

Employer FAQs for the California Wildfires: Your Role in Protecting Workers' Health, Safety, and Workplace Rights

A Practical Guidance® Article by Sheldon J. Blumling, Benjamin M. Ebbink, Nicole Kamm, Jacklin Rad, Andrew J. Sommer, and Megan C. Winter, Fisher & Phillips LLP



Sheldon J. Blumling
Fisher & Phillips LLP



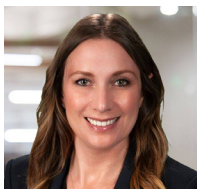
Andrew J. Sommer
Fisher & Phillips LLP



Benjamin M. Ebbink
Fisher & Phillips LLP



Megan C. Winter
Fisher & Phillips LLP



Nicole Kamm
Fisher & Phillips LLP



Jacklin Rad
Fisher & Phillips LLP

This detailed set of Frequently Asked Questions addresses the workplace-related issues facing employers in the wake of the California fires. In addition to legal obligations, you need to consider, this Insight also addresses the practical

questions that will most often arise during and in the aftermath of the natural disaster.

This article discusses:

- Workplace Safety
- Employee Leaves, Accommodations, and Remote Work
- Providing Assistance to Natural Disaster Victims
- Wage and Hour Issues
- Employee Benefits Issues
- Conclusion

Workplace Safety

What Are Employers' General Responsibilities to Assess Workplace Hazards during Wildfires?

California employers have a legal duty to provide a safe and healthy workplace under Cal/OSHA regulations. During wildfire outbreaks, this includes assessing hazards from wildfire smoke, fire proximity, and unsafe conditions before

employees return to work. This FAQ document will provide more detail, but at a minimum, you need to:

- Regularly monitor local conditions, including fire reports and evacuation zones.
- Evaluate the current Air Quality Index (AQI) for PM2.5, in outdoor workplaces and enclosed buildings without operative mechanical ventilation systems, to determine if the air is safe for workers.
- Conduct a workplace hazard assessment before allowing employees to return to the worksite.
- Develop feasible control measures to reduce employee exposure to wildfire smoke by, for example, allowing employees to work in enclosed buildings with mechanical ventilation systems, changing work schedules, reducing work intensity, and providing additional rest periods.
- Document safety measures and decisions to reduce liability.

When Must We Start Monitoring Air Quality Due to Wildfire Smoke?

You must begin monitoring the AQI for PM2.5 when wildfire smoke could affect a worksite. The AQI must be monitored before and throughout the work shift using reliable sources like:

- [U.S. EPA's AirNow](#)
- [Local air quality management district websites](#)
- Direct-reading instruments at the worksite (as long as they are [Cal/OSHA-compliant](#))

What Actions Are Required Based on the AQI for PM2.5?

- If the AQI is 151-500, you must provide respirators to all employees for voluntary use and encourage their use.
- If the AQI rises above 500, respirator use is mandatory. You must implement fit testing and medical evaluations for employees using respirators working above this AQI threshold.

How Should We Communicate Air Quality Concerns to Employees?

You must notify employees about the current AQI and the protective measures available to them and encourage employees to report worsening air quality or adverse symptoms related to wildfire smoke exposure. Communication should be clear, frequent, and in a language employees understand. Use email, text alerts, signage, or toolbox talks to ensure everyone is informed.

What Types of Respiratory Protection Must We Provide?

You must provide NIOSH-approved respirators such as particulate filtering respirators labeled N95, N99, N100, R95, P95, P99, or P100.

What Should We Do to Protect Employees Performing Remediation and Reconstruction in Fire Zones?

Workers completing remediation and reconstruction face increased risks from hazardous debris, toxic particles, and smoke exposure. You must:

- Provide enhanced respiratory protection based on the respiratory hazards to which the worker is exposed (e.g., half-mask or full-face respirators)
- Ensure workers have proper Personal Protective Equipment (PPE) such as gloves, goggles, protective footwear, and other protective clothing
- Train workers on hazard recognition and safe handling of fire debris
- Follow Cal/OSHA's Hazard Communication Standard to inform employees of the specific hazards present

Can Employees Refuse to Work if Our Worksite Is in an Evacuation Zone?

Yes. In California, it is illegal for employers to retaliate against workers who refuse to work in unsafe conditions, including when their worksite is in an evacuation zone. You should avoid pressuring employees to return to work. Also:

- Check local evacuation orders before reopening worksites
- Communicate clearly with employees about when it is safe to return

What Should We Do If Our Worksite Is Near, But Not in, an Evacuation Zone?

You must still assess potential safety hazards at the worksite. This includes:

- Monitoring air quality and fire reports
 - Providing necessary PPE
 - Allowing employees to work remotely if possible
 - Implementing flexible schedules for employees with evacuation concerns
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Employee Leaves, Accommodations, and Remote Work

Are Our Employees Entitled to Take California Paid Sick Leave during the Fires?

Employees may use [accrued sick leave under California law](#) for absences related to the wildfire disaster if the need falls under a permissible use (such as health issues or to care for a family member). Additionally, the employee may choose to take paid leave under your vacation or paid time off policy if the policy provides for such leave or the employer opts to allow, but this generally cannot be required unless reasonable notice is provided and stated in a policy or employment agreement. Don't forget that local laws may provide enhanced paid sick leave and other benefits. Be sure to provide employees with updated information about leave entitlements and workplace changes due to the disaster.

Should We Provide Family and Medical Leave?

Employees requesting time away from work could conceivably be protected by the California Family Rights Act (CFRA) and/or the federal Family and Medical Leave Act (FMLA) to the extent they develop a serious health condition or need to care for a family member with such a condition, and otherwise meet eligibility requirements. Even in the absence of such protection, your internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily providing an employee with leave in the absence of any legal obligation.

Are Our Employees Entitled to Workplace Accommodations?

Remember that the conditions during a natural disaster may create the need for an accommodation under the Americans with Disabilities Act (ADA) or California's Fair Employment and Housing Act (FEHA). For example, wildfire conditions could impact employees with respiratory or other medical conditions, mobility limitations, or mental health conditions like post-traumatic stress disorder. You should engage in the same interactive process with the employee as you would under other circumstances to handle requests and explore reasonable accommodations, including leave of absence.

Should We Allow Employees to Work Remotely?

In addition to being a potential reasonable accommodation, you may want to consider offering remote work as an alternative, if possible, for your work environment, to allow employees flexibility during this challenging time. [You can](#)

[read more about managing remote work policies here.](#)

Don't forget that you can always provide more benefits and flexibility than required by law, just be sure to apply such policies fairly and consistently.

Are There Any Additional Leave Laws in California that Apply to Emergency Situations?

You should note that employees involved in volunteer firefighting or disaster relief may have specific job protections under California law, including reinstatement rights after an emergency response. Moreover, employees taking leave to participate in certain emergency services are protected from retaliation under California law. You should ensure your managers and HR team are aware of these protections.

Additionally, as mentioned in our workplace safety section, California law prohibits an employer from taking or threatening adverse action against an employee in an emergency situation who refuses to report to a worksite or leaves a worksite in the affected areas based on a reasonable belief that the worksite is unsafe. The law also prohibits employers from forbidding employees to use mobile devices for certain safety purposes.

You should also note that some local jurisdictions may have additional requirements for leave or accommodations during emergencies. California leave and accommodation laws are complex, so it's best to contact experienced legal counsel if you have questions.

A number of our employees have been called upon to serve as relief workers to help with the wildfire devastation. Do laws such as USERRA protect them as they would National Guard members, reservists, and other members of the uniformed services?

Probably, yes. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a broad pro-employee statute, significantly restricting the treatment of employees who perform services protected by the statute. It provides three major categories of employer obligations:

- **Prohibition against discrimination.** Under the Act, a person cannot be denied initial employment, reemployment, retention, promotion, or any benefit on the basis their membership, application for service, or obligation for service in the armed forces.
- **Continuation of benefits while on leave.** USERRA also requires employers to provide eligible employees with up to five years of unpaid leave during the life of their employment. Throughout this period, the employee's seniority, health care, and pension benefits must be maintained –and–

- **Right to reemployment.** Returning service members have a virtually unfettered right to reemployment by their pre-service employers upon timely application for return to work.

Note that California law has additional protections for military service members on leave.

What Categories of Workers Might be Protected by USERRA?

In addition to military personnel called up to serve in response to the wildfires, the Bioterrorism Preparedness and Response Act extended USERRA's protections to certain emergency workers dispatched to assist with national disasters, including those employees performing as intermittent disaster response appointees upon activation of the National Disaster Medical System (NDMS), even if they are not otherwise members of the uniformed services. NDMS programs include DMAT (Disaster Medical Assistance Team), DMORT (Disaster Mortuary Operational Response Team), VIC (Victim Identification Center Team), NVRT (National Veterinary Response Team), NPRT (National Pharmacy Response Team), and NNRT (National Nurse Response Team). Members of the commissioned corps of the Public Health Service (PHS) also qualify for USERRA protection, as would any other category of persons designated by the President as "uniformed services" at times of national emergency.

How Do We Know If Our Employees Are Covered?

To establish USERRA eligibility, an employee must meet the following conditions:

- Hold a civilian job and have a reasonable expectation that employment will continue indefinitely
- Provide advance written or verbal notice that they intend to leave for service (or training, in some cases) with NDMS or another qualifying program. In cases of emergency necessity, as well as circumstances where it is unreasonable to provide notice, failure to do so is excused
- Engage in service that does not exceed the five-year cumulative limit of time to be released honorably from NDMS (or another qualifying federal program) –and–
- Subsequently submit a timely application for re-employment or report back for work in a timely fashion

To the extent that employees are unable to meet these criteria, they would not qualify for USERRA protection. USERRA covers both voluntary and involuntary service. If an employee volunteers for service and is placed on orders activating them for service, then the service is covered under USERRA even though the employee volunteered. If

an employee volunteers to serve with the relief effort but is not ordered to active service under any of the federal programs described above, they do not qualify for USERRA protection.

How Long after They Finish Working for NDMS Do Employees Have to Return to Us?

- If an employee works for NDMS for a period of up to 30 consecutive days, they must return to work for the first full regularly scheduled work period on the first full calendar day following completion of the period of service and safe transportation home, plus an eight-hour rest period. If it is impossible or unreasonable for the employee to return to work within this time frame through no fault of their own, then they must return to work as soon as possible following the eight-hour rest period.
- If an employee works for NDMS for a period of 31-180 days, they must submit a written or verbal application for reemployment not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable for the employee through no fault of their own, then they must submit the application as soon as possible thereafter.
- If an employee works for NDMS for a period of 181 days or more, the employee must submit an application for reemployment not later than 90 days following completion of the period of service.
- The above deadlines to report to work or apply for reemployment can be extended for up to two years to accommodate for periods during which a person was hospitalized for or recovering from an injury or illness that occurred or was aggravated during a period of military or NDMS service.

Are Employees Who Participate in NDMS Eligible for Health Care Coverage and Continuation?

Yes. NDMS employees have the same USERRA right to elect continued health care coverage as military personnel do. NDMS employees also have the right to immediately reinstate health insurance coverage upon their return to work.

One of our employees advised us that they wanted to volunteer with the wildfire relief effort and has since been absent from work. What are our obligations with regard to this employee?

If the employee does not qualify for federal USERRA protection or a California or local military leave law, you are not obligated to provide such protection. Nevertheless, they

may be eligible for FMLA or California law leave or leave under one of your other policies – check your policies and inquire with the employee before taking action.

Providing Assistance to Natural Disaster Victims

Our Employees Have Lost Homes and Need Assistance. Is There Anything We Can Do to Provide Them Assistance?

Yes, there are at least four ways in which you can assist.

- **401(k) plan hardship distributions.** Pursuant to 2019 IRS regulations, employers can amend their 401(k) plans to provide hardship distributions for expenses and losses (including loss of income) incurred by employees on account of a disaster declared by FEMA under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. To qualify for this benefit, an employee's principal residence or principal place of employment at the time of the disaster needs to have been located in an area designated by FEMA for individual assistance with respect to the disaster. This allows employees to take hardship distributions for federally declared disasters without waiting for the IRS to announce applicable relief.
- **Leave-sharing programs.** Employers can also set up a leave-sharing program to allow employees to donate their accrued, unused paid time off or leave to a pool that can be used by affected employees. Donation of leave programs must be carefully structured in compliance with existing guidance to ensure that the employee donating their leave is not taxed on the leave that they thought they had given to others.
- **Direct disaster relief assistance.** Section 139 of the Internal Revenue Code permits employers to provide assistance "to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster," provided that such expenses are not covered by insurance or otherwise. As long as such assistance is not a disguised form of additional compensation, it will be nontaxable to the recipients.
- **Charitable foundations.** Employers wanting to create a long-term assistance program for employees impacted by natural disasters and other hardships may also consider establishing a 501(c)(3) foundation, as described below.

Is It Possible for Us to Create a Charitable Organization through which Employees Can Make Tax-Deductible Contributions to Assist Other Employees Who Suffered Losses in the Storm?

Yes, it is possible for an employer to establish a 501(c)(3) private foundation that may provide disaster relief assistance to the employer's employees and their families (a "Charitable Foundation"). Once you establish this foundation, contributions may be tax-deductible to the donors and qualifying distributions are income tax-free to the recipients.

How Can We Create such a Charitable Foundation?

To avoid IRS concerns regarding private inurement, there are very specific requirements that you must follow to preserve the tax advantages:

1. You must take all appropriate steps to establish an official 501(c)(3) charitable organization, which requires creation of a not-for-profit entity and the filing of certain tax forms (both initially and on an ongoing basis).
2. The class of disaster relief recipients must be "large or indefinite."
3. You must select disaster relief recipients based upon "an objective determination of need" (e.g., disaster relief distributions must be purely needs-based, and may not be based upon factors such as the recipient's position or seniority with the employer).
4. The selection of disaster relief recipients and the determination of need must be made by either (i) an independent committee of the Charitable Foundation, "a majority of the members of which are persons other than persons who are in a position to exercise substantial influence over the affairs of the controlling employer" or (ii) "other procedures and standards" that are "adequate substitutes to ensure that any benefit to the employer is incidental and tenuous." –and–
5. Disaster relief distributions may not be made to, or for the benefit of, a "disqualified person" with respect to the employer (generally, "any person who was, at any time during the five-year period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the organization" and members of such a person's family) or a member of the independent committee referred to in Paragraph 4 above.

Most of these requirements exist to ensure that a Charitable Foundation has a purely charitable purpose and is not simply an additional employee benefit offered by an employer. If any of these requirements are not satisfied, there is a risk that contributions for disaster relief assistance will not be tax-deductible to the donors and distributions may be taxable to the recipients.

Wage and Hour Issues

How Do We Ensure Compensation Compliance?

When it comes to paying employees, California has many requirements that are unique to the state. While it is understandably difficult to track hours during such a devastating time, there are a few key aspects of California wage and hour law that you'll want to keep in mind.

- **Exempt employees.** First, you should note that different rules apply to exempt versus non-exempt employees. The key requirements to understand for exempt employees include the following:
 - **Performing work during the workweek.** Exempt employees are generally entitled to their full week of pay if they do any work during the workweek.
 - **Full day personal absences.** There are limited exceptions, such as might be the case when the employer is open for business, but the employee decides to take off a full day for personal reasons and performs no work.
 - **Using accrued leave.** Notably, you may require exempt employees to use accrued leave in certain circumstances, if it is available, but you should not dock pay for partial absences during the week or if your business closes for part of the week.
 - **Full week business closures.** You are not required to pay exempt employees for full week closures during which the employee performs no work.
- **Non-exempt employees.** Although non-exempt employees typically must be paid only for their actual hours worked, California has stringent requirements that apply to reporting time, on-call responsibilities, and more. Notably, "hours worked" includes "all time an employee is under the control of the employer, even if they are not working," according to the California Department of Industrial Relations. Here are some of the main considerations:
 - **Reporting time pay.** Non-exempt employees are often entitled to reporting time pay when they show up for their shift and are sent home before they've worked at least half their shift. But there is an exception for

certain conditions that are beyond the employer's control, including natural disasters like wildfires.

- **On-call rules.** Generally, employees who are required to be "on-call" or "standby" during the wildfires must be compensated for that time. The key is whether they are under the employer's control during that time.
- **Split-shift premiums.** These payments may be required if the employee is sent home early and asked to return later in the day.
- **Considerations for alternative workweek (AWW) arrangements.** If you change the schedule of employees on an AWW arrangement, you may need to pay overtime premiums for time exceeding eight hours in a day on a regularly scheduled workday.

Keep in mind that you might have additional legal obligation regarding compensation under the terms of an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract.

Can An Employee Volunteer to Perform Recovery Services for Us without Pay?

[Federal wage and hour law does not permit employees to do "volunteer" work to their for-profit private sector employer.](#) There are limited exceptions where such employees can volunteer for events sponsored by their employer. Employers considering any kind of unpaid volunteer services by their employees should carefully evaluate the legality of permitting this.

What Do We Do About Lost Time Records for Work Already Performed But Not Yet Paid?

As you know, it is important to ensure accurate records of hours worked, especially for employees working remotely or during partial closures. If the only records of hours worked are lost or unusable, then there is no perfect solution. Recreate the most-accurate accounting you can under the circumstances. Then have affected employee review, correct, and confirm the recreated time records. Another approach is to have each employee make the best-possible estimate of their hours worked. You should obtain the employee's written acknowledgement of their best recollection and should include the employee's authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available. Do not wait to receive this information if you can reasonably reconstruct the time worked, as employees must be paid promptly for time worked.

How Do We Record Employees' Worktime without Our Electronic Time Clocks?

Employees may record all hours worked by using handwritten timesheets or by other means. To ensure accuracy, each employee should enter their own time and should record the actual times when their work starts and stops each workday, including lunch and other breaks.

Employee Benefits Issues

Contributions to Our Pension Plan and 401(k) Are Due in the Next Few Weeks. Because of the Fires, We Either Can't Make the Contribution or Can't Determine How Much Is Owed. What Can We Do?

Following a presidential declaration of a major disaster, the IRS, USDOL, and Pension Benefit Guaranty Corporation (PBGC) routinely issue releases providing for extension of various deadlines for employee pension and welfare benefit plans for victims of the disaster in the affected states. For example, the USDOL has in the past issued statements that it will not seek to enforce ERISA violations for late contributions to retirement plans or deposit of employee contributions (including loan repayments) for plans, plan sponsors, and employers who are located in a county identified for individual assistance by FEMA due to the effects of major hurricanes. But to be eligible for the relief, plan sponsors must act reasonably, prudently, and in the interest of employees to comply as soon as practical under the circumstances. Detailed descriptions of the disaster areas and the relief granted are available on the [IRS](#) and [USDOL](#) websites.

Our 401(k) Record-keeper or Bank Trustee Is Not Operating. How Do Employees Access Their Accounts? Where Do We Make Contributions to the Plan?

You are under a legal requirement to submit funds to the record keeper/trustee as soon as reasonably possible, and no later than the 15th of the month following the payroll. If the record-keeper is not operating, you should take reasonable steps to segregate the funds in a separate account for the participants to address this problem. However, as indicated above, the USDOL has in the past indicated that it will not seek to enforce violations of ERISA for late deposit of employee contributions to a retirement plan given certain disaster conditions.

What If We Can't Meet Our Payroll Tax Deposits or File Our Form 5500 On Time because of the Fires?

In the past, the IRS has issued relief extending the deadline for filing the Form 5500 Annual Return/Report for employee benefit plans and granting an extension of certain filing deadlines for businesses and individuals located in one of the counties affected by a natural disaster.

The physician network we use is not functioning. How do our employees get health services?

There are several things you can do. First, check with your HMO or insurer to determine if the organization has designated replacements for the providers which are not functioning. In many cases, you may be able to substitute out-of-network providers without employees incurring additional costs. A number of insurers may be willing to waive out-of-network penalties, deductibles, or co-pays, and in certain cases, may be willing to waive plan restrictions such as limitations on prescription refills. For example, in response to a natural disaster, all pharmacists in a certain state were granted temporary authority to dispense up to a 30-day supply of medication (other than a Schedule II controlled substance) even if the prescriber could not be reached, based on their discretion. Additionally, some healthcare providers have allowed patients to refill medications early.

If you have a PPO which is lacking critical specialties or providers, contact the PPO provider or administrator to see if they have found replacements or to make sure they are willing to waive any exclusivity agreements that might exist. If you have employees or dependents who need critical prescriptions that cannot be filled in your area, contact the drug manufacturer. Many manufacturers are providing free drugs to those in need. You can also contact FEMA at 1-800-621-3362 (or 202-621-3362) to see what critical medical services are present in your area, and how providers can be contacted.

Conclusion

Your Fisher Phillips attorneys are here for you. You can review our [Comprehensive FAQs For Employers on Hurricanes and Other Workplace Disasters: 2024 Edition](#) for further information about responding to natural disasters. For more information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on [our California offices](#).

Related Content

Practice Notes

- [Cal/OSH Act: Compliance Requirements](#)
 - [Wage and Hour \(CA\)](#)
 - [Workplace Safety and Health \(CA\)](#)
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Sheldon J. Blumling, Partner, Fisher & Phillips LLP

Sheldon Blumling is a partner in the Irvine office and chair of the firm's Employee Benefits Practice Group. He advises clients with respect to all aspects of employee benefits and executive compensation, including qualified and nonqualified retirement plans, health and other welfare benefit plans, cafeteria plans, severance plans and equity-based compensation plans.

He also advises employers on compliance issues involving the Health Insurance Portability and Accountability Act (HIPAA) and all types of federal and state employment taxes, and he has had extensive experience advising clients on the employee benefits and executive compensation aspects of mergers and acquisitions.

Benjamin M. Ebbink, Partner, Fisher & Phillips LLP

Benjamin M. Ebbink is a partner in the Sacramento and Washington D.C. offices, Co-Chair of the Government Relations Practice Group and Chair of the Staffing Industry Group.

With over two decades of experience in the intersection between labor and employment law and public policy, he focuses on legislation and regulations enacted at the federal, state and local levels. Benjamin assists employers with navigating evolving legislative and regulatory landscapes in a variety of areas.

Nicole Kamms, Partner, Fisher & Phillips LLP

Nicole Kamm represents a broad range of clients, from small businesses to national companies, in a variety of industries, including healthcare, technology, manufacturing, retail, hospitality, construction, transportation and professional services. Nicole defends employers and provides dispute resolution counsel against individual and class claims of discrimination, harassment, retaliation, wrongful termination, and wage and hour violations before state and federal courts and administrative agencies. Nicole also provides strategic counsel and management training on employment issues that arise in the workplace, including hiring, discipline and termination decisions, leaves of absence, reductions in force and compliance issues arising under Title VII, the California Fair Employment and Housing Act, the California Family Rights Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the California Labor Code and Industrial Welfare Commission wage orders, and the federal and California Worker Adjustment and Retraining Notification Act.

Nicole has handled a full range of labor and employment matters, including claims before the Department of Labor, EDD, EEOC, and California Division of Labor Standards Enforcement (DLSE). Nicole regularly advises employers on preventive steps to minimize potential exposure arising from issues such as wage and hour compliance, independent contractor classification, and mass lay off strategies.

Jacklin Rad, Partner, Fisher & Phillips LLP

Jacklin Rad is a partner in the firm's Los Angeles office and advises employers across the state of California on the rapidly changing workplace laws, including pay transparency and regular rate calculations. Jacklin also provides guidance on workplace investigations.

Prior to joining Fisher Phillips, Jacklin was an attorney at a national labor and employment law firm where she provided advice and counseling to California clients on wage and hour, disability leave management, hiring and firing decisions, misclassification and pay equity matters.

Andrew J. Sommer, Partner, Fisher & Phillips LLP

With more than two decades of employment litigation experience, Andrew Sommer defends businesses in workplace safety inspections, investigations and enforcement actions brought by Cal/OSHA and other OSHA state programs. He is also highly experienced in defending individual and collective actions involving a wide array of wage and hour, whistleblower, disability, and wrongful termination claims.

Andrew also advises employers on workplace safety compliance, disciplinary actions, and the interactive process, among other work-related topics. Andrew takes a strategic and creative approach in providing advice and counsel to employers as well as resolving disputes in court and administrative proceedings.

Megan C. Winter, Partner, Fisher & Phillips LLP

Megan has spent her entire career defending and counseling employers in all aspects of employment law, including pay equity audits, wage and hour class and representative actions, harassment and discrimination litigation, reasonable accommodations, and family and medical leave law. Recognizing that different legal issues call for different approaches, Megan finds solutions that meet her clients' business needs and goals, whether that is developing leverage to obtain an early resolution or taking a case to trial.

Megan is Co-Leader of the San Diego office, Co-Chair of the firm's Leaves and Accommodations Practice Group, and a core member of the firm's Pay Equity Practice Group. She assists employers in developing workplace policies and procedures, and she regularly advises employers regarding day-to-day employment issues and strategies to avoid employment claims and litigation. Megan utilizes her B.S. degree in Mathematics to conduct damages analysis and compensation audits and to develop commission and compensation plans that comply with California's complicated and highly technical Labor Code.

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