

New Employment Laws for 2021

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Questions?

Please direct them to the following email address:

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Please include your name, company, and phone number

Today's Goals

- ❑ Important new California laws passed in 2020
 - ❑ Non-COVID-related legislation
 - ❑ COVID-related legislation
- ❑ Cal/OSHA Emergency Regulations and Reporting
- ❑ Action items for 2021



New Employment Laws for 2021



Expansion of California Family Rights Act (SB 1383)

- ❑ CFRA (like the federal Family and Medical Leave Act) previously only applied to California employers with 50 or more employees
- ❑ Effective January 1, 2021, CFRA now applies to all California employers with **5 or more employees**
- ❑ Represents a significant expansion of the law and new burden on small employers



Expansion of California Family Rights Act (SB 1383)

- ❑ Covered reasons for leave now include qualifying exigencies related to a family member called to active duty (similar to FMLA)
- ❑ Covered relations now include categories which **aren't included under FMLA**:
 - ❑ Grandparents, grandchildren, and siblings
 - ❑ Domestic partners continue to be covered (unlike FMLA which does not cover them)



Expansion of California Family Rights Act (SB 1383)

- ❑ **New law removes:**
 - ❑ **Previous right of employers to limit baby bonding leave to a combined 12 weeks when both parents work for the employer**
 - ❑ **Previous right of employers to limit reinstatement of certain “key employees”**



Expansion of California Family Rights Act (SB 1383)

- ❑ For employers with 50+ employees, creates a potential ***“stacking” problem***
- ❑ For example, since the FMLA does ***not*** cover leave to care for a grandparent, an employee could take up to 12 weeks in a year under the CFRA to care for that grandparent
 - ❑ This would exhaust all of their leave under the CFRA
- ❑ However, the employee is still entitled to up to a separate 12 weeks of job protected leave under the FMLA
 - ❑ Thus, if the employee needed additional time off to care for themselves, or to care for a spouse, or for any other purpose provided under the FMLA, they could do so, for up to 12 additional weeks of job protected leave
- ❑ That’s up to ***24 weeks*** of job protected leave

New Carveouts from AB 5 (AB 2257)

- ❑ Under the ABC test codified by AB 5, a worker is deemed to be an employee unless the putative employer can establish all three of the following:
 - A** That the worker is free from the hiring entity's control and direction in connection with performance of the work, both under the contract for performance of the work and in actually performing the work
 - B** That the worker performs work that is outside the usual course of the hiring entity's business; and
 - C** That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

New Carveouts from AB 5 (AB 2257)

- ❑ AB 2257 creates additional exemptions from the ABC test
 - ❑ Business-to-business exemption expanded
 - ❑ Single engagement business-to-business exemption
 - ❑ Referral agencies
 - ❑ Professional services (HR administrator, marketing, travel agent)
 - ❑ Musicians and music industry workers
 - ❑ Fine artists, videographers, photographers, graphic designers
 - ❑ Landscape architects
 - ❑ Competition judging

Are you in one of the above businesses/industries? ***Thank your lobbyist!***

New Carveouts from AB 5 (AB 2257)

- ❑ AB 2257 goes into effect immediately
- ❑ Keep in mind, even if you are eligible for an exemption under AB 2257, you are still subject to the *Borello* test
- ❑ AB 2257 does not provide an exemption for “gig” workers and the trucking industry

HOWEVER . . .

- ❑ California voters passed Proposition 22, which provides that app-based drivers (Uber, Lyft, DoorDash) are independent contractors and not employees, provided certain conditions are met

Pay Data Reporting Requirement (SB 973)

- ❑ Purpose of the new law is to assist DFEH in combating discrimination in pay practices
- ❑ Requires private employers with 100 or more employees to submit pay data to the DFEH by March 31, 2021 and annually thereafter
- ❑ The report must include information on the number of employees employed in specific job categories and separated by race, ethnicity, and gender
- ❑ The report must include wages earned and hours worked for all employees.
- ❑ DFEH published guidance and an FAQ in November 2020, and will be providing reporting templates before March 2021

<https://www.dfeh.ca.gov/paydatareporting>

New Board Member Diversity Requirement (AB 979)

- ❑ In 2018, California passed a law requiring publicly traded companies with principle executive offices in California to have at least one female on their boards by the end of 2019, with increases to the female representation to two or three members (depending on size) by the end of 2021
- ❑ AB 979 requires publicly traded companies to have at least one board member from an underrepresented community by the end of 2021
- ❑ By end of 2022, minority representative must be:
 - ❑ Board with 5-8 directors must have at least 2 directors from an underrepresented community
 - ❑ Board with 9 or more directors must have at least 3 directors from an underrepresented community

New Board Member Diversity Requirement (AB 979)

❑ What is an “underrepresented community”?

“Director from an underrepresented community” means an individual who self-identifies as 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



California Consumer Privacy Act Extension (AB 1281)

- ❑ Extends the exemption for employers from various provisions of the CCPA to January 1, 2022
- ❑ When California voters passed Proposition 24, this exemption was continued further, to January 1, 2023
- ❑ Nevertheless, employers are still covered by the CCPA's notice requirements
- ❑ California employers must provide notice to applicants and employees of the personal information which is being collected and the purposes for which it will be used
- ❑ If you haven't already, get and use a compliant notice form **NOW**



California Consumer Privacy Act Extension (AB 1281)

- ❑ Are you subject to the CCPA? Generally, you are if you are for-profit and meet **one** of the following:
 - ❑ Your company has gross revenues of more than \$25 million
 - ❑ Your company annually purchases, receives for commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more California consumers, households or devices
 - ❑ Your company derives 50% or more of annual revenues from selling consumers' personal information



New Protections for Victims of Crime or Abuse (AB 2992)

- ❑ Labor Code §§ 230 and 230.1 provides employment protections and protected leaves for employees who are victims of domestic violence, sexual assault, or stalking
- ❑ AB 2992 expands the definition of victim to now cover employees who are victims of “crime” or “abuse”



Statute of Limitations Extension (AB 1947)

- ❑ Under current law, employees claiming they were discriminated against or discharged in violation of the Labor Code have six months in which to file an administrative claim with the California Labor Commissioner
- ❑ Now, that deadline is extended to one year
- ❑ Compare: Employees have three years to file claims under FEHA for discrimination, harassment, or retaliation



Do not prematurely delete or destroy employee records

Kin Care Leave (AB 2017)

- ❑ Labor Code § 233 currently requires employers to permit employees to use at least half their annual accrual of employer-provided sick leave for kin care reasons
- ❑ AB 2017 amends the law to provide that it is up to the employee's "sole discretion" to designate leave used for this purpose



Corporate Statement of Information (AB 3075)

- ❑ **Effective January 1, 2022, or when the Secretary of State certifies that it has implemented California Business Connect, whichever is earlier**
- ❑ **Requires that when a company files its annual Statement of Information, it must include a disclosure whether any officer or director has a final judgment issued by the State Labor Commissioner or a court (from which no appeal is pending) for violation of the Labor Code or applicable Wage Order**
- ❑ **Further establishes that a successor to any judgment debtor is liable for any wages, damages, and penalties owed to the predecessor's former employees pursuant to that judgment**



Labor Commissioner and Binding Arbitration (SB 1384)

- Another attempt by California to undermine binding arbitration
- Allows the Labor Commissioner to provide legal representation to an employee in opposing an employer's petition to compel arbitration of a wage dispute
- Allows the Labor Commissioner to represent an employee in an arbitration proceeding conducted to resolve the dispute
- Labor Commissioner must determine the wage claim has merit based on its initial investigation and the employee is financially unable to afford representation
 - Hard to see how this last factor would be met given the wide availability of plaintiffs' attorneys who by custom and practice represent employees on a contingency basis

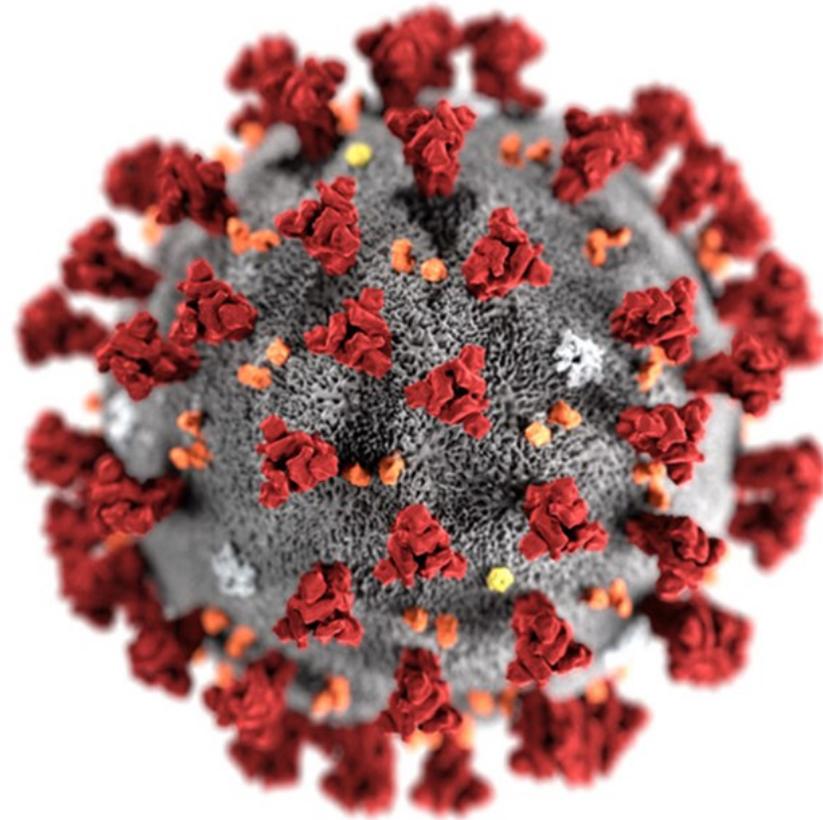
No Rehire Provisions in Settlement Agreements (AB 2143)

- ❑ Current California law prohibits inclusion of a “no-rehire” provision in settlement agreements of employment disputes unless the employer—in good faith—determined that the employee had engaged in sexual harassment or sexual assault
- ❑ AB 2143 clarifies that in order for the no-rehire provision to apply, the employee’s complaint giving rise to the dispute must have been made in good faith
- ❑ AB 2143 also expands the exception to the prohibition on no-rehire provisions to include cases where the employer determined that the employee had engaged in any criminal conduct
 - ❑ Employer must have documented a good faith determination of sexual harassment, sexual assault, or criminal conduct before the complaint
- ❑ No-rehire provisions are still permitted in severance agreements where no employee claim or complaint has been made

Mandatory Reporting of Child Abuse (AB 1963)

- ❑ California has a “mandatory reporter” law which requires certain categories of professions (doctors, teachers, school counselors, etc.) to notify law enforcement when they suspect child abuse is taking place
- ❑ This law extends that “mandatory reporter” requirement to include all human resources employees of businesses with 5 or more employees which employ minors
- ❑ Also extends the requirement to all supervisory employees who are in “direct contact” with and supervise minors
- ❑ Employers must provide mandated reporters with training on identifying and reporting child abuse and neglect
 - ❑ California Department of Social Services’ Office of Child Abuse Prevention provides online training which employers can use

Now for The 'Rona...



California Emergency Paid Sick Leave (AB 1867)

- ❑ Already in effect, requires employers with **500 or more employees** nationally to provide up to 80 hours of COVID-related paid sick leave to employees
- ❑ Emergency paid sick leave may be used when:
 - ❑ Employee is subject to a federal, state, or local quarantine or isolation order
 - ❑ Employee is advised by a health care provider to self-quarantine or self-isolate due to COVID-19
- ❑ Employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19
- ❑ Employers generally cannot require documentation to support use of emergency paid sick leave, and oral or written requests are permitted

California Emergency Paid Sick Leave (AB 1867)

- ❑ The amount of paid sick leave paid is the highest of:
 - ❑ The worker's regular rate of pay for the last pay period
 - ❑ The state minimum wage
 - ❑ The local minimum wage
- ❑ Paid sick leave is capped at \$511 per day and \$5,110 in aggregate
- ❑ Emergency paid sick leave **can't** offset traditional paid sick leave, but it **can** offset emergency paid sick leave provided since March 2020 under a voluntary policy or in accordance with a local COVID sick leave ordinance, if the reason for the leave was a covered reason and the rate of pay was at least the same as required under AB 1867

California Emergency Paid Sick Leave (AB 1867)

- ❑ As with the federal emergency paid sick leave law, and employer cannot require employees to use other forms of paid leave prior to using the California emergency paid sick leave
- ❑ If California emergency paid sick leave is paid out, it must be separately identified on the employee's pay stub
- ❑ AB 1867 expires December 31, 2020 or upon expiration of any extension of the federal Families First Coronavirus Response Act, whichever is later



Check your local jurisdiction as several cities have enacted their own local COVID-19 sick leave ordinances

COVID-19 Reporting (AB 685)

- Governor Newsom signed AB 685 on September 17, 2020 as non-emergency legislation**
- Goes into effect January 1, 2021**
- Expires on January 1, 2023**
- Provides for new employer notice and reporting requirements**
- Expands Cal/OSHA's authority to shut down worksite which are experiencing an "outbreak" as defined in the statute**
- Exempts Cal/OSHA serious citations alleging a serious violation relating to COVID-19 from the precitation standardized "1BY" form provision process**

COVID-19 Reporting (AB 685)

- ❑ Effective January 1, 2021, employers who receive a “*notice of potential exposure*” to COVID-19 must provide a *written notice* to other employees within *one day* of notice of the potential exposure
- ❑ The notice must be provided to all employees and employers of subcontracted employees who were on the employer’s “*worksites*” at the same time as the “*qualifying individual*” within the “*infectious period*” that they may have been exposed to COVID-19

COVID-19 Reporting (AB 685)

- ❑ A “*qualifying individual*” is any person who has any of the following:
 - ❑ A laboratory-confirmed case of COVID-19, as defined by the State Department of Public Health; **or**
 - ❑ A positive COVID-19 diagnosis from a licensed health care provider; **or**
 - ❑ A COVID-19-related order to isolate provided by a public health official; **or**
 - ❑ Died due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county
- ❑ A positive test means a positive result on any viral test for COVID-19 (this clarifies a previous uncertainty as to whether a presumptive positive COVID-19 test which had not been confirmed by the CDC would be considered a laboratory-confirmed case)

COVID-19 Reporting (AB 685)

- ❑ **“*Worksite*”** means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period
- ❑ It does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter
- ❑ In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual

COVID-19 Reporting (AB 685)

- ❑ AB 685 also requires employers to report COVID-19 “**outbreaks**” to the local public health agency in the jurisdiction of the worksite
- ❑ “**Outbreak**” is defined by the California Department of Public Health as “at least three probable or confirmed COVID-19 cases within a 14-day period in people who are epidemiologically-linked in the setting, are from different households, and are not identified as close contacts of each other in any other case investigation.”
- ❑ Any outbreak must be reported within **48 hours** of learning of the outbreak
- ❑ The employer must provide notification to the local health department of the names, numbers, occupations, and worksite of employees who meet the definition of a “qualifying individual”
- ❑ The employer must also report the business address and NAICS code of the worksite where the qualifying individuals work

COVID-19 Reporting (AB 685)

In addition...

- ❑ The employer that has an outbreak must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite

The reporting obligation is ongoing...

COVID-19 Reporting (AB 685)

- ❑ AB 685 fast tracks the timeline for issuing serious citations
- ❑ Usually, when Cal/OSHA intends to issue a serious citation, it first sends the employer a “1BY” notice, providing 15 days for the employer to provide additional evidence to support a defense, which could potentially inform whether Cal/OSHA will issue a serious citation
- ❑ AB 685 removes the “1BY” notice provision for COVID-19-related hazards.



Employers must closely monitor the statute of limitations to ensure that upon receiving a serious citation, they immediately evaluate the classifications, allegations, and penalties and determine whether an appeal is necessary

COVID-19 Reporting (AB 685)

- ❑ AB 685 grants Cal/OSHA expansive new authorities to close down worksites which constitute an “*imminent hazard to employees*” due to COVID-19
- ❑ The closure must be limited to the immediate area where the “imminent hazard exists,” and Cal/OSHA cannot prohibit entry to any areas that are outside of the hazard area
- ❑ Cal/OSHA must post a notice in a conspicuous place at the place of employment making this determination
- ❑ Cal/OSHA must permit entry to the worksite for activities to eliminate the dangerous condition
- ❑ Waives some of the notice provisions Cal/OSHA must usually comply with, so employers must be prepared to act immediately if a worksite gets closed

Emergency Cal/OSHA Regulations

- ❑ **Effective November 30, 2020**
- ❑ **All employers must prepare and implement a written COVID-19 prevention plan (similar to the Injury and Illness Prevention Program)**
- ❑ **For a comprehensive FAQ and a Model COVID-19 Plan:**



<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

Emergency Cal/OSHA Regulations

- ❑ If an employer becomes aware of a COVID-19 case in the workplace, the employer **must investigate** to determine which other employees may have been exposed and notify them within **one business day**
- ❑ Employers must offer, **and pay for**, COVID-19 testing **during work hours**, to all employees who may have been exposed
- ❑ Employers must exclude exposed employees from the worksite for 14 days after the last known exposure, and **must maintain the employee's earnings and benefits as if they employee had continued to report to work**
 - ❑ Employer may use employer-provided paid sick leave benefits and other benefits provided by public sources to satisfy this obligation. If exhausted, employer must still pay

Emergency Cal/OSHA Regulations

- ❑ Employers may not allow employees who tested positive to return to work until:
 - ❑ For individuals *with symptoms*:
 - ❑ 10 days have passed since symptoms first appeared; *and*
 - ❑ At least 24 hours have passed with no fever (without the use of fever-reducing medication); *and*
 - ❑ Other symptoms have improved
 - ❑ For individuals *without symptoms*, at least 10 days have passed since the date the test specimen was collected
- ❑ Employers may not require a negative test as a condition of returning to work
- ❑ There are additional testing requirements in the event 3 or more cases occur at a worksite within a 14 day period or 20 or more cases within a 30 day period

Workers' Compensation Presumption Expanded (SB 1159)

- ❑ Effective immediately
- ❑ Codifies Governor Newsom's executive order which created a rebuttable presumption that certain employees who test positive for COVID-19 contracted the virus at work if they worked outside the home within 14 days of diagnosis
- ❑ From July 6, 2020 forward, SB 1159 creates a "***disputable presumption***" of workers' compensation coverage for an employee who tests positive during an "outbreak" (if an employer has 100 or fewer employees, 4 or more employees testing positive within a 14 days period; if an employer has over 100 employees, 4% of employees test positive)
- ❑ Also creates a continuing disputable presumption of workplace injury for healthcare workers and first responders who get COVID-19 within 14 days of reporting to work

Workers' Compensation Presumption Expanded (SB 1159)

- ❑ Also creates a reporting requirement for employers with 5 or more employees
- ❑ All cases must be reported to the employer's workers' compensation carrier within 3 days of learning that an employee has tested positive
- ❑ The report must include the date of the test, the location where the employee worked, and the number of employees at the worksite
- ❑ Employers who fail to timely report information to their claims administrator or who intentionally submit false or misleading information are subject to a \$10,000 civil penalty to be assessed by the Labor Commissioner



What Should You Do in 2021?



To Do List

- Large employers: Revise your CFRA policies to reflect expanded coverages**
- Small employers: Get a written CFRA policy**
- Determine if your company can take advantage of any of the new AB 5 carveouts. If not, call your lobbyist**
- Audit your payroll records to ensure you can comply with the new pay data reporting requirements**
- Prepare California Consumer Privacy Act notice regarding types of personal information collected and purposes for which it is used**
- Review your settlement agreements to comply with no-rehire provision rules**
- If you employ minors, get the necessary mandatory reporter training**
- If you have 500+ employees, begin providing California emergency paid sick leave**

To Do List

- Draft a written COVID-19 plan**
- Prepare a written notice to give to employees if and when an outbreak occurs**
- Locate your closest COVID-19 test site and make arrangements with it to send employees for testing if necessary**
- Contact your workers' compensation carrier to prepare for reporting positive cases if and when they occur**

Any Questions?



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