POMS RISK CONTROL & INSURANCE SMARTER INSURANCE FOR SMARTER BUSINESS.

Starting the New Year on the Right Foot: Navigating HR and Workplace Safety in 2024

January 24, 2024

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Upcoming Webinars

Human Resources

AVOIDING FLSA VIOLATIONS: The Top Ten FLSA Alligators
January 25, 2024

Risk Control

Ergonomics: One of the Keys to a Successful Special Education Program
February 28, 2024

Artificial Intelligence: Safety Solution or Fools Gold?
March 27, 2024

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Agenda

- Cal OSHA Updates
- Federal/New Mexico OSHA Updates
- COVID Requirement Changes – California
- HR Federal and State Issues & Updates

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Cal OSHA updates

State of California CAL OSHA Department of Industrial Relations

- Workplace Violence Prevention Plan -SB 553
- Emergency Temporary Standard-Respirable Crystalline Silica
- Indoor Heat Standard moves closer to approval
- Revisions to the General and Construction Industry Lead standards (GISO 5198 and CSO 1532.1)

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Workplace Violence Prevention – SB 553

- SB 553 requires employers to have workplace violence prevention plans.
- The Division of Occupational Safety & Health (DOSH) needs to develop a standard to meet the requirements of SB 553 by December 31, 2025, and adopt it by December 31, 2026.
- However, the requirements of SB 553 are effective and enforceable by Cal-OSHA on July 1, 2024.

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The Four Workplace Violence Types:

- (I) "Type 1 violence," which means workplace violence committed by a person who has no legitimate business at the worksite, and includes violent acts by anyone who enters the workplace or approaches workers with the intent to commit a crime.
- (II) "Type 2 violence," which means workplace violence directed at employees by customers, clients, patients, students, inmates, or visitors.
- (III) "Type 3 violence," which means workplace violence against an employee by a present or former employee, supervisor, or manager.
- (IV) "Type 4 violence," which means workplace violence committed in the workplace by a person who does not work there, but has or is known to have had a personal relationship with an employee.

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WPV SB 553: Definitions

- "Threat of violence" means any verbal or written statement, including, but not limited to, texts, electronic messages, social media messages, or other online posts, or any behavioral or physical conduct, that conveys an intent, or that is reasonably perceived to convey an intent, to cause physical harm or to place someone in fear of physical harm, and that serves no legitimate purpose.
- "Workplace violence" means any act of violence or threat of violence that occurs in a place of employment.
- "Workplace violence" includes, but is not limited to, the following:
  - The threat or use of physical force against an employee that results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress, regardless of whether the employee sustains an injury.
  - An incident involving a threat or use of a firearm or other dangerous weapon, including the use of common objects as weapons, regardless of whether the employee sustains an injury.

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WPV-Elements (Continued)

- The plan shall be "easily accessible" to all employees.
- Names or job titles of the persons responsible for implementing the plan. If there are multiple persons responsible for the plan, their roles shall be clearly described.
- Effective procedures to obtain the active involvement of employees and authorized 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.
- Effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report.
- Effective procedures to ensure that supervisory and nonsupervisory employees comply with the plan.

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WPV Elements (Continued)

- Effective procedures to communicate with employees regarding workplace violence matters
- How an employee can report a violent incident, threat, or other workplace violence concern to the employer or law enforcement without fear of reprisal.
- How employee concerns will be investigated
- Effective procedures to respond to actual or potential workplace violence emergencies, including, but not limited to, all of the following:
  - Effective means to alert employees of the presence, location, and nature of workplace violence emergencies.
  - Evacuation or sheltering plans that are appropriate and feasible for the worksite.
  - How to obtain help from staff assigned to respond to workplace violence emergencies, if any, security personnel, if any, and law enforcement.

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WPV Elements (Continued)

- Procedures to develop and provide the training
- Procedures to identify and evaluate workplace violence hazards
- Procedures to correct workplace violence hazards
- Procedures for post incident response and investigation.
- Procedures to review the effectiveness of the plan and revise the plan as needed

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WPV Elements (Continued)

- Create and maintain a Violent Incident Log for every workplace violence incident.
  - For multi-employer worksite, the employer or employers whose employees experienced the workplace violence incident shall record the information in a violent incident log.

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What Poms is doing…

- Developing a WPV risk assessment via PRO to identify current policies in place and potential WPV emergencies.
- Developing a draft WPV template that will need to be customized for each client based on the results of the WPV risk assessment.
- Assisting in conducting training of the new WPV plan.

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Emergency Temporary Standard- Respirable Crystalline Silica

- Effective 12-29-23
- Applies to employees engaged in high-exposure tasks such as cutting, grinding, polishing, and cleanup of artificial stone containing more than 0.1% crystalline silica.
- Natural stone containing more than 10% crystalline silica.
- Section 5204.

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Indoor Heat Standard - Moving Along

- Would regulate indoor heat in workplaces.
- Will vote on the standard sometime in the first quarter of 2024.
- New section of GISO 3396.
- Would become effective when the temperatures for indoor work areas equal or exceeds 82 degrees Fahrenheit when employees are present.

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Lead Standard Revisions

- Revisions to lead permissible exposure limit and action level.
  - Proposed PEL from 50 micrograms per cubic meter of air to 10 over an 8-hour shift.
  - Proposed Action Level from 30 ug/m3 to 2.
- Questions regarding the methodology and assumptions used by the standards board.
- Still very controversial.
- The Board aims to adopt the standard in February 2024.

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Federal/NM OSHA Update

- Effective January 1, 2024 Final Rule Effective.
  - Electronic Submission Requirements for High Hazard Industries.
  - Establishments with 100 or more employees.
  - Legal Company Name required to be included.

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Federal/NM OSHA Update

- OSHA Penalties Increased
  - For Willful Violations, the minimum penalty increases from $10,360 to $11,524, the maximum penalty increases from $145,027 to $161,323.
  - For Repeated Violations, the maximum penalty goes from $145,027 to $161,323.
  - For Serious Violations, the maximum penalty goes from $14,502 to $16,131.
  - For other-than-serious violations, the maximum penalty goes from $14,502 to $16,131.

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Important Changes – COVID Cases

- January 17th, 2024 –
  - California Legislature passed Senate Bill 1159, which was signed into law by Governor Newsom on September 17, 2020.
  - SB 1159 places several requirements on employers, carriers, and third-party claim administrators regarding how to handle the assertion of an employee contracting COVID-19 on the job.
  - SB 1159 was set to sunset January 1st, 2023, but Assembly Bill 1751 extended the protections until January 1, 2024.
  - Cal OSHA provided several iterations of standards placing requirements on employers concerning how to ensure the safety of co-workers when the worksite had a positive COVID case. The latest iteration of these standards was communicated on January 9th, 2024. Many requirements have gone away while other remains or have been altered.

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COVID Items/Requirements Removed as of January 1st, 2024

- COVID Work-Related Injury Presumptions Eliminated
  - Senate Bill 1159 created several Labor Code sections that provide rules around when the assertion of a work-related COVID infection is presumed to have occurred at work. As of January 1st, 2024, these rules were eliminated.
  - Assertions by an employee of a positive COVID infection occurring on the job are now handled like any other assertion of a work-related injury.
- Employer's Requirement to Report Positive COVID Cases to the Carrier/Third Party Administrator Eliminated
  - Senate Bill 1159 created the requirement that employers report every positive COVID case to their carrier or third-party administrator. This requirement was to allow the carrier or administrator to determine if they were required to apply a work-related presumption to an employee claiming COVID as work-related because of an outbreak. As of January 1st, 2024, this is no longer required.

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COVID Items/Requirements Removed as of January 1st, 2024

- Reduced Timeframes for Carrier/Administrator to Investigate the Assertion of a Work-Related COVID Case Eliminated.
  - This bill also reduced the timeframe to investigate an assertion of a work-related COVID case from 90 to 45 days. As of January 1st, 2024, the timeframe to investigate any questionable case was restored to 90 calendar days.
- The requirement to use other COVID Leave Prior to the Payment of Temporary Disability Benefits Eliminated.
  - Finally, when the employee was unable to work, this bill required that an employer first exhaust any COVID related leave before the carrier or administrator could initiate the payment of temporary disability benefits. This is no longer the requirement. As of January 1st, 2024, the carrier or administrator must pay temporary disability benefits for loss time away from the job related to a work-related case of COVID.

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Conclusion

The requirements set forth in SB 1156, extended by AB 1751 expired on January 1st, 2024. This included employers having to report every positive COVID case to the carrier or administrator, limited timeframes to investigate the assertion of a work-related COVID case and extending a presumption an assertion of COVID was work related based on the number of infections at a worksite.

In addition, COVID related leave no longer needs to be used before the carrier or administrator is required to pay temporary disability benefits. CAL/OSHA left some of its requirements in place until February 3rd, 2025, while altering others.

It is important to regularly visit the Division of Occupational Safety and Health (DOSH) for important updates.

https://www.dir.ca.gov/dosh/coronavirus/

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Federal HR Regulatory Updates – Protections for Pregnant & Nursing Mothers

- The 2023 omnibus government funding bill included two provisions that expanded protections for pregnant and nursing employees.
  - **The Pregnant Workers Fairness Act (PWFA),** and
  - **The Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act**
  - These two laws are aligned with Title VII, the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and many existing state laws.
  - The new legislation clarifies many of the rights and treatment of working mothers that have historically been pieced together under multiple statutes, regulations, and court decisions.
- **The PWFA** requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations if doing so would not impose an undue hardship.
  - The PWFA took effect on January 1, 2023.
  - Employers should be mindful of these expanded protections for pregnant employees and carefully consider accommodations that may be needed as a result of their pregnancy.

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Federal HR Regulatory Updates – Protections for Pregnant & Nursing Mothers (Continued)

- **The PUMP Act** amended the FLSA by requiring employers to provide all employees—both exempt and non-exempt—with reasonable break time and a private location other than a restroom in which to express breast milk.
  - PWFA's requirements took effect in June 2023.
  - Employers with fewer than 50 employees may be granted an exemption from complying with the requirements if the employer is able to show that doing so would present an undue hardship in terms of expense or other difficulties in light of the employer's size, resources, nature, or business structure.
  - Employees must provide an employer with notice of an alleged failure to comply with the requirement to provide a private location to pump and give the employer 10 days to remedy the matter before initiating any legal action based on the failure.
  - Employers subject to the PUMP Act need to immediately ensure that they afford to all nursing mothers, regardless of their status as exempt or non-exempt, adequate break time and access to a private location for purposes of expressing breast milk.
  - Employers should also evaluate their current policies and procedures to ensure they are prepared to address accommodation requests from pregnant employees.

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Federal HR Regulatory Updates – USDOL Independent Contractors Final Rule

Note: On January 9, 2024, the USDOL issued a final rule on classification of independent contactors. *(See supplemental handout) Note: The IRS also addresses IC classification.*

- An independent contractor, or self-employed person, differs from a regular employee. One of the main differences between the two is that an employee is on the payroll and receives a steady paycheck from the employer.
- The test used under the FLSA is the "economic realities" test, which examines the totality of the circumstances in determining the economic reality of the relationship. The following factors are relevant considerations in determining employee status:
  - Degree of control;
  - Investment in facilities, tools, equipment;
  - Opportunity for profit and loss;
  - Permanency of the relationship;
  - Required skill; and
  - Whether the services rendered are an integral part of the company's business.
- In making the determination, the degree of control continues to be a major component of the analysis.
- It is very important for companies to review independent contractor status on a regular basis, and not to assume that previous analyses of the situation were correct.

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Federal HR Regulatory Updates – Weingarten Rights May Soon Apply to Non-Union EEs

The National Labor Relations Board (NLRB) recently released an advice memo in which it signaled it is evaluating whether to extend Weingarten rights to nonunion employers.

- Nonunion employees can have representative in investigatory interviews that could lead to discipline
- Nothing states a policy change is required
- Should your organization's policy change? Or just your practice?

The NLRB may be looking to expand this right to nonunion workforces once again may signal it will be more lenient when it comes to the type of conduct allowed by representatives in such meetings. Accordingly, this is an issue all employers should watch.

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Federal HR Regulatory Updates – The FTC Proposed Noncompete Rules

- The Federal Trade Commission (FTC) proposed a rule on January 5, 2023, prohibiting noncompete provisions in employment agreements.
  - Non-compete ban reportedly delayed until April 2024
  - The FTC rule proposed to ban agreements that are written so broadly as to effectively ban working in the same field post-employment and ban clauses that require paying unreasonable training costs if the employment terminates within a specified period.
- If the rule is implemented as proposed, it would bar employers from entering into or enforcing noncompete agreements with employees or independent contractors. The proposed rule would also nullify any existing agreements within six months from the date the rule takes effect.
- Employers should review their existing agreements and consider revising the agreements to include other contractual provisions that would protect their legitimate business interests even if the FTC rule takes effect.

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Federal HR Regulatory Updates – The NLRB Joint Employer Rule

- The National Labor Relations Board (NLRB) issued its Final Rule establishing a new standard under the National Labor Relations Act for determining whether two employers are "joint employers." The effective date for this new rule has been extended to February 26, 2024.
- There has already been opposition to this rule from the US Chamber of Commerce and a coalition of businesses who filed a lawsuit against the NLRB. The lawsuit alleges the joint employer rule is statutorily unauthorized and arbitrary and capricious. It is expected there will be continued opposition to this new standard throughout 2024.

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Federal HR Regulatory Updates – USDOL Proposed FLSA Rules

- The Department of Labor (DOL) has proposed to increase the salary threshold for overtime exemptions to $1,059 per week (or $55,068 annually) from $684 per week.
  (NOTE: California and other states already have a salary level basis for exemption that is higher than the current $684 per week.)
- If an employee in an executive, administrative or professional position makes less than $1,059 per week and the rule takes effect, as expected, the employee can earn overtime.
- The DOL has also proposed to increase the salary threshold for highly compensated employees to $143,988 from $107,432 annually and automatically update these salary changes every three years using contemporaneous wage data.

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California Labor Laws for 2024

- **Minimum wage** - As of January 1, 2024, the minimum wage increased to $16 per hour for all employers. This also means that exempt employees must be paid a minimum annual salary of $66,560.
- **Paid sick leave** - Starting on January 1, 2024, the law requires employers to provide and allow employees to use at least 40 hours or five days of paid sick leave per year.
- **Reproductive loss leave** - If an employee chooses to take leave under another leave entitlement provision, reproductive loss leave must be taken within three months of the last day of the other leave entitlement end date.
- **Written notice** - Starting on January 1, 2024, AB 636 requires an employer to include in the written notice additional information concerning the existence of a federal or state emergency or disaster declaration for the county or counties of employment.
- **Unenforceable and void noncompete agreements** – Under existing California law, noncompete agreements are generally unenforceable. This fall, Governor Newsom signed two laws that expand employee protections and employer obligations regarding noncompete agreements, effective January 1, 2024.
- **Cannabis use protections** – With the passage of S.B. 700, California joined the ranks of states protecting applicants and employees for cannabis use, under certain circumstances.

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California Labor Laws for 2024 (Continued)

- **Workplace violence prevention plan –** By July 1, 2024, nearly all California employers are required to design, implement and maintain a workplace violence prevention plan (WVPP). In addition, the new law requires employers to maintain a violent incident log, as well as provide yearly training to employees on how to identify and avoid workplace violence.
- **San Francisco, California, paid parental leave increased –** Effective December 4, 2023, San Francisco employers with 20 or more employees will be required to offer eight weeks of partial wage replacement to bond with a new child, rather than the previous six weeks, under the San Francisco Paid Parental Leave Ordinance.
- **Updated Wage Theft Prevention Notice** (AB 636): Employers are now required to provide more comprehensive wage theft prevention notices to employees, ensuring transparency in employment terms.
- **Anti-Retaliation Protections** (SB 497): This law creates a presumption of employer retaliation if adverse action is taken against an employee within 90 days of engaging in protected activities, making it easier for employees to establish a case of retaliation.
- **Changes in Arbitration Enforcement** (SB 365): Trial court proceedings will no longer be automatically stayed pending an appeal of an order denying a motion to compel arbitration, impacting how employers may approach arbitration.

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Impact of STERICYCLE, INC. Ruling

- On August 2, 2023, in *Stericycle, Inc., 372 NLRB No. 113 (2023)*, the National Labor Relations Board adopted a strict new legal standard for evaluating the validity of workplace rules under the National Labor Relations Act ("the Act").
- The NLRB overturned the *Boeing Co., 365 NLRB 154 (2017)*, its prior standard under which rules, policies and handbook provisions were treated either as categorically lawful or are subject to a test that weighed their tendency to restrict employee rights against the business needs justifying them.
- The NLRB re-adopted the test established in *Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)*, which declared unlawful any workplace rule that "would reasonably be interpreted" by employees as limiting protected activities.
  - The Lutheran Heritage standard was previously used by the NLRB to target commonly adopted rules and policies including, among many others, those promoting civility, courtesy, and productivity, and prohibiting harassing, disruptive, and insubordinate workplace conduct.

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Impact of STERICYCLE, INC. Ruling (Cont.)

- It is still unclear whether the Board's decision will be appealed. In the meantime, however, the decision is enforceable, and employers should ensure their work rules and policies are compliant.
- The *Lutheran Heritage* standard returns to case-by-case review of rules and heightens its scrutiny of policies in at least two important ways:

1. The NLRB now considers a rule ***presumptively unlawful if it "could"*** (rather than "would") be interpreted to limit employee rights, meaning rules may be invalidated even if there are alternative interpretations that are consistent with employee rights.
   - The NLRB sees employee rights under the Act as broadly defined, continually evolving and not susceptible to being specifically enumerated.
   - The Board may find a rule invalid based on potential interference with activities that were not, or could not have been, foreseen by the employer when drafted, and even if the rule was never interpreted or applied in an unlawful manner.

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Impact of STERICYCLE, INC. Ruling (Cont.)

- The *Lutheran Heritage* standard returns to case-by-case review of rules and heightens its scrutiny of policies in at least two important ways:

2. Whether a rule implicitly limits protected activities under the new standard will not be considered from the standpoint of a "reasonable" employee, as it was under Lutheran Heritage, but instead based on the perspective of someone "economically dependent" on the employer who considers engaging in activity protected by the Act.
   - As a result, rules that are appropriate under ordinary workplace circumstances may be found improper by the Board specifically in the context of a theoretical employee considering organizing or engaging in other concerted activities but fearful of doing so.
   - The Board's characterization of a "state of economic dependency" in the workplace implies that any workplace rule even arguably limiting employee rights is illegally coercive. The Board's decision does acknowledge there may be competing justifications for maintaining such rules.

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Impact of STERICYCLE, INC. Ruling (Cont.)

Practical Implications of the Decision for Employers:

- The Board will no longer treat categories of rules as appropriate but will separately scrutinize discrete provisions in employee handbooks on their own merits.
- The new standard construes rules from the idiosyncratic perspective of federal labor law and its very broad and evolving definition of protected, concerted activities.
- The NLRB now seems to assume coercion based on presumed "economic dependency" in the workplace and invites litigation about competing interests under an undefined standard.
- Should the Board find a work rule unlawful under Stericycle, the employer must timely remove, redact, or replace unlawful language and post and distribute notices to employees acknowledging the violation and providing information about their rights under the Act.
- Overly broad rules may be treated by the Board as unintentional evidence of discriminatory animus, muddying the stated reasons for discipline of an employee when applied to a given case.

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Impact of STERICYCLE, INC. Ruling (Cont.)

Practical Implications of the Decision for Employers:

- Maintaining an unlawful rule during an organizing campaign may result in the Board's invalidating an election where employees rejected union representation and ordering a rerun. Employers facing organizing efforts should definitely prioritize review of their workplace rules and policies prior to the filing of an election petition.
- Employers, regardless of whether they are unionized or not, should review their employee handbooks to ensure compliance with the Board's new employer handbook standards.
  - Employers should establish a regular, periodic review of their workplace rules with an eye toward the Board's new standard, to ensure that they prevent misunderstandings, avoid unintended interference with protected activities, and tailor the foreseeable effects of the rules on employee rights to demonstrable, legitimate, and substantial business justifications.
- The Board's new analysis of handbooks and work rules thus focuses on whether an employee could reasonably interpret the rule in question to have a "coercive meaning," even if a contrary, non-coercive interpretation of the rule is also reasonable.
- Please review November 2023 Webinar: Time to Review and Update Your Employment Policies:
  - https://www.pomsassoc.com/webinars/time-to-review-and-update-your-employment-policies

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Questions?

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