# 2021 Labor and Employment Law Update

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# Legal Disclaimer

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with legal counsel for individual responses to questions or concerns regarding any given situation.

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# Wage and hour updates

# **SB 3**: Increases California Minimum Wage

**Large Employers**

- 26 or more employees
- Minimum wage increases to **$14.00** per hour

**Small Employers**

- 25 or fewer employees
- Minimum wage increases to **$13.00** per hour

**New rates are effective January 1, 2021...**

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# **SB 3**: Increases California Minimum Wage

## Large Employers

**$58,240/year**

($14/hour × 40 hours/week × 52 weeks/year × 2)

$4,853.33/month

($58,240/year ÷ 12 months)

## Small Employers

**$54,080/year**

($13/hour × 40 hours/week × 52 weeks/year × 2)

$4,506.66/month

($54,080/year ÷ 12 months)

**Remember!** Increased minimum wage also increases minimum exempt salary that must be paid to meet the so-called “white collar” exemptions (e.g., executive, administrative, and professional)

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# **AB 1066**: Ag Overtime

| Date | Large Employers | Small Employers |
|---|---|---|
| **Jan. 1, 2020** | 9 hours/day;<br>50 hours/week | 10 hours/days |
| **Jan. 1, 2021** | 8.5 hours/day;<br>45 hours/week | 10 hours/days |
| **Jan. 1, 2022** | 8 hours/day;<br>40 hours/week | 9.5 hours/day;<br>55 hours/week |
| **Jan. 1, 2023** | 8 hours/day;<br>40 hours/week | 9 hours/day;<br>50 hours/week |
| **Jan. 1, 2024** | 8 hours/day;<br>40 hours/week | 8.5 hours/day;<br>45 hours/week |
| **Jan. 1, 2025** | 8 hours/day;<br>40 hours/week | 8 hours/day;<br>40 hours/week |

- AB 1066
- Wage Order 14
- Gradually phases in an 8/40-hour workweek
- Uses same “large” and “small” employer distinction as SB 3 (minimum wage)

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# **AB 2257**: Amends AB 5 Indep. Cont'r Law

- New exemptions for music industry occupations in connection with creating, marketing, promoting or distributing music
- No changes for trucking industry, gig workers, franchising industry
- Business to Business Exception Changes:
  - Removed language suggesting sole proprietorship could not qualify
  - Added clarification that businesses need only have the opportunity to contract with other clients, not actually have contracts with other clients

- **Effective immediately** upon Governor signature September 4, 2020.

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# **AB 3075**: Successor Liability Wage Enforcement

- Allows local jurisdictions to enact wage and hour laws more stringent than state laws.
- Prevents judgment debtor employers from avoiding judgments simply by forming a new business entity
  - Successor is liable for any wages, damages and penalties owed to former workforce under a final judgment
  - Successor is defined as 1) uses same facilities or the same workforce to offer same services, 2) has the same owners or managers, 3) employs a person who controlled the wages, hours or working conditions, **or** 4) operates business in the same industry and has an owner, partner, officer or director who is an immediate family member of any owner, partner, officer or director of the debtor.
- **Effective January 1, 2021**

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# **AB 1947**: New Filing Period for DLSE Claims

- Amends Labor Code section 98.7 to extend the deadline for filing claims with the Labor Commissioner from six months to **one year** after a violation.

- Amends Labor Code section 1102.5 to **authorize courts to award reasonable attorneys' fees to plaintiffs** who bring a successful section 1102.5 whistleblower action.

- Similar legislation was vetoed last year.

- **Effective January 1, 2021**

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# Sick pay and time away from work

# FFCRA Expired 12/31/2020

- December 21, 2020, Congress passed a bill to fund the government and provide economic relief in response to the continued COVID-19 pandemic.  President Trump signed the bill on December 27, 2020.
- A tax credit for employers offering paid sick leave beyond the December 31, 2020, FFCRA requirement and extends the Employee Retention Tax Credit.  Note that both the FFCRA and California COVID-19 Supplemental Paid Sick Leave programs expired at the end of the year.  There has not been any legislation to continue these paid leave programs.

# Federal FFCRA Paid Leave

- Employers with **fewer than 500 employees** are subject to the Families First Coronavirus Response Act (FFCRA), which includes:
  - Emergency Family and Medical Leave Act Expansion Act; and
  - Emergency Paid Sick Leave Act

# FFCRA Sick Leave Eligibility

- Unable to work (or telework) due to:
  - Being subject to federal, state, or local quarantine/isolation order related to COVID-19.
  - Doctor advises employee to self-quarantine due to COVID-19 concerns.
  - Employee is experiencing symptoms and seeking medical diagnosis.
  - Employee is caring for an individual subject to (1) or (2).
  - Employee is caring for child affected by school or daycare closure.
  - Employee is experiencing similar conditions specified by Secretary of Health and Human Services.

# FFCRA Sick Leave Amount

- Up to 80 hours of paid leave for full-time employees.

- For part-time employees, you take the number of hours the employee is normally scheduled to work over two workweeks.

# FFCRA Sick Leave Payments

- If leave is because employee is quarantined (pursuant a government order **or** advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, **then leave paid at employee's regular rate of pay** up to $511 per day and $5,110 over a two-week period.

- If leave is because employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to a government order **or** advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, **then leave paid at two-thirds the employee's regular rate of pay** up to $200 per day and $2,000 over a two-week period.

# FFCRA EFMLA Eligibility

- Unable to work due to:
  - Having to care for child due to child's school or child care provider being shutdown or unavailable because of a COVID-19 related reason.

# FFCRA EFMLA Leave Amount

- 12-weeks of leave, **but the first two weeks are unpaid** (but can be covered by other leave).
- Note:  If employee has already taken FMLA/CFRA leave, then FFCRA does not provide additional leave.
- Employers may require that employees use FFCRA leave concurrently with any leave offered under the employer's policies (e.g., vacation, paid time off, etc.)

# FFCRA EFMLA Payments

- The first two weeks of leave are unpaid, but can be covered by other leave.
- Remaining 10 weeks of leave **paid at two-thirds the employee's regular rate of pay** up to $200 per day and $12,000 over a 12-week period.

# **AB 1867:** Supplemental Paid Sick Leave

- Adds supplemental paid sick leave requirements for other employers (primarily larger employers with more than 500 employees);
- Codifies existing COVID-19 supplemental paid sick leave requirements for certain food sector workers; and
- Codifies existing COVID-19 handwashing requirements.

- **Effective immediately upon Governor's signature September 9, 2020**
  - **Sunsets 12-31-20, or upon expiration of FFCRA**

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# Supplemental Paid Sick Leave

- In general terms, the FFCRA created a paid sick leave entitlement for COVID-19 purposes that only applied to employers with fewer than 500 employees.
- The FFCRA also authorized health care or emergency responder employers to exclude certain health care providers and emergency responders from the FFCRA.
- AB 1867's provisions regarding COVID-19 Supplemental Paid Sick Leave (COVID-19 SPSL) is intended to fill in the FFCRA's gaps in coverage.

# Supplemental Paid Sick Leave

- Covered worker: employee must leave their home, not applicable to remote employees
- Hiring entity: employer with 500+ employees in the US, not just California
- Usage related to COVID-19:
  - Worker is subject to quarantine or isolation order
  - Worker was advised by health care provider to self-quarantine
  - Worker is prohibited from working by employer

# Supplemental Paid Sick Leave

- Available for employee use immediately upon hire (no waiting periods like California Paid Sick Leave)
- Applies to CBA-covered employees, city/state employees
- Must be granted  upon oral or written request (no need for medical certification)
- Employee determines how much leave to use, up to 80 hours

# Supplemental Paid Sick Leave

- Pay rate: the highest of either the worker's regular rate for the last pay period or state/local minimum wage
  - Max is $511/day and $5,110 total
- Employer cannot require use of other leave, PTO or vacation before or in lieu of COVID supplemental paid sick leave
- Employer must post the Labor Commissioner's poster covering leave
- Non-food sector employers must put available balance on pay stubs

# **AB 2017:** Kin Care Amendment

- This law amends California's so-called "kin care" statute (Labor Code section 233) to specify that the designation of sick leave for kin care purposes shall be made at the sole discretion of the employee.
- Intended to ensure the employee, not the employer, gets to designate how sick leave is credited and to preclude situations where an employer charges a sick day against kin care purposes, thus reducing the amount of kin care usage available for later purposes.

- **Effective January 1, 2021**

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# **SB 1383**: Expanded CFRA

- Expands the California Family Rights Act (CFRA) to provide nearly all employees with **12 workweeks of unpaid, protected**, leave to care for themselves, or a family member, as necessitated by a serious medical condition.
- **Employers of 5 or more employees** must provide leave under CFRA to employees who have completed 12 months of service with the employer **and** have worked at least 1,250 hours in the 12-month period preceding the leave period.
- Removes the prior threshold for coverage which required that an employer have 50 employees within 75 miles of the employee's worksite to be eligible for CFRA leave.
- Must update Handbooks.
- **Effective January 1, 2021**

# **SB 1383**: Expanded CFRA (cont'd)

- Qualifying reasons for "family care and medical leave" going forward include:
  - Birth, foster or adoption of a child by the employee;
  - The serious health condition of a child, spouse, parent of an employee, grandparent, grandchild, sibling, spouse, or domestic partner;
  - The serious health condition of the employee that makes the employee unable to perform the functions of the position of that employee; or
  - Qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.
- The definition of "child" is expanded include a biological, adopted, foster child, stepchild, legal ward, a child of a domestic partner, or person to whom the employee stands in loco parentis. Under SB 1383, the requirement that the child be under 18 years of age or an adult dependent child is eliminated.

# **SB 1383**: Expanded CFRA (cont'd)

- Now requires employers to reinstate employees that take leave under CFRA to the "same or a comparable position."
    - A position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave.
- If both parents are employed by the same employer, each employee is eligible to request, and the employer must grant, their full entitlement of 12 workweeks of leave.
- While AB 1383 expands CFRA to govern parental leave previously addressed in the New Parent Leave Act, it is important to note that the leave afforded under SB 1383 is separate and distinct from California's Pregnancy Disability Leave law.

# **AB 2992:** Expansion of Protected Time-Off

- Law protecting time off for victims of domestic violence, sexual assault and stalking is extended to apply to almost all victims of violent crime and allow time off for immediate family members of homicide victims. Now includes:
  - Stalking, domestic violence, or sexual assault
  - Crime that caused physical injury or that caused mental injury and a threat of physical injury
  - Person whose immediate family member is deceased as the result of a crime
  - Person against whom a crime has been committed

- **Effective January 1, 2021**

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# Expansion of Protected Time-Off (cont'd)

- Acceptable documentation for certification extended to include documentation from a victim advocate and any document that reasonably verifies a crime or abuse has occurred, including a statement from the employee on their own behalf.
- **Effective January 1, 2021.**

# **AB 2399:** Paid Family Leave for Active Duty

- The existing PFL program provides wage replacement benefits to employees who take time off to care for a family member with a serious health condition or to bond with a new child (either birth, adoption, or foster care placement).

- AB 2399 expands the PFL program to provide wage replacement benefits to employees who take time off to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's child, spouse, domestic partner, or parent.

- **Effective January 1, 2021**

# Cal/OSHA Updates

# Overview

- Exclusion and Paid Leave
- Return to Work
- COVID-19 Prevention Plan
- Employee Notifications
- Distancing and Masking
- Testing
- Reporting, Recordkeeping and Access
- Housing and Transportation Rules
- Vaccine Issues

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# Notice:

- This area of the law is extremely complex, so we urge you to read the actual statutes, regulations and FAQs put out by the various agencies, etc.  It is likely that this area of the law will continue to evolve rapidly, so be sure to keep yourself up to date, and do not rely on this material to be the final word.  There is pending litigation challenging Cal/OSHA's right to implement the regulation discussed below, but any court challenge will be unlikely to yield any relief in the near future.

# Exclusion and Paid Leave

# Exclusion and Paid Leave

- Ensure that employees who have tested positive, been exposed, or been ordered to isolate by public health authorities are
  - (1) excluded from the worksite until they have satisfied the return-to-work criteria and
  - (2) continue to be paid while they are off work.
    - This means no loss of pay, seniority, benefits or other employee rights.
    - Can require use of paid time off and can coordinate with other benefits (comp payments, SDI, etc.) to meet pay requirement.

# Paid Leave

- Employers shall “continue and maintain an employee’s **earnings, seniority,** and all other employee **rights and benefits**, including the employee’s right to their former job status.”
- Overlaps with California Paid Sick Leave (up to 3 days), California Supplemental Paid Sick Leave (up to 80 hours) for large employers of 500+ or Families First Coronavirus Response Act (up to 80 hours) for employers with 50 to 500 employees, comp payments, SDI payments, other employer provided sick leave, etc.
- Once employee exhausts other leave, additional “exclusion pay” is required if the employee is still unable to return to work due to COVID-19 related health issues.

# Paid Leave

- Not limited to one occurrence, so if an employee is positive, exposed, or ordered to isolate more than once, paid leave must be provided each time.
- Exceptions:
  - (1) if an employee is unable to work for reasons other than preventing the transmission of COVID-19 to persons at the workplace; or
  - (2) where the employer demonstrates the COVID-19 exposure was not work related.
  - No guidance on these exceptions yet so seek case-specific advice.

# Jan 8th FAQs Provide Guidance

- If employee is unable to work due to COVID symptoms or because of some reason other than that they might infect someone else in the workplace, not eligible for paid leave (FAQs 52 and 55.)
- To be eligible for pay, employee must test positive or have been exposed at work, but must not have symptoms that would prevent them from working and must not be contagious.
- Employee may be eligible for workers' compensation benefits or SDI, but not paid leave under the Cal/OSHA rule. (FAQs 50 and 60.)
- Eligible employees will "typically" be able to receive pay for the full length of quarantine, 10 days. (FAQ 53.)

# Return to Work

# Return to Work Criteria

- For cases **with** symptoms: (1) at least 24-hours must have passed since a fever of 100.4+ has resolved without the use of fever-reducing medications, (2) COVID-19 **symptoms must have improved**, and (3) at least 10 days have passed since symptoms first appeared.
- For cases **without** symptoms: the employee must not return to work until a minimum of **10 days** have passed since the date of the specimen collection of their first positive COVID-19 test.
- If a public health authority issues the order to isolate or quarantine, the employee shall not return to work until either the period of **isolation or the quarantine is lifted**.

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# Return to Work Criteria

- Employees with COVID-19 exposure may return to the workplace 14 days after the last known COVID-19 exposure.
  - On 12/14/20 CDPH updated its guidance to allow close contact employees without symptoms to discontinue quarantine after **day 10** from the date of last exposure **with or without** testing, but they must wear a face covering maintain a 6 foot distance from others at all times, until the 14 days has elapsed.
  - Governor Newsom issued an Executive Order overriding Cal/OSHA's 14 day requirement with CDPH's or a quarantine or isolation period recommended or ordered by the local health department, whichever is longer.
- Employers cannot require a negative COVID-19 test for an employee to return to work.

# COVID-19 Prevention Plan

# COVID-19 Prevention Plan

- Similar to an IIPP, the requirements for a COVID-19 prevention program are defined by law and include such things as protocols for:
  - identifying, evaluating, and communicating with employees about COVID-19-related hazards;
  - training employees;
  - employer obligations for reporting COVID-19 cases and recordkeeping; and
  - excluding COVID-19 cases and return to work criteria.
- Model CPP is available from Cal/OSHA

# CPP Requirements

- Identify who has authority and responsibility for implementing the CPP.
- Identify and evaluate the workplace for any COVID-19 hazards.
  - Interaction, area, activity, work task, process, equipment and material that potentially exposes employees to COVID-19 hazards
  - This means telling employees how to participate in hazard identification and evaluation
- Document hazards and corrective actions taken to eliminate them.

# CPP Requirements

- Identify methods to control COVID-19 hazards
  - Remote work; reducing persons in work areas; signs and floor markings to indicate path of travel; staggered arrival, departure, work and break times;
  - Face coverings rules;
  - Engineering controls such as ventilation;
  - Cleaning and disinfecting;
  - Prohibition on sharing tools, equipment, and PPE;
  - Hand sanitizing;

# CPP Requirements

- Investigate and respond to COVID-19 cases and outbreaks
  - Identify potential exposures;
  - Notify those who were exposed within 24 hours;
    - Including independent contractors, subcontractors and unions (per AB 685)
  - Identify workplace conditions that contributed to the exposure
    - Physical distancing, face coverings, engineering/administrative controls, PPE;
  - Determine how to reduce the risk of exposures;
  - Exclude positive and exposed (6 feet for 15 minutes in 24 hours)
  - “Offer” immediate testing;
    - “Provide” testing in outbreaks situations
  - Notify Cal/OSHA, the health department or your comp carrier as appropriate.

# CPP Requirements

- Effective communication plan
  - Who employees report COVID-19 related issues to, and how;
  - How to obtain free voluntary testing (for exposures);
- Training on:
  - Policies and procedures;
  - Benefits available;
  - Facts about COVID-19;
  - Methods of distancing and preventing infection;
  - Proper use of PPE;
  - COVID-19 symptoms and importance of excluding one from the workplace.

# CPP Requirements

- Exclusion of COVID-19 cases:
  - Ensure exclusion until return-to-work criteria is met;
  - Excluding those with exposure for 10 days after last known exposure;
  - Provide information on benefits available, such as paid leave and workers' compensation
- Inform employees of return to work criteria
- Reporting, Recordkeeping, and Access
  - Report COVID-19 cases to health department, comp carrier and Cal/OSHA
  - Maintain records of investigations and steps to implement CPP
  - Provide employees and officials with access to records, CPP, and information about the company's COVID-19 prevention activities.

# Employees Notifications

# Employee Notification

- Within 1 business day of high-risk exposure:
  - All employees who may have been exposed;
  - Independent contractors;
  - Other employers with employees at the worksite;
  - Employee representatives (union).
- Exposure period is:
  - With symptoms: two days before onset of symptoms and lasts for 10 days after the symptoms first appeared, and 24 hours have passed with no fever without the use of fever reducing medication and symptoms have improved.
  - Without symptoms: two days before the specimen was collected that resulted in the positive test until ten days after the specimen was collected.

# Employee Notification

- Cal/OSHA does not require written notice, but AB 685 does.
  - In writing via hand delivery, email or text message
- Notice must not identify the employee(s) with COVID-19.

# Distancing and Masking

# Distancing

- Must separate employees by at least 6 feet unless:
  - Employer can demonstrate it is not possible; or
  - Momentary exposure while persons are moving.
- Methods of distancing include:
  - Telework or remote work, reducing persons in work areas; signs and floor markings to indicate path of travel; staggered arrival, departure, work and break times.
- When not possible to maintain a 6-foot distance, employees must be as far apart as possible.
  - Where possible, install clear plastic partitions.
    - Still “exposed”

# Masking

- Must provide face covering and ensure it is worn properly at all times when indoors, and when outdoors if less than 6 feet away from another person.
- Face shields are not a replacement for a mask/face covering
- Exceptions:
  - Employee is alone in a room;
  - While eating and drinking, provided employees are at least 6 feet apart and outside air supply is maximized;
  - Employee is wearing respiratory protection;
  - Employee has a medical or mental health condition or disability, or is hearing-impaired or communicating with a hearing-impaired person.
  - Specific tasks which cannot feasibly be performed with a mask

# Masking

- Employees who are exempt from masks or other coverings due to a medical or mental health condition must wear an effective non-restrictive alternative, such as a shield with a drape on the bottom.
- Any uncovered employee must be 6 feet from all other persons or must be tested twice weekly for COVID-19.
- Testing is not an alternative to wearing a mask.
- Must not prevent employees from wearing a mask, even when not required by the regulations, unless it would create a safety hazard.

# Testing

# General Testing

- When there has been a COVID-19 case, testing must be offered to all employees who had potential exposure.
  - Immediately available;
  - Free;
  - Available during working hours or paid time.
- Testing can be through health department or other free test sites, as long it's immediately available and available during working hours
- Must inform employees of availability, reason for testing, and procedures following a positive test.
- Cannot use testing as an alternative to masking requirements.

# Multiple Infections - Outbreaks

- Three or more positive tests within rolling 14 day period is an "outbreak". [Note different definitions.]
- Required to provide testing to all employees at the exposed workplace.
  - Test all employees again one week later.
- Continuous testing of employees who remain at the workplace at least once per week, or more frequently if recommended by the local health department.
- Continue this weekly testing until there are no more new cases in a rolling 14 day period.

# Major Outbreaks

- 20 or more cases within rolling 30 day period.
- Required to provide testing to all employees at the exposed workplace.
  - Test all employees twice per week or more frequently if recommended by the local health department.
- Continuous testing of employees who remain at the workplace at least twice per week, or more frequently if recommended by the local health department.
- Continue this twice weekly testing until there are no more new cases in a rolling 14 day period.

# Jan 8th FAQs Provide Guidance

- “Offer” and “provide” mean the same thing (FAQ 28.)
- Employers can send employees to third-party test centers, including health departments, or can bring testing into the workplace (FAQs 30 and 32.)
- Need not obtain documentation when employee refuses testing, but it is best practice.  (FAQ 31.)

# Reporting, Recordkeeping and Access

# Reporting

- Report to health department within 48 hours of outbreak (3+ cases):
  - Individual's name, number, occupation, worksite, business address, and NAICS code, total number of cases, as well as the hospitalization and/or fatality status.
  - Unredacted information and medical records related to a COVID-19 case may be provided **upon request** to the local health department, California Department of Public Health, the Division, the National Institute for Occupational Safety and Health, or as otherwise required by law.
- Continue to give notice to the health department of any new case.
- Report to Cal/OSHA any COVID-19 related serious illness or death.

# Reporting

- Report to workers' comp carrier within 3 business days of any positive test.  Notice must include:
  - That an employee has tested positive;
    - Only provide information about identity if the employee asserts it is work-related or if employee has filed a DWC-1 claim form
  - The date of the positive test (i.e. date specimen was collected);
  - Address of the employee's place of employment during  the 14-day period preceding the date of the employee's positive test;
  - Highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

# Recordkeeping

- Keep all records related to the steps taken to develop and implement the CPP.
- Record and track all COVID-19 cases with the name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test, while ensuring medical information remains confidential.

# Access

- Employee/union access to:
  - Records re COVID-19 cases, with personal identifying information redacted
  - CPP
  - Log 300 records

# Housing and Transportation Rules

# Employer Housing Rules

- Must implement priority housing assignments based on individuals who work together from the same family (or who otherwise reside together outside of work), are on the same crew, or are on the same shift.
- Must be able to ensure sufficient space in the units to permit social distancing while the employees are in the various units, and employer is responsible for ensuring the units are cleaned at least once a day.
- If residents are exposed to COVID-19, the employer must isolate that employee by providing a private bathroom, sleeping area, cooking and eating facility until the end of the isolation period.

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# Employer Housing Rules

- Ensure beds are six feet apart, keeping the heads of beds as far away from one another as possible.
- Bunk beds are no longer allowed.
- Maximize outdoor air and increase filtration with ventilation systems.

# Employer Transportation Rules

- Prioritize shared transportation assignments in the following order:
  - (1) Employees residing in the same housing unit shall be transported in the same vehicle.
  - (2) Employees working in the same crew or worksite shall be transported in the same vehicle.
  - (3) Employees who do not share the same household, work crew or worksite shall be transported in the same vehicle only when no other transportation alternatives are possible.

# Employer Transportation Rules

- Ensure that distancing and masking is followed while waiting for transportation;
- Vehicle operator and all passengers are separated by 3 feet in all directions;
- All persons in the vehicle wear a mask.
- Employees must be screened prior to boarding.
- All high contact areas (door handles, buckles, armrests, etc) must be cleaned and disinfected before each trip.

# Employer Transportation Rules

- Windows must be kept open unless:
  - Over 90 degrees and AC is in use;
  - Under 60 degrees and heating is in use;
  - Protection from weather conditions is needed;
  - A cabin air filter is in use with EPA Air Quality Index of over 100.
- Hand sanitizer must be used before entering and exiting the vehicle.

# Vaccine Issues

# **California**: No Mandates… YET

- Employers may require vaccines before employees return to the worksite if the failure to be vaccinated constitutes a direct threat to other employees in the workplace because the virus is rampant and easily transmitted in the workplace.
- Exceptions must be made for employees who cannot be vaccinated because of disabilities or due to sincerely held religious beliefs.
- Employers do not have to accommodate secular or medical beliefs about vaccines.
- No guidance from DFEH at this time.

# **EEOC:** Guidance Issued 12/16/2020

- Employers may require vaccination based on safety-based standards.
- Must conduct individualized assessment of: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.
- Must engage in interactive process with employees with disabilities or religious beliefs preventing vaccination to find a reasonable accommodation, such as remote work, masks, etc.
- If no reasonable accommodation is possible, may exclude the employee from the workplace, but not automatically terminate.

# **Cal/OSHA:** Guidance Issued 1/8/2021

- Even if employees get vaccinated, employers must follow all aspects of emergency rule with respect to vaccinated employees (FAQ 24.)
- Stated the issue of vaccines will be addressed further in the future
- No clarification on the issue of requiring vaccination

# **AB 685:** Notice of COVID-19 Exposure

- Mandatory notice to employees
- Qualifying individual:
  - Positive for COVID-19
  - Ordered to isolate due to COVID-19 by public health officer
  - Died due to COVID-19
- Worksite:
  - Building, store, facility or field where the qualifying individual worked during the infectious period
- Infectious Period
  - 2 days prior to symptom onset thru 10 days after symptom onset for symptomatic employees; 10 days after positive test for asymptomatic
- **Effective January 1, 2021**

# Notice of COVID-19 Exposure

- Notice requirements triggered when:
  - Public health official or medical provider gives notice that an employee was exposed to a qualifying individual at the worksite
  - Employee or their emergency contact gives notice that the employee is a qualifying individual
  - Notice through employer's testing protocol that an employee is a qualified individual
  - Notice from a subcontractor that a qualifying individual was on the worksite

# Notice of COVID-19 Exposure

- Employer must provide notice within one business day to:
  - All employees at the same worksite
  - All subcontracted employees at the same worksite
- Notice must be in writing
  - Hand delivery, email or text message
  - Must be in English and the language understood by the employee
- Notice must also be provided to any employee representative

# Notice of COVID-19 Exposure

- Must notify all employees who may have been exposed and any representative about COVID-19-related benefits under applicable federal, state or local laws, including COVID-19-related leave, employer sick leave and workers' compensation, as well as the employee's protections against retaliation or discrimination.
- Must notify employees, employers of subcontracted employees, and employee representatives of disinfection and safety plan per federal CDC guidelines.

# Notice of COVID-19 Exposure

- Must notify local public health agency in writing of any outbreak
  - 3 or more positive employees who live in different households within a 2-week period
    - Note the distinction between this and the WC presumption in SB 1159
- Must give names, number, occupation and worksite information as well as business address and NAICS code

# **AB 685:** Cal/OSHA Powers

- Authority to issue Order Prohibition Usage or Stop Work Order if agency determines there is an imminent hazard of exposure to COVID-19.
- Cal/OSHA must provide notice to the employer of the order.
- Will be limited to only the immediate area where the imminent hazard exists.

# **AB 2043:** Cal/OSHA Standards for Ag

- Requires Cal/OSHA to give ag employers “best practice” guidelines for COVID-19 prevention
  - Cal/OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees
  - https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Agriculture.pdf
- Requires a statewide outreach campaign to disseminate these best practices and educate employees on COVID-19 employment benefits such as sick leave and workers compensation.

- **Effective immediately upon Governor’s signature on September 28, 2020.**

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# What to Do Now

- Establish COVID-19 Prevention Plan
  - Model https://www.dir.ca.gov/dosh/dosh_publications/CPP.doc
  - Best practice:  stick very close to the model.
- Train, train, train!
- Develop checklist for procedures after a positive test
- Research each county in which employer has operations for specific additional guidance/requirements

# Workers’ compensation

# **SB 1159**: COVID-19 & Workers' Comp

- Creates a rebuttable presumption of workers compensation coverage for "essential workers" who contract COVID-19.
  - Codification of Governor Newsom's Executive Order N-62-20 which expired in July 2020.
  - Expires January 1, 2023.
- Requires the exhaustion of COVID-19 specific sick leave before any workers compensation benefits are payable.
  - Employers cannot require employees to use sick or vacation leave and must restore other leave if used.
- **Effective immediately upon Governor's signature on September 17, 2020.**

# **SB 1159** (cont'd)

- Essential Workers who contract COVID-19 prior to July 6, 2020, are entitled to a rebuttable presumption that COVID-19 illness arouse out of the course and scope of employment if:
  1. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor at the employer's place of employment (not including an employee's home or residence) at the employer's direction;
  2. This day of labor occurred between March 19, 2020 and July 5, 2020; and
  3. The diagnosis was made by a licensed physician and confirmed by a COVID-19 serologic test within 30 days of the date of diagnosis.
- The **presumption may be rebutted by** evidence of health and safety measures adopted by the employer and non-occupational exposures the employee encountered

# **SB 1159** (cont'd)

- Enactment of new Labor Code section 3212.88, which provides that workers who test positive during an "outbreak" at the employee's specific place of employment on or after July 6, 2020, are entitled to a rebuttable presumption that COVID-19 illness or death arose out of the course and scope of employment if:
  1. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor at the employer's place of employment (not including an employee's home or residence) at the employer's direction;
  2. This day of labor occurred on or after July 6, 2020; and
  3. The positive test occurred during a period of an "outbreak" at the employee's specific place of employment.
- Applies to employers with 5 or more employees.

# **SB 1159** (cont'd): Definitions

- "**Specific Place of Employment**" - Particular building, store, facility or agriculture field where the employee works at the employer's direction, does not include the employee's residence.
- "**Outbreak**" - Within 14 days one of the following exists at the specific place of employment:
  a) If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19;
  b) If the employer has 100 or more employees at a specific place of employment, four percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or
  c) A specific place of employment is ordered to be closed by specified public health agencies or a school superintendent due to a risk of infection due to COVID-19.
  - The definition of "outbreak" is different than the definition for AB 685 notice requirements and the Cal/OSHA ETS.

# **SB 1159** (cont'd): Reporting Requirements

- When an employer knows, or should know, of a positive test result, the employer must notify their claims administrator in writing **within 3 business days** of the following:
  1. That an employee has tested positive;
     - Note: The employer should not provide any personal identifiable information about the employee unless the employee is claiming or has submitted a claim that the illness is work related.
  2. The date the employee tested positive;
  3. The address(es) of the employee's specific work place(s) during the 14-day period preceding the employee's positive test; and
  4. The highest number of employees who reported to that location within the 45-day period preceding the last day the employee worked at each specific place of employment.
- Employers may be subject to civil penalties of up to $10,000 for intentionally submitting false or misleading information, or for failing to report required information.
- https://www.dir.ca.gov/dwc/Covid-19/FAQ-SB-1159.html

# Other legislative updates

# Exec. Order on CA WARN Act

- 3/17/20 Executive Order N-31-20 modified 60-day notice requirement for an employer that orders a mass layoff, relocation or termination.
- LC 1401(a), 1402, and 1403 were suspended to permit employers to act quickly in order to mitigate or prevent the spread of coronavirus.
- The mass action must be caused by COVID-19-related "business circumstances that were not reasonably foreseeable at the time that notice would have been required"; the employer otherwise provides notice to affected employees in compliance with the CA WARN Act; and the notice satisfies other specific requirements.
- https://www.dir.ca.gov/dlse/WARN-FAQs.html

# **SB 973**: Annual Pay Data Reports

- Enacted to allow designated state agencies to collect wage data enabling them to identify wage patterns and increase enforcement of equal pay or discrimination laws.
- Reporting requirement:
  - Private employers with **100 or more employees** that are required to file an annual Employer Information Report (EEO-1), will be required, annually, to submit pay data reports for the prior calendar year (i.e., the "Reporting Year") to the Department of Fair Employment and Housing (DFEH).

- **Effective January 1, 2021, with the first deadline date of March 31, 2021, and an ongoing annual reporting obligation.**

# **SB 973**: Annual Pay Data Reports (cont'd)

- In order to identify the number of employees by race, ethnicity, and sex, whose annual earnings fall within each pay band (i.e., wage range), the employer shall calculate the employee's earnings as shown on the IRS Form W-2 for the entire Reporting Year, regardless of whether the employee worked the entire calendar year.
  - "The employer shall tabulate and report the number of employees whose W-2 earnings during the "Reporting Year" fell within each pay band."
- Employers may include clarifying information regarding any of the information included in the report.
- Employers should seek legal guidance to identify potential wage disparities and evaluate if there is an underlying legitimate and lawful explanation and whether clarifying remarks should be included in the report.

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# **SB 973**: Annual Pay Data Reports (cont'd)

- DFEH can share this report with the Department of Labor Standards Enforcement (DLSE) upon request.
  - However, the information contained in the report is otherwise confidential and is **not** subject to the California Public Records Act.
- DFEH is authorized under this law to "receive, investigate, conciliate, mediate and prosecute complaints" of violation of equal pay provisions under Labor Code 1197.5.
  - Must coordinate with the DLSE and Department of Industrial Relations (DIR).
- The DFEH may request from the Employment Development Department (EDD) the names and addresses of businesses with 100 or more employees to verify compliance.
  - An employer that submits a copy of the employer's EEO-1 Report containing the same or substantially similar pay data information required under this section, is in compliance.
  - Failure to submit a compliant report may expose employers to enforcement orders and be required to pay the agency costs associated with seeking the compliance order.

# **SB 1384**: Labor Commissioner Authority

- All petitions to compel arbitration on claims regarding recovery of compensation, appeal of an award, or review of an award by the superior court pending before the Labor Commissioner must be served on the Labor Commissioner.
- Authorizes the Labor Commissioner, upon the request of an employee who cannot financially afford counsel, to request that the Labor Commissioner represent the employee in proceedings to determine enforceability of an arbitration agreement in court or by the arbitrator.
- An employee may also request that the Labor Commissioner represent the employee bound by an arbitration agreement during an arbitration proceeding if:
  1. The employee is unable to afford counsel; and
  2. The Labor Commissioner determines through informal investigation that the claim has merit.
- **Effective January 1, 2021**

# **AB 2143:** Ban on “No Rehire” in Settlements

- Amends 2019 prohibition on settlement agreement provisions prohibiting employee’s ability to work for the settling employer
  - Requires the employee to have filed a complaint in good faith
  - Exemption if the employer makes a good faith determination that the employee engaged in sexual harassment or sexual assault or any criminal conduct prior to the employee’s complaint

- **Effective January 1, 2021**

# **AB 1963:** HR Required to Report Child Abuse

- HR personnel in businesses that employ minors are added to the list of mandated reporters
- Must report if they observe a child they know or reasonably suspect to be a victim of child abuse or neglect
  - Report to police/sheriff, county Child Protective Services
- Also adds requirement for any supervisor of minors to report sexual abuse

- **Effective January 1, 2021**

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# **AB 979:** Corporate Board of Directors

- Publically held corporations must diversify board with "underrepresented communities"
  - Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.
- At least one director by 12/31/21
- By December 31, 2022, boards with nine or more directors must appoint a minimum of three directors
  - Between four and nine directors must appoint a minimum of two directors
- Information will be publically reported by Secretary of State

# **AB 1731:** Updates to EDD Work Sharing Plans

- Work sharing plan means a plan submitted by an employer for approval by the EDD, under which an employer requests the payment of work sharing compensation for its employees as a means of avoiding potential layoffs
- EDD is required to create expanded online reporting and forms submission to make it easier for employers to maintain operations and utilize the program

# 2020 Cases

# Exhausting Administrative Remedies

- Employee was consistently underperforming due to deficiencies in interpersonal communication skills and limited background job functions
- Chosen for a RIF due to funding cuts, based on low rankings, communication problems and failure to adhere to policies.
- Filed a DFEH/EEOC complaint alleging discrimination, harassment, and retaliation because of his age, association with a member of a protected class, family care or medical leave, national origin, and religion.  Immediately received a Right-to-Sue- Notice.

# Exhausting Administrative Remedies

- 18 months later he filed suit with 4 co-workers alleging age discrimination, wrongful termination and failure to prevent discrimination which alleged the RIF was a pretext to terminate older workers.
- Court struck disparate impact and class allegations because they were not part of initial DFEH/EEOC complaints.
- Employee amended his administrative complaints and sought to amend his lawsuit allegations.
- Court denied amendment and dismissed the case.
- *Foroudi v. The Aerospace Corp.*

# Illegal Noncompetition Contracts

- When plaintiff began working, he signed a “Confidentiality, Noncompetition, Assignment and Notice Agreement” which contained a 2-year ban on competing with the company. Also contained requirement for arbitration of any disputes.
- During his employment, he earned deferred bonuses. After termination without cause, he was owed nearly $1 million.
- He filed a lawsuit asking for a declaration that he could compete without risking breach of the agreement or jeopardizing his entitlement to the unpaid bonuses.

# Illegal Noncompetition Contracts

- Case was ordered to arbitration.  After trial, arbitrator denied all of plaintiff's claims, found in favor of company on bonuses and found that the dispute over noncompetition was moot.
- Plaintiff filed petition to vacate arbitration award based on argument that arbitrator exceeded his authority in award that violated public policy.  Trial court denied.
- On appeal, court concluded arbitrator exceeded his power issuing award that enforced a contract that illegally restricted the right to work.
- *Brown v. TGS Management Company*

# $17 million for Termination and Defamation

- Employee was terminated following investigation into claims of gender harassment and discrimination by a subordinate.
- Filed suit for defamation, wrongful termination and breach of covenant of good faith and fair dealing.
- Court found claims were supported by evidence:
  - HR failed to properly investigate;
  - Relied on sources that were biased against employee;
  - Found bank wanted to terminate to deprive employee of his bonus.
- Awarded $8.6 million in compensatory damages and $8.6 million in punitive damages.
- *King v. U.S. Bank National Association*

# “Continuing Violation” Theory

- Employee alleged she suffered sustained, egregious sexual harassment for “most of the time” during her employment.
- Harassment dated back to 2006, but she didn’t file hostile work environment complaint with DFEH until in 2017. Court denied summary judgment based on the statute of limitations.
- Employer appealed. Court held that there were several incidents of sexual harassment in the one-year period before termination.
- *Blue Fountain Pools & Spas v. Superior Court*

# Exit Search Time is Compensable

- California Supreme Court answered whether time spent waiting for, and undergoing required exit searches compensable as hours worked → Yes.
- Estimated time took between five and 20 minutes regularly, up to 45 minutes when store was busy.
- Time spent was "under employers control" because employees had to find and flag down a security officer, could not leave premises during the search, and search was required if an employee brought any belongings into the store.
- *Frlekin v. Apple, Inc.*

# Dismissal of Discrimination Lawsuit

- Employee was terminated for: HIPAA violation re patient personal health information, displaying an inappropriate photo in the workplace, carelessness in performing her duties, dishonesty during investigation, and failure to take responsibility.
- She sued, alleging discrimination based on age and association with African Americans.
- Trial court granted summary judgment, holding that age comments and complaints about treatment of African American co-workers were not from/to anyone involved in termination.
- *Arnold v. Dignity Health*

# Arbitration Agreement Unenforceable

- Employee filed suit for harassment, hostile work environment, sex and age discrimination under FEHA.
- Company moved to compel arbitration.  Employee challenged the arbitration agreement as procedurally and substantively unconscionable.
- Procedurally unconscionable because it was a “contract of adhesion”
- Substantively unconscionable because it limited depositions to two per party and was not mutual because employer’s claims for breach of confidentiality did not have to be arbitrated.
- *Davis v. Kozak*

# Gay/Transgender Protections under Title VII

- Employer terminated employees for being gay or transgender.
- US Supreme Court held Title VII does prohibit such discrimination in that it is "because of ... sex.“
- Note California law has long provided protections to gay employees and extended the protection to transgender employees in 2017
- *Bostock v. Clayton County*

# Non-Severability Clause Invalidated Arbitration Agreement

- Employee signed waiver of class actions and “any other representative action,” including PAGA claims.
- Following termination, employee filed individual, class and PAGA claims.
- The trial court granted the employer’s motion to compel arbitration of Kec’s individual claims except the PAGA claim
- The court of appeal held it was unenforceable due to illegal ban on PAGA claims and because of the “blow up provision”
- *Kec v. Superior Court*

# Hirer Not Liable for Independent Contractor's Death

- Employee of independent contractor was killed on hirer's premises while replacing a forklift tire.
- Independent contractor litigated case under workers' compensation.
- Heirs sued hirer of independent contractor for wrongful death based on negligence.
- Court held hirer was not liable because it did not actively direct the contractor's employee to do the work in a particular way or fail to undertake a particular safety measure the hirer promised.
- *Horne v. Ahern Rentals, Inc.*

# Use of Personal Vehicle to Carry Employer Tools

- Service technicians were required to carry tools and supplies to worksites.  They did not have an office, but reported to worksites directly from home and back to home.
- Class action sought wages for commute time alleging requirement to carry tools and supplies made the time compensable.
- Employer argued that employees didn't *have* to carry the items, and employees were free to use their commute time as they desired.

# Use of Personal Vehicle to Carry Employer Tools

- Court observed that if carrying the items was optional and did not interfere with the ability to use the commute for personal purposes, such as take a child to school on the way to the worksite, it would not be compensable.
- However, there was a factual dispute regarding whether employees were required, either strictly speaking or as a practical matter, to commute with tools and parts in their personal vehicles.
- There was also a factual dispute regarding the volume of items that were carried in their vehicles while commuting.
- *Oliver v. Konica Minolta Business Solutions U.S.A., Inc*.

# CBA Cannot Eliminate Travel Time Compensation

- Plaintiff filed a class action alleging failure to pay for:
  - Badging in at electronic gate
  - Walking to mandatory shuttle and waiting for bus
  - Traveling by bus to worksite
  - Donning/doffing safety gear for meetings
- CBA adopted practice of “in on employee’s time, out on the Company’s” meaning pre-shift travel time was uncompensated.
- Court evaluated Wage Order and determined it did not override the requirement to pay employees for all hours worked.
- *Gutierrez v. Brand Energy Servs. of Cal., Inc*

# Piece Rate Workers Not Entitled to Premiums

- Plaintiffs sued alleging denial of rest periods and failure to pay rest period premiums for missed rest periods.
- After losing at trial, plaintiffs appealed.
- Appellate court found that both claims were viable but held that awarding *both* forms of compensation would violate the rule against double recovery.
- Premium pay statute is not intended to impose a penalty on the employer, and because plaintiffs had already recovered on their nonpayment of wages claim, any further premium pay would penalize the employer.
- *Sanchez v. Martinez*

# Thank you!

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