...

- CFRA = Employer could refuse to reinstate an employee returning from leave to the same or comparable position if, among other things, the employee was salaried and among highest paid 10% of the employees employed within 75 miles of the employee's worksite.

Now...

- CFRA = No more “key employee” exception
- FMLA = Still retains the “key employee” exception.



California Employer Compliance Considerations for 2021

CFRA Change #7 of 7

New Parent Leave Act?

Previously...

- NPLA = Baby bonding when employer had between 20 and 49 employees.

Now...

- CFRA = Now incorporates this because of its 5-employee count reduction
- FMLA = Only if other FMLA requirements are met



California Employer Compliance Considerations for 2021

Overview of Changes to CFRA

Change	Previously	Now
Employee Count Radius	75 miles	N/A – Eliminated
Minimum Employee Count	50 employees	5 employees
“Family Members”	Employee's parent, child, spouse or domestic partner (Same as FMLA*)	Now includes employee's grandparents, grandchildren, and siblings
Specific Military Leave	Not previously provided	Leave for qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the United States Armed Services (Closer to FMLA)
Parents Working for Same Company	Limited to collective 12 weeks, not at the same time (Same as FMLA)	Each parent can get separate 12-week entitlements, both can elect to take leave at the same time
“Key Employee” Exception	Same as FLMA	N/A – Eliminated
Repeal of New Parent Leave Act	Protected baby bonding leave (for employers with 20 to 49 ee's)	Eliminated because it is now duplicative of what the CFRA will provide.



California Employer Compliance Considerations for 2021

California Further Restricts Use of “No Rehire” Clauses

- New law limits use of “no re-hire” clauses in settlement agreements
- Clauses are prohibited if employee filed an employment claim in court, with administrative agency, in arbitration, or in internal process and did so in good faith



California Employer Compliance Considerations for 2021

California Further Restricts Use of “No Rehire” Clauses

The law does not:

- prevent employers from terminating employment
- prohibit no-rehire clauses when employer, prior to any complaint by employee, has documented a good faith determination that employee engaged in sexual harassment or criminal conduct
- require rehiring if the employer has a legitimate, non-discriminatory reason for refusing to rehire the employee



California Employer Compliance Considerations for 2021

Hours Worked: What is compensable time?

California Law

The California Wage Orders define “**hours worked**” as:

- “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

Employers must pay at least **minimum wage** to employees for all “hours worked.”



California Employer Compliance Considerations for 2021

Frlekin v. Apple Inc.

- Retail store employees brought a class action alleging their time spent waiting for and undergoing Apple's exit searches (typically 5 to 20 minutes) was compensable time.
- Apple Policy:
 - Required all employees to undergo exit searches of all bags, packages, purses, backpacks, briefcases, and personal Apple technology devices such as iPhones.
 - Instructed managers and security to ask employees to open every bag, unzip internal compartments, and remove any Apple products (verify serial number) or other bag contents.
 - Failure to comply may lead to disciplinary action, up to and including termination.



California Employer Compliance Considerations for 2021

Frlekin v. Apple, Inc. (continued)

Court found:

- Key question: Was employee time spent waiting for and undergoing mandatory personal bag checks *controlled activity*?
- Elements of control:
 1. Whether an activity is mandatory?
 - *Employees required to locate and wait for a manager/security guard.*
 2. What is the location of the activity?
 - *Employees confined to the workplace until after the bag check.*
 3. What is the degree of the employer's control?
 - *Employees compelled to take specific actions and movements.*



California Employer Compliance Considerations for 2021

Frlekin v. Apple, Inc. (continued)

- Elements of control (continued):
 4. Whether the activity primarily benefits the employee or employer?
 - *Apple's interest to detect and deter theft.*
 5. Whether the activity is enforced through disciplinary measures?
 - *Apple policy re: discipline, up to and including termination.*



California Employer Compliance Considerations for 2021

Ridgeway v. Wal-Mart

- Long-haul truck drivers brought a class action alleging Wal-Mart violated California law requiring minimum wage for all hours worked.
- Layovers consisting of 10-hour rest periods mandated by law.
- Wal-Mart Policy:
 - Layovers taken at home (not tractor cab) required manager preapproval.
 - Drivers must record any breaks taken at home and the approving manager's name.
 - Drivers subject to disciplinary action, up to and including "immediate termination," for taking an unauthorized layover at home.



California Employer Compliance Considerations for 2021

Ridgeway v. Wal-Mart (continued)

Court found:

- Key question: Did Wal-Mart's policy **restrain** employee conduct such that the drivers were not free to spend the layover time as they saw fit?
- Wal-Mart's policy imposed **constraints** on employee movement such that employees could not travel freely and avail themselves of the full privileges of a break.
- Requirement that drivers seek **permission**, rather than provide **notification**, before taking layover at home meant Wal-Mart reserved the right to decline.



California Employer Compliance Considerations for 2021

The Administrative Exemption and the Salary Basis” Test

- Facts of the Semprini case
- The administrative exemption and the “salary basis” test
- The broader message from the Semprini decision



California Employer Compliance Considerations for 2021

What information to include on paystubs?

California Labor Code section 226

- i. gross wages earned
- ii. total hours worked by the employee, except for exempt employees
- iii. number of piece-rate units earned and any applicable piece rate, if applicable
- iv. all deductions
- v. net wages earned
- vi. inclusive dates of the pay period
- vii. name of the employee and only the last four digits of his or her Social Security number (or employee identification number)
- viii. legal name and address of the employer
- ix. all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate



California Employer Compliance Considerations for 2021

What's in a name?

California Labor Code section 226

- * viii. the legal name and address of the employer



California Employer Compliance Considerations for 2021

Noori v. Countrywide Payroll & HR Solutions

- Employee alleged wage statements violated Lab. Code § 226 because employer identified as “CSSG.”
 - **C**ountrywide **S**taffing **S**olutions **G**roup = an unregistered out-of-state fictitious business name for Countrywide



California Employer Compliance Considerations for 2021

Noori v. Countrywide (continued)

Court found:

- CSSG was not the employer's "registered name, nor is it a minor truncation."
- Law does not require an employer to state its complete or registered name, and fictitious business names may be sufficient in certain circumstances.
- But CSSG acronym may be **confusing or meaningless**.
- Employer's name accurately stated on paycheck was insufficient.



California Employer Compliance Considerations for 2021

Commute Time as “Hours Worked”

- The general “coming and going” rule
- Facts of the Oliver case
- The deciding factor- employer’s right to control

California Employer Compliance Considerations for 2021

California's Fair Employment and Housing Act (FEHA)

- Employers must engage in a “timely, good faith **interactive process**” by which the employer communicates with the disabled employee in selecting an appropriate reasonable accommodation.
- Employers **must initiate** the interactive process when:
 - i. an employee with a known physical or mental disability or medical condition requests an accommodation;
 - ii. the employer becomes aware of the need for accommodation through a third party; or
 - iii. the employer becomes aware of the possible need for accommodation because the disabled employee has exhausted leave of absence rights and the employee or employee's health care provider indicates that further accommodation is necessary.



California Employer Compliance Considerations for 2021

FEHA (continued)

- Employers required to accommodate only a “**known**” disability.
 - Duty to provide reasonable accommodation does not arise until the employer is aware of the employee’s disability and physical limitations.
- Where the disability, resulting limitations, and necessary reasonable accommodations are **not obvious** to the employer, the employee bears the burden to specifically identify both the disability and resulting limitations.
- Employers not required to accept an employee’s subjective belief that he or she is disabled and may rely on **medical information** from the employee’s medical provider.

California Employer Compliance Considerations for 2021

Doe v. Department of Corrections

- Psychologist filed lawsuit alleging his employer, California Department of Corrections and Rehabilitation (CDCR), failed to provide reasonable accommodation of his disabilities (*i.e.*, asthma and dyslexia) and engage in the interactive process.
- Accommodation request: work in a quiet place to help focus and concentrate because he suffered from "LD-NOS."



California Employer Compliance Considerations for 2021

Doe v. Department of Corrections (continued)

- Doctor's notes:
 - Vague references to an "underlying medical condition," a "physical disability, and "migraines."
 - "Easily distracted" and became "disorganized" under stress.
 - No description of work limitations caused by a disability.
- Doe refused CDCR's request for signed release of medical records to obtain information re: nature and extent of his disability.



California Employer Compliance Considerations for 2021

Doe v. Department of Corrections (continued)

Court found:

- Doctor's notes –
 - too vague and should have identified the disability or specified a diagnosis (e.g., asthma or dyslexia).
 - did not describe any kind of work limitations resulting from his disability.
- CDCR never knew the extent of Doe's limitations.
- CDCR was unable to determine whether Doe was disabled and could be afforded reasonable accommodation.



California Employer Compliance Considerations for 2021

Liability of Staffing Companies for Workplace Misconduct

- Facts of the Duckworth case
- The court's decision
- Implications for employers and staffing companies



This concludes Day #3 of HRLCS 2021.

We sincerely thank you for your time and partnership!
To get in touch, please contact the **Acrisure Agency
Partner** who invited you to attend.

Also, please take the attendee survey now.

*The link is posted in the "Chat" panel, and you will also be
redirected to it immediately upon the conclusion of this call.*



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For any questions, please contact
hrlds2021@acrisure.com.