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Constangy, Brooks, Smith & Prophete, LLP offers a wide lens on workplace law. Since 1946, the firm has helped employers navigate the legal and regulatory environments of the changing workplace. Constangy represents a wide range of Fortune 500 corporations, small companies, government agencies and non-profit organizations. From its roots in labor relations and manufacturing, to recent work in helping employers understand the convergence of digital technology in the modern workplace, Constangy's capabilities cover

all aspects of the employer-employee relationship. The firm has more than 180 attorneys across 15 states, offering services ranging from the defence of single and multi-plaintiff employment discrimination, harassment and retaliation claims to complex wage and hour litigation, workplace safety, and affirmative action compliance issues, as well as OSHA, workers' compensation, ERISA and employee benefits, immigration, and labor relations.

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 “Gig” Economy and Other Technological Advances

California is diverse – socially, politically, economically and geographically. The Golden State is home to nearly 40 million people, a thriving technology sector in Silicon Valley, the world’s entertainment capital in Hollywood and the nation’s agricultural heartland in the Central Valley. While the region’s allure for economic growth and development is undeniable, its employee-friendly employment laws present unique challenges for any global entity looking to establish or enhance a presence in the state.

California’s employment laws are often progressive, and usually provide workers significantly greater levels of protection than those offered by other states or by federal laws. These differences are most notable in areas such as: high minimum wages; paid sick leave; a variety of protected leave laws; stringent, and often punitive, wage and hour laws, including daily overtime, mandatory premium wages for missed meal, rest and recovery periods for non-exempt employees; and penalties imposed by individual lawsuits for a variety of working condition violations. Most recently, California enacted a consumer data privacy act that is similar to the European Union’s GDPR that may impact how employers treat employment data of its employees, applicants, temporary workers, interns, volunteers, independent contractors, and those persons’ dependents and/or beneficiaries. The state is also known for enhanced protections against discrimination, harassment and retaliation.

Most recently, California enacted protections against hair style and/or texture discrimination and broadened the scope of hostile work environment harassment to include a single incident. As a result, employers must be keenly aware of these unique, complex, and at times contradictory, differences when administering a workforce that includes workers both inside and outside the state.

California has a vibrant gig economy, most prominently in the technology and entertainment/motion picture sectors, which provides fertile ground for new business start-ups. However, while new small businesses envision a workplace free from restrictions, California has numerous wage and hour laws that make it difficult for new business start-ups. For example, California’s record-keeping requirements and its duty to pay employees for all time worked make it difficult for employees to work remotely and unsupervised. New businesses tend to operate with a loose attention to rules, which can be a problem when they fail to provide mandatory meal and rest periods. Such a failure can result in a failure to pay employees a premium wage for missed meal and rest breaks. New businesses also tend to view all employees as exempt from overtime coverage, but California’s strict over-

time exemption rules can lead to substantial liability when employees are misclassified.

Similarly, while outside consultants remain lawful, designating a worker as an outside consultant requires employers to establish independent contractor status for the consultant, which will be difficult under California law. Most recently, in 2018, the California Supreme Court adopted a three-part test to determine whether an individual worker was properly classified as an independent contractor. Under this test, an individual is an independent contractor only if the hiring entity establishes that:

- it does not direct the worker in the performance of the individual’s services;
- the individual performs work outside the scope of the company’s typical business; and
- the individual is “customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity”, such as affirmatively going into business for themselves as a corporation or limited liability company.

This test is anticipated to be codified in the near future as the bill is pending before the State Senate after passing in the Assembly earlier in 2019. Further, in May 2019, the Ninth Circuit has opined that the so-called ‘ABC test’ applies retroactively. As the services that gig workers perform tend to be essential to the hiring entity’s business, new gig economy businesses run a serious risk of misclassifying their workers if they designate them as consultants and independent contractors, thereby incurring substantial liability for tax penalties for failing to withhold payroll taxes, liability for failure to pay minimum wages, liability for failure to pay overtime, liability for failure to reimburse expenses, and other wage and hour violations.

The implications of this new test on the very foundation of many app-centered businesses dominating California’s gig economy remains to be determined.

1.2 “Me Too” and Other Movements

In response to the #MeToo movement, the California legislature has introduced multiple legislative proposals to address harassing conduct in the workplace. One new law provides enhanced protection from claims of defamation for sex harassment investigations by conferring a qualified privilege on certain communications made in connection with an investigation. In September 2018, the governor signed several other laws that include: increased harassment prevention training obligations; limitations on whether an employer may prohibit employees from discussing harassment claims; and restrictions on employers’ ability to recover legal costs after successfully defending a sexual harassment lawsuit. Employers can expect that California will continue efforts to enact new legislation in this arena.

One such effort is the recent California law requiring each publicly-held company headquartered in California to have at least one female on its board of directors by the end of 2019 and to add one or more females, depending on the size of the board, by the end of 2021. This law's stated purpose is to address the lack of representation of women on boards of directors.

California also has a history of enacting statutes to decrease pay inequities and to promote equal pay. The California Equal Pay Act of 1949 was enacted to target wage discrimination against women by prohibiting disparities in wages based on gender. California has expanded that statute beyond federal law to include other protected classifications, such as race and ethnicity, and it recently enacted a statute that prohibits inquiries about an applicant's salary history and erodes many defenses to pay equity claims. Employers can expect the California legislature to adopt additional statutes to promote pay equity and, as a result, should consider conducting audits of their pay practices for compliance with California's growing body of pay equity laws. Employers should also consider removing salary history questions from applications and interviews, as basing a new employee's salary on that information could unwittingly result in an unjustified pay disparity.

1.3 Decline in Union Membership

Union membership continues to grow in California in the public sector, even though union membership in the private sector continues to decline – this is in line with most of the country. Private sector unionization is more prevalent in Northern California than in Southern California, where unions tend to be aligned with the motion picture/television, healthcare, and hospitality industries.

1.4 National Labor Relations Board

Many of the protections afforded by collective bargaining are less necessary in California, where employee-friendly laws already provide a significant level of protection. In other words, California employment laws already provide a high 'floor' of protection that makes the prospect of union representation and the obligation to pay union dues less attractive than in many states where the floor of protection is much lower.

Additionally, since November 2017 when the new NLRB General Counsel was confirmed, many of the policies enacted under the Obama-era NLRB have been rolled back. In a recent 'workplace rules' memorandum, the NLRB advised that employers in California, as with the rest of the country, can now prohibit employees from using company emails for personal reasons during work time, but not during non-work time. In addition, court decisions that determined typical employer handbook policies to be unlawful because they might chill (ie, discourage) employee speech will no longer preclude many employer confidentiality policies. However,

the NLRB's relaxation of its Obama-era decisions that found joint employer liability even when there was little control by an entity may not change the status of joint employment in California, which is broadly defined.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

California favors the employer-employee relationship over other forms of relationships with workers. Most recently, the California Supreme Court expanded the definition of 'employer' by adopting a simplified three-part test to determine when a worker is an employee or an independent contractor. The state legislature is looking to codify this test, as the bill has most recently passed the Assembly and is being reviewed by a Senate Committee. The second factor of the test – ie, "that the worker performs work that is outside the usual course of the hiring entity's business" – significantly narrows the scope of workers traditionally classified as independent contractors. For example, a business that operates various urgent healthcare facilities may not designate all physicians as independent contractors because physicians perform work that is an integral part of the entity's regular business.

The other two factors of this test also create difficult obstacles to establishing independent contractor status – (i) the worker must be free from the direction or control of the hirer and (ii) the workers must be customarily engaged in the same nature of trade, occupation or business as the work performed for the hiring entity. Thus, with regard to the latter factor, a worker who provides plumbing services to a business may not be an independent contractor unless that worker also has a separate "trade, occupation, or business" as a plumber. If not, he or she must be paid as an employee for the plumbing services provided.

Joint employer liability for established independent contractors is also a real risk in California. Business entities – such as franchisors, general contractors and 'client employers' (ie, those who utilize temporary staffing companies) – may still incur joint liability for the employment violations of those separate businesses. Indeed, California imposes liability for many wage and hour violations or California Occupational Safety and Health Act (Cal OSHA) violations by statute on client employers who obtain workers through temporary agencies and other labor contractors, such as those providing janitorial services and security guard services. Those client employers may be required to share in the liability for any wage and workers' compensation violations, and may not shift all liability to the independent contractor business.

In addition, companies should be aware that, even where companies may otherwise have an independent contractor

relationship, California's workers' compensation laws may deem those individuals to be 'employees' within the meaning of the workers' compensation arena simply because the employment agreement or employee handbook contains a 'work for hire' clause that presumptively creates an employment relationship for workers' compensation purposes.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

California is an at-will employment state, so unless a contract – individual or union – specifies a specific period of employment with other terms and conditions, the employment relationship is presumed to be at-will and can be terminated, with or without notice, and with or without cause. Nonetheless, the at-will presumption can be easily overcome through long employment and alleged promises of continued employment. For that reason, employers should lock down at-will employment through policies and signed integrated acknowledgments, in which employees agree that their employment is at will and may only be changed via a writing signed by the employee and a senior official of the employer. In the same vein, policies on all aspects of employment affecting employees should be spelled out explicitly in the form of an employee handbook, with written and signed acknowledgments by the employee, and notice should be given before implementation of any substantive revisions to policies.

California also requires 'wage theft' notices, in which the employer must convey in writing specific information at the time of hire, whenever there are changes to those terms, and at the end of the employment relationship. The terms that must be included in the notice are: pay rate, overtime compensation and work schedule. Commission plans should be in writing and clearly define performance metrics, timing of payouts, clawbacks, caps, floors, or any other limitation on payment for sales not due to an employee's efforts. Commission agreements may be modified, but once the employee has earned the commission based on the terms of the contract, the employee has a right to be paid for the earned commission. Until a new contract is formed or employment is terminated, the commission agreement remains in effect.

California provides for several overtime exempt classifications, the tests for which are more rigorous than those required under federal law (FLSA). The primary difference is that, while the FLSA measures overtime exemptions based on the quality of the job duties performed, California measures overtime exemptions based on quantity of job duties – ie, to be exempt, an employee must perform exempt job functions at least 50% of the time worked.

2.3 Immigration and Related Foreign Workers

California has several statutes, including but not limited to the Immigrant Worker Protection Act, that restrict employer

inquiries and actions regarding an employee or applicant's legal status to work. Employers may not inquire or re-verify employment eligibility of a current employee unless required by federal law. A statute that became effective on 1 January 2018 prohibits employers from voluntarily consenting to permit an immigration enforcement agent's entry into any non-public areas of the worksite, or to permit that agent to access, review or obtain copies of employee records. Employers must also notify their employee workforce about government Form I-9 inspections within 72 hours of receiving notice of the inspection. On the other hand, a federal district court recently enjoined the State of California from restricting private employers from co-operating with federal immigration enforcement and from imposing large fines for violations of those restrictions.

California also prohibits municipalities, counties and other state government entities from passing mandatory e-verify ordinances that apply to private employers. However, private employers may still voluntarily elect to use e-verify.

California enacted the California Values Act, which essentially makes California a sanctuary state by limiting how much local law enforcement can co-operate with federal authorities to enforce immigration law. Some cities have actively defied the state by opting out of the law, while others have embraced the state law.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

California has exceptions to many wage and hour and other employment laws for employees covered by a collective bargaining agreement (CBA). For example, California employers may compel arbitration of an employee's statutory claims, as long as the CBA contains a 'clear and unmistakable' waiver of the right to bring those claims in a judicial forum. Similarly, California employers are not required to cover union employees under the state paid sick leave law, but only if there is a CBA that provides for the use of sick days for those employees and contains certain minimum hours and working condition provisions. Union employees in certain groups and industries (construction, commercial driving, security services, electrical or gas companies, or publicly owned electric utility) do not need to be provided with statutory meal and rest breaks as long as the CBA provides for such breaks.

Employees in a collective bargaining unit also may agree to overtime provisions that are different than otherwise applicable statutory law, but only if they are paid under the CBA at least 130% of the minimum wage and the alternative overtime provisions are stated in the CBA.

Entities interested in taking over existing California businesses should beware of state and local worker retention laws, under which a 'change in control' can trigger a requirement that the new employer hire workers from the old employer

for at least a transitional period. Such statutes already exist in the aviation, grocery store and janitorial services industries. In addition, if workers were represented by a union, the new employer may be required to recognize and bargain with that union. Obama-era NLRB decisions expanded successorship obligations. However, the new NLRB General Counsel has submitted such cases for review.

3. Interviewing Process

3.1 Legal and Practical Constraints

California continues to increase the number of off-limit topics during interviews and the application process. These topics now include:

- prior salary history information, including information about compensation and benefits;
- criminal convictions before a conditional offer of employment has been made;
- any arrests that did not result in a conviction;
- membership in protected categories; and
- medical inquiries before an employment offer has been made.

A recently enacted statute also imposes a step-by-step procedure that employers must follow when considering not to hire an applicant because of a criminal conviction.

While California does not have a blanket prohibition against conducting credit checks and background checks, there are limitations as to when and for whom they may be used. For example, background checks may only be conducted after a candidate receives an offer of employment. Credit checks of prospective employees may only be conducted when the candidate is being considered for certain positions that have a fiduciary duty over the financial and credit information of others. Neither background nor credit checks should be used to masquerade discrimination.

California permits employers to produce an ‘investigative consumer report’, which includes speaking with references, including past employers, friends, associates or neighbors, about a prospective employee’s character, reputation (generally), personal characteristics, or mode of living. Employers, however, must disclose the purpose and obtain the applicant’s written authorization before using an investigative consumer reporting agency to conduct a background investigation. Prior authorization is not required for employers that choose to conduct background checks on their own without the services of an investigative consumer reporting agency, but they must disclose any information that is a matter of public record. In addition, when responding to inquiries, employers may not interfere with an individual’s attempts to find jobs by providing false or misleading references.

4. Terms of the Relationship

4.1 Restrictive Covenants

California favors portability of employment, so much so that post-termination restrictive covenants such as non-compete agreements are void and against public policy because they constitute a “restraint from engaging in a lawful profession, trade, or business of any kind”. California permits non-compete agreements only for the sale of goodwill or dissolution of a partnership.

Employers also need to be aware that California courts will not allow a restrictive covenant to be ‘blue-penciled’ (ie, stricken out of the contract or otherwise modified so as to result in an enforceable provision). To avoid these restrictions, employers have attempted to place choice of law provisions in contracts. Effective 1 January 2017, however, California prohibits employers from requiring a California employee to adjudicate claims in a forum outside of California, or to impose the law of another state other than California law. The only exception is when the employee or applicant is represented by an attorney when the agreement is negotiated. Companies acquiring new employees from competitor companies should encourage their new employees to be forthright about their agreements with their prior employer.

While California protects an individual’s right to be free from restraint in engaging in a lawful profession, trade or business, California also protects trade secrets under its Uniform Trade Secrets Act, which is substantially similar to the federal Defend Trade Secrets Act. Therefore, while non-compete agreements are unavailable in California, an employer doing business in California can still protect itself from a former employee’s use of its trade secrets at a competitor.

California also regulates invention assignments, prohibiting employers from obtaining assignments of inventions developed entirely on an employee’s own time and without use of any of the employer’s materials, equipment, facilities or trade secrets, unless it falls within one of three exceptions:

- the invention relates at the time of conception to the employer’s business;
- the invention relates to an actual or demonstrably anticipated research or development of the employer; or
- the invention results from any work performed by the employee for the employer.

Moreover, an agreement that contains a provision requiring an employee to assign an invention to the employer will not be enforceable unless the employee is provided with written notification of the above requirements.

While non-competes are generally barred, over the last 30-plus years employers have relied upon a 1985 Califor-

nia appellate court decision to support their employee non-solicits under California law. In 2019, another California appellate court called into question the viability of that 1985 decision and employee non-solicits, stopping short of overruling the decision such that there remains some opportunity for employers to argue that reasonable employee non-solicits are still enforceable under California law.

4.2 Privacy Issues

It is the public policy of California to protect an individual's right to privacy. While these protections are not absolute, they are expansive. Under the California Constitution, an individual has the right to privacy. California seeks to balance the privacy rights of individuals against the rights of another to invade their privacy. Individuals are provided expansive workplace privacy protections in areas such as surveillance/monitoring of workplace activities and electronic performance; background checks, drug and health testing; and the security of personal identity information.

Requirements imposed on employers include secure record-keeping requirements for employee medical records, secure disposal requirements for personal information, consent requirements for the use of audio tapes/cameras in the workplace, and specific disclosure requirements in events of security breach. While private employers appear to have certain legal protections over invasion of privacy suits, the law in this area is new and evolving. As a result, employers should stay apprised of new developments in the law relating to social media privacy protections, employee GPS tracking and drug testing. Policies regarding proper use of technology in the workplace, and the means that will be used to monitor such use, are highly recommended.

California has recently enacted a Consumer Data Privacy Act, which becomes effective in 2020 and which some have described as being similar to the comprehensive privacy and security regime of the European Union's General Data Protection Regulation. Whether this law applies to employee data remains uncertain: while it appears to only apply to 'consumers,' California's well-established right of privacy protecting individuals suggests that the act could extend to protecting the records and information of California residents maintained as part of the employment relationship.

4.3 Discrimination, Harassment and Retaliation Issues

More broadly than federal law and most states, California protects employees from discrimination, harassment and retaliation in the workplace by employers, by their officers, directors, agents and other employees (supervisors, and sometimes co-workers), and under certain circumstances by third parties.

Under the Fair Employment and Housing Act (FEHA), California protects its workers from workplace discrimination,

harassment and retaliation, as a matter of public policy, on the basis of a multitude of categories, including race, religion, gender (including pregnancy, childbirth, breastfeeding or related medical conditions), medical condition, genetic information, marital status, sexual orientation, citizenship, age (over 40), national origin, gender identity and expression, color, ancestry, religion, creed, disability (mental or physical), sex, and military and veteran status. In 2018, California expanded the 'national origin' protection to include 'national origin group,' which includes any ethnic groups, tribes, geographic places of origin, and countries that are not presently in existence and/or recognized in the international community. Most recently, California enacted the Create a Respectful and Open Workplace for Natural Hair (CROWN) Act, which prohibits discrimination based on hair style and hair texture by extending protection for both categories under the FEHA and the California Education Code. California workers also may not be discriminated against based on their political affiliation or political activity.

Some of these categories are not covered under federal law (sexual orientation or gender identity) and do not apply to small businesses (fewer than five employees). Nonetheless, smaller businesses often adhere to providing greater protections under California law in anticipation that they will grow beyond the five-employee threshold. California's 'joint employer' approach requires affiliated businesses to be combined to total up the number of employees. The Department of Fair Employment and Housing has issued new regulations benefiting the transgender community relating to the use of rest rooms and other facilities, as well as poster requirements regarding transgender rights. Certain religious non-profit entities are exempt from most of California's discrimination and harassment laws.

California has specific requirements for training supervisors regarding sexual harassment every two years. Other types of training may, but are not required to, include training investigators on how to conduct discrimination, retaliation and/or harassment investigations, and training employees regarding discrimination, harassment and retaliation in the workplace. Since 2014, this mandatory supervisor training must include prevention of 'abusive conduct,' meaning "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." These mandatory training and education programs are intended to combat the implicit biases people may have about individuals who are different from them.

This year, a California law broadened the legal definition of harassment, such that a single incident is now sufficient to bring a hostile work environment claim if the conduct unreasonably interfered with the worker's performance or created an intimidating, hostile or offensive work environment. The same law expanded an employer's potential

liability for a non-employee's sexual harassment to include conduct based on any FEHA-protected characteristics other than sexual harassment, such as harassment based on race and national origin.

California's Labor Code also provides a basis for discrimination related to an employee's filing of a workers' compensation claim. Such claims typically may increase the workers' compensation award with a penalty up to USD10,000, together with reimbursement for lost wages and work benefits, costs and expenses, and possible reinstatement.

California also has several statutory protections that prohibit retaliation in many contexts, including for complaining about conduct even though it may be lawful. Generally, employers may not retaliate against employees for complaining about most workplace activity that may violate a local, state or federal rule or regulation.

4.4 Workplace Safety

California has been at the forefront of workplace safety. Companies in California are required to create an effective injury and illness prevention program, containing a general plan to keep the workforce free from work-related injuries and illnesses. All employers in California also must prohibit smoking inside facilities and they must provide workers' compensation coverage for their employees, including those employees who are engaged on a temporary basis. Companies must provide notice of the coverage in a conspicuous place, and new employees must also be provided with instructions on, among other things, how to obtain appropriate medical care for job-related injuries and how to file a workers' compensation claim.

The injury and illness prevention program is directed at a broad array of safety concerns but it also has been interpreted as requiring employers to protect workers from all sorts of workplace violence. New regulations for the healthcare industry under Cal OSHA require employers to have a written workplace violence prevention plan, which can be incorporated into the Injury Illness Prevention Plan already required for all employers, annual review of and training on the plan, reporting and record retention, and maintenance of a violent incident log. Cal OSHA is expected to create a safety standard for other general industries that is similar to that implemented for the healthcare sector.

Employers in California also have access to an important tool in combating workplace violence. An employer may obtain a workplace temporary restraining order and a permanent injunction on behalf of an employee to prevent acts of violence from being carried out in the workplace and/or against an employee outside the workplace.

4.5 Compensation and Benefits

In California, although the employment relationship is often at-will, employers should set forth their employment policies in an employee handbook that is provided to an employee at the time of hire and require an acknowledgment from the employee of receipt and review. At a minimum, the employee handbook should contain policies governing the at-will status, confidentiality and proprietary information, employment status, compensation and work hours, wage and hour, discrimination, retaliation and harassment prevention, leave of absence policies, and a general overview of benefits. Not only can such practices assist employers in making their case at litigation, but employees will also be given the tools to understand and take responsibility for the terms and conditions of their employment.

Anti-harassment policies must be provided in one of two ways: (i) a poster developed by the California Department of Fair Employment and Housing (DFEH), and (ii) either an anti-harassment brochure developed by the DFEH or through a policy that contains certain information required by the DFEH. Many employers find it easiest to post the poster and to distribute the brochure.

There is no California state mandate for employers to offer group health insurance, although federal law may do so. If an employer does provide group health insurance, California insurance laws require policies to cover certain benefits and give employees the right to continue group coverage in certain circumstances upon separation from the group. Employers should be aware of Cal COBRA, which allows employees to keep their group health plan for extended periods when their job ends or when their hours are cut, and may also be available to those who have exhausted their federal COBRA coverage.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

It is often the case that, at the end of the employment relationship, it is too late to think of ways to end the relationship. A little preparation at the beginning of the employment relationship will help make a potentially unpleasant end more palatable. This is certainly true for executives who typically have compensation agreements, with or without a specified term, but it is also true in the case of the average worker if there is an at-will agreement in his or her orientation documents.

Under California's anti-wage theft laws, employees must be notified at the outset of their employment of certain terms of their employment, including, among other things, how they will be paid, when they will be paid, who is their employer, and what position they will hold. Typically, offer letters may

be used (but are not required) for non-executive employees, while more senior executives should be given detailed employment agreements. Notably, during their employment, if there are changes in the basic terms of their employment, such as rate of pay, position, employer or payroll changes, written notice must be provided to the employee prior to the change.

Since 2017, employers intending to enter into an employment agreement with an individual who primarily resides in California to work in California should be aware that it may not require such employees to adjudicate outside of California any claims arising in California, or deprive that individual of the substantive protections of California law with respect to any controversy arising in California. This means that both a 'choice of law' provision providing for another state's laws to apply and a 'choice of venue' provision providing for disputes to be resolved in another state may be, if required as a condition of employment, unlawful under California law. California recognizes an exception for those individuals who are represented by an attorney when negotiating the terms of their employment agreement; in those instances, this law will not apply.

Executive employment agreements should contemplate the different ways in which the employment relationship ends, including but not limited to terminations as a result of death or disability, or with or without cause. 'Change in control' agreements are generally enforceable in California. In situations involving terminations without cause, the employer should be prepared to include severance information.

California employers should consider entering into arbitration agreements with class action waivers at the beginning of the employment relationship. California has stringent rules on whether arbitration agreements are 'unconscionable' or not, but there are many ways to structure an arbitration agreement to be valid. California also recognizes third party beneficiaries of arbitration agreements, such that a third party non-signatory may, under certain circumstances, enforce an arbitration agreement. On the other hand, California courts usually do not permit signatory parties to enforce an arbitration agreement on non-signatory third parties, mainly because the third parties do not benefit from the contract.

Typically, whether a company must close down a division or department, or lay off a group of employees, is not contemplated when employees are hired. However, prior to any mass lay-offs, California employers must be aware of the notice requirements of California's WARN statute. Although this statute resembles the federal WARN statute, there are key differences in process, employer coverage and types of notification requirement.

Companies may also want to consider having a policy that addresses when severance may or may not be paid to employ-

ees as a result of lay-offs. As a practical matter, companies should consider having templates of separation agreements (over 40 and under 40) with a full release of claims prepared for inevitable situations where it may need to promptly terminate an individual.

As addressed more fully above in Section 4. **Terms of the Relationship**, employers in California should include or enter into agreements (non-disclosure, confidentiality and inventions assignment agreements) with their employees at the outset to protect confidentiality of information, trade secrets, inventions and other proprietary rights.

California allows liquidated damages within contracts, although they are not generally favored. It may be helpful to have a liquidated damages provision for anticipatory material breaches of the contractual terms of any agreement discussed in this part.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

California presumes that all employment relationships are 'at-will' unless there is evidence to the contrary in the form of an agreement, whether it is in writing, by conduct, or verbal. In order to preserve that at-will status, most employers add an 'at will' integrated agreement in their pre-hire documents, as well as in employee handbooks and other signed acknowledgments, such that the employee agrees that employment is at will and that the at-will nature of employment may only be altered in a writing that is signed by the employee and a senior official of the employer. Therefore, wrongful termination, breach of contract claims are generally not options for most employees or employers due to the presumption of at-will employment.

When there is a contract for a specified term of employment, and that contract is breached, California recognizes claims for breaches of express or implied contract, as well as related claims for breach of implied covenant of good faith and fair dealing that is present in all contracts. The non-breaching party may recover expectation damages, or damages for loss of the benefit of the bargain. Importantly, the injured party has a duty to mitigate his or her damages, and so, if the employee, must begin diligently searching for a new job or, if the employer, for a new employee to fill the position left open by the employee.

Contractual claims often arise in the union setting, where the employment relationship is based on the collective bargaining agreement. In such settings, there is usually a three or four-step grievance process, followed by arbitration proceedings if the grievance steps do not result in resolution of the dispute. Terminations and other forms of discipline in

this setting are based on a ‘just cause’ standard, requiring employers to demonstrate that they had ‘just cause’ to terminate or discipline an employee pursuant to the collective bargaining agreement or related work rules.

6.2 Discrimination, Harassment and Retaliation Claims

Given the expansive nature of protection afforded employees under FEHA, it is vitally important for employers who have any employees in California to have a carefully drafted discrimination, harassment and retaliation prevention and remediation policy, including detailed investigation procedures for handling harassment, discrimination or retaliation complaints. In fact, California regulations require employers with five or more employees to have written policies against unlawful discrimination, harassment and retaliation that must conform to those regulations.

Under FEHA, employees are required to exhaust administrative remedies before filing a lawsuit, which is accomplished by filing a complaint with the state or federal agency. California courts recognize a continuing violation doctrine for discrimination charges based on a course of conduct that occurred partly outside the time period allowed for filing an administrative charge. While an employee may sue under FEHA for claims of discrimination, harassment and/or retaliation, he or she also may file claims for failure to prevent and/or remediate discrimination, harassment or retaliation in the workplace. In addition, FEHA makes it a separate violation for an employer to fail to engage in the interactive process with a qualified individual with a disability.

California recognizes theories of ‘constructive discharge’, when an employee resigns his or her employment while claiming that he or she was forced to quit because of an intolerable work environment. Accordingly, an employer does not need to fire an employee before facing a claim for retaliatory termination. The requirements for constructive discharge, however, are substantial.

California workers’ compensation statutes create a separate basis of employer liability for discrimination against individuals who file a workers’ compensation claim. Such claims may increase the workers’ compensation award up to USD10,000, together with reimbursement for lost wages and work benefits, costs and expenses, and possible reinstatement. Co-ordination among the employer’s employment counsel and the workers’ compensation insurance carrier and/or workers’ compensation counsel is encouraged.

Effective January 2019, employers may no longer use settlement agreements to prevent employees from disclosing factual information related to certain sexual assault or harassment, or harassment or discrimination based on sex if the worker has filed a civil or administrative action. Claimants

may request that their identity, and the facts that could lead to the discovery of their identity, be shielded from disclosure.

6.3 Wage and Hour Claims

California has a robust set of wage and hour laws that are far stricter than federal law. This is a particularly dangerous area for companies doing business in California. California employers should note that there are many ways in which California treats wages and hour issues differently from, and often more stringently than, federal law, including classification of employees, overtime, minimum wage, the timing of pay, final pay, bonuses, mandatory meal, rest and recovery periods for certain employees, vacation pay, sick leave, etc.

Additionally, certain violations under California’s Labor Code contain penalties for inaccurate wage statements, penalties for seating violations, liquidated damages for unpaid wages, waiting time penalties for failing to pay all wages due at the time of termination, and premium pay for missed, short or late meal and rest periods.

Since 2004, California employers have been faced with the California Private Attorneys’ General Act (PAGA), which allows employees, after certain administrative exhaustion requirements are met, an almost unfettered right to file a qui tam-style representative lawsuit alleging violations of the California Labor Code on behalf of ‘aggrieved employees’, without the rigorous standards for a class action. A PAGA action is brought solely to collect penalties for such violations.

Under PAGA, an individual affected by at least one Labor Code violation by an employer may, on behalf of a group of aggrieved employees, pursue penalties for any and all Labor Code violations committed by that employer. Aggrieved employees receive just 25% of the share of civil penalties recovered, with the state receiving the remaining portion. PAGA also permits recovery of attorneys’ fees, which represents a significant incentive for attorneys to file PAGA claims. Even though PAGA has been around for more than a decade, PAGA cases are extremely difficult to defend and are not subject to arbitration or class action waivers.

For employers looking to expand services or to open new facilities in California, California’s unique wage and hour laws make it necessary and valuable for employers to seek advice and counsel from an experienced California labor and employment attorney before embarking on a California enterprise.

6.4 Whistle-blower/Retaliation Claims

California has a myriad of laws that prohibit employers from retaliating against employees who report suspected violations of law. Among the numerous whistleblower/retaliation claims, those that are brought against private employers include the California Fair Employment and Housing

Act (FEHA), California's Hazardous Substances Information and Training Act, the California Occupational Safety and Health Act (Cal OSHA), California's general whistleblower protection laws under Labor Code Section 1102.5, California workers' compensation statutes, and the California Health and Safety Code covering retaliation by healthcare facilities. California further provides a common law retaliation claim, in which employees may file a "wrongful termination in violation of public policy" claim, in which the "fundamental and substantial" public policy embodied in the constitution or a statute has been violated.

California has amended its general whistleblower statute so that it now expressly prohibits anticipatory retaliation, which may occur when an employer retaliates against the employee in anticipation of an employee reporting unlawful conduct. It also protects employees who complain only internally within the employer's organization, and the protection extends to situations where the employer is mistaken about the employee complaining about unlawful conduct and when the complaint is by a member of the employee's family.

Depending on the retaliation statute, employees may be able to choose between filing a complaint in civil court and filing an administrative charge with a state agency. For retaliation under FEHA, employees will need to exhaust their administrative remedies by filing an administrative charge with the DFEH and receiving a Right-to-Sue Notice before commencing a civil action. Other retaliation claims, such as those under Cal OSHA, do not require employees to file an administrative charge before proceeding in civil court.

6.5 Dispute Resolution Forums

California has few restrictions on the types of dispute resolution forum available to employees and their employers regarding their disputes, such as arbitration and mediation. Arbitration is a fairly common technique used by employers to decrease potential monetary exposure to certain claims. Arbitration may be cheaper, is less likely to produce high punitive damages or emotional distress verdicts, and may move forward to an earlier resolution than court cases, but arbitration can also be expensive for the employer given that employers are required to pay all of the costs related to the arbitrator. Mediation is often used by California employers as a vehicle to resolve disputes through a negotiated settlement before a trained mediator before litigation is filed or during the pendency of a litigation.

State agencies also are available to California employees and employers, such as the state Labor Commissioner for most wage-related claims, workers' compensation for work-related injuries, the DFEH for most discrimination claims, and the Unemployment Insurance Appeals Board for claims of unemployment insurance.

Most employment lawsuits are filed in California's state courts because the rules, judges and juries tend to favor employees. Employers, if they cannot force the case into arbitration, favor federal court because of its strict deadlines and rules, better caliber of judges, and juries that must issue unanimous verdicts, as opposed to state juries that decide liability based on a supermajority of nine jurors out of 12. For that reason, employers often seek to remove civil lawsuits filed in state court to federal court, if at all possible.

6.6 Class or Collective Actions

California has experienced a class action epidemic in recent years. In California, employers should expect to see mostly wage and hour class actions, not class actions focused on nationwide discrimination, retaliation or harassment claims as there might be in other parts of the country. Reasons for this may be the ease of filing a wage and hour class action or PAGA complaint and the difficulty in proving disparate impact (ie, impact on a group of employees within a protected category) versus disparate treatment of a single individual based on a protected category. Individual employees also can easily find attorneys to represent them in a single-plaintiff discrimination, harassment or retaliation matter given the availability of large-scale punitive damages awards, and attorneys' fees.

Class certification requirements mirror, in large part, the requirements of Rule 23 of the Federal Rules of Civil Procedure. They do, however, differ in several ways, including the fact that California does not require a class action to satisfy one of the three types of class actions defined in Rule 23(b). Owing to the risk of 'one-way intervention', where class members may take advantage of a favorable ruling while avoiding unfavorable ones, California courts tend not to consider dispositive motions prior to certification, unless there is a compelling justification to do so.

In California, workers may opt out of a class rather than opting in, as is the case under several federal statutes such as the FLSA and ADEA. FLSA collective cases are relatively rare in California because the state law typically gives employees more protections over wages and hours than federal law. In cases where there may be a California class action and an FLSA collective action, individuals must consider whether they wish to opt out of the California class, but opt into the FLSA collective. Another significant issue for California class actions is the availability of attorneys' fees, where California utilizes a 'lodestar' method that permits enhancements (ie, multipliers of fees, due to the risk of the attorney accepting the case on a contingency fee basis).

For years, California courts have struggled to prevent class action waivers from being enforced in employment agreements. Recently, however, the United States Supreme Court has repeatedly held that class action waivers are enforceable in the employment context, particularly as applied to wage and hour class action litigations, and may be used to compel

employees to resolve their employment claims through individual arbitration proceedings. The Supreme Court, however, did not address representative action (eg, PAGA) waivers, which means that the California Supreme Court ruling that PAGA claims may not be subject to arbitration still stands.

6.7 Possible Relief

California is a hotbed of substantial potential relief against employers and for employees in employment disputes.

In the employment context, California awards punitive damages in a number of situations where the employer: had advance knowledge of an employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others; authorized or ratified the bad conduct; or committed one or more acts of oppression, fraud or malice. Punitive damages in California can be exorbitant, and liability may be conferred on the corporation by any of its officers, directors or 'managing agents' – ie, someone who has considerable discretion to make decisions that ultimately determine corporate policy. A jury is permitted to set an award of punitive damages, with courts reviewing them to make sure that they are constitutional. Awards of more than nine to ten times the amount of actual damages have been recognized as constitutional by both the United States Supreme Court and California courts.

In the wage and hour context, a California employer can be hit with a 'stacking' of multiple types of damages and related penalties for the same violation. For example, if an employer does not provide for a duty-free 30-minute meal break to a non-exempt hourly employee who works more than six hours in one shift, the employer might be assessed for unpaid wages for the time spent on the meal break because it was interrupted by work, a meal break premium of one hour of pay for the interrupted meal break, waiting time penalties if it is for a former employee, liquidated damages for unpaid minimum wages for the time during the break, and other derivative claims such as penalties for an inaccurate wage statement and PAGA penalties. Moreover, under Business and Professions Code Section 17200, the statute of limitations for unpaid wage style claims can be extended from three years to four years.

There are a plethora of claims for which the prevailing employee may recover attorneys' fees. Attorneys' fees are generally recoverable in most wage and hour and PAGA cases.

Attorneys' fees are also recoverable for discrimination, harassment or retaliation claims under the Fair Employment and Housing Act. In California, in addition to enjoining employers from disability discrimination and demanding remediation provided under the Americans with Disabilities Act (ADA), the California Disabled Persons Act and the Unruh Civil Rights Act provide for monetary damages and attorneys' fees not available under the ADA.

7. Extraterritorial Application of Law

California has expansive laws to protect its citizens who reside and work in California. With the shift towards more and more movement of individuals through the global marketplace, California may need to revisit whether their rights are portable beyond the California borders. It also protects non-resident employees when they work a full day or week in California through the California Labor Code and California's unfair competition laws, but the California Supreme Court has held that the employer need not comply with California law on days when non-residents only work part of the day in California and the other part in another state.

At least one federal district court has held that California law most likely will not apply to protect the wages and hours of non-residents who worked outside of California, even when they worked for a California-based employer. That is because the California Supreme Court, in deciding that some non-residents may receive the protections of California law, focused on the location of where the work was performed.

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