

THE ESSENTIALS - CALIFORNIA EMPLOYMENT LAW UPDATE

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By: Eugene C. Ryu, Connor J. Meggs

The October edition of the Essentials marks the end of California's legislative session. As a helpful summary for employers, we have outlined key provisions of the new California employment laws for 2022:

MOST SIGNIFICANT, GENERALLY APPLICABLE CHANGE

SB - 331 -- Prohibitions in Settlement Agreements

For agreements entered into on or after 1 January 2022, the new law extends the existing prohibition on disclosure of sex discrimination/harassment claims to preventing the disclosure of acts of workplace harassment or discrimination not based on sex. This new law also makes it an unlawful employment practice for an employer or former employer to include a provision in a separation agreement that would prohibit the disclosure of unlawful employment practices or any non-disparagement agreement that would act to prevent the employee from disclosing unlawful acts.

WAGE & HOUR LAWS

AB - 1003 -- Makes Wage Theft Punishable as Grand Theft

Any intentional theft of wages in an amount greater than nine hundred fifty dollars (US\$950) from any one employee, or two thousand three hundred fifty dollars (US\$2,350) in the aggregate from two or more employees, by an employer in any consecutive 12-month period, can be punishable as either a misdemeanor or felony, and the wages or other compensation subject to such a prosecution are recoverable as restitution. This bill treats independent contractors as employees.

SB - 646 -- Certain Janitorial Employees Exempt From PAGA

SB-646 updates the Private Attorneys General Act of 2004 (PAGA) to except janitorial employees represented by a labor organization (that has represented janitors before 1 January 2021) operating under collective bargaining agreements that include binding arbitration procedures. This law sunsets on 1 July 2028.

AB - 701 -- Warehouse Distribution Centers With Quotas

Employers with over 100 California employees at a single warehouse distribution center—or with 1000 or more California employees at multiple warehouse distribution centers—must give each nonexempt employee (including employees of third-party employers, temporary services, or staffing agencies) a written description of any quota. This notice must include (1) the number of tasks to perform or materials to produce or handle, (2) the relevant time period, and (3) any potential adverse employment action that could result from a failure to meet the quota. This written description must be provided upon hire, or within 30 days of the 1 January 2022 effective date. This new law also prohibits employers from requiring employees to meet quotas that prevent compliance with meal or

rest periods, use of bathrooms, and health and safety laws. Finally, this law provides that any time spent by an employee complying with health and safety codes is considered time on task and productive time for the purposes of any quota or monitoring system. This law also creates a rebuttable presumption of unlawful retaliation if adverse action is taken within 90 days of the employee's first request for quota information or complaint about a violation of the provisions of this bill.

SB - 362 -- Prohibits Workload Quotas for Pharmacists at Chain Pharmacies

A chain community pharmacy is prohibited from establishing a workload quota for its pharmacists or pharmacy technicians. A chain community pharmacy is a pharmacy that is part of a chain of 75 or more stores in California under the same ownership.

SB - 62 -- Garment Manufacturing Industry: Wage Structure, Liability, and Record Keeping

SB 62 provides that employees engaged in garment manufacturing may not be paid by the piece or unit, except in workplaces where employees are covered by a bona fide collective bargaining agreement. The new law also expands the group sharing joint and several liability with a garment manufacturer to include contractors and brand guarantors. Lastly, the new law increases the record keeping duration from 3 years to 4 years for every employer engaged in the business of garment manufacturing.

SB - 639 -- Phasing Out Subminimum Wage Program for Mentally or Physically Disabled Employees

Existing law allows employers to pay employees who are mentally or physically disabled less than minimum wage under a state subminimum wage licensing program. SB 639 prohibits new licenses from being issued after 1 January 2022 and has additional parameters for renewals of existing licenses. The bill also requires the development of a plan to phase out the use of this program by 1 January 2025.

SB - 572 -- Wage Liens Against Employers

SB 572 authorizes the Labor Commissioner to create, as an alternative to a judgment lien, a lien on real property to secure amounts due to the Commissioner under any final citation, findings, or decision.

SB - 727 -- Contractor Liability for Debts Owed by Subcontractors

For contracts entered into on or after 1 January 2022, a direct contractor will be liable for penalties, liquidated damages, and interest owed by the subcontractor on account of the performance of the labor, in specified situations. For example, a contractor will be liable where the contractor had direct knowledge of the subcontractor's failure to pay wages or other benefits.

INDEPENDENT CONTRACTOR

AB - 1023 -- Contractors Who Bid and Work on Public Works Contracts

AB 1023 updates existing requirements to require contractors to provide compliance monitoring and payroll information to the Labor Commissioner every 30 days while work continues and 30 days after the final day of work performed. It also requires such records to be transmitted electronically and prohibits the Labor Commissioner from levying penalties until 14 days after the deadline.

AB - 1506 -- Exemption from the ABC Independent Contractor Test for Newspaper Distributors and Carriers

AB 1506 extends the temporary exemption from the ABC test for newspaper distributors and carriers for an additional three years until 1 January 2025. The bill also requires that every newspaper publisher or distributor that hires or contracts with newspaper carriers provide information related to their workforce, including the number of carriers, the average wage, and the number of wage claims filed with the LWDA.

AB - 1561 -- Extends and Expands Various Exemptions from the ABC Independent Contractor Test

AB 1561 extends the temporary exemption from the ABC test for licensed manicurists and construction trucking subcontractors for three years until 1 January 2025. The bill also expands the existing exemption for persons who provide underwriting inspections, premium audits, and risk management for the insurance and financial services industries to also include a person who provides claims adjusting or third-party administration services. The bill also clarifies the exemption for data aggregators and housing salespersons.

COMPLIANCE

AB - 1033 -- Parent-in-laws Covered Under the CFRA

Last year, California passed SB 1383, which significantly modified the California Family Rights Act. Among the changes was the expansion of the definition of “family member” to include, for example, parents and grandparents. AB 1033 adds “parent-in-law” to the definition of “family member.”

SB-657 -- Electronic Posting

SB 657 provides that “[i]n any instance in which an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached. Email distribution pursuant to this section shall not alter the employer’s obligation to physically display the required posting.”

SB - 807 -- Procedural Changes to the Enforcement of Civil Rights by the Department of Fair Employment and Housing

The new law updates the counties in which the Department of Fair Employment and Housing is able to file a petition to compel compliance with its investigation. SB 807 also increases the record keeping time period mandated for employers to four years and tolls the statute of limitations for complainants to file a civil action.

OSHA/ SAFETY

SB - 321 -- New Cal/OSHA Advisory Committee to Help Protect Domestic Workers

SB 321 provides that the Division of Occupational Safety and Health of California (Cal/OSHA) will create an advisory committee to recommend state policies to protect the health and safety of domestic workers and to develop voluntary industry-specific occupational health and safety guidance for the purpose of educating household domestic service employees and employers.

AB - 654 -- Change for Employers Reporting COVID-19 Cases

AB 654 makes minor changes to existing COVID-19 case reporting protocols. Rather than employers notifying “employees who may have been exposed” employers are now required to notify “all employees who were on the premises where there has been a confirmed case of COVID-19.” The bill also expands the group of employers exempt from the COVID-19 outbreak reporting requirement, to include, for example, child day care facilities and residential care facilities for the elderly.

AB - 73 -- Expands Scope of Health Emergencies and Category of Essential Workers

Last year, in response to the COVID-19 pandemic, California enacted Health & Safety Code 131021. It requires, among other things, that the State Department of Public Health and Office of Emergency establish a stockpile and distribution system of personal protective equipment sufficient to supply all health care workers and essential workers for a 90-day pandemic or other health emergency. AB 73 broadens the scope of this law in two ways. First, wildfire smoke events are considered health emergencies for these purposes. Second, the law expanded the definition of “essential worker” to include agricultural workers.

SB - 606 -- Update to Cal/OSHA Safety Violation Penalties for Employers with Multiple Worksites

SB 606 creates a rebuttable presumption that employers with multiple worksites have committed enterprise-wide workplace safety violations when the employer has a written policy or procedure that violates Cal/OSHA provisions, or Cal/OSHA has evidence of a pattern or practice of the same violation committed by that employer involving multiple worksites. Enterprise-wide violations will now be subject to the same penalty as willful or repeated violations.

This new law requires Cal/OSHA to issue a citation for an egregious violation for each willful and egregious violation. Further, the new law requires each instance of an employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties. Therefore, the maximum penalty would be calculated per violation multiplied by the number of employees exposed.

KEY CONTACTS



EUGENE C. RYU
PARTNER

LOS ANGELES, SAN FRANCISCO
+1.310.552.5035
GENE.RYU@KLGATES.COM



CONNOR J. MEGGS
ASSOCIATE

LOS ANGELES
+1.310.552.5031
CONNOR.MEGGS@KLGATES.COM

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