



The First 100 Days, California Style: The Epicenter of Privacy and Employment Change

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Sheryl Falk is recognized as a leading lawyer in privacy, data security and trade secrets. As co-leader of the firm's Global Privacy and Data Security Practice, she brings significant expertise and strategic thinking to help her clients comply with their quickly changing privacy and data security obligations. Sheryl works closely with her clients, protecting their critical data by investigating and responding to data security incidents and handling data privacy and trade secret litigation. One of the first attorneys in the US to be certified in computer forensics, Sheryl is a former Federal Prosecutor and Certified Information Privacy Professional and has been recognized in *Legal 500*.



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Chair of Winston's Los Angeles and Silicon Valley labor and employment practices, Monique focuses on defending employers in large national wage and hour class actions. Since 2012, she has been recognized in Southern California's *Super Lawyers* as a "Rising Star" in the area of Employment Litigation: Defense, has repeatedly been named a "Top Woman Attorney in Southern California" by *Los Angeles Magazine*, and received *Euromoney LMG's* 2018 Rising Star award for labor and employment, an award given to the top attorney under the age of 40 in the country.

LABOR & EMPLOYMENT

Can Employers Require COVID-19 Vaccinations?

- Vaccines are here!
- Employers may require employees to be vaccinated in many circumstances
 - Pre-screening vaccination questions must be job-related and consistent with business necessity
 - Must consider medical and religious accommodations
- Business-by-business analysis required

Considerations for Requiring Vaccinations

- Nature of business
- Where do employees work?
- Do employees work closely with each other?
- Do employees provide in-person customer service?
- Are vaccines available to employees?
- What do you want to accomplish by requiring the vaccine?

Other Vaccination Considerations

- California employers who require vaccination must pay the cost/pay for time to get vaccine
- Reasonable accommodations and the interactive process; ensuring no retaliation
- Exclusion of employees who refuse vaccinations
- Unionized workforce considerations
- Access to vaccines
- Confirming employees have been vaccinated
- Liability for side effects
- Will mandatory vaccines result in higher vaccination rates?
- **Potential claims for failing to require vaccinations**

2021 COVID-Related “To Do” List

- Plan and Prepare for COVID-19 Notice Requirements
- Revise the Company’s leave policies to comply with changes to CFRA
- Review and Comply with California COVID-19 Supplemental Paid Sick Leaves in Effect in 2021
- Review and Revise the Company’s Written COVID-19 Prevention Plan and Provide Employee Training

Plan and Prepare for COVID-19 Notice Requirements

- California employers must take the following action within **one business day** of a “potential exposure” in the workplace:
 - Provide Notice to:
 - exposed employees and employers of subcontracted employees who were at the worksite within the infectious period who may have been exposed to COVID-19
 - employee representatives (including unions, if applicable) of exposure to employees and employers of subcontracted employees
 - non-exposed employees
 - local public health department
 - Translation Required

Plan and Prepare for COVID-19 Notice Requirements (cont.)

- Notices must include information regarding COVID-19-related benefits that employees may receive, including workers' compensation benefits, COVID-19 related leave, company sick leave, paid sick leave, as well as the Company's anti-harassment, and anti-retaliation policies
- Notices must also include information about the Company's disinfection protocols and safety plan to eliminate any further exposure
- Within **48 hours**, California employers must notify the local public health department if there are three or more laboratory-confirmed cases of COVID-19 among workers
- Failure to comply may result in civil penalties of up to \$25,000 for each violation

Revise the Company's Leave Policies to Comply with Changes to the CFRA

- CFRA used to only apply to employers with at least 50 employees within a 75-mile radius
 - Now expanded to employers with 5 or more employees
 - Employees are eligible if they worked for the employer for at least 12 months (can be non-consecutive) and worked at least 1,250 hours in the 12-month period preceding the leave

Revise the Company's Leave Policies to Comply with Changes to the CFRA

- New CFRA use expansions:
 - More family members (grandparents, grandchildren, siblings, adult children – in addition to parents, minor children, spouses and registered domestic partners)
 - Broader Baby Bonding Leave
 - Because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child or parent in the United States Armed Forces
 - Elimination of the Key Employee Exception to CFRA Leave
- Potential for Employees to take CFRA and FMLA Leave for different reasons with no overlap

COVID-19 Paid Leaves Available to Employees in California

- CA Paid Family Leave
- CA Paid Sick Leave
- FFCRA Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave – Expired, but permissible use through 3/31/21
- Los Angeles City Emergency Covid-19 leave Ordinance
- Long Beach City Covid-19 Paid Supplemental Sick Leave Ordinance
- San Mateo County Emergency Covid-19 Paid Sick Leave Ordinance
- Sacramento County Worker Protection Health and Safety Act
- San Francisco Public Health Emergency Leave Ordinance
- San Jose City Covid-19 Paid Sick Leave Ordinance

Review and Revise the Company's Written COVID-19 Prevention Plan and Provide Employee Training

- Cal/OSHA Emergency Temporary Standards went into effect on November 30, 2020; Monetary penalties began being assessed February 1, 2021
- Compliance requires a written COVID-19 Prevention Program covering the following:
 - Communication to employees about the employer's COVID-19 prevention procedures
 - Identification, evaluation and correction of COVID-19 hazards
 - Physical distancing
 - Use of PPE
 - Engineering controls and administrative controls to reduce transmission risk
 - Procedures to investigate and respond to COVID-19 cases in the workplace
 - COVID-19 trainings for employees
 - Testing for employees who are exposed to COVID-19 in the workplace
 - Exclusion of COVID-19 cases and exposed employees from the workplace until they are no longer an infection risk
 - Return to work criteria
 - Maintenance of records of COVID-19 cases and reporting of multiple cases to Cal/OSHA and the local health department

Pandemic-Related Wage and Hour Considerations

- Reduced Compensation/Duties and Effects on Exempt Status
 - Minimum wage rate increases
 - California minimum wage rate increased from \$12 to \$13 for employers with 25 or fewer employees and from \$13 to \$14 for employers with 25 or more employees
 - Salary-Basis Test for exempt employees - \$58,240/\$54,080
- Work from Home Expense Reimbursements
- Work from Home Considerations for Non-Exempt Employees
- Calculation of Pandemic/Hazard Bonuses Into Regular Rate of Pay
- Compensable Time for Pre- and Post-Shift Activities
- Wage statements and paid leaves

PRIVACY

Will Congress Pass a Federal Privacy Law?

- Shift in US political landscape
- Consumer awareness/demand for transparency/rights
- Pressure from state privacy laws
- Schrems II/EU effect on international data transfers
- International action on privacy

What Would Privacy Regulation Under the Biden Administration Look Like?

- Biden platform included the Consumer Privacy Bill of Rights and the Electronic Communications Privacy Act
- Kamala Harris – champion for Privacy rights as California AG
- Democratic privacy bills pending:
 - Consumer Online Privacy Rights Act
 - American Framework to Ensure Data Access, Transparency, and Accountability Act
 - Facial recognition bills
- Republican privacy bills pending: Safe Data Act
- Bipartisan support for APPS Act – mobile app collection and use
- Points of contention – Preemption/private right of action

What is the Impact of the New Federal IoT Cybersecurity Law?

- Law enacted December 4, 2020
- Applicable to Federal IoT purchase/use
- NIST Standards to be released in June 2021
 - Secure development
 - Identify management
 - Patching
 - Configuration management
- Vulnerability reporting system
- Benchmark for private sector for “reasonable security”

CCPA: Recent Developments

- Enforcement notices issued
 - Focus on sale of data
 - Impacted by COVID-19
- Dec. 2020 - AG proposed fourth set of CCPA regulation modifications
- Multiple class actions filed arising out of data breaches/violations of CCPA
- *McCoy v. Alphabet* decision – No private right of action for general violation of CCPA

CRPA: Highlights

- Effective Jan. 1, 2023
- Adds and updates consumer rights
- Creates “sensitive data” category
- Strengthens children’s data protections
- Restricts automated decision making/profiling
- Imposes necessity-based data minimization
- Imposes obligations on service providers/contractors/vendors
- Expanded breach liability
- Creates California Privacy Protection Agency

Virginia Privacy Law

- Effective data Jan. 1, 2023
- No monetary threshold/100,000 Virginia Residents/50% gross revenue data sales
- New and updated Consumer Rights
- Targeted advertising
- Data Controller obligations
- Enforcement by Attorney General
- No private right of action

More State Privacy Regulation Looming

- COVID-related Privacy laws
- 20 State privacy laws pending
 - Consumer rights
 - Business obligations
 - Reasonable security measures
 - Private right of action
- Florida – sweeping privacy reform
- NY – Privacy Bill of Rights

How Should Companies Respond to Recent Changes in Privacy?

- Resource for complicated privacy compliance
- Conduct a privacy impact assessment
- Make deliberate decisions data collection/use to meet purpose limitation
- Focus on data minimization
- Consider that strict laws drive best practices
- Implement process to update/incorporate reasonable security
- Update data breach response plan

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