

[Webinar]

# Best Practices to Avoid Wrongful Termination in a Pre-Recession World



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## Speaker



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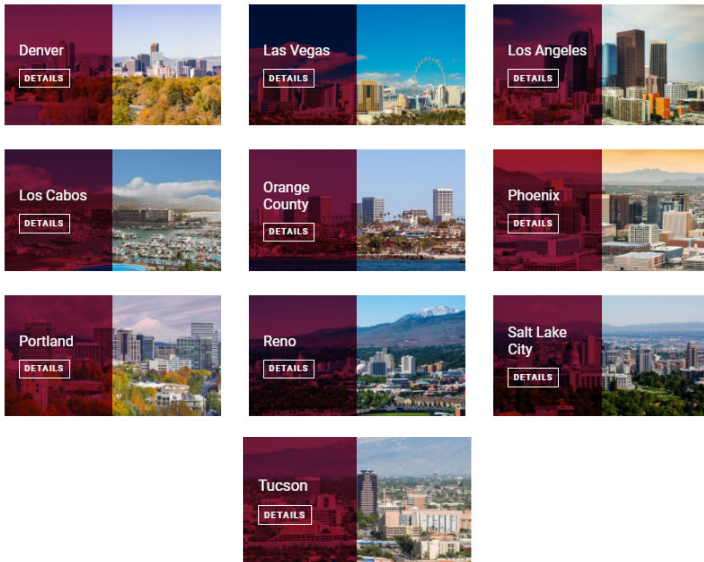
# About the Firm

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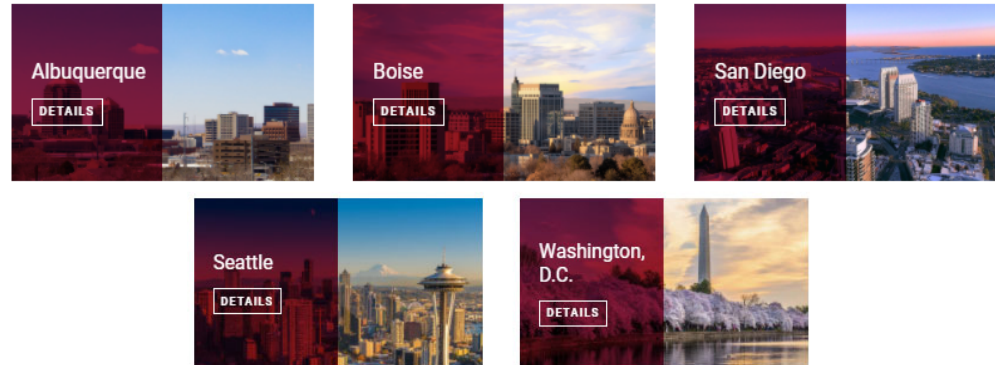
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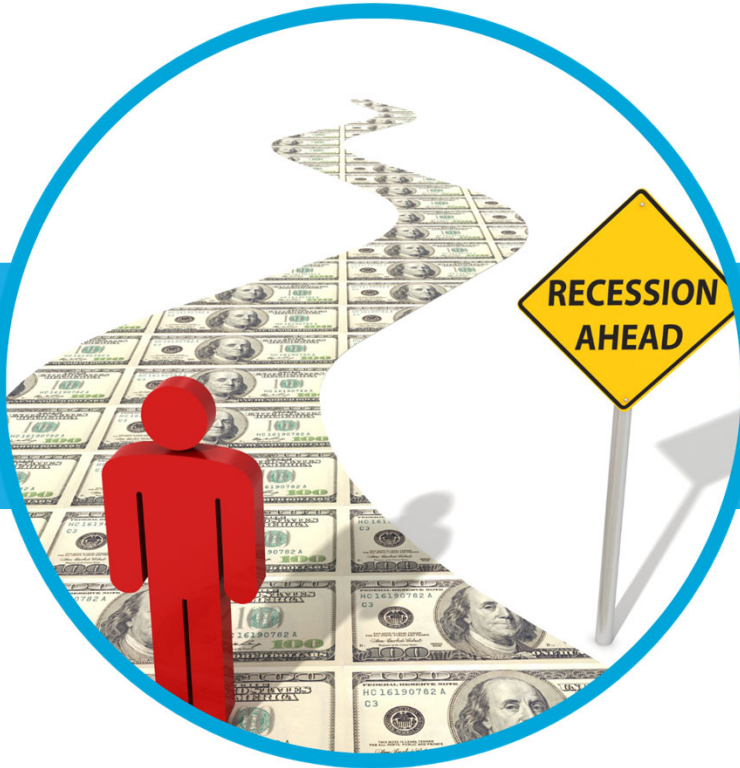
- › Founded in 1938 in Phoenix, AZ
- › More than 450 attorneys
- › Licensed to practice in 35 states

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# Common Employment Claims/Lawsuits Stemming From Pre-Recession

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- Types of lawsuits on the rise during pre-recession and during the Biden administration
- Binding Arbitration Provisions
- How to properly lay off employees
- How to terminate employees
- New California Laws for 2022



# Signs of Recession

# Recession is Coming!

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- › September 13, 2022, Dow Plunges 1300 after the release of Consumer Price Index (CPI)
- › Inflation Rate increases on average from 8 – 9 percent on a monthly basis
- › Energy, fuel, natural gas, and electricity all increased
- › Biden passes the Inflation Reduction Act to lower prescription drug costs, address global warming, raise taxes on some billion-dollar corporations and reduce the federal deficit
- › Feds continue to raise interest rates to combat inflation
- › Salary for employees remains relatively constant

# In the News

 The New York Times

## Warner Bros. Discovery Faces More Rounds of Layoffs

Warner Bros. Discovery Faces More Rounds of Layoffs. Executives signaled that job cuts would be coming after WarnerMedia and Discovery merged in...



## Layoff Fears Grow as Companies from Robinhood to Tesla Cut Jobs

BY CLAIRE BALLENTINE

 Forbes

## More Layoffs On The Horizon? Does This Push Us Into A Recession?

Experts are worried that recent layoffs and hiring freezes among tech giants will impact the labor reports in the second half of 2022.



 Reuters

## JPMorgan, BofA cautious on job cuts as Goldman layoffs loom

Wall Street bankers have become increasingly concerned about layoffs in the coming months. As the risk of recession...



 Forbes

## Expect Layoffs At 51% Of U.S. Companies, According To New Survey

Here's what you need to know. Layoffs and Hiring Freezes. According to consultancy PwC, a survey of 700 executives and board members from...



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# Biden Administration and Wage and Overtime

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- › The federal minimum wage is currently \$7.25 an hour (same since 2009)
- › Wants to substantially increase the federal minimum wage to \$15 by the year 2026
- › What does this mean for California?

# Minimum Wage and Paid Sick Leave

California cities and counties are increasingly passing their own minimum wage laws which apply only within their jurisdiction

- Federal: \$7.25/hour – About to be changed per Biden
- California: \$14.00/hr 25 employees or less, \$15.00/hr 26 employees
- CA cities and counties are increasingly passing their own minimum wage laws which apply only within their jurisdiction
- Los Angeles City and unincorporated LA County
  - **\$16.02** effective 7/1/2022
  - Paid Sick Leave – 48 hours



**Important Points:** Stay up to date on local ordinances in each California city and county in which you have employees working.

## Biden Administration: Enforcement (Joint Employer)

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- The U.S. Department of Labor (DOL) dramatically shifted its focus once President Biden took office with a renewed focus on investigations.
- The determination of joint employment will be based on the “economic realities” of the employment relationship. For example, who controlled working conditions, the nature of the work being performed and whether workers were vital to the company’s business.
- This new rule went into effect on September 28, 2021.
- Pursuant to DOL rules that went into effect September 28, vertical joint employment exists under the Fair Labor Standards Act where “an employee has an employment relationship with one employer (for example a staffing agency, subcontractor, labor provider, etc.),” another employer is “receiving the benefit of the employee’s labor,” and “the economic realities show that the employee is economically dependent on, and thus employed by,” the other employer.

## Biden Administration: Enforcement (Joint Employer) *(cont.)*

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California jury returned a record-setting \$137 million judgment verdict against Tesla for racial discrimination on October 4, 2021. The Black elevator operator was employed by a third-party staffing agency. The workers who subjected him to disparagement were also paid by another company. But Tesla, not the staffing agency, will be the one to pay.

Biden has vocalized his support for potentially making California's ABC Test the federal standard.

# Independent Contractors – California’s ABC Test

- › California adopted the ABC Test (for purposes of California Wage Orders, the Labor Code, and the Unemployment Insurance Code)
- › Rebuttable presumption that all workers are employees
- › To classify a worker as an independent contractor, the hiring entity must establish that all three prongs are met:
  - A. The worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact;
  - B. The worker must perform work that is outside the usual course of the hiring entity’s business; and
  - C. The worker must be customarily engaged in an independently established trade, occupation or business of the same nature as the work performed by the worker for the hiring entity.
- › The test is subject to a number of exceptions that each have their own tests

# Non-Compete Agreements

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President Biden issued a broad EO on promoting competition in the American economy, which “includes 72 initiatives by more than a dozen federal agencies.”

- › It is expected the Biden Administration will continue to promote and enact legislation restricting the use of non-compete agreements and will also seek to “ban all no-poaching agreements.”

# Employee Arbitration Agreements

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- › What is an arbitration provision?
- › Why have it in your employment contract?
  - Advantages
    - Jury
    - Arbitrator
    - Limited Discovery
  - Disadvantages
    - Costs
    - Arbitrator
- › Is it legal to force employees to sign an arbitration agreement as a part of employment?
  - *Chamber of Commerce USA v. Bonta* 13 F. 4<sup>th</sup>. 766 (9<sup>th</sup> Cir. 2021)



# The Dos and Don'ts of Laying Off Employees

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# What is a Layoff?

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- › The employer decides to eliminate jobs through no fault of the employee.
- › Terminations for poor performance or misconduct are not “layoffs”
- › Can be categorized as:
  - Reduction in capacity
  - Termination of operations
  - Job restructuring
  - Hybrid

## What to Do?

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Ask:

- › What do we want to company to look like at the end?
- › What functions are essential?
- › Can two departments/offices/positions become one?
- › How many people do we need in each position?

## What Not to Do?

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- › Do not focus on individuals and people you want to terminate
- › Performance manage these people out before the layoff

## What to Do?

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- › Start by looking at boxes on an organization chart and job descriptions
- › Ask: Who are the best-qualified people for the remaining work?
- › Consider the number of employees possibly being laid off to determine whether the federal or state WARN Act could be triggered (More than 50 employees?)

## What Not to Do?

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- › Do not focus on who is best in their current job because the current job might change
- › Do not let the word of the layoff get out in advance
- › Do not do the lay off on a Friday or near a holiday
- › Statistically there are increased incidents of workplace violence when an employee is terminated on a Friday (You just ruined their weekend/holiday, and they go home, get drunk and stew over the decision on the weekend. All negative influences.)
- › During the week the laid-off employee is surrounded by other people who are working, and the laid-off employee can be productive by contacting the unemployment office, submitting applications, contacting prospective employers, etc.

## What to Do?

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- › Consider any legal requirements and any applicable contracts relating to termination
- › Is termination for cause required?
- › Must any notice be provided?
- › Must severance be paid?

## What Not to Do?

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- › Do not blame others or express dissent when communicating the layoff decision
- › Do not prolong the time the employee remains working after being given notice. Turn off system access promptly and don't let the laid-off employee be a morale killer by hanging around

## What to Do?

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- › Consider whether the employee has engaged in any protected activity such as having a work-related injury, taken a leave of absence, made a “whistleblower” type of complaint?
- › Perform statistical analysis for possible adverse impact claims (consider sex, race, age, disability status, etc.)
- › Consider offering severance benefits in exchange for a release of all claims
- › When providing severance benefits in a group layoff situation remember the special notice requirements for employees who are 40 years old or older under the Age Discrimination in Employment Act

## What Not to Do?

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- › Do not do anything to prevent the employee from obtaining another job or from collecting Unemployment benefits until that time



# Proper Termination of Employees

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# Termination 101

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- › How many write ups-does the employee have in their file?
- › When was the employee's last write-up?
- › Does the write-up give the employee a reasonable time period to correct their behavior?
- › Was the write-up signed by a witness?
- › Was the write-up signed by the employee?
- › How will the write-up look in front of a jury?

# Termination Process

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- › Who should terminate the employee?
- › How many people are present during the termination?
- › What to say during the termination?
- › Should the company offer a severance?
- › How should the severance be calculated?
- › Is the employee over 40?





# California Round-Up: New Laws for 2022

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# SB 331: Settlement and Non-Disparagement Agreements

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Prohibits confidential settlement agreements in any case alleging harassment, discrimination or retaliation for reporting harassment or discrimination

- › Applies to agreements entered into on or after January 1, 2022
- › Only applies to the factual information related to the claim filed
- › Does not prevent confidentiality of the amount paid in settlement

# Employment Practices Liability Insurance (EPLI)

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# Employment Practices Liability Insurance (EPLI)

EPLI provides coverage for employers against employee claims and lawsuits brought against the company, such as discrimination, sexual harassment, retaliation and wrongful termination.

A few points to consider when on the fence about purchasing EPLI:

- › Employee claims & lawsuits are excluded under the standard General liability policy;
- › Even with good employment practices in place, we live in a very litigious society and employers are vulnerable to lawsuits from past, present and prospective employees;
- › EPLI will cover both your defense and settlement costs.
- › EPLI will also provide Third party Coverage

What factors influence the cost of insuring your business for EPLI coverage?

- › Your industry and number of employees
- › Location of business
- › Have you had prior suits against the business?
- › Percentage of employee turnover
- › Whether you have established employment rules & practices in place



**Any Questions?**

# THANK YOU!



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- ✓ Complimentary HR assessment
- ✓ Employee disciplinary and documentation review
- ✓ Employment Practices Liability Insurance (EPLI) policy

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