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WHITE PAPER

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A Review of 2023 Labor & Employment Legislation in California

The 2023 California legislative session saw the passage of a number of new and important labor and employment laws.

As in prior years, the California Legislature continued to expand employee leave rights this session. They increased the amount of paid sick leave employers are required to provide under California's existing paid sick leave law and established a new reproductive loss leave for employees.

Noncompete agreements also remained at the forefront of California law. The Legislature has declared that noncompetes, which have long been unenforceable in California, are now also *unlawful*. In addition, the new law indicates an employer will commit a civil violation any time it enters into a noncompete agreement even if the employer doesn't seek to enforce the agreement. Further, California employers are required to notify certain current and former employees that a previously signed unlawful noncompete is void by February 14, 2024.

Another key area for the Legislature is cannabis laws. Based on a law that passed in 2022, and beginning on January 1, 2024, employers may not take any adverse employment action against employees for off-duty marijuana use. This year, the California Legislature expanded the law to protect applicants from discrimination based on prior cannabis use.

In response to higher rates of workplace violence, the Legislature also established the country's first set of general industry workplace violence safety standards. Beginning in 2024, employers will have new obligations, including developing and implementing a workplace violence prevention plan, training employees, and maintaining records regarding workplace violence.

Other new and amended statutes will require employers to revisit company policies and litigation strategies. For example, the Legislature eliminated automatic stays of trial court proceedings when appealing a denial of a motion to compel arbitration—meaning employers could be forced to continue litigating in court while challenging on appeal a denial of the right to arbitrate. The Legislature also established a rebuttable presumption of retaliation if an employee or applicant engages in protected activity related to wages and equal pay, making it more important than ever to accurately document performance issues and discipline employees in a timely manner.

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The following are summaries of the most important new enactments. Employers should consult with knowledgeable employment counsel about these new statutes.

NONCOMPETES

SB 699—Restrictions on Out-of-State Noncompetes, Civil Violations, and Private Enforcement

SB 699 amends the California Business and Profession Code, beginning on January 1, 2024, to state that noncompete agreements and noncompete clauses in employment contracts are "unenforceable regardless of where and when the contract was signed." The law also prohibits employers and former employers from seeking to enforce noncompete agreements that are void under California law "regardless of whether the contract was signed and the employment was maintained outside of California." Thus, by way of SB 699, the California Legislature is attempting to extend California's protections to employees who did not live or work in California at the time they signed a noncompete agreement. Notably, under California law, noncompete agreements include clauses that prohibit solicitation of customers post-employment.

Additionally, starting on January 1, 2024, an employer will commit a civil violation any time it enters into or seeks to enforce a noncompete agreement that is void under California law. Moreover, the statute now provides for a private right of action for actual damages and for injunctive relief, if the law is violated. A prevailing employee is also entitled to attorneys' fees and costs.

Recommendation for Employers: Employers should review California employment contracts to ensure they do not contain unlawful noncompete language. Employers should also be wary of the reach of SB 699 to cover employees who did not live or work in California at the time they signed a noncompete agreement and should engage competent counsel when trying to navigate potential risks from the new law.

AB 1076—Restrictions on Noncompetes and Notice Requirement

AB 1076, which also amends the California Business and Professions Code, effective on January 1, 2024, explicitly states that it is "unlawful" to include a noncompete provision in an employment agreement.

Additionally, AB 1076 creates a notice requirement for employers. By February 14, 2024, California employers and non-California employers with California employees must provide "written individualized communication" to current employees and former employees who were employed after January 1, 2022, and who previously signed noncompete provisions that their noncompete clause or agreement is "void." The notice must be delivered to the employee's last known address and email address.

AB 1076 also provides that it is an act of unfair competition to require an employee to sign a noncompete clause or agreement, or to fail to provide the required notice.

Recommendation for Employees: Employers should identify any noncompliant agreements with current and former employees who are residents of California and were employed after January 1, 2022. After identifying such employees, employers must comply with the written notice requirement by February 14, 2024.

LEAVE

SB 616—Paid Sick Leave Expansion

Effective January 1, 2024, SB 616 increases the number of job-protected paid leave hours employees can take each year from three days or 24 hours to five days or 40 hours. If employers wish to cap their employees' use of paid sick leave in each year of employment, SB 616 similarly increases the cap from three days or 24 hours to five days or 40 hours in each year of employment. SB 616 further modifies certain requirements depending on whether an employer provides sick leave to employees on an accrual/carryover basis or on an upfront/lump-sum basis.

Accrual Method. Employers may still provide sick leave on an accrual basis at an accrual rate of one hour for every 30 hours worked. An employer also may satisfy accrual requirements with a different accrual method, as long as the accrual is on a regular basis, and the employee has accrued at least three days of paid sick leave by their 120th calendar day of employment and at least five days of paid sick leave by their 200th calendar day of employment.

Additionally, for employers using an accrual method, California employers may still cap an employee's accrual of paid sick leave that they can carry over to the following year. SB 616, however, raises that cap from 48 hours to 80 hours.

Upfront / Lump-Sum Method. Employers using a frontload or lump-sum approach must now provide the full five days or 40 hours—increased from three days or 24 hours—upfront in a lump sum each calendar year or 12-month period. Employers providing the full 40 hours of paid sick leave up front each year automatically satisfy any carryover requirements, provided that all sick leave is available for use during the same calendar year in which the employer provides it.

Regardless of whether the employer uses a lump-sum or accrual method, employers may still require employees to work 90 calendar days before using paid sick leave. And employers still need not pay out accrued but unused sick time provided it is separate from a paid time-off policy upon termination. Further, employers can still comply with their sick leave obligations via paid time-off or vacation benefits that otherwise comply with the requirements of SB 616 (though all such accrued and unused time must be paid out at termination).

Recommendation for Employers: Employers should revise their sick leave policies to ensure that employees receive a total of 40 hours of paid sick leave per year—either provided upfront or accrued over time in the methods described above. Additionally, employers using the accrual method will now need to allow up to 80 hours of accrued but unused sick leave to be carried over to the following year and comply with the accrual timing requirements. Employers that comply with California's paid sick leave requirements via a paid time-off policy or a vacation policy should ensure those policies are compliant with SB 616's new requirements.

SB 848—New Leave for Reproductive Loss

SB 848 supplements California's Bereavement Leave law and increases an employee's leave entitlements for a "reproductive loss event," which is defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction." Covered employees include an employee who experiences the reproductive loss event or an employee who would have been a parent if not for the reproductive loss event. Covered employers include public employers or private employers with five or more employees. The act protects any California employee employed for at least 30 days prior to commencement of the leave, even if part of that time was spent working outside of California.

The employee experiencing a reproductive loss event may take up to five days of leave any time the leave is triggered. Employees are required to take the leave within three months of the event, notwithstanding an alternative policy in place by the employer. An employee may request leave for a reproductive loss more than once in a 12-month period. However, if an employee experiences more than one reproductive loss event within a 12-month period, the employer is not obligated to provide more than 20 days of leave within that 12-month period (though other leave or disability laws may apply).

Unlike bereavement leave, employees are not required to provide documentation to prove the occurrence of such an event. Employers must keep the employee's request for leave for a reproductive loss confidential, as well as any other information provided. Generally, the reproductive loss leave is unpaid, except when the employer policy provides otherwise or when an employee chooses to use vacation, personal leave, sick leave, or other compensatory time-off that is available to the employee. Employers must allow employees to use paid time-off, accrued paid sick leave, or other compensatory time-off in lieu of taking an unpaid leave.

Recommendation for Employers: Employers should revise their employee handbooks and leave policies to provide eligible employees with at least five days of reproductive loss leave pursuant to the law. Management and human resources should be trained on the new law, including the confidentiality requirements.

DISCRIMINATION AND RETALIATION

SB 700—Cannabis Use

Effective January 1, 2024, AB 2188 amended the Fair Employment and Housing Act ("FEHA") to prohibit employers from engaging in any adverse employment action against employees for off-duty marijuana use. Building on that protection, SB 700 will prohibit employers from requesting information from applicants about their prior use of cannabis. SB 700 also prohibits employers from using information obtained from

a criminal history report about an employee's or applicant's prior cannabis use to discriminate against them, unless the employer is otherwise permitted to consider or inquire about that information under the state's Fair Chance Act or other state or federal law.

Notably, nothing in the act permits an employee to possess, be impaired by, or use cannabis on the job. It also does not affect the rights or obligations of an employer to maintain a drug- and alcohol-free workplace.

Recommendation for Employers: Employers should review and revise their antidiscrimination, drug use, and background check policies to comply with the new protections regarding cannabis use. Employers should also inform their hiring team to refrain from asking applicants about any prior cannabis use; however, during the hiring process, they can reaffirm that the use of, possession of, or impairment by cannabis at the workplace is prohibited and provide applicants with a copy of their Workplace Drug and Alcohol Policy. Employers should look into using drug tests that screen for psychoactive cannabis metabolites. These tests indicate recent cannabis use because they can detect the level of active tetrahydrocannabinol ("THC") in an individual—as opposed to traditional drug tests that screen for nonpsychoactive cannabis metabolites, which are what remain in the body after THC is metabolized and indicate that cannabis was used at some unspecified point in the past. These new tests allow employers to isolate cannabis use during the workday and can be used to support a finding of impairment at work.

SB 497—Rebuttable Presumption of Retaliation

SB 497, referred to as the Equal Pay and Anti-Retaliation Act, amends California Labor Code Sections 98.6, 1102.5, and 1197.5 to create a "rebuttable presumption" of retaliation if an employee is disciplined or discharged within 90 days of certain protected activity, including, but not limited to, discussing wages, making complaints about unpaid wages, making complaints about equal pay violations, or encouraging any employee to exercise their rights under these laws.

Under the current law, a retaliation claim includes three stages of a shifting burden of proof: (i) the employee must establish a prima facie case of retaliation; (ii) the employer must identify a legitimate, nonretaliatory reason for their act(s); and (iii) the employee must prove that the employer's nonretaliatory reason was a pretext for retaliation. To establish a prima facie case of retaliation under current law, an employee must demonstrate: (i) the employee engaged in protected activity; (ii) the employer engaged in an adverse action against the employee; and (iii) there was a causal nexus between the protected activity and the alleged adverse action.

The creation of a rebuttable presumption of retaliation should make it easier for employees to establish a prima facie case of retaliation. Faced with the rebuttable presumption, the employer will have the initial burden of establishing a legitimate, nonretaliatory reason for the alleged retaliation. If the employer does so, the employee must demonstrate that, despite the nonretaliatory justification, the discipline was nonetheless retaliatory in nature. SB 497 further provides that, in addition to other remedies, the employer is liable for a civil penalty of up to $10,000 per employee per violation "to be awarded to the employee who was retaliated against." The law goes into effect on January 1, 2024. Neither the preamble nor the statute itself mentions whether the presumption will have retroactive effect.

Recommendation for Employers: The new burden-of-proof structure may make it more difficult in some instances for employers to obtain early dismissal of retaliation claims or to win summary judgment. In light of this new structure, employers should carefully review and evaluate any disciplinary or discharge decisions made within 90 days of an employee engaging in protected activity covered by this statute.

ARBITRATION

SB 365—No Automatic Stay

SB 365 reverses the longstanding rule that trial court proceedings are automatically stayed pending an appeal of an order denying a motion to compel arbitration. The law, which takes effect on January 1, 2024, adds a provision to Section 1294(a) of the California Code of Civil Procedure eliminating automatic stays at the trial court level during the appeal process. The change in law now gives courts the discretion to decide whether a case should move forward or be stayed while the appeal is pending.

SB 365 follows a trend of recent California laws adverse to arbitration. In October 2019, Governor Newsom signed AB 51, which prohibited employers from requiring employees to enter into certain arbitration agreements, including agreements to arbitrate claims under the California FEHA and Labor Code. In February 2023, the Ninth Circuit declared AB 51 was pre-empted by the Federal Arbitration Act ("FAA") in its entirety because the law stood as an obstacle to entering into arbitration agreements.

Like AB 51, SB 365 will probably be challenged on FAA preemption grounds.

Recommendation for Employers: Employers should track legal developments involving SB 365 to keep up to date on its viability and applicability to their litigation strategies.

WAGE & HOUR

AB 594—Public Prosecution for Labor Code Violations

AB 594 authorizes public prosecutors—district attorneys, city attorneys, county counsel, and the attorney general—to bring criminal and civil actions to enforce specified provisions of the California Labor Code (except those related to agricultural labor relations, apprenticeships, or a Private Attorneys General Act action). The relevant provisions primarily include unpaid minimum wage, unpaid overtime, meal break, and rest break violations.

In practice, this means public prosecutors will be able to step into the shoes of the Labor Commissioner for their geographic jurisdictions. Public prosecutors will be able to seek injunctive relief and seek the same attorney's fees and costs the Labor Commissioner would be entitled to under Section 98.3 of the California Labor Code. Funds that are recovered from legal actions will be used to reimburse affected employees for any damages and wage losses. The court may award reasonable attorney fees and costs to the prevailing plaintiff in the legal action. Any remaining funds will be disbursed to the General Fund of California. The law goes into effect on January 1, 2024, and will remain in effect until January 1, 2029.

Notably, the act provides that any individual agreement (which does not include collective bargaining agreements) between an employee and an employer limiting representative actions or mandating arbitration "shall have no effect on the authority of [a] public prosecutor or the Labor Commissioner to enforce the [Labor] [C]ode." Further, it contains an anti-stay provision that states that the "appeal of the denial of any motion . . . to impose such restrictions on a public prosecutor or the Labor Commissioner shall not stay the trial court proceedings."

Recommendation for Employers: Given the bill's expansion of authority to enforce Labor Code provisions, employers should utilize this law as a catalyst to consider reviewing their various wage and hour policies to ensure compliance with California law. This particularly applies to employers that have relied on arbitration agreements to limit their exposure. Additionally, employers should keep track of legal developments involving the act because its anti-stay provision is likely to be challenged on FAA preemption grounds.

Minimum Wage Increases

Beginning January 1, 2024, the California minimum wage increases to $16 per hour for all employers. Certain California cities have specific local minimums that increase in the new year as well. For example, beginning January 1, 2024, the San Diego minimum wage increases to $16.85 per hour. And, beginning July 1, 2024, both Los Angeles and San Francisco will increase their minimum wage from $16.78 and $18.07, respectively, to a yet-to-be-determined amount based on the Consumer Price Index.

WORKPLACE VIOLENCE

SB 553—Workplace Violence Prevention

SB 553 creates Labor Code Section 6401.9 and requires California employers to establish, implement, and maintain a tailored workplace violence prevention plan by July 1, 2024. The plan must include: (i) names or job titles of people responsible for implementing it; (ii) procedures to obtain employee involvement in developing and implementing it; (iii) methods the employer will use to implement the plan, including training; (iv) procedures to investigate and respond to reports of workplace violence and to prohibit retaliation against employees who make a report; (v) procedures to ensure compliance with the plan; (vi) procedures to communicate to employees how they can report an incident and how their concerns will be investigated; (vii) procedures to respond to actual or potential workplace violence emergencies; (viii) procedures to develop

and provide required training; (ix) procedures to identify and evaluate workplace violence hazards and procedures to correct them; (x) procedures for post-incident response and investigation; and (xi) procedures to review the effectiveness of the plan and revise it as needed.

The act also requires employers to record information in a violent incident log for every workplace violence incident. The act details specific requirements for incident logs as well, including the date, time, and location of the incident, a detailed description of the incident, and the workplace violence type or types, among other things. The California Department of Industrial Relations, Division of Occupational Safety and Health, or Cal/OSHA, will be responsible for enforcing these requirements through inspections, citations, and penalties as high as $153,744 for willful violations.

SB 533 applies to virtually all employers and employees in California, with the following limited exceptions: employers covered by California's Violence Prevention in Health Care standard, employees who telework from a location of their choosing that is outside their employer's control, certain law enforcement agencies, facilities operated by the Department of Corrections and Rehabilitation, and places of employment that are not accessible to the public and have fewer than 10 employees working at a given time.

Recommendation for Employers: Employers should establish compliant workplace violence prevention plans and incident logs. Employers should carefully review the requirements of the act to ensure their plan and incident logs are compliant. As part of the plan, employers should provide training to employees and ensure that there is a widespread understanding of its terms.

SB 428—Workplace Restraining Orders for Harassment

Under existing law, California employers may seek a restraining order on behalf of an employee when one or more of their employees have suffered unlawful violence or a credible threat of violence connected to the workplace.

Effective January 1, 2025, SB 428 expands current law and enables employers to seek harassment-related restraining orders on behalf of their employees as well. An employer whose employee suffers harassment, defined under the law as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose," may seek a temporary restraining order and/or injunction to prevent further harassment connected to the workplace. Individual employees can also seek restraining orders against harassment. The law prohibits courts from issuing restraining orders for actions that are constitutionally protected, protected by the National Labor Relations Act, or otherwise protected by law.

Recommendation for Employers: Employers should consider developing a procedure to determine the appropriate circumstances to seek a restraining order on behalf of their employees, and consider using this tool to prevent inappropriate workplace behavior where appropriate.

INDUSTRY SPECIFIC

AB 1228—Fast Food Council and Minimum Wage

AB 1228 establishes a Fast Food Council within the Department of Industrial Relations, which has the authority to set minimum employment standards for national fast food chains operating in California, including regulations relating to wages, hours, health and safety, and other working conditions, with limited exceptions.

AB 1228 applies to workers at "national fast food chains" in California. The term "national fast food chains" is defined as "limited-service restaurants consisting of more than 60 establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service."

As of April 1, 2024, AB 1228 requires that workers at national fast food chains receive a minimum wage of $20 per hour. And, beginning on January 1, 2025, the Council may establish further minimum wage increases annually based on the lesser of a 3.5% increase or an increase tied to the Consumer Price Index, and may establish minimum wage standards that vary by region. The Council's authority will sunset on January 1, 2029.

Recommendation for Employers: California employers that qualify as "national fast food chains" (limited-service restaurants consisting of more than 60 establishments nationally) should ensure compliance with the newly established wage requirements taking effect on April 1, 2024, and monitor and engage on issues under consideration by the Fast Food Council.

SB 525—Health Care Minimum Wage

SB 525 adds Sections 1182.14 and 1182.15 to the California Labor Code and substantially raises the base minimum wage for health care workers. The new law applies to nearly every type of medical employer except hospitals owned/controlled by the State Department of State Hospitals, tribal clinics exempt from licensure, and outpatient settings operated by tribal organizations. It also creates an expansive definition of covered "health care" positions to include virtually any employee who works in the health care setting, including, for example, interns, janitors, housekeeping staff, groundskeepers, guards, food service workers, and laundry workers.

The stated goal is for all covered health care employers eventually to pay a minimum wage of $25/hour. When that rate takes effect, however, depends on the type and size of the health care employer. For example, the minimum wage for any large health care employer with more than 10,000 employees will be $23 per hour from June 1, 2024, to May 31, 2025, $24 per hour the following year, and $25 per hour the year after that. For facilities with a large percentage of Medicare and Medicaid patients, rural independent hospitals, and small county facilities, the increase in minimum wage will start at $18 per hour in 2024 and increase 3.5% annually through 2033.

For certain limited employers who cannot afford to pay the new wage scales, the law creates a waiver program. These employers may seek a temporary pause or an alternative phase-in schedule for the new minimum wage requirements. To qualify for a waiver, an employer must provide documentation of its financial condition, as well as that of any parent or affiliated entity, "to continue as a going concern under generally accepted accounting principles."

SB 525 also significantly limits health care employers' abilities to meet the salary threshold required for most exemptions from overtime and minimum wage. To be properly classified as exempt, salaried employees must earn a monthly salary of no less than 150% of the health care worker minimum wage, or 200% of the applicable state minimum wage for all workers under Section 1182.12, whichever is greater.

Importantly, SB 525 imposes a 10-year moratorium on local measures to increase compensation for health care workers covered by this bill. This prohibition, among other things, appears to negate the ballot initiatives that were proposed in Los Angeles County, San Diego County, and various California cities to impose a cap on the compensation that could be paid to any employee, including executives, of a covered health care facility. Additionally, there is a preemption moratorium on local measures to cap executive compensation, which was also the subject of local ballot initiatives in the aforementioned localities.

Recommendation for Employers: Covered health care employers should analyze the impact of the new law on their budgets, identifying which health care category and minimum wage apply to their workplace. Health care employers should take careful notice of the broad applicability of the minimum wage increases to all employees who work in the health care setting, regardless of title. Employers should also: evaluate how increases in the new minimum wage will impact overall compensation of the organization; determine which exempt employees are impacted by the salary basis threshold increase and either increase their salary to maintain the exemption or reclassify them; and review any collective bargaining agreements if relying on the California exemption to overtime (Labor Code Section 514).

SB 723—Rehiring Rights for Laid-Off Employees in the Hospitality Industry

SB 723 amends California Labor Code Section 2810.8, which was created in 2021 during the COVID-19 pandemic, and requires certain employers in the hospitality and service industry to recall employees who were laid off for COVID-19-related reasons in order of seniority. Section 2810.8 was set to sunset at the end of 2024. SB 723 extends the sunset to the end of 2025.

SB 723 applies to "laid-off employees" in hotels with 50 or more guest rooms, private clubs, event centers, airport hospitality operations, and airport service providers, as well as janitorial, building maintenance, and security services provided to office, retail, and other commercial buildings. "Laid-off

employee" is defined as anyone employed "6 months or more and whose most recent separation from active employment by the employer occurred on or after March 4, 2020, and was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, reduction in force, or other economic non-disciplinary reason due to the COVID-19 pandemic." The new law also creates a rebuttable presumption that anyone separated by a covered employer due to lack of business, reduction in force, or other economic reason was separated because of the COVID-19 pandemic.

Recommendation for Employers: Employers in covered industries should carefully review records of all laid-off employees to see if any have a "right of recall." Covered employers should maintain a list of all employees with recall rights, and they should also establish procedures to ensure that those employees receive notice of open positions. If the employer declines to hire an employee with recall rights, it should ensure that the employee receives the necessary documentation explaining the reasons the employer declined to hire him or her. Covered employers should be aware that these practices must remain in effect until the end of 2025.

SB 54—Diversity Reporting for Venture Capital Firms

SB 54 requires covered entities to report certain information regarding their funding determinations to the California Civil Rights Department. A "covered entity" is defined as a venture capital company that meets both of the following criteria: (i) the venture capital company either primarily engages in the business of investing in, or providing financing to, startup, early-stage, or emerging growth companies, or it manages assets on behalf of third-party investors; and (ii) the venture capital company must have a nexus to California established by any of the following: headquarters in California; a significant presence or operational office in California; making venture capital investments in businesses that are located in or have significant operations in California; or soliciting or receiving investments from a California resident.

As of March 1, 2025, SB 54 requires covered entities to survey and report annually certain diversity data on the founding teams of all businesses in which a covered entity made a venture capital investment in the prior calendar year. The report must include aggregated demographic information of founding team members, including their race, ethnicity, disability status, gender, sexuality, and veteran status. Covered entities must disclose whether any founding team members declined to provide such information. Additionally, the report shall state the number of venture capital investments a covered entity made to businesses primarily founded by "diverse founding team members" relative to the total number of venture capital investments made by such covered entity in a given year. Any venture capital firm that fails to provide the requested data will be subject to undisclosed fines. The California Civil Rights Department will publish the data and maintain an online database available to the public.

Recommendation for Employers: Venture capital firms that qualify as "covered entities" should begin the process of gathering the necessary survey information to comply with the March 1, 2025, deadline.

LAWYER CONTACTS

Matthew W. Lampe
New York
+1.212.326.8338
mwlampe@jonesday.com

Elizabeth B. McRee
Chicago
+1.312.269.4374
emcree@jonesday.com

Aaron L. Agenbroad
San Francisco
+1.415.875.5808
alagenbroad@jonesday.com

Rick Bergstrom
San Diego
+1.858.314.1118
rjbergstrom@jonesday.com

Mark E. Earnest
Irvine
+1.949.553.7580
mearnest@jonesday.com

Kelsey A. Israel-Trummel
San Francisco
+1.415.875.5831
kitrummel@jonesday.com

Cindi L. Ritchey
San Diego
+1.858.314.1200
critchey@jonesday.com

Amanda C. Sommerfeld
Los Angeles
+1.213.243.2174
asommerfeld@jonesday.com

Koree B. Wooley
San Diego
+1.858.314.1191
kbwooley@jonesday.com

Liat Yamini
Los Angeles
+1.213.243.2317
lyamini@jonesday.com

Steven M. Zadravecz
Irvine
+1.949.553.7508
szadravecz@jonesday.com

Josh Dutton, an associate in the San Diego Office, and Erin McMahon, an associate in the San Francisco Office, contributed to this White Paper.