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2020 Mid Year Labor Law Update

Presented by
California Employers Association

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HOTLINE FOR EMPLOYERS

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The California Landscape Contractors Association has partnered with the California Employers Association to provide CLCA members a **NO-COST HR HOTLINE!**

Providing guidance on:

- Hiring & Firing Processes
- Paid Sick Leave Laws & FMLA
- Breaks, Lunches & Overtime
- Employee Handbooks
- Harassment Prevention
- Remote Workers



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Stuff Our Lawyers Make Us Say

This presentation should not be relied upon as legal advice. Consult an attorney about any issues of legal significance to you & your company.



- AB 5 Gig Update
- Harassment Prevention Training
- Minimum Wage Increases
- Paid Family Leave Expansion
- Boots, Masks & Uniforms
- Supreme Court Ruling
- COVID -19
 - Families First Corona Virus Response Act (FFCRA)
 - OSHA Guidance for Covid-19 Investigations
 - Workers' Comp Coverage
 - I-9 Flexibility
 - Return to Work Recommendations
 - EEOC & ADA



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AB 5 Update: Gig Economy Bill



Adopts *Dynamex* case & ABC Test as law

General rule: “A person providing labor or services for [pay] **shall be considered an employee** rather than an independent contractor unless the hiring entity demonstrates that **all** of the following conditions are satisfied”

Applies to all Labor Code, Wage Order and UI claims



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ABC Test

ABC Test presumes all workers are employees *unless the worker:*

- A. is free from control and direction of the hirer,
- B. performs work that is **outside the usual course** of the hiring entity's business, AND
- C. is customarily engaged in a trade, occupation, or business of the same nature as the work performed.

Penalties: \$5,000 to \$15,000 for each violation
\$10,000 to \$25,000 per violation for a pattern and practice

SO MANY EXCEPTIONS



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Latest AB 5 Update

34 separate pieces of legislation related to AB 5 have been introduced in the Legislature since January!

- Pharmacists
 - Marriage therapists
 - Youth sports referees
 - Loggers
-
- On March 30th U.S. Court of Appeals denied a teamsters injunction which means motor carriers are still able to continue operating as independent contractors

Employer Takeaways — ICs

- ✓ Determine if your ICs can exist w/ABC test
- ✓ If not, convert contractors over to employees to avoid misclassification claims
- Misclassification problems: owed meal/rest, overtime, wage statement violations, expenses, penalties...

Consult legal counsel!

Big News! Harassment Prevention Training Update



- August 2019: SB778
- All employers with **5 or more employees** must provide harassment prevention training by 1/1/21
 - 1 hour for non-managerial employees
 - 2 hours for managers

**NEW - Free On-line
training for Employees &
Supervisors from DFEH!**



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Training Specifics

- California businesses with 5 or more employees **MUST** provide harassment prevention training every 2 years (SB1343).
- **Employees** are required to have 1 hour of training.
- **Supervisors and Managers** are required to have 2 hours of training within six (6) months of hire.
- Supervisors must receive the two (2) hour training within six (6) months of assumption of the position.
- If you hire **temporary employees**, the training for temporary employees must be completed by the temporary agency (the employer) within six (6) months of hire.
- **Seasonal and temporary employees**, or any other employee that is hired to work for less than six (6) months must be trained within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. (SB530)

Employer Takeaways

Must use qualified trainer

- ✓ Employment law attorneys
- ✓ HR professionals with at least two years of practical experience in harassment complaint handling, investigations
- ✓ Law school, college, or university instructors

Must be interactive

- ✓ Live, or interactive webinar (no recordings)
- ✓ Interactive online training
- ✓ Opportunity to ask questions
- ✓ Covers all content required by law
- ✓ **The clock is ticking!**




July 1st Minimum Wage Increases



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2020 State Minimum Wage

January 1st	Small Employer	Large Employer
	25 or fewer	26 or more
 2020	\$12.00	\$13.00
2021	\$13.00	\$14.00
2022	\$14.00	\$15.00
2023	\$15.00	\$15.00



Salaried Exemption Increases

Small Employers: 25 or fewer employees
Large Employers: 26 or more employees

Exempt Salary

January 1, 2020	\$49,920/\$54,080
January 1, 2021	\$54,080/\$58,240
January 1, 2022	\$58,240/\$62,400
January 1, 2023	\$62,400/\$62,400

*Duty and Salary Test (2 x State min wage x 2080 hours)
both must be met!*



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July 1st Increases

- Alameda - \$15 for all employees and all employer sizes
- Berkeley - \$16.07 for all
- **Emeryville - \$16.84 for all**
- Fremont - \$13.50 small employers and \$15 large employers
- LA City/ County - \$14.25 small employers and \$15 large employers
- Malibu - \$14.25 small employers and \$15 large employers
- Milpitas - \$15.40 for all
- **Novato - \$15 (100 or more employees), \$14 (26-99), \$13 (1-25)**
- Pasadena - \$14.25 small employers, \$15 large employers
- San Francisco - \$16.07 for all
- San Leandro - \$15 for all
- Santa Monica - \$14.25 small employers and \$15 large employers
- Santa Rosa - \$14 small employers and \$15 large employers



Employer Takeaways



- ✓ Check your county and city minimum wage laws — 30+!!
- ✓ Make \$ increases where and when necessary
- ✓ Ensure your exempt employees meet both the salary and duty tests
- ✓ **Prepare for 2021:** Will your salaried employees still meet the test?

Expansion of Paid Family Leave SB 83 July 1st



Wage Replacement Benefits
for 8 weeks (was 6) under
California's state disability
insurance (SDI) program:

*** To care for a seriously ill child,
spouse, parent, grandparent,
grandchild, sibling or domestic partner.*

*** To bond with a minor child within one
year of the birth or placement of the
child through foster care or adoption.*

**PFL does not provide job
protection, only monetary
benefits;** job may be protected
through other laws such as
the [Family and Medical Leave
Act \(FMLA/CFRA\)](#) or the New
Parent Leave Act (20+).



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These boots
were made
for working...



- **California LC 6401** requires employers to “furnish and use safety devices and safeguards ... reasonably adequate to render such employment and place of employment safe and healthful.”
- **Federal** regulation that exempts footwear from the requirement that employers purchase required safety gear. [29 C.F.R. § 1910.132 (h)(2)]
- *UPS Ground Freight Inc. v. California Occupational Safety and Health Appeals Board* (Cal. Ct. App., Feb. 6, 2020) Clear adoption of Cal-OSHA’s enforcement position requiring California employers to pay for any safety gear, to include steel-toed boots, required to protect employees from hazards they’re exposed to at work.

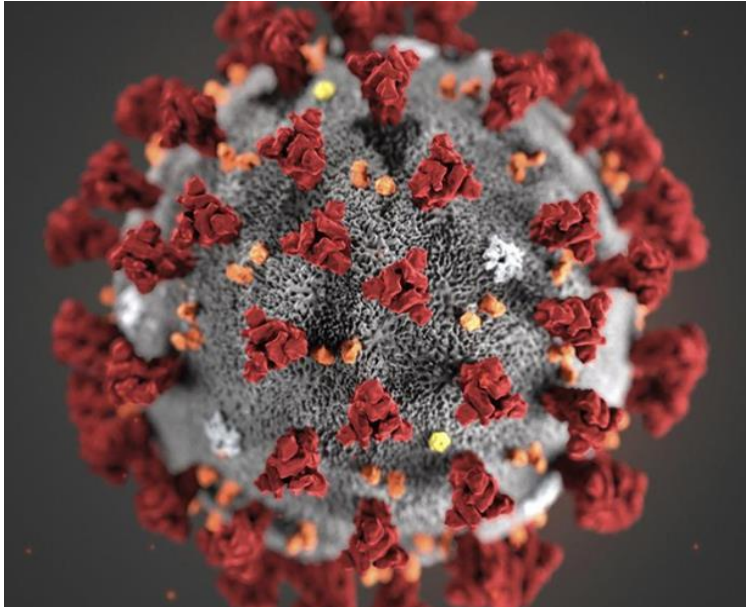


Supreme Court Ruling Prohibits Discrimination Based on Sexual Orientation and Gender Identity Across the U.S.



- June 15, 2020
- Title VII's protections against employment discrimination or harassment on the basis of sex.
- *Courts reviewed 2 cases on sexual orientation and one on gender identity*
- *“An employer who fires an individual merely for being gay or transgender defies the law,” – Justice Neil Gorsuch*
- Law passed in CA – 2003
- Review your employee handbook





Families First Coronavirus Response Act



- “FFCRA” signed into law on March 18, 2020
- Effective: **April 1 - Dec. 31, 2020**
- Up to **2 weeks** of EPSL
- Up to **12 weeks** of EFMLA
- Not retroactive
- Reimbursement to employers through payroll tax credits
- **Required Poster April 1st**

Covered Reasons for Leave: unable to work or telework because	Rate of Pay	Cap on Payment
(1) Employee subject to a federal, state, or local quarantine or isolation order	Employee's regular rate of pay	\$511 per day and \$5,110 aggregate per person
(2) Employee advised by a health care provider to self-quarantine	Employee's regular rate of pay	\$511 per day and \$5,110 aggregate per person
(3) Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.	Employee's regular rate of pay	\$511 per day and \$5,110 aggregate per person
(4) Employee is caring for an individual who subject to an order or self-quarantine as described above	2/3 of the employee's regular rate of pay	\$200 per day and \$2,000 aggregate per person
(5) Employee is caring for son or daughter if the school or child care is closed/unavailable due to COVID-19 precautions. Small business exemption	2/3 of the employee's regular rate of pay	\$200 per day and \$2,000 aggregate per person
(6) Employee is experiencing any other substantially similar condition specified by the HHS	2/3 of the employee's regular rate of pay	\$200 per day and \$2,000 aggregate per person

Can I Get Leave If My Employer ...

- **General Rule: No Leave If Not Scheduled to Work**
- Closes worksite while I am on EPSL or EFMLA?
 - Must pay for any EPSL or EFMLA used before closure.
 - No leave entitlement from date of closure on
- Closes worksite but says they will reopen in future? No. (Once reopen, Yes)
- Is open but furloughs me (no work)? No
- Is open but reduces my hours?
 - No for hours you are no longer scheduled to work
 - Yes for hours you are scheduled

Emergency Paid Sick Leave for Employers with fewer than 500 employees



Count: Part-time, full-time, temporary employees & employees on leave

- Must provide **up to 80 hours** of EPSL benefits for COVID-19 absences if employee can't work
- **Prorated** for part time employees
- **Lump sum** of hours – employees may use immediately or as needed
- **EPSL is in addition** to any other leave
- Employees are eligible regardless of length of employment



Documentation for EPSL Tax Credit

Written request containing:

- Employee's name;
- Date or dates for which leave is requested;
- Statement of the COVID-19 related reason the employee is requesting leave; *and*
- Statement that the employee is unable to work, including telework, for such reason.



Emergency Family and Medical Leave Expansion Act



- Expansion of FMLA to employers with 1-499 employees
- Temporary: 4/1-12/31/2020
- **Up to 12 weeks** of EFMLA leave if school is closed or if child care unavailable
- **Paid** and unpaid components
- Not all FMLA requirements apply to employers who were never subject to FMLA before **only the Emergency FMLA requirements apply**

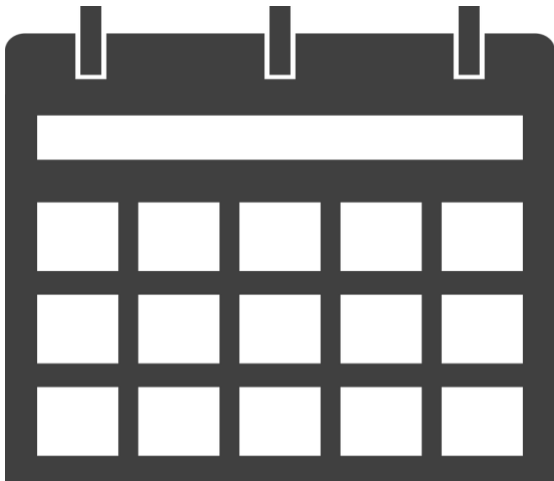


Qualifying Reason for EFMLA Leave

- Any employee who has been employed for **at least 30 calendar days**
- Only one qualifying reason
- Up to 12 weeks of job protected leave if...
- Employee unable to work or telework due to the **need to care for a child under 18 if the child's school or child care is closed or child care provider is unavailable due to COVID-19**
- May take time off intermittently with employers permission.



Duration of EFMLA



- Full-time employee: up to 12 weeks of EFMLA at 40 hours a week
- Part-time employee: eligible for leave for the number of hours that the employee is normally scheduled to work over that period
- EPSL/EFMLA: Total 12 weeks combined

Pay During EFMLA

First 2 Weeks of EFMLA	<ul style="list-style-type: none"> • Unpaid (May choose to use up to 80 hours EPSL to receive pay, if no EPSL left elect to use other employer provided leave)
After 2 Weeks of EFMLA	<ul style="list-style-type: none"> • Paid at rate of 2/3 of employee's regular rate of pay • Use the number of hours the employee would normally be scheduled to work for each day of leave that an employee takes up to 12 weeks
Cap on Pay	<ul style="list-style-type: none"> • Not to exceed \$200/day and \$10,000 aggregate over 12 weeks • Can't get UI while getting EFMLA because there is work available

EFMLA Documentation for Payroll Tax Credit

Written request contains:

- Employee's name;
- Date or dates for which leave is requested;
- Statement of the COVID-19 related reason the employee is requesting leave; *and*
- Statement that the employee is unable to work, including telework, for such reason.



Documentation Cont.

Request due to school closing or child care unavailability: (EFMLA or EPSL #5):

- Name and age of the child
- Name of the school that has closed or place of care that is unavailable
- A representation that **no other person will be providing care for the child during this period**
- Child over 14: a statement that special circumstances require the employee to provide care

Small Business Exemption

Exempt **only** if the:

1. Employs fewer than 50 employees;
2. Leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; **and**
3. An authorized officer of the business has determined and documented that at least one of three business conditions exists

See DOL Qs #4, 58-59



Small Business Exemption Criteria

- Proving EPSL or EFMLA for childcare reasons would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; OR
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; OR
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.



EFMLA Reinstatement

More than 25 Employees: Entitled to reinstatement to the same or equivalent position

Less than 25 Employees: Entitled to reinstatement unless:

- Position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
- Employer made reasonable efforts to restore you to the same or an equivalent position;
- Employer makes reasonable efforts to contact you if an equivalent position becomes available; and
- Employer continues to make reasonable efforts to contact you for one year beginning either on the date the COVID-19-related leave ends or the date 12 weeks after your leave began, whichever is earlier.

CAL OSHA Guidance



AB 2043 Amended: Standards Board shall adopt for COVID-19 infection prevention for agricultural employers and employees by January 1, 2021.

“Cal/OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees.”

May 26th - All employers now must determine whether employees who have COVID-19 contracted it at work.

Occupational Safety and Health Administration (OSHA) reverses previous guidance.



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Recording on 300 Log

Required to record cases of COVID-19 if **all** are met:

1. Case is a confirmed case of COVID-19,
2. Case is work-related, and
3. Case involves one or more of general recording criteria (i.e., medical treatment beyond first-aid, days away from work)

Report to Cal-OSHA

- Inpatient hospitalization, regardless of length of time, for other than medical observation or diagnostic testing (**no longer 24-hour exemption**)
- Occurs as a result of an incident, accident, emergency, or exposure over time and in a degree or amount sufficient to create a realistic possibility that death or serious physical harm in the future could result from the actual hazard created by the exposure.

WC & COVID-19 Cases

May 6th – Executive Order was issued that presumes an employee who works on site and then tests positive with COVID-19 was most likely infected at work and is entitled to Workers' compensation benefits.

Presumption expired July 5, 2020 but workers' comp still a remedy if virus is contracted at work. Employees will have prove they got it at work – make sure you have (and follow) a compliant safety plan.

Investigating COVID Cases

Employers now have a compliance responsibility to determine the work-relatedness of each COVID case

1. Ask the employee how they contracted COVID-19
2. While respecting privacy, discuss employee's activities (in/out of work) that may have led to COVID-19 illness;
3. Review employee's work environment for potential SARS-CoV-2 exposure.

Use all evidence available to determine if the COVID-19 illness was contracted at work

Contact the County Health Department

Did I Get COVID at Work?

COVID-19 is likely work-related if:

- Several cases develop among workers who work closely together
- Contracted shortly after lengthy, close exposure to customer or co-worker who has a confirmed case of COVID-19
- Job duties include frequent, close exposure to the general public in a locality with ongoing community transmission

COVID-19 is most likely NOT work-related if:

- Only worker to contract COVID-19 in vicinity and job duties do not include having frequent contact with the general public, regardless of the rate of community spread
- Outside the workplace, closely and frequently associates with someone who 1) has COVID-19; 2) is not a coworker, and 3) exposes the employee during period in which the individual is likely infectious

I-9 Form Temporary Flexibility

- New Form I-9 Exp. Date 10/31/2022 (upper right)
 - Dated 10/21/2019 (lower left)
- Department of Homeland Security (DHS) has announced temporary flexibility for completing Form I-9, while employers are operating remotely.
- DHS has extended the time in which employers may respond to Notices of I-9 Inspection and time to address E-Verify responses.
- CEA webinar on August 5th!

The image shows a Form I-9, 'Employee Eligibility Verification', from the U.S. Citizenship and Immigration Services (USCIS). A large red stamp is overlaid on the form, reading 'NEW FORM I-9 Employers must begin to use by May 1, 2020.' The form includes fields for the employer's name, address, and contact information, as well as sections for the employee's name, address, and identification documents. The stamp is positioned over the top half of the form, partially obscuring the header and the 'Section 1: Employer Information' section.

I-9 Temporary Flexibility

- ICE continues to be flexible regarding the physical presence requirements for I-9 inspection **until August 17, 2020** due to continued COVID-19 precautions.
- Employers may continue to inspect Section 2 documents remotely (video link, fax, or email). Once normal operations resume, all employees who were on-boarded remotely must report to their employer within three business days for in-person verification.
- This flexibility applies to employers and workplaces that are operating remotely.
- Where the new flexibility may not apply, employers may continue to designate authorized representatives to act on their behalf to review documents in person.
- ICE is giving a **120-day** extension of time to respond to Notices of Inspection (NOIs) that were issued in March 2020.



Returning to Work

- Bringing employees back the right way
- Clear written documentation
- Reduce anxiety
- Provide a positive experience
- Draft a recall letter that works for you!



Elements of a Recall Letter

Employment Details

- Return to work date, work hours and time to report
- Job title, Supervisor, Overview of responsibilities
- Employment classification (exempt/nonexempt; part-time/full-time)
- Salary or wage information / Employment at-will statement

Outline Any Workplace Changes

- Job or department location changes (work from home, etc.)
- Company hours of operation, Staggered shifts
- Policy changes for meetings, peer communication, travel, benefits

Mandatory Safety Precautions

- Check county and industry guidelines
- Identify a Crisis Management Team or Safety Officer
- Document the safety measures & CDC recommendations being taken by the company

Recall Letters

Employee's Responsibility

- Allow a reasonable amount of time for employees to respond to your letter
- Note that employees must respond to you by a specific date. Include a statement about what will happen if they do not respond by the deadline.
- Acknowledgment statement with a signature.
- Example: We will expect you to return on _____. If you do not contact us before that date, or if you do not show up ready to work at your assigned time, we will assume you have voluntarily resigned as of the close of that business day.

What if my Employee Won't Come Back to Work?

1. What do I do if my employees don't want to come back to work?

- If the employee refuses with no explanation then the employee is voluntarily separating from employment or terminated.
- If the employee or a family member has a health-related issue impacting their return, you must determine if the employee is protected under law (i.e. (ADA), (FEHA), injury or illness, FFCRA).
- If there is a child care related issue – FFCRA/ school activities leave.

2. Employee doesn't want to return to work because they earn more money on UI?

- Notify your employees in writing that there is work available and the effective date that work is available.
- Employers can inform employees that a refusal to return is a voluntary resignation. Document that you offered an opportunity to return to work and it was rejected. Get employee's refusal in writing.

More Questions

3. What if my employee says they are afraid to return to work?

- Outline all actions being taken to comply with federal, state, and local laws to ensure a safe and healthy workplace.

4. Am I allowed to take my employee's temperature?

- Yes. And, if temperature taking at the workplace is mandated, the time spent being tested and waiting for a test is considered part of the workday.

Records are confidential medical records that should be maintained so that only those with a legitimate right of access can see those files.

Questions Continued

5. Should I require my employees to wear a mask?

- The Centers for Disease Control and Prevention has [recommended that individuals wear face masks](#) "to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others."
- If you require employees to wear face masks, as a best practice decision or because required by a state or local law, consider providing masks or reimburse employees for the cost. Check local ordinances.

6. What happens if an employee returns to work and they (or someone in their family) gets sick?

- FFCRA provides paid sick leave for people affected by COVID-19. Smaller employers may be exempt from some of the paid emergency family leave requirements.
- CEA's [Returning to Work Tool Kit](#) Free for Members or at CEA Store



EEOC & ADA Guidance

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

What if an employee says they need an accommodation because they are at “high risk” for illness from the coronavirus?

Ok to discuss these topics with “at risk” employees:

1. How the disability creates a limitation. Ok to request medical documentation of a disability that isn't obvious.
2. How the requested accommodation will address the limitation.
3. Whether another accommodation could solve the issue.
4. How the proposed accommodation will enable the employee to continue performing the job's essential functions.

Update: June 17 - ADA prohibits mandatory antibody testing before allowing employees to return to the worksite!



At-Risk Workers

Someone with an impaired immune system is “immunocompromised.”
Conditions that cause a person to be immunocompromised, include:

- Bone marrow transplantation.
- Cancer treatment.
- Immune deficiencies.
- Organ transplantation.
- Poorly controlled AIDS or HIV.
- Prolonged use of corticosteroids (immune-weakening medications).

Centers for Disease Control and Prevention (CDC) notes that employees with conditions that put them at a higher risk for severe illness from the coronavirus also include people with:

- Chronic kidney disease who are undergoing dialysis.
- Chronic lung disease. Diabetes.
- Liver disease. Moderate to severe asthma.
- Severe obesity (body mass index of 40 or higher).



Wrap Up

- Update Employee Handbook
 - Harassment Prevention Training Guidelines
 - Paid Family Leave
 - FFCRA and leave interactions
 - Minimum wage increase
 - Uniform reimbursement policy (boots, masks, etc.)
- Use New I-9 Form
- Put up FFCRA Poster or email to remote workers
- COVID-19 Policies and Procedures

Please Fill Out The Survey



HRCI: 529846

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SHRM: 20-JVUCU

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