

GIBSON DUNN

CA MCLE Blitz

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Latest Trends & Hot Topics in California Employment

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THE STATE OF NON-COMPETES

01

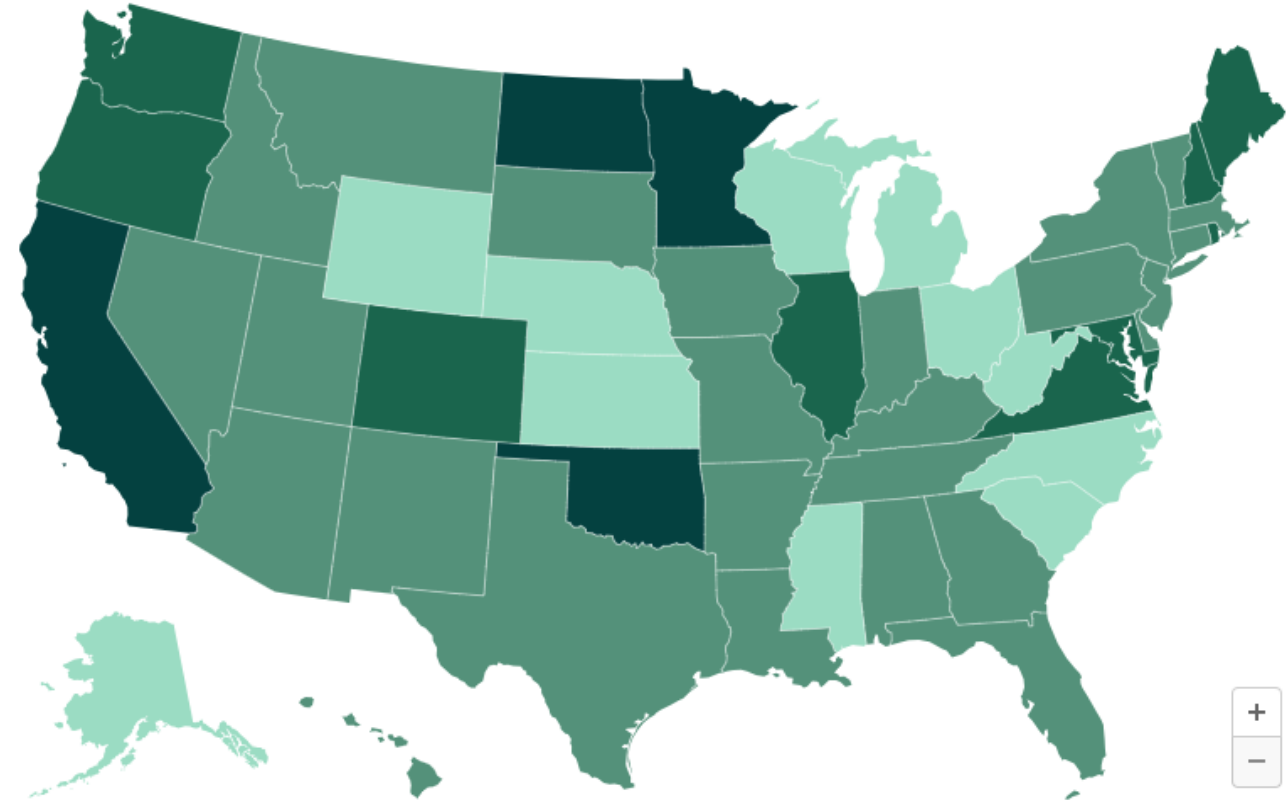
RESTRICTIONS ON NON- COMPETE AGREEMENTS

California is among the most restrictive.

Current Noncompete Agreement Laws by State

Legislative Restrictions

No restrictions Full Ban Income Restrictions Other Restrictions



Map: Economic Innovation Group • [Get the data](#) • [Download image](#)



NAVIGATING THE CURRENT NON-COMPETE LANDSCAPE

- As of January 1, 2024, Senate Bill 699 added Section 16600.5 to the Business and Professions Code:
 - Expanded California's existing restrictions on non-competes to out-of-state agreements.
 - Created new enforcement rights for employees to challenge non-compete clauses.
 - Authorizes employees, former employees, and prospective employees to seek injunctive relief, actual damages, or both, and entitles a prevailing plaintiff to recover reasonable attorneys' fees and costs.

IMPACT OF SECTION 16600.5

Non-competes

- No real change as California has long prohibited non-compete agreements in the employment context
- Made penalties available and imposed fee shifting

Non-solicit of *customers*

- Amendments explicitly incorporated 2008 California Supreme Court decision (*Edwards v. Arthur Andersen*)
- Likely prohibited

Non-solicit of *employees*

- Less clear from the statute

FTC'S FINAL RULE BANNING NON-COMPETE CLAUSES

- The Final Rule **banned new non-competes with all workers**, regardless of compensation level, seniority, or policy-making function.
- “Non-compete” defined broadly as any term or condition of employment that “**prohibits**,” “**penalizes**” or “**functions to prevent**” a worker from seeking or accepting work or operating a business in the U.S. after the conclusion of employment.

CHALLENGES TO THE NON- COMPETE RULE

- Multiple challenges to the Final Rule in Pennsylvania, Florida, and Texas
- On August 20, 2024, N.D. Tex. granted summary judgment “setting aside” the Final Rule as outside the FTC’s authority and arbitrary and capricious under the Administrative Procedure Act
 - FTC cannot enforce its rule against anyone, non-competes that were enforceable before the rule remain enforceable, and businesses and workers are free to enter into new non-competes.
- FTC appealed the ruling to the Fifth Circuit on October 18, 2024.
- Likely to be further developments under Trump administration.

EMERGING REGULAR RATE OF PAY TREND

02

NOVEL THEORY OF LIABILITY: RSU LITIGATION

- New regular rate theory has emerged regarding whether the value of vested **restricted stock units** granted to non-exempt employees should be included in the **regular rate of pay**
- Plaintiffs' bar largely pursuing this theory with demand letters
- A handful of cases have been filed, targeting technology and biopharmaceutical companies



UNRESOLVED LEGAL ISSUES IN RSU REGULAR RATE CASES

- Statutory exclusions from the regular rate of pay under the FLSA (29 U.S.C. 207(e)):
 - Gifts
 - Payments for occasional periods when no work is performed
 - Discretionary bonuses
 - Profit-sharing plans
 - Employee contributions to benefit plans
 - Premium pay
 - Stock options
- There is no case law addressing what may be applicable to RSUs.



CHANGING LEGAL LANDSCAPE OF DEI

03

THE *SFFA* DECISION: REFRESHER



- **THE DECISION**

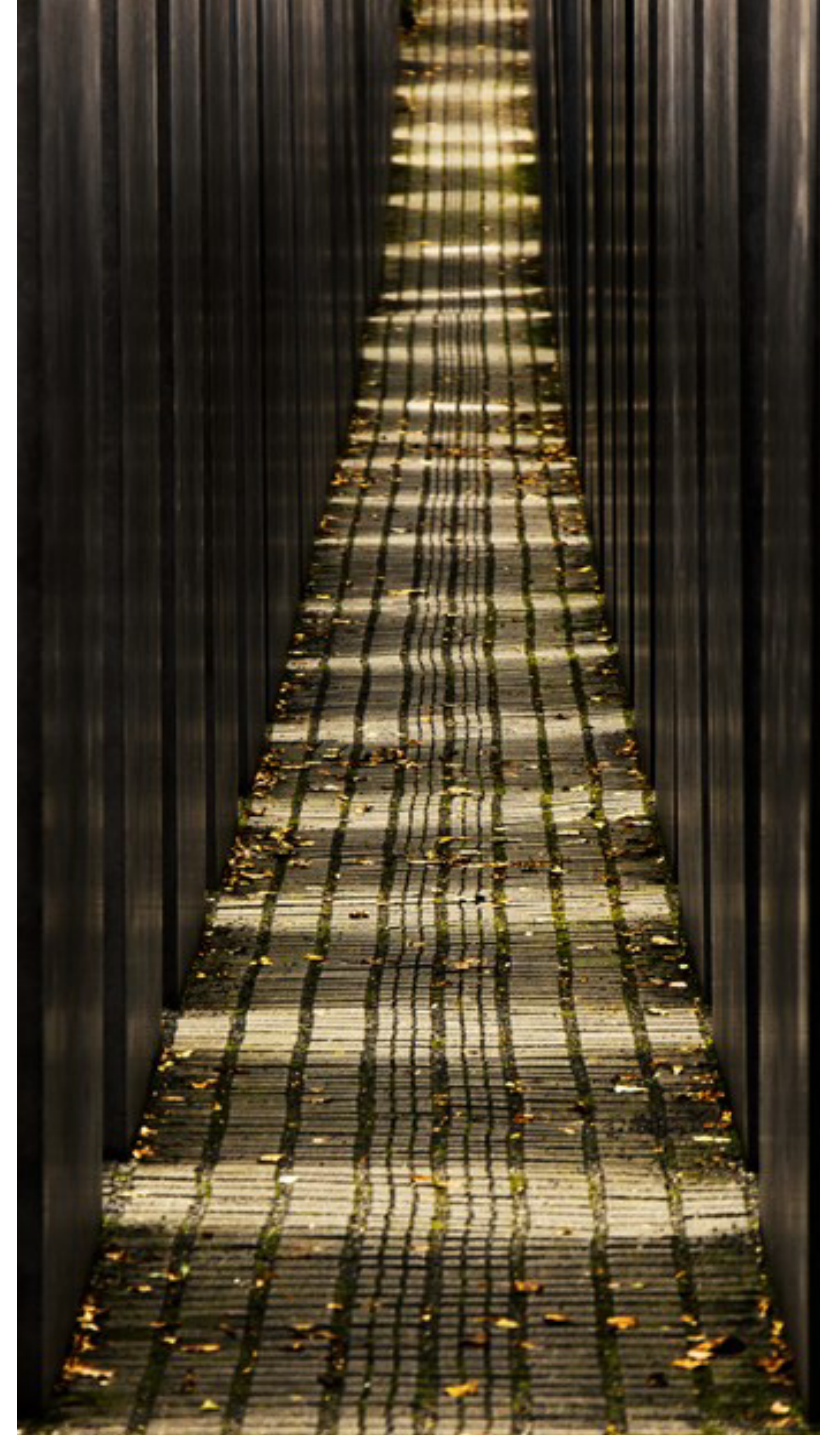
- Race-based admissions failed strict scrutiny
- Used race as “negative” factor in “zero-sum” process
- Impermissible racial stereotyping
- No “logical end point”

- **IMPLICATIONS FOR EMPLOYERS**

- *SFFA* does **not** directly affect laws applicable to employers
- But it has galvanized critics of DEI-related policies and broader legal challenges

RELEVANT LAW: TITLE VII

- Title VII of the Civil Rights Act of 1964 applied long before *SFFA*
- Prohibits consideration of **race, color, religion, sex, national origin, other protected characteristics** in employment
- Requires an **adverse employment action**



RELEVANT LAW: SECTION 1981

- Section 1981 of the Civil Rights Act of 1866 also predates *SFFA*
- Prohibits **race-based** discrimination in making or enforcing contracts
- Discrimination must be **intentional**
- Must be an **existing or proposed contract** that the plaintiff wishes to make or enforce
- “**But for**” causation
- An “**injury in fact**” required for standing

OTHER RELEVANT LAWS

- State antidiscrimination laws
 - California Fair Employment and Housing Act
 - Unruh Civil Rights Act
- Employment, housing, education, insurance, credit, or access to public accommodations
- If employer receives government funds, could be subject to:
 - Title VI
 - Title IX
 - Equal Protection Clause of 14th Amendment
 - State Equal Protection Clauses

TYPES OF LEGAL CHALLENGES

- Conservative advocacy groups and other activist plaintiffs
- Companies in all sectors targeted; public companies more vulnerable
- Main categories of cases:
 - Contracting claims under Section 1981
 - Reverse discrimination claims
 - Challenges to agency rules, laws, regulatory decisions
 - Securities litigation
- Some lawsuits challenge firms for *not doing enough* to reach DEI goals.



DEVELOPMENTS IN 2024

- Gibson Dunn DEI Task Force tracking **80+ DEI-related cases** filed since *SFFA*, **100+** pieces of legislation
- Some challenges to laws and programs have succeeded, while others have been rejected—***SFFA v. U.S. Naval Academy***
- Reversal of standing decision in ***Do No Harm v. Pfizer***
- Scope of adverse employment action expanded under ***Muldrow v. City of St. Louis***

TRENDS IN 2025

- The Trump Administration has already been and is expected to remain active in this field—
e.g. **Executive Orders**
- Case to watch in 2025—***Ames v. Ohio Department of Youth Services***
- “**Background circumstances**” standard for reverse discrimination claims—SCOTUS to decide

BEST PRACTICES FOR EMPLOYERS TO NAVIGATE RISKS

- Engage **counsel** and stay **up to date**
- Consider **audits**
- Involve all **relevant constituents** at your company
- **Inventory and categorize programs** based on level of risk and, if warranted, take action to mitigate risk
- Examine **communications** and public materials
- Promote **equal opportunity** through programs that are open to all
- Avoid **quotas** or proportional goals
- Train employees on the need for **individualized, non-discriminatory decision-making**

2025 LEGISLATIVE CHANGES

04

PAGA REFORM (AB 2288, SB 92)

- **Most significant modification to Labor Code Private Attorneys General Act of 2004 since it was enacted two decades ago**
- **On or after June 19, 2024:**
 - **Limitations on standing**
 - Courts may “**limit the scope**” of PAGA claims prior to trial
 - **Reductions in PAGA penalties**
 - **No stacking penalties**
 - **Early case resolution** procedures
 - Shifting **higher percentage of penalties** to employees

PAGA EXEMPTIONS (AB 1034)

- **PAGA exemption: construction industry employees**
- Existing law exempts from PAGA employees in the construction industry with valid collective bargaining agreements until January 1, 2028.
 - Provides for a grievance and binding arbitration procedure to redress any violations of the Labor Code.
- This bill extends the PAGA exemption to **January 1, 2038.**

MINIMUM WAGE AND SALARY

- **Minimum wage**
 - **Effective January 1, 2025, statewide minimum wage will increase to \$16.50**
 - **City increases also taking effect in 2025:**
 - *San Jose:* \$17.95 (January 1)
 - *San Diego:* \$17.25 (January 1)
 - *San Francisco:* likely increasing July 1, 2025
 - *Los Angeles:* likely increasing July 1, 2025
- **Salary threshold for exemptions**
 - **Minimum salary for full-time exempt employees: \$68,640**

WAGE AND HOUR EXEMPTIONS (AB 3105)

- **Exemption for faculty at out-of-state private institutions of higher education**
- Existing law exempts from certain wage/hour provisions those employed to provide instruction for a course or laboratory at *an independent institution of higher education*.
 - The bill revises the definition of an “independent institution of higher education.”
 - Effective January 1, 2025.

INDEPENDENT CONTRACTORS (SB 988)

- **Payment of freelancers**
- A party hiring a **freelancer** will be required to:
 - Have a written contract with the freelancer;
 - Pay the freelancer the compensation specified in the contract by the date specified in the contract; and
 - Retain the contract for at least four years.
- Effective January 1, 2025.

INDEPENDENT CONTRACTORS (AB 224)

- **Independent contractor exemptions: newspaper distributors and carriers**
- Existing law exempts (1) newspaper distributors working under contracts with a newspaper publisher and (2) newspaper carriers from the application of the *Dynamex* standard and “ABC test” until January 1, 2025.
 - **The *Borello* test governs these workers.**
 - This bill extends that exemption until **January 1, 2030.**

FAIR EMPLOYMENT AND HOUSING ACT (FEHA) (SB 1100, 1137, 1340)

- **Local governments empowered to enforce discrimination laws [SB 1340]**
 - This bill requires the Civil Rights Department to work with local agencies regarding enforcement.
 - Effective January 1, 2025.
- **“Intersectionality” codified as basis for discrimination claim [SB 1137]**
 - Clarifies that discrimination is prohibited on the basis of the combination of multiple protected traits.
 - Effective January 1, 2025.
- **Driver’s license requirements cabined to specific job functions [SB 1100]**
 - It will be unlawful for employers to require applicants to provide a driver’s license, unless employer reasonably expects driving to be a function of the job and there is no satisfactory alternative to driving.
 - Effective January 1, 2025.

TIME OFF AND LEAVES OF ABSENCE (AB 2499)

- **Expanded time off protections for jury duty, court appearances, and qualifying acts of violence**
- Will prohibit retaliation against taking time off to serve on a jury, make a court appearance pursuant to a subpoena or court order, or due to a “qualifying act of violence.”
 - Employers will be required to provide reasonable accommodations and written notice of these rights to new hires and employees.
 - Effective January 1, 2025.

TIME OFF AND LEAVES OF ABSENCE (AB 2123, SB 1105)

- **Immediate access to Paid Family Leave [AB 2123]**
 - Employers will be prohibited from requiring employees to use two weeks of accrued vacation before accessing Paid Family Leave.
 - Effective January 1, 2025.
- **Paid sick leave: agricultural employees with emergencies [SB 1105]**
 - Allows use of paid sick days by agricultural workers to avoid smoke, heat, or flooding conditions created by a local or state emergency.
 - Effective January 1, 2025.

REQUIRED PUBLIC DISCLOSURES (AB 3234)

- **Disclosure required for voluntary social compliance audits regarding child labor**
- Employers who voluntarily engage in social compliance audits to assess compliance with child labor laws will be required to post a link on their website with a report detailing the findings of the audit.
 - Effective January 1, 2025.

POSTING REQUIREMENTS (AB 2299)

- **Model whistleblower posting available**
- Labor Commissioner required to develop a model list of employee whistleblower rights and responsibilities.
 - Any employer who posts this list will be deemed in compliance with whistleblower law posting requirement.
 - Effective January 1, 2025.

LABOR RELATIONS (SB 553)

- **Collective bargaining representatives remediating workplace violence**
- Authorizes a **collective bargaining representative** of an employee to seek a TRO and an order after hearing on behalf of an employee or other employees at the workplace.
 - Effective January 1, 2025.

CAL/OSHA REGULATIONS (SB 1350)

- **Expansion of Cal/OSHA jurisdiction to household domestic services**
- Expands the definition of “employment” to include household domestic services performed on a permanent or temporary basis.
 - Effective **July 1, 2025**.

PRESENTER PROFILES

05



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Cynthia Chen McTernan is a partner in the Los Angeles office of Gibson, Dunn & Crutcher. She is a member of the firm’s Labor and Employment, Class Actions, and Litigation practice groups, and represents clients across a variety of industries, including technology, retail, life sciences, and higher education.

Cynthia specializes in high-exposure employment and class action litigation. She has represented clients in a wide range of employment litigation matters, including wage-and-hour, discrimination, retaliation, and harassment claims under both federal and state law, and including in class, collective, and representative actions under the California Private Attorneys General Act. She also dedicates a portion of her practice to employment counseling, anti-discrimination and anti-harassment training, and pre-litigation investigations. She has advised clients on a variety of employment-related issues ranging from DEI best practices to employee misconduct and termination issues.

In addition to her employment expertise, Cynthia also handles a variety of other civil and commercial disputes for her corporate clients, and has significant experience in class actions, government enforcement actions, and mass arbitrations involving consumer protection issues.

Lawdragon has recognized Cynthia in their guide of the *500 Leading Corporate Employment Lawyers* for 2025, which features “the nation’s best advisors on workplace mobility, employee benefits and executive compensation, traditional labor matters and, of course[,] disputes . . . from wage and hour class actions, to discrimination and non-compete agreements.” She was also recognized by her peers as one of *The Best Lawyers in America*® in Commercial Litigation for 2025, and before that, by *Best Lawyers*® as “One to Watch” for multiple years.

Cynthia graduated from Harvard Law School in 2013, where she was an editor on the Harvard Journal of Sports and Entertainment Law. She received a Bachelor of Arts in English with High Distinction and *summa cum laude* from Duke University in 2010, where she was a Benjamin N. Duke Scholar and was inducted into Phi Beta Kappa. Cynthia is admitted to practice in the States of New York and California.

Cynthia’s full biography is available [here](#).

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Megan Cooney is a partner in the Orange County office of Gibson, Dunn & Crutcher. She is a member of the firm's Labor and Employment, Class Actions, and Litigation Practice Groups.

Megan's practice focuses on high stakes employment and class action litigation. She has represented employers across the country in class actions, collective actions, representative actions under the California Private Attorneys General Act, and sensitive individual actions alleging a broad range of employment-related claims. Megan has extensive experience litigating wage and hour, discrimination, retaliation, harassment, and worker misclassification claims.

Megan also has extensive experience advising employers regarding personnel policies, employee handbooks, job classification, termination issues, and other employment-related matters. Megan also represents clients in connection with workplace investigations and compliance audits. She has represented clients in a wide variety of industries, including technology, finance, healthcare, retail, industrial services, manufacturing, entertainment, and transportation.

Megan has been recognized for delivering significant results for clients. *Lawdragon* has recognized Megan in their guide of the *500 Leading Corporate Employment Lawyers* since 2022 and, in 2023, included Megan in the inaugural *2023 Lawdragon 500 X – The Next Generation* guide which highlights those “who will define where the legal profession of our country goes” and whose “leadership will be called upon by businesses and individuals when they face their crossroads.” She was also recognized by *Law360* as one of five Rising Stars in Labor & Employment. Megan was recognized by *The Best Lawyers in America 2025* for her work in Litigation - Labor and Employment, and as “One to Watch” for 2023.

Megan earned her law degree *magna cum laude* in 2013 from Pepperdine University where she was a Literary Citation Editor for the *Pepperdine Law Review* and a member of the Interschool Appellate Advocacy Team. She earned a Bachelor's degree in Political Science in 2010 from California Lutheran University, graduating *summa cum laude*. Megan is a member of the State Bar of California.

Megan's full biography is available [here](#).

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