

# 2025 Employment Law Annual Update

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Better as One with Hopkins Carley

# Presenters



**Ernest Malaspina**



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**Kathy G. Shaw**

# Today's Agenda

- New legislation and regulations
- Wage and hour developments
- Discrimination and harassment developments
- Immigration developments
- Employee benefits updates
- AI for HR cases
- But wait, there's more!



# New Legislation and Regulations

# California Minimum Wage Rises Again

- State minimum wage will be \$16.50 per hour for all employers in 2025
- Be alert to local minimum wage rules
- Impact on minimum salary for white-collar exemptions
- Minimum pay for computer professionals and inside sales also increases in 2025
- Fast food exception

# What Should Employers Do Now?

- Adjust pay as necessary for non-exempt employees
- Review the pay of exempt employees, computer professionals, and inside sales workers
- Consider other forms of compensation impacted by the new minimum wage
- Address discrepancies strategically

# Freelance Worker Protection Act

- What is a “freelance worker”?
- What is a “hiring party”?
- The basic requirements
  - Names and addresses of parties
  - Itemized list of services, value, and compensation method
  - Payment due date
  - Completion due date
- Enforcement mechanisms

# What Should Employers Do Now?

- Applies to contracts entered into or renewed after January 1, 2025
- Review active contracts for automatic renewal clauses
- Confirm that written agreements satisfy all statutory requirements going forward



# New FEHA Amendments - Intersectionality

*“...an analytical framework that sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm. The framework and term ‘intersectionality,’...captures the unique, interlocking forms of discrimination and harassment experienced by individuals in the workplace and throughout society...”*

# New FEHA Amendments - Intersectionality

- The amendments add to the list of protected classes:
  - Any combination of those characteristics
  - A perception that the person has any of those characteristics or any combination of those characteristics
  - A perception that the person is associated with a person that has, or is perceived to have, any of those characteristics or any combination of those characteristics

# What Should Employers Do Now?

- Consider adding language to existing harassment and discrimination prevention policies consistent with the amendments
- Update harassment and discrimination prevention training and presentation materials to include the new concept

# Employer Intimidation Act

- Prohibits employer-mandated, “captive audience meetings”
- Prohibits employers from subjecting or threatening an employee with discharge or retaliation because the employee declines to attend employer-sponsored meeting or refuses to listen to the employer’s view about religion or politics
- political activities and affiliations includes labor union organizing

# What Should Employers Do Now?

- Consider the cost-benefit of holding such meetings in the first instance – is it worth the risk?
- The clash between state and federal law - consider whether making such meetings voluntary (in accordance with state law) or mandatory (as permitted by federal law) is in the best interest of the company
- Consider a “wait and see” approach



# Temporary Restraining and Protective Orders

- Current state law permits employers to seek restraining orders to protect employees and their immediate family members from person who has engaged in violence or made a credible threat of violence
- New law expands the types of conduct that can form the basis for such order to include harassing conduct
- Examples

# What Should Employers Do Now?

- Review current policies as well as harassment and discrimination training and presentation materials to stress the importance of reporting all harassing conduct to managers or Human Resources as soon as it is observed or known
- Consult with counsel about the possible benefits and drawbacks of seeking protection orders – the decision should be based on the specifics of the individual circumstance

# Wage and Hour Developments

# Four Key, Related Developments

- *Huerta v. CSI Electrical*- hours worked
- *Camp v. Home Depot*- rounding of time records
- Amendments to Private Attorneys General Act (PAGA)
- *Ramirez v. Charter Communications*- enforceability of arbitration agreements

# The *Huerta* Decision- “hours worked”

- The facts of the *Huerta* case
- The issue- what time counts as “hours worked” within the meaning of the Wage Order?
- The California Supreme Court’s decision
  - Time spent in mandatory security checks counts as hours worked
  - Meal period time counts as hours worked if the employee is not allowed to leave the premises



# The *Huerta* Decision- What Should Employers Do Now?

- Assure that meal period policies specifically permit employees to leave the premises during their meal periods
- Assure that non-exempt employees are paid for time spent in mandatory security screening processes
- Consider whether non-exempt employees should be paid for other non-productive time when they are under the employer's control

# ***Camp* Decision- rounding of time records**

- The facts of the *Camp* case
- The issue- are employers permitted to round the time records of non-exempt employees for payroll purposes?
- The California Supreme Court's decision
  - Employers must pay employees for all time worked
  - If the employer has captured, or can capture, the employee's precise hours worked, it must pay the employee for all time recorded

# The *Camp* Decision- What Should Employers Do Now?

- Do not round the time records of non-exempt employees when calculating payroll
- Confer with counsel regarding potential liability arising from past rounding practices

# California Legislature Amends PAGA

- What is PAGA?
- Permits lawsuits similar to class actions.... but different
- What has changed?
  - Plaintiff must personally experience the violations
  - Penalties can be limited if employer takes corrective actions
  - Some double recoveries limited
  - Increase in employees' share of recovery

# The *Ramirez* Decision- Arbitration Agreements

- The facts of the *Ramirez* case
- The issues
  - what terms in the arbitration agreement are impermissible?
  - should the court enforce the arbitration agreement at all?
- The California Supreme Court's decision
  - Mutuality, limitations period, limitations on discovery, and limitations on remedies all unconscionable
  - No per se rule regarding multiple unenforceable terms in arbitration agreement



# PAGA Amendments and *Ramirez* Decision- What Should Employers Do Now?

- Review most common examples of non-compliance with counsel and address discrepancies strategically
- If you have not already done so, consider utilizing arbitration agreements
  - Mandatory or voluntary?
- If you have arbitration agreements in place, consider having an attorney review them if they have not been updated recently

# Discrimination & Harassment

# How Isolated is Isolated?

- *Twanda Bailey v. San Francisco District Attorney's Office*
  - Investigative Assistant
  - The coworker, the mouse, and the racial slur
  - The department's personnel officer's initial response
  - The City's Human Resources Department investigates
  - The personnel officer's alleged retaliation
  - Ms. Bailey resigns and sues
    - The lower courts weigh in – isolated incident
    - The California Supreme Court weighs in

# What Should Employers Do Now?

- Consider claims of harassment and discrimination, even those involving a single incident, carefully, realistically, and based on the totality of the circumstances
- Consult with counsel when evaluating investigative findings to ensure that issues like department environment, potential coworker toxicity, and potential favoritism issues are considered in that evaluation
- The court's decision emphasizes the importance of vigorously implementing zero tolerance harassment and retaliation prevention policies, as well as proper training of managers, supervisors, and in this case, personnel officers.

# EEOC Updates Guidance on Harassment

- The update comes almost 25 years after the last published guidance on harassment in the workplace
- The new guidance replace five prior guidance documents
- The new guidance includes 90 pages of text and 80 pages of annotation that includes 387 footnotes
- Not legally binding, but reflects many new developments

# EEOC Updates Guidance on Harassment

- The guidance breaks down the components of a harassment claim into three parts:
  - The covered bases and causation
  - Discrimination respecting a term, condition, or privilege of employment
  - Liability



# Covered Bases and Causation

- Harassment examples
- Religion-based examples
- Sex-based harassment examples
- Age-based examples
- Current phraseology

# What Should Employers Do Now?

- The guidance includes 77 fact pattern examples and provides practical advice on most topics – while it may not be the best use of time to read the entire publication, reviewing the examples if faced with unusual complaints or situations may prove helpful
- When updating harassment prevention policies, the guidance can prove useful with respect to the newer examples of offending conduct and modern terminology, such as “AI-generated” and “deepfake”

# **Immigration Update – Preparing for the Shifting Landscape Under a New Administration**

**Gizie Hirsh  
Employment & Labor**

# Restrictions on Humanitarian Benefits

- Deferred Action for Childhood Arrivals (DACA)
- Temporary Protected Status (TPS)

**Application for Temporary Protected Status**  
Department of Homeland Security  
**Form I-821**

**Part 1. Information About Attorney**

1. USCIS Online Account Number (if any)

**Name of Attorney**

2. Family Name (Last Name)

Given Name (First Name)

3. Middle Name

**Part 2. Eligibility Information for Attorney**

Select all applicable items.

1.a. ☐ I am an attorney licensed to practice law in, and in good standing of, a court of general jurisdiction in the following country where I reside regularly engaged in study or business in that country.



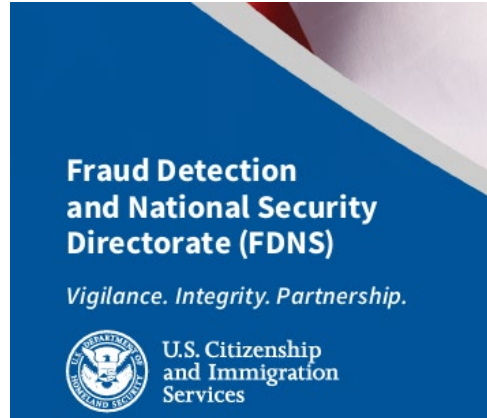
## Procedural Hurdles and Delays

- Increased scrutiny and slower processing
- Visa delays
- Travel bans



# Increased Compliance Enforcement

- I-9 Audits
- Fraud Detection and National Security Directorate (FDNS) Visits
- Worksite Raids





# Managing Uncertainty



- Addressing employee concerns
- Engaging with lawmakers

# Employee Benefits Legal Update

**Kathy Shaw**  
**Employee Benefits & Executive Compensation**

# Employee Benefits Legal Update

## ERISA TURNS THE BIG 5-O!



# Department of Labor (EBSA) Cybersecurity Rules

- DOL/EBSA announced increased emphasis on cybersecurity compliance in plan audits.
- Recent guidance addresses best practices for plan sponsors to implement:
  1. Written cybersecurity policy approved by senior management and reviewed by outside experts and includes:
    - Consistent used of multi-factor authentication
    - Responding to security incidents and breaches
    - Strong access control procedures, especially for cloud-based data
    - Vendor management
  2. Annual risk assessments and third-party security audits.
  3. Annual training for staff members.
  4. Business continuity planning.
  5. Encryption.

# 401(k) Class Action Lawsuits

Plaintiffs allege that plan sponsors charge excessive fees to participants and/or provide poor-performing investment alternatives.

- Courts want a benchmark plan or fund for comparison. Without a meaningful benchmark, cases are often dismissed.
- Recent cases provide examples of acceptable practices:

Probably ok	Probably not
Revenue sharing with a cap	Uncapped revenue sharing
Offering many alternative options	Offering one bad investment among many
Not offering the cheapest funds available	Offering retail shares when institutional share are available



# 401(k) Class Action Lawsuits

- Employers must vigilantly review, compare and monitor:
  - investment fees and fund performance.
  - the services provided to the plan
  - service provider compensation and fees
  - investment policy and the plan's compliance with it
  - the range of the plan's investment lineup

**DOCUMENT THE REVIEW PROCESS!!!**

# Class Action 401(k) Lawsuits

New plaintiffs' claims regarding employer's use of **plan forfeitures**.

- Forfeitures occur when employees terminate employment with unvested benefits. Unvested amounts stay in the plan.
  - IRS allows employers to use forfeitures to offset future employer contributions. Proposed regulation pending.
  - Forfeitures can also be used to pay administrative expenses or increase benefits.
- Plaintiffs argue breach of fiduciary duty when employer used forfeitures to offset contributions, saying that forfeitures should be used to reduce costs for the participants, not the employers.
  - Numerous suits brought this year in California against major plan sponsors (Clorox, HP, Intuit, BMO Financial).
  - Even when granting a motion to dismiss, court decisions include troubling language for plan sponsors who use forfeitures.
  - Potential future impact of Loper Bright.



# SECURE 2.0 Continues...

## Changes Effective January 1, 2024:

- Long-Term Part-time Employees eligible for 401(k) plans after three years.
- RMD Starting Date increased to age 73.
- Student loan matching contributions allowed.
- Force-out distribution minimum increased to \$7,000.
- Emergency expense withdrawals.

## Changes Effective January 1, 2025:

- Long-Term Part-time Employees eligible for 401(k) plans after two years.
- Automatic enrollment required for 401(k) and 403(b) plans established after 12/29/2022.
- Catch-up contribution limit increases to \$11,250 ages 60-63.

**Written Amendment Deadline: December 31, 2026**

# Health Plan Rules

Final Rules under Mental Health Parity and Addiction Equity Act (MHPAEA):  
Effective January 1, 2025

- Protects against a medical plan imposing more stringent requirements for mental health and addiction benefits than for medical/surgical benefits.
  - Applies to both financial requirements (deductible and co-pays) and quantitative treatment limits (number of visits).
  - Applies to restrictions as written and in operation.
  - Plans must clearly articulate the criteria used for making claims decisions.
- Requires comparative analyses of the application of non-quantitative treatment limits.
  - Design and application requirements.
  - Data evaluation tests.

Failure to comply results in DOL prohibiting the plan from enforcing treatment limits.

# Health Plan Rules

## Affordable Care Act Section 1557 Nondiscrimination Rules

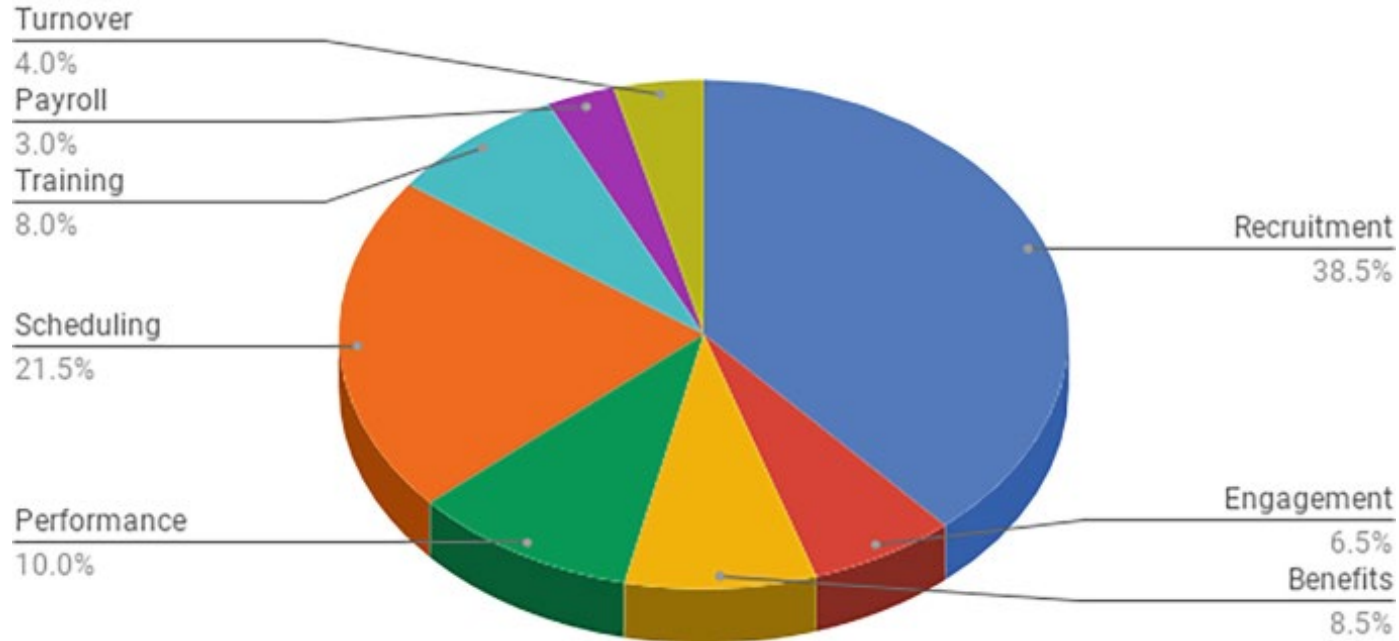
- Prohibits discrimination in health programs on the basis of race, color, national origin, sex, age or disability.
- Discrimination on the basis of sex includes discrimination on the basis of gender identity and sex stereotyping.
- Applies to insurance companies and third-party administrators who receive federal funds.
- Employers and employer health plans are generally not subject to the Rule, but your service providers may be! Could affect your plan design.
- Compliance deadline: July 5, 2025.

# AI for HR: Use Cases & Concerns

**Tedrick Housh**  
**Data Privacy & Cybersecurity Compliance**



## AI Applications by HR Category



Chan, L., Hogaboam, L., Cao, R. (2022). Artificial Intelligence in Human Resources. In: Applied Artificial Intelligence in Business. Applied Innovation and Technology Management. Springer, Cham. [https://doi.org/10.1007/978-3-031-05740-3\\_9](https://doi.org/10.1007/978-3-031-05740-3_9)



**“Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964” (May 18, 2023 Guidance)**



# EEOC Guidance on Assessing Bias in AI for Employment

- Could an employer's use of an algorithmic decision-making tool be a "selection procedure"? **Yes.**
- Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor? **Yes.**
- What is a "selection rate"? **Percentage of a group selected, e.g.  $48/80 = 60\%$  v.  $12/40 = 30\%$ .**
- What is the "four-fifths rule"? **Presume disparate impact if minority group's selection rate is less than 80% of majority's rate, e.g., 60% majority to 30% minority ratio is 50%, thus less than 80%.**
- Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII? **No.**
- If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that impact? **Yes. The failure to adopt a less discriminatory algorithm considered during development may give rise to liability.**



# Mobley v. Workday (N.D. Cal. July 12, 2024)

Job applicant, an African American male over the age of 40 who suffered from anxiety and depression, alleged race, age and disability discrimination due to Workday's algorithmic applicant screening tools (the "Service"). On a motion to dismiss for failure to state a claim, the court held:

- The Service was an "employer" under Title VII, ADEA, and ADA but was not an "employment agency." The Service recommended whom to advance in the hiring process.
- Applicant stated **disparate impact** discrimination claims, sufficiently alleging that he was qualified for the positions and that he had disclosed his protected traits when applying.
- Applicant failed to state a disparate treatment claim or that the Service aided and abetted under the California FEHA.

The court inferred the screen was automated because the Service sent him rejection emails in the middle of the night, and sometimes within an hour of his (100) application(s).

# AI – Transformative or Discriminatory?

- Recruiting talent in the artificial intelligence world
- *Derek Mobley v. Workday, Inc.*
  - Mr. Mobley's education, certifications, and experience
  - The application process through Workday
  - The rejections
  - The U.S. District Court weighs in
    - Is Workday an agent of the employers that utilize its platform?

# What Should Employers Do Now?

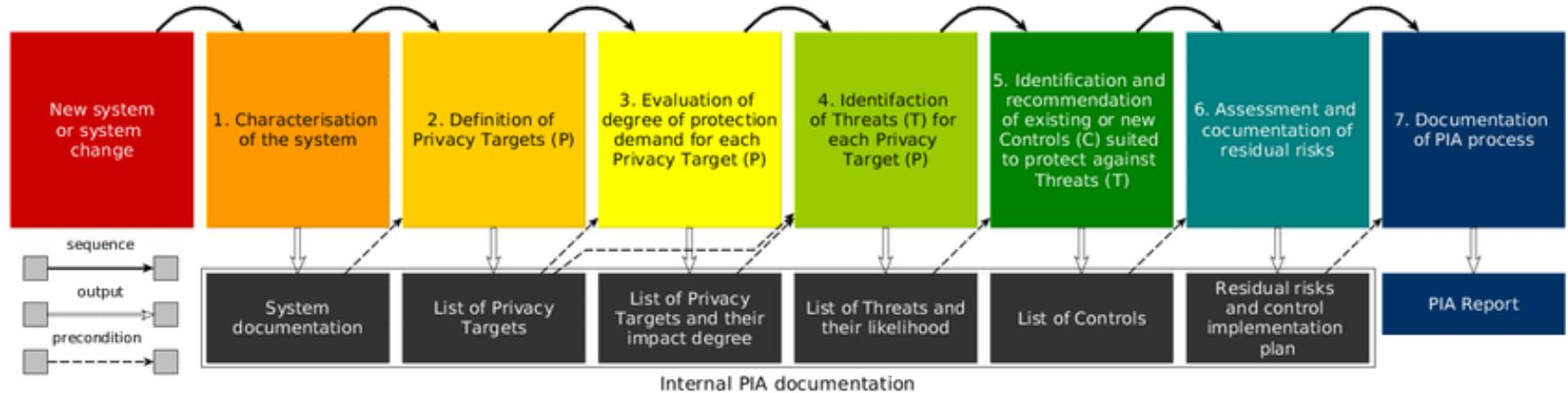
- Employers utilizing AI-powered hiring tools should review their processes to ensure that employers understand exactly how these tools impact individual hiring decisions – avoid disparate treatment
- Employers utilizing outside vendors providing such services should choose carefully among the offerings, including personality and assessment testing components

# Privacy Impact Assessments

## A Privacy Impact Assessment:

- Is an assessment tool to evaluate business operations involving personal information.
- May be required if you have data subjects in **California**, Connecticut, **Colorado**, Delaware, Florida, Iowa, Indiana, Montana, Oregon, Tennessee, Texas, Utah and/or Virginia. Expect this list of states to grow. Be aware of new Washington “My Health My Data” law.
- Usually triggered by a “heightened risk of harm to consumers” via targeted advertising, profiling, or the sale or processing of sensitive personal information (which includes biometric data).

# The PIA Methodology



“Mobile Health Systems for Community-Based Primary Care: Identifying Controls and Mitigating Privacy Threats,” by Iwaya, L., Fischer-Hübner, S., Ählfeldt, R. & Martucci, L., JMIR mhealth and uhealth, Mar. 20, 2019.

# But Wait, There's More!



# What Might the New Administration Bring for Employers?

- Mass deportations?
- Hostility toward DEI programs?
- Some changes favorable for employers?



# Anticipating Possible Mass Deportations

- California's Immigrant Worker Protection Act
  - Employers receiving notice of an I-9 audit must notify employees of the audit
  - Employers can voluntarily allow immigration agents to enter non-public areas in the workplace or review employee records, but can also insist on a subpoena or warrant
- Should employers conduct self-audits to evaluate I-9 compliance?
  - Labor Code section 1019.2 prohibits employers from re-verifying eligibility for employment unless required by federal law, but enforcement has been enjoined
- The importance of the attorney-client privilege

# Anticipating Attacks on DEI Programs

- Distinguish between basing employment decisions on membership in a protected class (which is generally prohibited by law) and efforts to assure that members of protected classes are included in applicant pools, promotion considerations, etc.
- Discuss specific initiatives with counsel

# Some Changes Favorable for Employers?

- Restrictions may be loosened on-
  - independent contractor status
  - unionization and collective bargaining
  - reporting pay data on EEO-1
  - minimum salary for exempt status
- Remember that California law may be more restrictive than federal law

# Q&A



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This program is valid for 2.0 PDCs for the SHRM-CPSM or SHRM-SCPSM.

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# Thank You!