

Your Next Headache Could Be...Pay Equity, Class Actions, or Biometric Privacy?

#staffinglaw

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Haight has a multifaceted practice focusing on employment litigation, counseling, and compliance, as well as intellectual property and trade secret matters. In addition, she chairs the steering committee of the Mintz Women's Initiative.



Sarah Kroll-Rosenbaum, Esq.
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Kroll-Rosenbaum's practice focuses on efficiently and creatively defending companies in complex litigation. Over the past several years, she has led the defense of more than a dozen temporary health care staffing companies in class, collective, and representative actions.

Covid-19 Legal Issues Become Endemic

Covid-19

- **State and local laws continue to impact employer vaccine policies**
 - Texas: Employees may obtain exemptions for medical or religious reasons, as well as for reasons of “personal conscience.”
 - Florida: Employees may obtain (automatically granted) exemptions for medical reasons, a sincerely held religious belief, demonstrated Covid-19 immunity, employer’s agreement to comply with regular testing at the employer’s expense, or the employer’s agreement to use employer-provided PPE.
- **Office safety in the Covid era**
 - California (Temporary Emergency Standard) and New York (HERO Act) both require employers to put into place and otherwise maintain certain preparedness plans for their physical work sites to best prevent employee illness or exposure.

**PAGA and the
Possible Future of
Mass(ively Annoying)
Arbitrations and the
Return of Class
Actions**

PAGA Basics

- California Labor Code 2698 *et seq.*, the Private Attorneys General Act
- Allows individuals to bring representative actions against employers for civil penalties on behalf of the state for certain (many) labor code violations
 - \$100 penalty for the first violation
 - \$200 penalty for all subsequent violation
 - 75% of the recovery goes to the state

Viking River Cruises Inc. v. Moriana

Case No. 20-1573

- Does the Federal Arbitration Act permit individuals to waive their right to bring a PAGA action?
- Challenge to the *Iskanian* Rule—California Supreme Court said an individual may not waive right to bring a representative PAGA action
- Expect a SCOTUS decision by the end of this term
- Practical implications of likely ruling—more arbitration

Can a Court Strike a PAGA Claim for Lack of Manageability?

- *Wesson v Staples The Office Superstore LLC*, 68 Cal. App. 5th 746 (2021)
- Courts have the inherent ability to strike a PAGA claim if it is unmanageable for trial
- *Estrada v Royalty Carpet Mills Inc.*, 22 WL 855568 (Cal. Ct. App., March 23, 2022)
- California Courts cannot strike a PAGA claim based on manageability

California Supreme Court will need to decide.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Amends the FAA to prohibit predispute mandatory arbitration of sexual assault and/or sexual harassment disputes
- Applies to disputes occurring after March 3, 2022
- Applies to *cases*, not claims
- Practical implications

Substantive Legal Areas With Risk

Restrictive Covenants

- **Enforceability of noncompetes and nonsolicits varies by jurisdiction**
 - Some only allow for noncompetes to be enforced with employees above a certain salary threshold
 - Example, IL: \$75,000
 - Differing consideration requirements—for some states, continued or offered employment is sufficient; for others, need to provide additional consideration
 - Example, MA: garden leave
- **Nondisclosures in the post #MeToo era**
 - Cannot prohibit disclosure of information about unlawful acts in the workplace—particularly concerning discrimination, sexual harassment, and sexual assault complaints—in a growing number of states; for example, NJ, CA, NY, WY

Pay Disclosure

- **Growing number of jurisdictions have enacted pay transparency legislation**
 - CA, CO, CT, MD, ND, NYC, OH (Toledo, Cincinnati), RI, WA
 - Pending: AL, CA (expanding current requirements), MA, NY, SC
- **The latest: NYC—salary transparency law**
 - This amends NYC Human Rights Law, requiring employers to state the minimum and maximum salary for any position to be performed in NYC

Biometrics

- **Defining biometrics and their use in the workplace**
 - Potential uses: health and safety screening; security (building and technology access); timekeeping; immigration compliance
 - Implicates a number of different federal laws: HIPAA, GINA (Genetic Information Nondiscrimination Act), FCRA, GDPR (if in the EU)
- **Growing number of states enacting biometric legislation: IL, TX, and WA**
 - IL: First state to enact, BIPA imposes a number of obligations on private employers who possess and collect biometric data—ranging from publishing their retention policy and guidelines for destroying the data to notifying individuals when they collect or otherwise receive their data
 - Allows for a private cause of action to be brought by the individual (as opposed by the state AG)

Third-Party Liability

The Good

- **Clients of staffing companies are third-party beneficiaries of the arbitration agreements between the staffing company and employee.**
 - *Franklin v. Community Regional Medical Center*, 998 F.3d 867 (9th Cir. 2021)

The Unsettled

- **Can a staffing company employee turn around and sue the client after competition of litigation with the staffing company?**
 - *Grande v. Eisenhower Medical Center*, Case No. S261247 (California Supreme Court)

Q&A

Thank you!



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