the abtl REPORT

Tips to Avoid Jeopardizing Your Client's Insurance Coverage

By Cheryl Dunn Soto

Insurance is often a driving force in litigation, with insurance dollars funding many settlements. As insurance coverage counsel for insureds, I have observed that insurance can also be a source of friction between clients and their defense counsel when that counsel overlooks the more subtle roles insurance can play in litigation. Below is a discussion of five common insurance-related issues that should be on every defense counsel's radar.

1. Tendering

It is important to establish a policy regarding the tendering of insurance claims. Your engagement agreement should state that policy, particularly if you do not wish to assume responsibility for such tenders. Otherwise, the client may blame you when it later discovers there would have been insurance coverage for a lawsuit but-for a failure to tender.

If you accept responsibility for tendering, educate yourself. Tendering a lawsuit alleging defamation in 2021 solely under a 2023-2024 commercial general liability policy may result in a subsequent claim under your own malpractice policy. The same can be said for counseling your client that it need only tender a matter once it ripens into litigation if the applicable policy is a claims-made-and-reported one. And never discount the possibility that an endorsement provides coverage. For example, it is not unusual for a "business owners" policy to contain an employment practices liability endorsement that provides coverage for employment practices claims.

2. Communicating with Insurers

When an insurer has accepted coverage, it is vitally important to keep the insurer "in the loop." Always obtain the insurer's consent to present an offer or counteroffer. Failure to do so may result in there being no coverage in the event an offer is accepted.

Insurers also need to be regularly apprised as to the status of a case. That said, when communicating with a client's insurer, it is important to understand your relationship with the insurer to comply with your legal and ethical duties.

If you are retained by the insurer to defend its insured, e.g., you are "panel" counsel, a tripartite relationship is created whereby you have two clients: the insured and the insurer. As a result, communications between either the insurer or the insured and you are protected by the attorney-client privilege, and both clients are the holders of the privilege. *Bank of Am., N.A. v. Superior Ct.,* 212 Cal. App. 4th 1076, 1083 (2013). Furthermore, your work product is protected even when transmitted to the insurer. *Id.*

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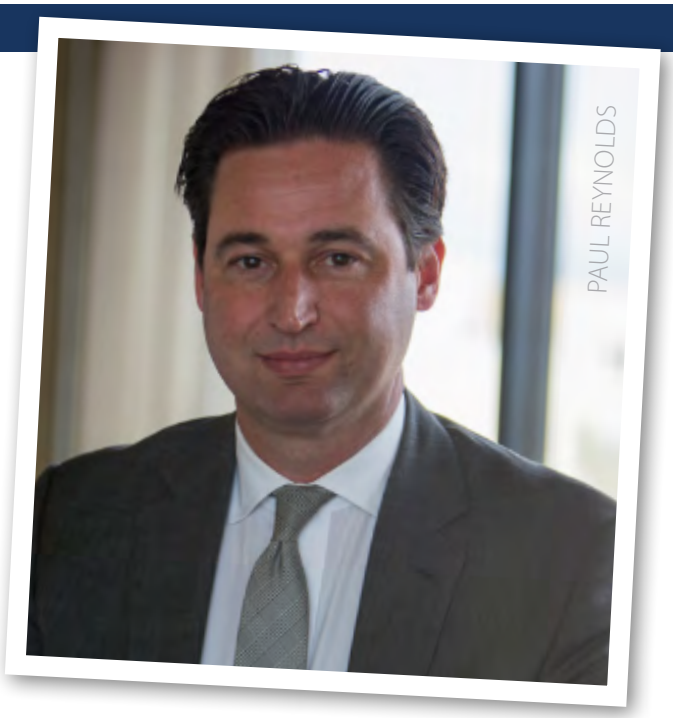
PRESIDENT'S LETTER:

ABTL San Diego, 2023

By Paul Reynolds


PAUL REYNOLDS

Well, another year has come and gone. But not quite before we present our ABTL Report for the Fourth Quarter. First up is "Tips to Avoid Jeopardizing Your Client's Insurance Coverage" by Cheryl Dunn Soto, which serves as a helpful refresher regarding the important issues that relate to that topic—from identifying insurance coverage and the tendering of claims, communicating with the insurer, the impact of policies with burning limits, the impact of which claims are challenged in dispositive motions on the duties to defend and indemnify, and concerns raised settlement confidentiality provisions.

Next up, our Editor, Eric Beste, has prepared a report from the ABTL 49th Annual Meeting, held in Kona, HI, in October. Reading Eric's report brought back to me what an exceptional seminar we had this year—both in terms of the quality of the presentations, and the many opportunities to meet, or get to know better, members from all chapters it provided (this was the best-attended Annual Seminar yet). We hope all of you can join us next year, and Eric has included the details for next year's program—the ABTL's 50th Annual Seminar!—in his piece.

Following that is an excellent update on California employment law by Rose Huelskamp Serrano, Anne Wilson, Tony Skogen, Katherine Fine, and Jonah Mekebri. This piece is not only a helpful précis if you happen to practice employment law, but also a useful summary for those of us who employ others through our practices.

Finally, on a personal note, writing this letter is my last official duty as the 2023 chapter President. It was my honor and pleasure to serve in this role—in addition to it just being a lot of fun—and I would like to briefly thank all of those who helped make this another successful year for the chapter, including all the Board of Governors members, Committee chairs, Executive Committee members and, of course, most particularly, our invaluable Executive Director, Lori McElroy. And, lastly, please join me in welcoming our 2024 President, Andrea Myers, who I am sure is looking forward to all of our support and involvement next year, in service of yet another successful one for our chapter.

Paul Reynolds

Paul Reynolds, President of ABTL San Diego Chapter and partner at Shustak Reynolds & Partners, P.C.

Tips to Avoid Jeopardizing Your Client's Insurance Coverage | *Continued from cover*

If you are retained by the insured, you need to determine whether the policy is a "duty to defend" policy that places the duty to defend on the *insurer* or a "reimbursement" policy that places the duty to defend on the *insured* and merely requires the insurer to reimburse defense fees and costs paid by the insured or perhaps pay such fees and costs directly. It is not unusual for business clients to have directors and officers ("D&O") and errors and omissions ("E&O") policies that are reimbursement policies. Under a reimbursement policy, the insurer is not your client. Therefore, you should be careful about communications with the insurer – particularly your written communications. You should assume such communications are not privileged and are discoverable by the opposing party, along with any work product shared with the insurer. *See, e.g., In re Imperial Corp. of Am.,* 167 F.R.D. 447, 451 (S.D. Cal. 1995).

If your client's insurer is defending but you were selected by the insured, you are likely being retained as "independent" or *"Cumis"* counsel. However, you should always clarify your role with both the insurer and the insured to avoid any confusion, particularly if you sometimes serve as panel counsel. When you are retained as independent counsel, you must disclose to the insurer "all information concerning the action *except privileged materials relevant to coverage disputes"* and timely "inform and consult with the insurer on all matters relating to the action." Cal. Civ. Code § 2860(d) (emphasis added). "Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party." *Id.*

3. "Burning Limits" Policies

If your client has a "burning limits" policy, amounts incurred in its defense erode the policy limit. For example, if your client has a $1 million limit and incurs $600,000 in defense costs, it is left with only $400,000 in coverage for a settlement or judgment. D&O and E&O policies are typically burning limits policies.

Defense counsel may be left in the dark about the burning-limits nature of the client's policy or simply ignore the ramifications of such a policy in formulating the case strategy. More often than it should, this results in the client having little or no insurance dollars to resolve the lawsuit. There is also a potential for the client to run out of defense coverage prior to the conclusion of the litigation. In either event, defense counsel faces an unhappy client, if not a malpractice claim.

If your client has a burning limits policy, you should attempt to resolve the lawsuit as early as possible and certainly before the available limits are substantially eroded by defense costs. Early resolution is particularly important if the client is facing liability in an amount close to or exceeding the policy limits.

4. Dispositive Motions

Several years ago, defense counsel referred a client who wanted to challenge its insurer's coverage denial. The case was in an early stage, with the client having recently won a demurrer and an insignificant amount of defense costs having been incurred. Unfortunately, the "successful" demurrer resulted in the dismissal of the only potentially covered claim, which under the circumstances created a significant hurdle for a successful coverage challenge.

When determining which claims to challenge through dispositive motions, always remember that, for purposes of the duty to defend, there must be at least one potentially covered claim in the lawsuit. See Buss v. Superior Ct., 16 Cal. 4th 35, 46 (1997). Failure to keep this in mind could result in your client winning a battle but losing its insurance coverage in the process.

5. Settlement Confidentiality Provisions

Insureds often choose to sue their insurer after the conclusion of the underlying litigation for which coverage is sought. It is not unusual for underlying litigation to be resolved by means of a settlement containing a confidentiality provision that does not include a carve-out allowing for disclosure of the settlement in subsequent litigation against the insurer. Failure to include such a carve-out is not necessarily insurmountable. However, if you have reason to believe your client may sue its insurer for coverage in the future, it is best that any confidentiality provision include language allowing for disclosure of the settlement in subsequent coverage litigation.

Conclusion

Although not an exhaustive list, consideration of the points above should go a long way towards ensuring your actions do not inadvertently jeopardize your client's insurance rights.

Cheryl Dunn Soto is a partner at Franklin Soto Leeds LLP. She is a seasoned attorney with more than 25 years of experience. Ms. Soto is an ABTL Board Member.

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Aloha and Mahalo for a Successful 2023 Annual Seminar

By Eric Beste

Over three sunny and warm days this past October, over forty members of the San Diego Chapter joined over two hundred of their colleagues from across the State for the ABTL's 49th Annual Seminar on the Big Island of Hawaii. As in previous years, the Seminar provided a unique opportunity for members of the civil trial bar in California to interact with and learn from some of the best and brightest trial lawyers and judges, while also giving members and their families a well-deserved vacation at one of the best resorts in the world. And the San Diego Chapter continued the trend of having more of its members selected to serve on panels, and having a high participation rate from both our local bench and bar. When coupled with the luxury and value of the accommodations at the Fairmont Orchid, this year's Seminar could only be described as an unmitigated success.

Among the outstanding presentations this year were several that included (or were led by) members of ABTL's Board of Governors of the San Diego Chapter. Valentine Hoy, a partner at Allen Matkins Leck Gamble Mallory & Natsis LLP, provided a seasoned and wise perspective on trial advocacy as the defense panelist on "So You Think You Can Trial? Tips and Tricks for Effective Advocacy Before the Jury and Judge." By explaining how to take advantage of the various stages of litigation to advance your strategic goals before a judge or jury, Val clearly and effectively laid out how to think about using trial advocacy to get more out of a limited set of facts.

Randy Jones, member of ABTL's Board of Governors and partner at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., showed how to effectively tackle difficult topics with a personable and humble style by speaking of his experiences as a diverse lawyer and mentor during the panel presentation, "Post-Covid Effective DEI Mentoring and Menteeing." Randy deserves credit for issuing a call to action to all ABTL attorneys to take on the mantle of mentoring diverse talent in our organizations. He also showed the bravery to specifically implore "non-diverse" attorneys to help change the face of the ABTL to better reflect the clients we serve.

Colin Ward, member of ABTL's Board of Governors and the head of litigation at Viasat, Inc., expertly led a panel on the brave new world facing litigators and in-house counsel seeking to lawfully and ethically collect and use social media. The presentation, entitled "Evidentiary Issues Involving Collection and Admissibility of Social Media," not only educated the audience on the types of evidence generated by social media, but also provided a framework for understanding the risks and benefits of collecting and using such evidence in hotly contested disputes. And Colin effectively communicated the reactions of many in-house counsel confronting the discovery challenges associated with this sort of evidence. ("Well, that was terrifying.").

Finally, several current and former members of the state and federal judiciary (including many from San Diego) engaged in candid and substantive discussions with attendees in small break-out sessions. These informal discussions continued during the daily social events, providing both attorneys and judges with the opportunity to gain valuable insights into how they could work together to further the practice of law and advance the administration of justice.

In addition to participating in friendly golf, tennis, and pickleball tournaments, ABTL members and their guests had the opportunity to view competitors in the Woman's Ironman World Championship as they raced past the resort. And many attendees chose to spend their time in paradise relaxing by the pool, on the beach, or in the beautiful waters of the Pacific Ocean. All told, the 49th Annual Seminar provided ABTL members with an unparalleled opportunity to learn and network with colleagues from across the State, while at the same time benefitting from the rest and relaxation that can only come from a Hawaiian vacation.

The San Diego Chapter is already preparing for an even greater showing at the 50th Annual Seminar, scheduled for October 17-20, 2024, at The Meritage Resort & Spa in Napa Valley, California. If you would like to help with the planning, please reach out to Lori McElroy at abtlsd@abtl.org and she can connect you with the Annual Seminar committee members. In the meantime, block out October 17-20 for a great event in 2024!

Eric Beste. is a partner at Barnes & Thornburg LLP focusing his practice on white collar criminal defense, internal investigations and compliance matters, and complex business litigation. Eric is an attorney board member of ABTL and he is the editor of the ABTL Report.

Employment Law Update: Top 10 New California Laws for 2024

By Rose Huelskamp Serrano, Anne Wilson, Tony Skogen, Katherine Fine and Jonah Mekebri

The new year will bring new legal requirements for California employers. Legislative changes impacting minimum wage, paid sick leave, noncompete agreements and other employment and labor laws must be addressed by employers. Here are the top 10 changes for employers in the new year.

New Year – New Laws Effective Jan. 1, 2024!

1. Minimum Wage Increase for the State of California

California's minimum wage increases from $15.50 per hour to $16 per hour, regardless of the number of employees. As a result, the minimum salary to meet the "salary basis" test for exempt employees will increase from $64,480 to $66,560.

2. Expansion of California Paid Sick Leave to Five Days or 40 Hours (SB 616)

Senate Bill (SB) 616 expands the Healthy Workplace, Healthy Families Act of 2014 to require California employers of all sizes to provide a minimum of five days or 40 hours of paid sick leave (PSL) per year. This is a substantial increase from the current California minimum of three days or 24 hours.

In addition to providing workers more paid sick days, SB 616 increases the accrual and carryover amounts for PSL. Specifically, employers may continue to use the existing accrual rate (one hour accrued for every 30 hours worked) or a different accrual method as long as employees accrue (a) no less than 24 hours or three days of PSL by the end of their 120th day of employment and (b) no less than 40 hours or five days of PSL by the 200th day of employment. Any remaining accrued PSL must be carried over to the next calendar year, but employers may cap PSL accrual at 80 hours or 10 days (doubling the prior cap minimum under state law). An employee's use of PSL may be limited to 40 hours or five days in a calendar year or 12-month period.

For employers who frontload the entire amount of PSL at the beginning of the year, they may continue to do so if the amount banked is five days or 40 hours. There is no carryover requirement if an employer utilizes this lump-sum paid sick leave policy.

Further, the amended law extends some obligations and protections to employees covered by a collective bargaining agreement. It also expressly exempts employers covered by any local ordinance that is inconsistent with the amendments.

3. Bereavement Leave for "Reproductive Loss" (SB 848)

SB 848 expands California Bereavement Leave law to require employers with five or more employees to provide up to five days of protected leave following a "reproductive loss event." Under this new law, eligible employees are those who have worked for the employer for at least 30 days. A "reproductive loss event" means the day of or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth or unsuccessful assisted reproduction. Employees may take nonconsecutive days off for leave under this statute and, subject to narrow exceptions, the leave must be completed within three months of the triggering event. If an employee experiences more than one "reproductive loss event" within a 12-month period, a covered employer is not required to provide more than 20 days of reproductive loss leave.

Reproductive loss leave must be taken under any existing appliable leave policy of the employer. If the employer does not have an existing policy requiring paid leave, all five days of leave may be unpaid. However, employees may choose to use any accrued and available sick leave, or other paid time off, for reproductive loss leave. There is no requirement under this specific statute for an employee to provide documentation for the request for reproductive loss leave. Additionally, employers are required to maintain the confidentiality of any employee who requests leave.

4. Rebuttable Presumption of Retaliation for Adverse Action within 90 Days of Protected Conduct by Employee (SB 497) and Local Enforcement of the Labor Code (AB 594)

The Equal Pay and Anti-Retaliation Protection Act (SB 497) amends California Labor Code sections 98.6, 1102.5 and 1197.5 to create a rebuttable presumption of retaliation if adverse action is taken against any employee or applicant for employment within 90 days of certain "protected activity." This will make it easier for employees to establish workplace retaliation.

Under the current law, a retaliation claim includes three stages of a shifting burden of proof: (a) the employee or applicant must establish a *prima facie* case of retaliation; (b) the employer must identify a legitimate, non-retaliatory reason for their act(s) and (c) the employee or applicant must prove that the employer's non-retaliatory reason was a pretext for retaliation.

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To establish a *prima facie* case of retaliation, an employee or applicant must demonstrate: (a) the employee engaged in protected activity; (b) the employer engaged in an adverse action against the employee and (c) there was a causal nexus between the protected activity and the alleged adverse action. The new rebuttable presumption will eliminate the initial burden on the employee to establish a *prima facie* case and shift the burden directly to the employer to prove a non-retaliatory reason for the adverse action.

The new law also increases the potential penalties employers may face for retaliation to include a civil penalty to $10,000 ***per employee***, per violation, "to be awarded to the employee who was retaliated against."

The Equal Pay and Anti-Retaliation Protection Act increased in significance following the passage of Assembly Bill 594, which specifically authorizes local prosecutors to bring actions to enforce the California Labor Code. It also provides a budget of $18 million for local prosecutors to enforce statewide labor laws. Enforcement actions by local prosecutors will not be subject to arbitration agreements between the employer and employee (other than collective bargaining agreements) and may result in the award of unpaid wages, penalties and attorneys' fees. The Los Angeles, San Francisco, and San Diego district attorney offices already have "workplace justice" divisions specializing in prosecution of such matters. Employers in those counties should beware that there will likely be an increase in enforcement proceedings due to these new laws.

5. Illegal Non-Compete Agreements Now Risk Significant Civil Exposure (SB 699/AB 1076)

SB 699 prohibits employers from entering into or attempting to enforce noncompete agreements that are void under state law regardless of where the employee worked when the agreement was entered and/or where the agreement was signed. This bill adds section 16600.5 to the California Business and Professions Code, which makes it a civil violation for an employer to enter into a violative noncompete contract and provides a private right of action to employees, former employees and prospective employees for injunctive relief or for the recovery of actual damages, or both, as well as reasonable attorney fees and costs. SB 699 discusses the Legislature's findings that noncompete agreements apply to one in five workers and that these agreements have a chilling effect on employee mobility. The bill also restates that California's public policy provides that every contract that restrains anyone from engaging in a lawful profession, trade or business of any kind is void, except under limited statutory exceptions.

AB 1076 adds section 16600.1 to the California Business and Professions Code, codifying existing case law in *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937 regarding the prohibition on noncompete agreements being broadly construed, absent a specific statutory exemption. Section 16600.1 makes it illegal for an employer to include a noncompete clause in any employment contract or to require an employee to enter into a noncompete agreement. This amendment also requires employers to notify all employees hired after Jan. 1, 2022, that any noncompete clauses entered are void. Such notice must be complete on or before Feb. 14, 2024. Finally, a violation of section 16600.1 shall constitute an act of unfair competition and provide a private right of action for violations.

6. Cannabis Discrimination (AB 2188 (2022))

Passed during the 2022 legislative session, AB 2188 makes it unlawful for an employer to discriminate against an applicant or employee for the use of cannabis off the job and away from work. Further, employers may not discriminate against employees or applicants based on an employer-required drug test that found non-psychoactive cannabis metabolites in the person's hair, blood, urine or other bodily fluids. Employers may still test employees and applicants for cannabis, but they must ensure that the drug screening does not screen for non-psychoactive metabolites. Certain applicants and employees are exempt from this new law based on their profession, such as those in the building and construction trades, and based on their relation to the federal government, such as an applicant for a position requiring a federal background investigation.

With AB 2188's effective date approaching, it will be important for employers to reassess their background check and drug screening procedures to ensure compliance with the new law.

Coming Later This Year…

7. Workplace Violence Prevention Plans (SB 553)

SB 553 requires most California employers to adopt a written comprehensive workplace violence prevention plan by July 1, 2024. The plan must include and detail, among other things, procedures:

(a) ensuring compliance with the plan,
(b) developing and providing training on the plan,
(c) correcting workplace violence hazards in a timely manner,
(d) establishing post-incident response and investigation,
(e) to assess and evaluate risk factors for workplace violence,
(f) to communicate with employees regarding workplace violence matters,

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(g) obtaining assistance from the appropriate law enforcement agency during all work shifts and
(h) ensuring active involvement of employees in developing, implementing and reviewing the plan.

The plan must also designate the person(s) responsible for implementing and maintaining the plan by name or job title, and it must be easily accessible to all employees. Finally, covered employers must also record specifically enumerated information in a "violent incident log" about every incident, post-incident, response and investigation performed in accordance with the workplace violence prevention plan.

Be on the lookout for a follow up article by DMW in the new year outlining the features of this plan!

Industry-Specific Changes

8. Additional Disclosure of Disaster Declarations and Agricultural Employers under Labor Code Section 2810.5 (AB 636)

Under California Labor Code section 2810.5, existing law requires California employers to provide an employee, at the time of hiring, a written notice containing specified information about the employer and the terms and conditions of employment in the language the employer normally uses to communicate with the employee.

Effective Jan. 1, 2024, AB 636 amends section 2810.5 to require the written notice of the existence of any federal or state emergency or disaster declaration applicable to the county or counties in which the employee will be employed that was issued within 30 days prior to the employee's first day of employment and that may affect the employee's health and safety during their employment.

Effective March 15, 2024, agricultural employers must provide employees working under the federal H-2A visa with written notice, in Spanish (and, if requested by the employee, in English), describing the employee's additional rights and protections under California law and regulations, including, but not limited to:

(a) the federal H-2A program wage rate required to be paid during the contract period,
(b) frequency of pay,
(c) pay for piece-rate workers,
(d) entitlement to paid and unpaid breaks,
(e) transportation travel time compensation when required,
(f) contents of itemized wage statements,
(g) sexual harassment prohibitions,
(h) requirements regarding availability of toilets, potable water, handwashing facilities and shade,
(i) workplace safety requirements, training and correction of hazards,
(j) prohibitions against tool or equipment charges,
(k) right to accrue and take sick leave, workers' compensation coverage, disability pay and medical care for injuries and
(l) the right to complain to state or federal agencies and to seek advice from collective bargaining representatives or legal assistance organizations.

The Labor Commissioner is required to publish an updated section 2810.5 notice template for agricultural employers by March 1, 2024.

9. Revised Deal on Fast Food Workers Minimum Wage (AB 1228)

Beginning in April 2024, the minimum wage for fast food workers in California will increase to $20 per hour, a nearly $4 per hour increase over the average wage of California's 500,000 fast food workers in 2022, under AB 1228. Covered employers include "national fast food chains" with more than 60 limited-service restaurants nationally, and at least one in California, who fall under North American Industry Classification System (NAICS) Code 722513 for limited-service restaurants (establishments primarily engaged in providing food services (except snack and nonalcoholic beverage bars) where patrons generally order or select items and pay before eating). Excluded from the new law are bakeries or restaurants located in a grocery store or airport.

AB 1228 also establishes a new Fast Food Council, including employer and worker representatives. Going forward, the Fast Food Council will have the power to annually raise fast food workers' minimum wage and develop proposals for other working conditions, including health and safety standards and training.

10. Minimum Wage Increase for Healthcare Workers (SB 525)

Effective June 1, 2024, SB 525 raises the statewide healthcare worker minimum wage to $23 per hour for healthcare facilities: (a) with 10,000+ full-time employees, (b) that is part of an integrated healthcare system with 10,000+ full time employees, (c) that is, owns, controls or operates a dialysis clinic or (d) that is owned, affiliated or operated by a county with a population of more than 5 million.

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For these healthcare facilities, that rate will rise to $24 on June 1, 2025, and $25 on June 1, 2026. Most clinics (other than dialysis clinics) will see the minimum wage rise to $21 per hour on June 1, 2024, and then to $22 on June 1, 2026. Other healthcare facilities will be required to pay its employees at least $21 per hour beginning on June 1, 2024, and then $23 per hour beginning on June 1, 2026. This is the nation's first law creating a statewide healthcare worker minimum wage and cannot be overridden by local ordinances.

For more information regarding any of the above, or if you would like to discuss any other employment matters, please contact DMW employment law attorneys

(Left to right, top to bottom) Rose Huelskamp Serrano, Anne Wilson, Tony Skogen, Katherine Fine and Jonah Mekebri. are attorneys at Duckor Metzger & Wynn, they are also active members in ABTL. Anne Wilson is the firm's Board of Governors representative.

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