

Today's webinar will begin shortly. We are waiting for attendees to log on.

Presented by:

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Don't Get Stuck In the Room by the Elevator and Ice Machine: Top Employment Law Mistakes Hotel Operators Make

for the CALIFORNIA LODGING INDUSTRY ASSOCIATION

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WAGE & HOUR



EVERY YEAR WE ASK:

IS THIS THE YEAR THINGS GET
SIMPLER, MORE STRAIGHT
FORWARD AND LESS
COMPLICATED FOR EMPLOYERS?

For 2017 the answer is ...

No.

This Year We Saw Changes to All of the Following:

- Changes to the Federal Exemption Standards
- Changes to Minimum Wage
 - California Minimum Wage
 - Los Angeles City Minimum Wage
 - Los Angeles County Minimum Wage
 - San Diego Minimum Wage
 - San Francisco Minimum Wage
 - Oakland Minimum Wages
- Piece Rate Pay Standards
- Protections from PAGA claims
- Equal Pay Claims
- Protections for Employees Wishing to Discuss Their Wages
- And more...

Wage & Hour

- Record number of wage and hour lawsuits – due to sustained tough economic times.
- In 2014, 8,126 wage and hour lawsuits filed under the FLSA. This is a record high.
- The bulk of wage and hour lawsuits deal with misclassification of employees, alleged uncompensated “work” performed off the clock, and miscalculation of overtime pay.
- Many are brought in the form of class actions.

Popular FLSA/Labor Code Claims

- Non-exempt employees treated as exempt from overtime pay requirements



What's the Risk?

- Corporate Liability
- Individual Liability
 - FLSA Definition
 - Managers/executives are increasingly being considered for personal liability
- Criminal Liability



Salary Basis Test

- Must be paid on a “salary basis”
- Fixed and unvarying weekly salary must be paid without reduction for variations in the quantity or quality of work for any week in which any time was worked (with some exceptions)

Administrative Exemption – Duties Test

- Office or non-manual work related to general business operations of employer or customer
- Customarily and regularly exercise discretion and independent judgment in matters of significant operational concern

What You Should Do Now!

- Identify employees and job classifications that may be vulnerable to attack
- Determine how to handle the affected employees and job groups
 - Reclassification?
 - Fluctuating Workweek?
 - Remediation for questionable past practices?

What You Should Do Now!



- Review, audit, update, and execute
 - HR policies and procedures
 - All exempt job descriptions
 - All independent contractor relationships



What California Employers Should Look Forward to... SB 3

Date	26 or More Employees	25 or Fewer Employees
January 1, 2017	\$10.50	\$10.00 (current rate)
January 1, 2018	\$11.00	\$10.50
January 1, 2019	\$12.00	\$11.00
January 1, 2020	\$13.00	\$12.00
January 1, 2021	\$14.00	\$13.00
January 1, 2022	\$15.00	\$14.00
January 1, 2023	\$15.00	\$15.00

Meal & Rest Breaks



Meal and Rest Breaks

- ***Augustus v. ABM Security Services, Inc.***
 - ABM Security Services employs security guards and required them to remain on-call even while taking their rest breaks.
 - The California Supreme Court concluded that the on-call rest break policy violates California law. The nature of rest breaks requires employees to be relieved of all duties.
 - The mere possibility of being called back does not invalidate breaks.
 - Limited DLSE exemption process for on-duty rest breaks if there would be an undue hardship for employer.

Takeaways

- Rest period policies must be updated to explicitly state that employees are relieved of all duty.
- Need to implement policies and procedures to dissuade inference that field employees, with cell phones or dispatch equipment, are “on-call” on their rest break (i.e. advise them to turn off devices during rest period).
- Increasing importance to have acknowledgement in timekeeping system or timesheets that uninterrupted rest periods have been provided.

Wage & Hour - Overtime

- Off the Clock Claims on the Rise
 - Prep. Work for Next Shift
 - End of shift bank runs
 - Giving Report to next shift.



Wage & Hour - Uniforms

- Who pays?
- Who cleans?
- What about lost items?
- Non slip shoes?



Inspection of Personnel Records (AB 2674)

- Changed Law on 1/1/13:
- AB 2674 changes California Labor Code 1198.5
- Makes significant changes to the inspection and retention of personnel records, in the following areas:
 - (1) who has the right to inspect or request copies of the entire personnel files (employee or representative);
 - (2) any deadlines for providing access to files (30 days);
 - (3) must have a form the employees can use to request to view their personnel file;
 - (3) where and how records must be made available;
 - (4) an employer's obligations to retain files (3 years after separation from employment); and
 - (5) penalties for failure to comply (\$750 + a lawsuit for injunctive relief.



Paid Sick Leave (California now, everyone else later.)



AB 304: Paid Sick Leave Amendment

- Clarifies Healthy Workplaces, Healthy Families Act of 2014 (*i.e.*, paid sick leave law).
- Now allowed to use alternative accrual methods for leave so long as they meet the law's minimum standards.
- Guidelines provided on how to calculate rate of pay for leave:
 - Exempt – same as method used to calculate pay for other forms of paid leave
 - Non-exempt – either regular rate of pay for workweek or total wages (less overtime) divided by total hours worked in full pay periods during prior 90 days

AB 304: Paid Sick Leave Amendment

- Unlimited or undefined leave banks should be recorded as “unlimited” on wage statement
- Employee must work for same employer for at least 30 days within previous 12 months in order to accrue paid sick leave

AB 304: Practical Guidance for Employers

- You must ensure that accurate leave accrual is stated on every pay stub.
- You should consider moving from PTO back to separate vacation and sick leave:
 - Protected use of sick leave extends to all of PTO vs. just to 3 days/24 hours of sick leave
 - Front-loading of sick leave is easier to manage than accrual
 - Sick days need to be paid out at termination if combined into PTO

Social Networking



Social Networking Can Also Be A Nightmare For Business



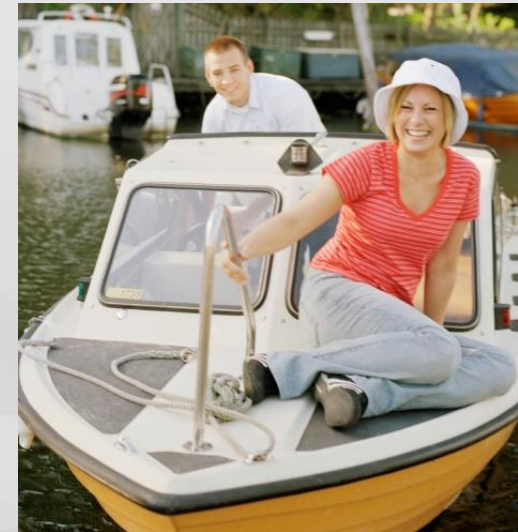
- A Burger King employee posted this picture with the caption: “This is the lettuce you eat at Burger King.”
- The picture contained “geo-tags” that allowed viewers to easily identify the Burger King location.

The Internet Can Be a Powerful Tool For Employers



Uncovering Employee Deceit

- Registered nurse on FMLA leave taken to recover from lower back and leg pain.
- Co-workers complained about her Facebook posts showing pictures of her Mexico vacation.
 - Riding in a boat, laying on a bed & holding beer bottles, caring for and holding her grandchildren, and making trips to Home Depot.



Risks: NLRB

- NLRB's General Counsel has issued 10 memoranda on social media. Issues raised:
 - ✓ Allegations of overboard employer social media policies
 - ✓ Unlawful discipline or discharge over contents of social media posts
 - ✓ Area of heightened interest for the NLRB

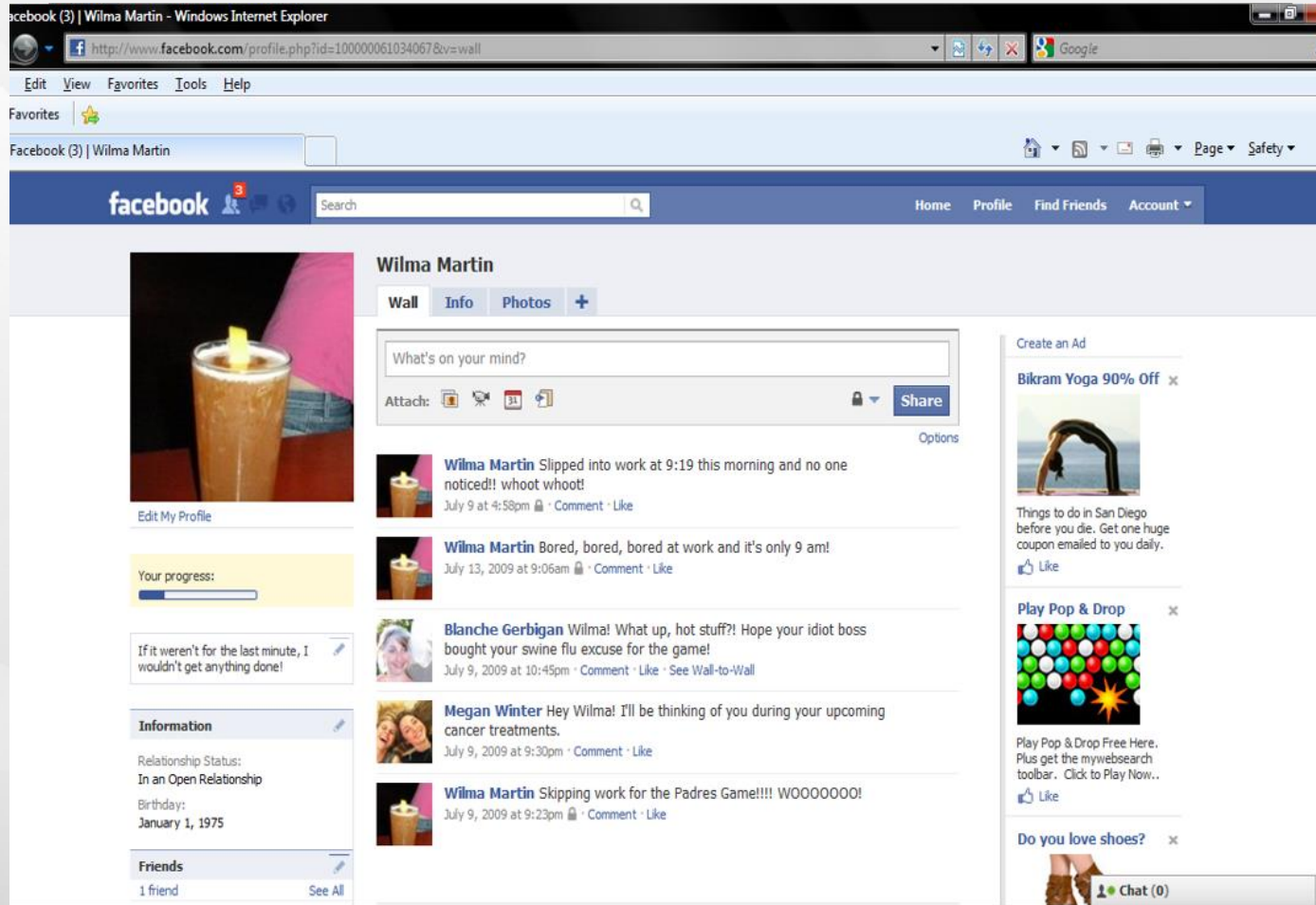


Primary Legal Issue: Discrimination Rules Still Apply

- Same discrimination rules apply
- Ignorance is bliss
 - Not knowing about protected categories is the best defense in failure to hire cases
- Software may track what Facebook pages are reviewed by hiring managers

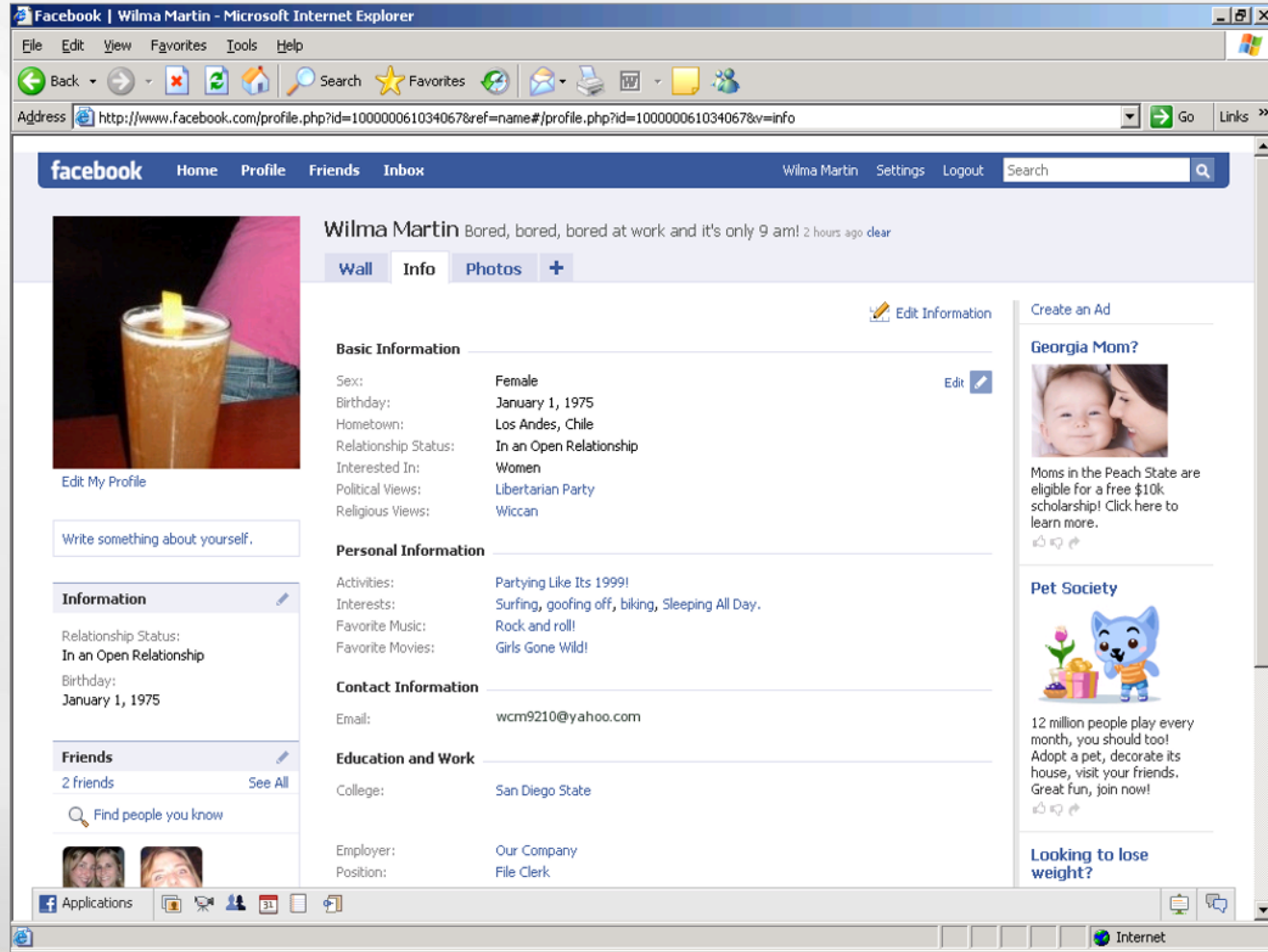


Risks: Knowledge of EEO-Sensitive Information





Risks: Knowledge of EEO-Sensitive Information



A Goldmine of Information for Employers

- The internet, and social networking sites in particular, present a goldmine of information for employers looking to monitor the workforce
- Examples . . .

Halloween Party

- An intern at a bank sent his boss the following e-mail:

“I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.”
- His boss responded the next day:

“Thanks for letting us know – hope everything is ok in New York. (cool wand)”

Halloween Party

- His boss also attached a photo from the intern's Facebook page
- The boss blind copied the entire bank on his reply so that they would all know that the intern skipped work to go to a Halloween party



Discipline Issue No. 2: Coercion

- Employers cannot coerce employees to give them access to social media for monitoring purposes
- E.g., employers cannot force employees to provide log in credentials



Discipline Issue No. 3: Off Duty Conduct

- California and approximately 27 other states prohibit discrimination based on lawful off-duty conduct
- Off-duty conduct, even though embarrassing, may not be used to discipline an employee unless it falls within certain types of conduct

Discipline Issue No. 3: Off Duty Conduct

- Off duty conduct subject to discipline:
 - Unlawful conduct
 - Publishing trade secrets / confidential info.
 - Misrepresentations regarding the business
 - Inappropriate use of company name/logo

Discipline Issue No. 3: Off Duty Conduct

- Off duty conduct potentially not subject to discipline:
 - Alcohol consumption
 - Promiscuous behavior
 - Unpopular political views

What An Employer Should Do?

- Clear Policies on Harassment
- Clear Policies on Social Media Use That Follows The Law
- Consistent Application

FINAL PAY



Timing of Final Pay

- **Why is it Important to Get This Right?** - California Labor Code Section 203 gives employees penalty pay for up to 30 days pay when they do not receive their final pay timely.
- **Rule:** If the employee quit without notice then we have 72 hours to issue their final pay, including any accrued, unused vacation/PTO, as well as tips (share of service charges).

If we terminate an employee then final pay is due on the last date of employment (even if we terminate them on the spot for something that happened during a shift).

Tricky part – If an employee quits with less than 72 hours notice then we have 72 hours from when they tell us they are quitting to get them their final pay. For instance, if they give us 24 hours notice, then we would have 48 hours after their separation to pay them their final pay. Best practice would be to just get it done at time of separation so there are no loose ends.

- **Where:** Make available at the employees worksite. Labor Commissioner says send it to them to hold for employee. What do you think about that idea?



Accessibility



BACKGROUND

OVERVIEW OF LAW

Title III provides, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.”

TITLE III CONSTRUCTION

Existing: Pre January 26, 1993

- Barrier removal that is readily achievable
- Continuing obligation

Alterations: commenced after January 26, 1992

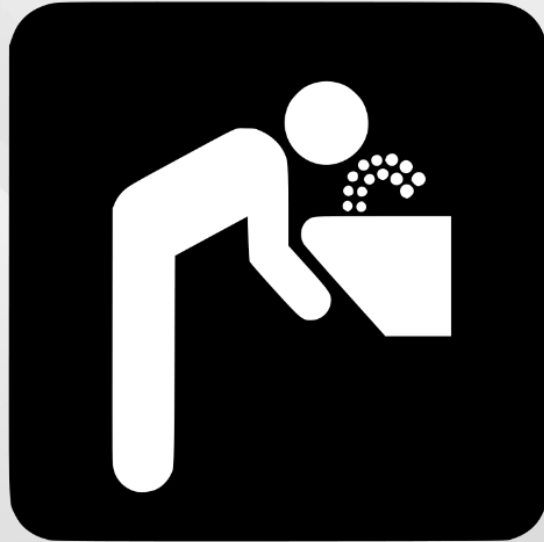
- Made so altered area is “readily accessible” to and usable by” disabled individuals

TITLE III CONSTRUCTION

New: All new construction whether public accommodations or commercial facilities after January 26, 1993 had to comply with ADA Standards for Accessible Design (1991 ADAAG)

ADA FACILITIES REQUIREMENTS

- There are almost a thousand ADA facility requirements that apply to public accommodations



TOP PRIORITIES FOR DOJ & ADVOCATES

- Accessible Parking and Access Aisles
- Access to the Entrance
- Toilet Rooms
- Sales and Service Counters
- ATMs & Vending Machines

DEFENDING TITLE III LAWSUIT

1. Research Plaintiff and Plaintiff's Counsel
 - "Frequent flier"
 - "True believer"
 - Single incident
 - Date Incident
 - Preserve video/evidence
2. Research public accommodation
 - Construction date
 - Renovations
 - Future construction / alterations
3. Potential for motion to dismiss
 - Standing
4. Joinder other Title III lawsuits

DEFENDING TITLE III LAWSUIT

5. Potential Stay v. Aggressive Discovery
6. Accessibility Survey
 - Internal v. External
7. Property Remediation
8. Settlement / Offer of Judgment
9. Motion for Summary Judgment
 - Standing / Mootness
 - Standing / Intent to Return

REMEDIATION RECOMMENDATIONS

1. Survey existing facilities
2. Make obvious corrections first
 - External Areas
3. Redesign prototypes for new stores/facilities – get input from experienced architect

REMEDIATION RECOMMENDATIONS

4. Train or retrain personnel in dealing with and assisting disabled patrons
 - Implement Written Policy
5. Consider costs of litigation versus costs of compliance

Single-Use Bathrooms (AB 1732)

- Applies to all single-user toilet facilities in any business establishment, place of public accommodation, or government agency
- All such facilities must be identified as all-gender facilities
- Authorizes inspections for compliance
- Law effective March 1, 2017



SERVICE ANIMALS



Service Animals: Definition

- Definition significantly narrowed to include only dogs individually trained to do work or perform tasks for the benefit of an individual with a disability.
- No other animals – except trained miniature horses in limited circumstances – are permitted.

Service Animals: Verification

- Places of Public Accommodation:
 - **May** ask individuals seeking accompaniment by an animal
 - If the animal is required due to a disability; and
 - What task/work the animal is trained to do
 - **May** remove a service animal that is “out of control” if its handler does not take effective action to control it, or if the animal is not housebroken
- **May not** require proof of service animal certification/licensing
 - There is no official, universally recognized, certification/badge/license

Prop 64 Effect On Our Workplace

- Legalized the *recreational use* of marijuana in California for adults over 21
- Legalized growing of up to 6 marijuana plants for personal use

In short...

it is no longer *illegal* to use marijuana recreationally



So...Can Mary Jane Come to Work?

- What Prop 64 does NOT do:
 - Does not supersede right of employers to maintain a drug-free workplace;
 - Does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace.
- Takeaways:
 - Cannot take adverse action or test simply based on display of a medical marijuana card. Need reasonable suspicion at workplace.
 - Interactive process required when employee indicates need for accommodation and that taking marijuana for pain assistance.
 - Assembly Bill 7, also passed last year, discusses prohibition and ban in the workplace of e-cigarettes containing nicotine except in certain locations.

OSHA Drug Testing Regulations

- To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.
- Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

OSHA Drug Testing Regulations

- Effect of regulations:
 - Determining whether you are obligated, per contract, to have blanket drug testing policies.
 - Deciding under what circumstances you will conduct post-accident testing (e.g. after \$500 of damage or serious bodily injury caused by the accident).
 - Update policies accordingly.
 - Train managers, based on Prop 64 and these new regulations, on when drug testing is proper.

Questions



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Thank You



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