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2021 California Employment Law Roundup

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As 2021 is quickly approaching, employers in California are reminded to make any necessary changes to their policies due to the expansion of the California Family Rights Act and other new legislation. We have set forth below a brief summary of some of the key new laws impacting many California employers in 2021.

SB 1383 – Expansion of California Family Rights Act

The current California Family Rights Act ("CFRA"), modeled largely after the federal Family and Medical Leave Act ("FMLA"), requires employers with 50 or more employees to provide protected leave rights to employees with at least one year of service, who have worked at least 1,250 hours during the past 12 months, and who are employed at a worksite with 50 or more employees within 75 miles. However, effective January 1, 2021, SB 1383 eliminates the requirement that employees work at a worksite with 50 or more employees within 75 miles and expands the CFRA to now apply to all private employers with five or more employees. As a result, the CFRA now applies to large and small employers alike with five or more employees, even if the employer only has one employee in California. The CFRA allows employees to take up to 12 weeks of unpaid leave to care for their own serious health condition (other than pregnancy related medical conditions, which are covered under Pregnancy Disability Leave), or to care for a "family member" with a serious health condition, or to bond with a new child within 12 months of the birth, adoption or foster placement of the new child. SB 1383 has now expanded the CFRA to allow protected leave due to a qualifying exigency related to covered active duty of an employee's spouse, domestic partner, child or parent in the Armed Forces of the United States, as specified in section 3302.2 of the California Unemployment Insurance Code. The definition of "family member" was also expanded to included siblings, grandparents and grandchildren, which is broader than the FMLA, in addition to child, parent, spouse and domestic partner. As a result, it is possible that an employee may qualify for 12 weeks of CFRA leave that is not available under the FMLA, but then still be eligible for 12 weeks of FMLA leave for a different qualifying reason. SB 1383 also repeals the New Parent Leave Act, which allowed employees employed at a worksite with 20 or more employees within 75 miles to take protected leave for the birth, adoption or foster placement of a child. Now, all employees in California working for employers with five or more employees will be eligible for all of the protected leave rights under the CFRA, regardless of the number of employees working within 75 miles. Also, if both parents work for the same employer, both parents can now each take 12 weeks of protected leave to care for a new child, whereas the FMLA allows both parents to only take a combined total of 12 weeks of leave to care for a new child. Additionally, SB 1383 eliminated the highly compensated "key employee" exception to CFRA leave, which is available to employers under the FMLA. Employers of all sizes should review their existing leave policies because small employers who never had to previously comply with CFRA/FMLA leave and large employers who have worksites in California with fewer than 50 (or 20) employees within 75 miles will need to develop policies and procedures for these new leave requirements and provide CFRA leave to all employees in California.

AB 685 – COVID Exposure Notification

As of January 1, 2021, California employers will have new notice and reporting obligations under Cal/OSHA in regard to COVID-19. AB 685 specifically adds section 6409.6 of the Labor Code which requires employers, within one business day, to provide written notice of a potential COVID-19 workplace exposure to all employees, employees' exclusive representative (such as a union), and employers of subcontractors who were at the same worksite as a "qualifying individual" within the infectious period. The Labor Code defines a "qualifying individual" as any individual who (1) has a

positive viral test for COVID-19, (2) is diagnosed with COVID-19 by a licensed health care provider, (3) is ordered to isolate for COVID-19 by a public health official, or (4) has died due to COVID-19. If such qualifying individual has been at the employer's worksite during the infectious period, the employer must provide written notice in both English and the language that the majority of the workforce understands of the potential COVID-19 workplace exposure. Employers may communicate this written notice by e-mail, text message, or memorandum. The notice must specifically include information regarding COVID-19 benefits under federal, state, or local laws that are available to employees as well as information regarding the employer's disinfection and safety plan that it plans to implement and complete per the guidelines of the Centers for Disease Control and Prevention. Employers may not reveal the name of the qualifying individual and cannot retaliate against a qualifying individual for disclosing a positive COVID-19 test or diagnosis or order to quarantine or isolate. Lastly, employers are required to maintain records of notifications for at least three years.

Section 6409.6 of the Labor Code further imposes the obligation for employers to report when there has been an outbreak in their workforce. Specifically, if an employer is notified of the number of cases that meet the California Department of Public Health's definition of a COVID-19 outbreak, the employer must, within 48 hours, notify the local public health agency of the names, number, occupation, and worksite of employees who meet the definition of a "qualifying individual." The Labor Code exempts health facilities from this reporting requirement.

AB 685 also adds subsection (h) to section 6432 of the Labor Code, which creates an exemption for COVID-19 where Cal/OSHA may issue a citation without having to provide the employer with a standardized form containing descriptions of why it believe there to be a "serious violation" in the place of employment. This expands Cal/OSHA's discretion by allowing it to shut down a worksite if it deems employees are exposed to COVID-19 so as to constitute an "imminent hazard."

These COVID-19-specific changes to the Labor Code will remain in effect until January 1, 2023. In preparation to meet these new requirements, employers should prepare a template COVID-19 notice that is ready to distribute, make a list of all employees, unions, or subcontractors that need to be notified, prepare a disinfection or safety plan, and create training and checklists for supervisors and managers covering the new requirements. It is essential for employers to prepare in advance so that they can meet the 24-hour notice requirement in the event there is exposure in the workplace.

SB 1159 – Workers' Compensation

Having already gone into immediate effect on September 17, 2020, SB 1159 adds Labor Code sections 3212.86 – 3212.88 which expand the definition of "injury" under workers' compensation to include illness or death from COVID-19. SB 1159 codifies the rebuttable presumption that an employee who reports having COVID-19 is presumed to have contracted the virus at the workplace and is therefore compensable under certain circumstances. The rebuttable presumption applies only if the employee contracted the virus during a workplace "outbreak," the definition of which varies depending on the number of employees an employer has, and if the employee was present in the workplace within 14 days before the employee tested for COVID-19.

For workers' compensation injury claims after July 6, 2020, the employer has 45 days from the date of the claim to gather and submit evidence to deny the presumption that the injury is compensable. Employers should act promptly and present evidence that could rebut the presumption. Such evidence could include measures taken by the employer to reduce potential transmission of COVID-19 at the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection.

SB 1159 also requires an employer who knows or reasonably should know that an employee has tested positive for COVID-19 to report certain information to its claims administrator. This notice must be given within three business days and must include the address(es) of the worksite(s) where the employee worked during the 14 days before the positive test, the date of the employee's positive COVID-19 test, and the highest number of employees who reported to the workplace in the past 45 days. The notice must not include any personally identifiable information regarding the employee who tested positive, unless the employee filed a workers' compensation claim. Employers can be issued fines of up to $10,000 for failing to report that an employee has tested positive for COVID-19. The changes and requirements under SB 1159 will remain in effect through January 1, 2023.

AB 1867 – Small Employer Family Leave Mediation Program

To help address the expansion of the CFRA to small employers, AB 1867 establishes a mediation program for family care leave claims brought against small employers. The California Department of Fair Employment and Housing ("DFEH") pilot program will mediate family care leave claims brought pursuant to section 12945.2 of the California Government Code filed against employers with five to 19 employees. Either the employee or the employer may request the mediation. Employees

cannot pursue their claim in court until the mediation is completed. This program is set to end on January 1, 2024.

AB 2257 – Worker Classification

Last year, AB 5 codified the "ABC test" adopted by the California Supreme Court in its 2018 decision of *Dynamex Operations West, Inc. v. Superior Court*, as used to determine worker classification status for claims brought by independent contractors seeking protections under the California Wage Orders, and AB 5 also expanded the ABC test to other aspects of the Labor Code, including for purposes of unemployment insurance and workers' compensation benefits. AB 5 also set forth numerous occupations that were exempt from the ABC test and instead were governed by the multifactor test based on the California Supreme Court's 1989 decision in *S.G. Borello & Sons, Inc. v. DIR* (the "Borello" test), which makes it easier to qualify as an independent contractor than the ABC test.

AB 2257, which went into immediate effect on September 4, 2020, now establishes various modifications to AB 5. AB 2257 not only exempts certain occupations from the ABC test altogether, but also modifies the requirements to make it easier for certain occupations to qualify as exempt under the ABC test. For example, AB 2257 creates exemptions for licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, and feedback aggregators, while also revising the conditions and criteria pursuant to which business service providers providing services pursuant to a contract to another business are exempt. AB 2257 also established that referral agencies and service providers providing services to clients through referral agencies are exempt. Employers should seek guidance to assess AB 2257's specific exemptions and its revisions to the conditions, criteria, and applicable definitions for such exemptions to determine whether AB 2257 applies to or affects their business.

SB 973 – Equal Pay Reporting

Employers with 100 or more employees who are required to file an EEO-1 under federal law will now be required to submit a pay data report to the California Department of Fair Employment and Housing ("DFEH") for the prior calendar year. The first report is due on March 31, 2021, and annually thereafter. Each report submitted by March 31 covers the prior calendar year. The report to the DFEH shall be made available in a searchable and sortable format and must include two categories of information:

(1) The number of employees by race, ethnicity and sex in each of the following categories: Executive or Senior Level Officials and Managers; First or Mid-Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers. Employers shall create a "snapshot" by counting individuals in each category from a single pay period of their choosing between October 1 and December 31 of the prior year.

(2) The number of employees by race, ethnicity and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey (https://www.bls.gov/respondents/oes/). Employers shall calculate the annual earnings (defined as W-2 income) and the total number of hours worked by each employee.

AB 1947 – Labor Code Changes

Effective January 1, 2021, section 98.7 of the Labor Code is amended to extend the deadline from six months to one year to file a complaint with the Division of Labor Standards Enforcement ("DLSE") for discrimination and retaliation claims. This new legislation also makes attorney's fees recoverable for retaliation claims that are brought under section 1102.5 of the Labor Code. This will likely cause an increase in whistleblower claims, especially in response to employees raising complaints about the numerous federal, state and local COVID-19 guidelines.

This article highlights key new laws with broad impact, but employers should be aware that there are other new laws that also may impact them in 2021. We recommend that California employers consult with employment counsel to ensure compliance, as many of these new laws expand the scope of risk for employers and require changes to existing workplace policies and practices.

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