CALIFORNIA ENACTS NEW LAWS AFFECTING EMPLOYERS IN 2021

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Governor Gavin Newsom recently signed a number of bills that will affect California employers in 2021. Most significantly, the new laws greatly expand the California Family Rights Act (CFRA), create stringent workplace reporting requirements related to COVID-19, and clarify California's year-old independent contractor law, Assembly Bill 5 (AB 5).

SUPPLEMENTAL COVID-19 PAID SICK LEAVE

Assembly Bill (AB) 1867 expanded supplemental paid sick leave for COVID-19-related reasons for certain employers not already covered by the federal Families First Coronavirus Response Act (FFCRA). Specifically, it required private employers that employ 500 or more U.S. employees to provide California employees with paid sick time for COVID-19-related absences.

The law was made effective 19 September 2020 to 31 December 2020 or upon expiration of any federal extension of FFCRA (whichever is later). On 31 December 2020, the federal FFCRA leave provisions expired, and the California legislature did not enact any COVID-19 specific leave requirements for employers with fewer than 500 employees.

The California legislature chose not to adopt any new laws requiring employers of any size to provide COVID-19 leave in 2021. Therefore, as of 31 December 2020, both the FFCRA and AB 1867 COVID-19 leave requirements expired. Employers are allowed to still take federal tax credits for voluntarily providing COVID-19 leave through 31 March 2021.

In addition, some local governments, including the City and County of San Francisco, San Mateo County, and Sacramento County, have extended their local sick leave ordinances to require covered employers to provide paid COVID-19 sick leave into 2021.

COVID-19 RECORDING AND REPORTING REQUIREMENTS

Taking effect 1 January 2021, AB 685 establishes stringent COVID-19 recording and reporting requirements when employers receive notice of a potential COVID-19 exposure at the workplace. Among other things, AB 685 requires employers to provide multiple notices *within one business day* after receiving notice of a potential COVID-19 exposure:

- Written notice[1] to all employees and employers of subcontracted employees who were at the worksite within the infectious period;

- Written notice to employee representatives, including unions and, in certain circumstances, attorneys who represent the affected employees;
- Written notice regarding COVID-19-related benefits, including workers' compensation benefits, COVID-19 leave, paid sick leave, and the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and
- Written notice to employees regarding the company's disinfection protocols and safety plan to eliminate any further exposures, per CDC guidelines.

Employers must also notify their local public health department within 48 hours if an "outbreak" occurs at the worksite (defined as three lab-confirmed cases within two weeks). The new law also authorizes the Division of Occupational Safety and Health (Cal/OSHA) to immediately shut a business down without prior notice if it concludes there is an imminent risk of serious physical harm due to COVID-19, and to issue significant monetary citations for serious violations relating to COVID-19.

The law also requires employers to draft and implement a separate COVID-19 Pandemic Plan that addresses all COVID-19 exposures, identifies the manner in which the employer intends to correct such exposures, and indicates how the employer will enforce its procedures, train its employees, conduct inspections, and review its plan for effectiveness.

REBUTTABLE PRESUMPTION OF CONTRACTING COVID-19 AT WORKPLACE

Senate Bill (SB) 1159 creates a rebuttable presumption that an employee contracted COVID-19 at work if the employee tests positive within 14 days after reporting to his or her place of employment during an "outbreak" at the workplace[2] in relation to workers' compensation benefits. The bill defines a "specific place of employment" as "the building, store, facility, or agricultural field where an employee performs work at the employer's direction," and specifically does not include an employee's residence if they are working at home.

This presumption exists for employees who suffer illness or death resulting from COVID-19 on or after 6 July 2020 through 1 January 2023. In addition, when the employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer is also required to report to its claims administrator in writing within three business days.

SIGNIFICANT EXPANSION OF CFRA

A major expansion of California's existing family medical leave law, the California Family Rights Act (CFRA), requires employers with five or more employees to provide certain unpaid, protected family, medical, and military leave to eligible employees. The new law, SB 1383, goes into effect on 1 January 2021.

The previous version of CFRA tracked the requirements of the federal Family Medical Leave Act (FMLA) and only applied to companies with 50 or more employees within a 75-mile radius.

More specifically, the following changes to CFRA were enacted:

- *Employer Eligibility Threshold of Five Employees:* CFRA has been expanded to apply to employers with five or more employees.[3] Such employers must now provide eligible employees with up to 12 workweeks of unpaid protected leave during a 12-month period.[4]

- *Expanded Definition of "Family Members":* CFRA allows employees to take unpaid protected leave to care for a "family member" with a serious health condition. FMLA and the previous version of CFRA define "family member" as the employee's parent, child, spouse, or domestic partner. SB 1383 significantly expands this definition to include siblings, grandparents, and grandchildren. In addition, "child" now covers all adult children (regardless of whether they are dependent) and children of a domestic partner.
    - This expansion appears to allow an employee to take a combined total of 24 weeks of unpaid leave under CFRA and FMLA due to the differing definitions of "family member." For example, an employee who takes 12 weeks under CFRA to care for a grandparent with a serious health condition may also be eligible under FMLA to take another 12 weeks of leave to care for a spouse with a serious health condition.[5] This issue may need to be resolved by the courts or a clarifying amendment.
- *Parents Who Work For the Same Employer:* CFRA previously provided that when both parents of a child work for the same employer, the employer is not required to give more than 12 weeks to both parents combined to bond with their child (birth, adoption, or placement of foster child within one year of the event). The changes to CFRA remove this provision, and employers must now provide 12 weeks to both employees.
- *"Key Employee" Exception Eliminated:* Under the previous CFRA, "key employees" who are among the highest 10% paid employees in the company could be refused reinstatement when necessary due to financial harm to the company. The new law eliminates this exception, so all employees have a right to reinstatement to the same or comparable job position (to the extent that the employee would have remained in that position if they had been continuously employed during the CFRA leave).

Governor Newson also signed AB 1867 which, among other things, establishes a new "small employer family leave mediation program" applicable to companies with 5 to 19 employees. This pilot program was specifically created to address concerns that small employers would face increased litigation due to non-compliance with the new provisions of CFRA. This mediation program will be in effect until 1 January 2024, unless extended.

Under AB 1867, if an employer receives a Right-To-Sue letter from the California Department of Fair Employment and Housing (DFEH) regarding a claim under the new CFRA, then the employer may request mandatory mediation through the DFEH, and the employee cannot pursue a claim in civil court until the mediation is completed. While there is no requirement that the parties resolve a claim at the mediation, the goal of AB 1867 is to help resolve disputes before costly litigation is initiated.

PPE SUPPLY FOR HOSPITALS

AB 2537 requires public and private employers of workers in general acute care hospitals (as defined in California Health and Safety Code Section 1250(a)[6]) to maintain specific stockpiles of personal protective equipment (PPE), including specified respirators, surgical masks, isolation gowns, eye protection, and shoe coverings. Specifically, beginning 1 April 2021, employers must maintain a three-month supply of the specified equipment. Further, the bill requires employers to establish and implement effective written procedures for periodically determining the quantity and types of equipment used in its normal consumption. Hospitals must also be prepared to report their highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year to the California Department of Industrial Relations (DIR).

EXPANDED PROTECTION FOR EMPLOYEES WHO ARE VICTIMS OF CRIME OR ABUSE

AB 2992 expands the prohibition on discrimination and retaliation against employees who are victims of crime or abuse. The bill also revises the categories of time off work under these circumstances to include taking time off to work to seek medical attention for injuries caused by crime or abuse, to obtain services from prescribed entities as a result of crime or abuse, to obtain psychological counseling or mental health services related to an experience of crime or abuse, or to participate in safety planning and take other actions to increase safety from future crimes or abuse.

REVISIONS TO "KIN CARE"

Currently, employees can use up to half of their accrued sick leave to care for a family member, also known as "kin care."AB 2017 revises the law to provide that the designation of the sick leave taken under these provisions is at the sole discretion of the employee. It clarifies that the employee has the right to designate sick leave as kin care or not, in order to avoid a designation error and unintentional draw down of kin care time when the sick days were actually taken for personal sick leave.

EXTENSION OF TIME TO FILE DLSE COMPLAINTS

AB 1947 extends the time to one year (from six months) for employees to file a complaint with the California Division of Labor Standards Enforcement (DLSE) from the date on which they are "discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner." The bill also amends Labor Code Section 1102.5[7] to expressly authorize courts to award reasonable attorneys' fees to a worker who prevails on a "whistleblower" claim under the Labor Code.

AMENDMENTS TO PROHIBITION OF NO-REHIRE PROVISIONS IN EMPLOYMENT SETTLEMENT AGREEMENTS

Under existing California law,[8] an employment settlement agreement may not contain a provision prohibiting or restricting a settling party from obtaining future employment with their employer. However, existing law creates an exception from the prohibition if the employer has made a good faith determination that the employee engaged in sexual harassment or sexual assault.

Effective 1 January 2021, AB 2143 expands this exception to include determinations that the employee engaged in any criminal conduct. The bill amends the statute to make clear that an employee must have filed his/her claim against the employer *in good faith* in order to be entitled to the restriction against the no-rehire provision. In addition, AB 2143 requires the sexual assault or sexual harassment to be documented by the employer before the employee filed the claim.

PAY DATA REPORTING TO DFEH

SB 973 requires a private employer with 100 or more employees that is required to file an annual Employer Information Report (EEO-1) under federal law, to submit a pay data report to the DFEH on or before 31 March 2021, and each year thereafter.

The report must contain information about employees' race, ethnicity, and gender in the following categories: all levels of officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers. The bill also requires the DFEH to make the reports available to the DLSE upon request and to maintain the pay data reports for at least ten years. The bill also authorizes the DFEH to seek an order requiring non-reporting employers to comply.

DIRECTORS FROM UNDERREPRESENTED COMMUNITIES ON CORPORATE BOARDS

AB 979 requires any publicly held domestic or foreign corporation whose principal executive office is located in California to have a minimum of one director from an underrepresented community by no later than 31 December 2021. It also requires that by 31 December 2022, any California-based publicly held corporation with more than four but fewer than nine directors to have a minimum of two directors from underrepresented communities, and such a corporation with nine or more directors to have a minimum of three directors from underrepresented communities.

Under the new law, a “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.

EXTENDED EXEMPTIONS FROM CCPA

AB 1281 extends the exemptions for personal information collected in the employment context and certain information collected in the course of a business-to-business (B2B) transaction or about B2B-related personnel for employers from the California Consumer Privacy Act (CCPA) until 1 January 2022.

Employers must still comply with the CCPA requirement to provide notice before, or at the time of, collecting the personal information from an applicant or employee and must describe every category of information that will be collected and the purposes for which it will be used.

REVISIONS TO AB 5

AB 2257 does not change the underlying framework of AB 5, which codified the “ABC” test for independent contractors, but it does make revisions and additions to some of the existing exceptions under the law. For more details on AB 5 and the “ABC” test, please see our prior client alert.

For example, AB 2257 revises provisions related to exempt bona fide B2B contracting relationships from the law's application, such as for individual businesspersons who contract with one another “for purposes of providing services at the location of a single-engagement event,” provided certain criteria are met (including a lack of control over the work, a written contract specifying payment amounts, and each individual's maintenance of his or her own business location).

It also does the following:

- expands contracting business to include services provided to a public agency or quasi-public corporation;
- clarifies that the criteria of providing services directly to the contracting business rather than to customers of the contracting business does not apply if the business service provider's employees are solely

performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses;

- specifies that the written contract for services must state the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services;
- provides that the business service provider's business location may include the business service provider's residence; and
- makes clear that the business service provider can potentially contract (as opposed to the prior requirement of "actual contracts") with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

AB 2257 also expands the professional services exemption to include content contributors, advisors, producers, narrators or cartographers for certain publications, and more. It also exempts recording artists, songwriters, lyricists, composers, musical engineers and mixers, as well as musicians and musical groups engaged for a single-engagement live performance event, among other exemptions.

ON-DUTY REST BREAKS FOR UNIONIZED SECURITY OFFICERS

AB 1512 permits employers to require their unionized security officers to take on-duty rest breaks (i.e., remain on call or on the premises during rest breaks; carry and monitor a communication device during rest breaks). This law is to remain in effect until 1 January 2027.

Employers may mandate this rule only if the collective bargaining agreement expressly provides for the security officers' wages, hours of work, working conditions, rest periods, final and binding arbitration of disputes concerning application of the rest period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate.

Under the new law, if a security officer's on-duty rest period is interrupted (i.e., the officer is called upon to return to performing the active duties prior to completing the rest period), the officer must be permitted to restart the rest period as soon as practicable. If a security officer is not permitted to take an uninterrupted rest period of at least ten minutes for every four hours worked or major fraction thereof, the security officer must be paid one additional hour of pay at their regular base hourly rate.

SUCCESSOR LIABILITY FOR UNPAID WAGES

Beginning 1 January 2022, or upon certification by the California Secretary of State (whichever is earlier), AB 3075 expands the information corporations must include in their statement of information filed with the state. Specifically, AB 3075 requires a corporation to include whether any officer or director, or in the case of a limited liability company, any member or manager, has an outstanding final judgment issued by the DLSE or a court of law, for which no appeal therefrom is pending, for a violation of any wage order or labor code.

The new law also adds a section to the California Labor Code that provides that a successor employer is liable for any wages, damages and penalties owed to any of the predecessor employer's former workforce pursuant to a final judgment if the successor employer meets any of the following criteria:

- uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the predecessor employer;
- has substantially the same owners or managers that control the labor relations as the predecessor employer;
- employs as a managing agent[9] any person who directly controlled the wages, hours or working conditions of the affected workforce of the predecessor employer;
- operates a business in the same industry and the business has an owner, partner, officer or director who is an immediate family member of any owner, partner, officer or director of the predecessor employer.

K&L Gates's team of employment lawyers is available to answer any questions regarding these matters.

FOOTNOTES

[1] Written notice may include, but is not limited to, personal service, e-mail, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.

[2] As defined by SB 1159, an "outbreak" exists if (1) the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (2) the employer has more than 100 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 (3) a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

[3] Governor Newsom stated that this lower threshold will impact nearly six million Californians.

[4] To qualify for CFRA, employees will still need to meet eligibility requirements of the previous CFRA, which include 12 months of service and 1,250 hours worked for the employer in the previous 12-month period.

[5] Additionally, if the employee also needs leave due to pregnancy, she could be entitled to up to an additional four months of leave under California Pregnancy Disability Leave.

[6] "General acute care hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services.

[7] Labor Code § 1102.5 prohibits employers from making, adopting, or enforcing any policy that prevents an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of a state or federal law. The statute also prohibits retaliation against any employee who discloses such information, refuses to participate in an activity that would result in a legal violation, or has exercised such a right in a former job.

[8] Section 1002.5 of *California Code of Civil Procedure*.

[9] The term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the *California Code*

of Civil Procedure.

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