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New California Laws for 2021: What Employers Should Know

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In 2020, California Governor Gavin Newsom signed several laws impacting California employers. The new laws — some of which were signed into law just weeks ago — address several topics including sick leave, worker classification, employee leave, workers' compensation, safety regulation enforcement, wages and unemployment insurance.

All employers with operations in California should be aware of these new laws, understand how these laws may affect their operations and consult with counsel to address any compliance questions. The effective date of each new law is indicated in the heading of the Assembly Bill (AB) or Senate Bill (SB).[1]

AB 685 — Notice Obligations for COVID-19 Exposures in the Workplace and Cal/OSHA Enforcement Changes (Effective Jan. 1, 2021)

AB 685 prescribes notice requirements on employers in the event of a COVID-19 exposure in the workplace, enhances reporting requirements to local health authorities in the event of a COVID-19 outbreak, and expands the Division of Occupational Safety and Health of California's (Cal/OSHA) authority to shut down worksites deemed to be an "imminent hazard" due to COVID-19 and issue "serious violation" citations.

Under AB 685, private and public employers who receive notice of a potential exposure to COVID-19 must do the following within one business day:

- Provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the "qualifying individual"[2] within the infectious period that they may have been exposed to COVID-19.
- Provide written notice to the exclusive representative (union), if any, of the employees above.

- Provide all employees who may have been exposed and their exclusive representative, if any, with information regarding COVID-19-related benefits to which they may be entitled, including but not limited to worker's compensation, COVID-19-related leave, and paid sick leave, as well as the employer's anti-discrimination and anti-retaliation policies.

- Provide notice to all employees, the employers of subcontracted employees, and the exclusive representative, if any, of the disinfection and safety plan that the employer plans to implement and complete, per CDC guidelines.

The written notice provided to employees may include, but is not limited to, personal service, email 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.

AB 685 also imposes reporting obligations on employers who are notified of a COVID-19 outbreak, as defined by the CA Department of Public Health. Within 48 hours of learning of the outbreak, employers must notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation and worksite of qualifying individuals, as well as the employer's business address and NAICS code of the worksite where the qualifying individuals worked. Following the reporting of an outbreak, the employer must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

The new law also adds a section to the Labor Code which specifically provides that Cal/OSHA can shut down or prohibit operations at a worksite when, in the opinion of Cal/OSHA, a worksite or operation “exposes workers to the risk of infection” of COVID-19 so as to constitute an imminent hazard. In addition, it eliminates the requirement that Cal/OSHA provide to the employer its notice of intent (1BY) to issue a “serious violation” citation for COVID-19 related hazards. This means that employers no longer have a “15-day window” to respond to the notice with evidence to support their defense before a citation can be issued. This provision of the bill will expire on January 1, 2023.

This bill amends sections 6325 and 6432 of the Labor Code and adds section 6409.6 to the Labor Code.

AB 736 - Expansion of Professional Exemption (Effective Sept. 9, 2020)

AB 736 expands the professional exemption under Industrial Wage Commission (IWC) Wage Order Nos. 4-2001 and 5-2001 to include part-time, or “adjunct,” faculty at private, non-profit colleges and universities in California. The law amends the Labor Code by adding Section 515.7, which states that an employee providing instruction for a course or laboratory at an independent institution of higher education, as defined by the Education Code, shall be classified as exempt under the professional exemption if the employee meets both a duties and salary test.

To meet the duties test, the employee must be primarily engaged in an occupation that is commonly recognized as a learned or artistic profession and must customarily and regularly exercise discretion and independent judgment about the performance of his/her duties.

To meet the salary test, the employee must be paid on a salary basis and receive a monthly salary equivalent to no less than two times the state minimum wage for employment in which the employee is employed for at least 40 hours per week. Alternatively, when employed per course or laboratory,

the faculty member must receive at least the following amounts per hour, for all classroom or laboratory time, preparation, grading, office hours and other course or laboratory-related work: $117 in 2021; $126 in 2021; $135 in 2022; and a percentage increase in 2023 and each year thereafter that is equal to the percentage increase to the state minimum wage. Employees must be compensated separately for non-course related work on behalf of the employer, which shall not affect the employee's classification as an exempt employee. Finally, when employed under a collective bargaining agreement (CBA), the faculty member must be paid pursuant to that CBA if the classification of employment in a professional capacity is expressly included in the CBA in clear and unambiguous terms.

This bill adds Section 515.7 to the Labor Code.

AB 979 — Appointment of Directors from Underrepresented Communities on Corporate Boards (Effective September 30, 2020)

AB 979 builds on SB 826, passed in 2018, which mandated that any publicly held corporation whose principal executive offices (according to the corporation's SEC 10-K form) are in California place at least one female director on its board by December 31, 2019. SB 826 also imposed minimum seat requirements that must be filled by women — proportional to the total number of seats — by December 31, 2021. Specifically, under SB 826, by December 31, 2021, any California-based publicly held corporation with six or more directors must have at least three female directors on its board; if the number of directors is five, then at least two must be women; and if the number of directors is four or fewer, then the corporation must have at least one female director.

AB 979 requires, no later than December 31, 2021, 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, and, by December 31, 2022 calendar year, 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.

Any company that doesn't comply with these requirements will face significant financial penalties consistent with the penalties previously implemented under SB826, including a $100,000 penalty for failing to timely file board member information with the Secretary of State pursuant to to-be-adopted regulations; a $100,000 penalty for the first violation of the new law; and a $300,000 penalty for the second and any subsequent violation.

The bill amends Section 301.3 of — and adds Sections 301.4 and 2115.6 to — the Corporations Code.

AB 1281 — California Consumer Privacy Act (CCPA) Amendments and Regulations (Effective September 29, 2020)

AB1281, which amends Section 1798.145 of the Civil Code and was approved by Governor Newsom on September 29, 2020, extends the exemptions under the California Consumer Privacy Act (CCPA) for personal information collected and shared in the employment and business-to-business contexts through December 31, 2021, if the California Privacy Rights and Enforcement Act (CPRA) — which is

on the November 3 ballot and contains the same extensions, but through 2022 — does not pass. The two exemptions would otherwise sunset at the end of 2020. Businesses now have certainty that those two exemptions will continue for at least another year.

In addition, on August 14, 2020, the California Attorney General announced that the state's Office of Administrative Law (OAL) had approved the CCPA implementing regulations, which became effective immediately. Most of the changes were revisions for grammar and consistency, but there are five minor updates – not specific to the employment context – discussed in our prior alert.

AB 1512 — Mandatory On-Duty Rest Breaks for Unionized Security Officers (Effective Sept. 30, 2020)

AB 1512 permits employers to require their unionized security officers to take on-duty rest breaks: i.e., to remain on the premises during rest breaks; remain on call during rest breaks; and carry and monitor a communication device during rest breaks. In enacting AB 1512, the Legislature recognized that security officers must be able to respond to emergency situations without delay and call for assistance from police, fire or ambulance services when necessary.

Employers may mandate this rule only if the collective bargaining agreement expressly provides for the employees' 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 of their post prior to completing the rest period), the officer must be permitted to restart the rest period as soon as practicable. A rest period is not interrupted simply because the officer must remain on the premises, remain on call and alert, and/or monitor a radio or other communication device. If a security officer is not permitted to take an uninterrupted rest period of at least 10 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.

This bill amends Section 226.7 of the Labor Code.

AB 1731 — Unemployment Insurance and Work-sharing Plans (Effective September 28, 2020)

AB 1731 creates an alternative, expedited process by which employers may apply to and participate in California's work-sharing program. Previously, employees were eligible for unemployment benefits if they worked less than their usual weekly hours as a result of the employer's participation in a work-sharing plan that met specified requirements and had been approved by the Director of Employment Development. Employers who wished to participate in a work-sharing program were required to submit to the director a signed, written work-sharing plan application form that met specified requirements.

AB 1731 requires the director to accept an application to participate in, or renew participation in, the work-sharing program that is submitted electronically and requires the Employment Development Department (EDD) to create a portal on its internet website for the provision and receipt of such applications. In addition, for work-sharing plan applications submitted by eligible employers between

September 15, 2020 and September 1, 2023, the new law requires that, upon approval by the director, they be deemed approved for one year unless a shorter plan is requested by the employer and approved by the director. The new law also mandates that the EDD mail to eligible employers a claim packet for each participating employee within 5 business days following approval of the application, and make online claim forms available to the approved employer for each participating employee within five business days following approval of the application if the employer submitted its work-sharing plan application online. Upon completion of the documents in the claim packet, the EDD must establish an unemployment insurance claim pursuant to applicable requirements. Among other things, the new law requires participating employers and employees to meet the required unemployment insurance claim filing and weekly certification requirements.

This bill amends Section 1279.5 of — and adds Section 1279.6 and Section 1279.7 to — the Unemployment Insurance Code.

AB 1867 — Supplemental Paid Sick Leave; Handwashing; Family Leave Mediation (Effective Sept. 9, 2020)

AB 1867 packs three unrelated laws into one bill: supplemental paid sick leave for employers with 500 or more employees nationwide; handwashing requirements for food employees working in any food facility; and small employer family leave mediation pilot program under the California Fair Employment and Housing Act (FEHA).

Supplemental Paid Sick Leave: This bill codifies Governor Newsom's Executive Order N-51-20 (signed April 16, 2020) which provided supplemental paid sick leave to food sector employees for an employer with 500 or more employees nationwide as a result of the COVID-19 pandemic (COVID-19 Supplemental Paid Sick Leave). This bill also extends COVID-19 Supplemental Paid Sick Leave to non-food sector employees such that sick leave must be provided to all employees who leave their homes or place of residence to perform work and who work for employers that have 500 or more employees nationwide. Moreover, COVID-19 Supplemental Paid Sick Leave is now available to health care employees and emergency responders who were not provided paid sick leave by their employers under the federal Families First Coronavirus Response Act (FFCRA).[3]

For an employee to be eligible for COVID-19 Supplemental Paid Sick Leave, the employee must be unable to work due to one of the following reasons: the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; the employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or the employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19. The California Labor Commissioner has clarified that being subject to the State of California's "general stay-at-home order" does not mean that the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. Eligible employees are entitled to paid sick leave based on whether they are considered full-time or part-time. The California Labor Commissioner has published useful FAQs to assist employers.

In addition, an employer must comply with the notice and paystub requirement previously established under the California Healthy Workplaces, Healthy Families Act of 2014 (HWHFA). In other words, an employer must provide an employee with written notice that sets forth the amount of paid sick leave available for use on either the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.

Covered employers are required to provide COVID-19 Supplemental Paid Sick Leave until December

31, 2020, the same date that the FFCRA is set to expire. Should the FFCRA be extended, the COVID-19 Supplemental Paid Sick Leave will also be extended to track the end date of the FFCRA. Finally, should the employee be on a COVID-19 Supplemental Paid Sick Leave while the law expires, the employee is allowed to finish taking the amount of leave.

Handwashing Requirements: AB 1867 requires employees working in any food facility to be permitted to wash their hands every 30 minutes and additionally as needed.

Small Employer Family Leave Mediation Pilot Program: The California Department of Fair Employment and Housing (DFEH) has, among other things, the power to investigate, mediate and prosecute complaints by employees or former employees under FEHA. AB 1867 requires the DFEH to create a small employer family leave mediation pilot program which would authorize a small employer or the employee to request all parties to participate in mediation through the DFEH's dispute resolution division. If mediation is requested, this bill would prohibit the employee from pursuing a civil action until the mediation is complete, and the statute of limitations would be tolled for the employee to bring a civil claim. This program expires as of January 1, 2024.

This bill adds to, or repeals, section 12945.21 of the Government Code, adds section 113963 to the Health and Safety Code, amends section 248.5 of the Labor Code and adds Sections 248 and 248.1 to the Labor Code.

AB 1947 — Time period for filing DLSE complaints (Effective Jan. 1, 2021)

AB 1947 extends the period of time for employees who believe that they have been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner to file a complaint with the Division of Labor Standards Enforcement from six months to one year. AB 1947 also authorizes a court to award reasonable attorney's fees to a plaintiff who successfully brings a whistleblower action under Labor Code Section 1102.5. Prior to AB 1947, workers who prevailed in lawsuits alleging that their employer made, adopted or enforced a policy that prevented them from disclosing information to a government or law enforcement agency where they had reasonable cause to believe that the information disclosed a violation of a state or federal law could obtain damages, but were not permitted to recover attorney's fees. AB 1947 now affords them the ability to do so.

This bill amends Sections 98.7 and 1102.5 of the Labor Code.

AB 2017 — Sick Leave: Kin Care (Effective Jan. 1, 2021)

AB 2017 provides that when an employee takes sick leave to attend to the illness of a family member, the designation of sick leave is at the sole discretion of the employee.

This bill amends section 233 of the Labor Code.

AB 2143 — Settlement Agreements (Effective Jan. 1, 2021)

AB 2143 amends Code of Civil Procedure section 1002.5 to specify the circumstances under which an agreement to settle an employment dispute may include a provision that prohibits a settling party from working for the employer again (sometimes known as a "no-rehire" provision). Under current law, an employer may not enter into an agreement that restricts an "aggrieved person" from working for the employer against which the "aggrieved person" has filed a claim. Pursuant to AB 2143, the

“aggrieved person” must have filed the claim in good faith for the provision to apply. In addition, while existing law has an exception to the ban on “no-rehire” provisions if the employer has made a good-faith determination that the “aggrieved person” engaged in sexual harassment or sexual assault, AB 2143 requires the determination of sexual assault or harassment to be documented by the employer **before** the “aggrieved person” filed the claim. AB 2143 also extends this exception to include determinations of criminal conduct.

This bill amends Section 1002.5 of the Code of Civil Procedure.

AB 2147 — Convictions (Effective Jan. 1, 2021)

AB 2147 allows certain individuals with criminal convictions who have been released from custody and completed the California Conservation Camp program to have their convictions expunged. Individuals who have been convicted of certain crimes, including murder and rape, are automatically ineligible for this relief. AB 2147 was passed in the wake of California’s recent serious fire seasons to allow for incarcerated individuals who have worked assisting with firefighting through the California Conservation Camp program to more easily retain employment in firefighting after they have been released from custody.

This bill adds section 1203.4b to the Penal Code.

AB 2257 — Worker Classification: Independent Contractors (Effective Sept. 4, 2020)

In 2019, Governor Newsom signed AB 5, which codified the ABC test articulated by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* for purposes of determining whether a worker was properly classified as an independent contractor.

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract for the performance of the work and in fact.

2. The worker performs work outside the usual course of the hiring entity’s business.

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

AB 5 established several exemptions for which the ABC test does not apply. Instead, those exempted industries/professions were to continue to be subject to the factors articulated by the California Supreme Court in 1989 in *Borello & Sons, Inc. v. Department of Industrial Relations* and other contractor classification criteria in the statute.

AB 2257 makes some significant changes:

- It repeals Labor Code section 2750.3 which was enacted as a result of AB 5 and adds new sections 2775 through 2787 of the Labor Code.

- It expands the scope of the exempted industries to include, among others, recording artists, songwriters, lyricists, licensed landscape architects, real estate appraisers, home inspectors,

people who provide underwriting inspections and other services for the insurance industry, still photographers, photojournalists, videographers, photo editors, fine artists, freelance writers, translators, editors, content contributors, advisors, narrators, cartographers, producers, copy editors, illustrators, or newspaper cartoonists.[4]

- It makes some key changes to the Business Service Providers (i.e., business-to-business) Exemption as follows: (a) expands contracting business to include services provided to a public agency or quasi-public corporation; (b) 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; (c) specifies 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; (d) the business service provider's business location may include the business service provider's residence; and (e) the business service provider can contract (vs. actually contracts) with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

- It clarifies that a service provider that provides services through a referral agency may be properly classified as an independent contractor if the service provider satisfies 11 criteria which include: (1) the service provider is free from the control and direction of the referral agency both as a matter of contract and in fact; (2) if the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, or a professional license, permit, certification registration, the service provider must certify to the referral agency that they have the required documents; (3) the service provider provides its own tools and supplies to perform the services and the service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client; (4) without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client; (5) the service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client and the service provider is free to accept or reject clients and contracts; and (6) the referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

- It provides that in addition to the Attorney General of the State of California and certain City Attorneys, District Attorneys may now prosecute an action for injunctive relief for non-compliance with AB 2257.

This bill repeals Labor Code section 2750.3, adds section 2775 through 2787 to the Labor Code, and amends and adds several sections of the Revenue and Taxation Code.

AB 2399 – Paid Family Leave (Effective Jan. 1, 2021)

Paid Family Leave will include time off for participation in a qualifying exigency related to the active duty or call to active duty of an individual's spouse, domestic partner, child or parent in the Armed Forces of the United States. AB 2399 will revise defined terms for paid family leave purposes and

include a definition of “military member.”

This bill amends sections 3302 and 3307 of the Unemployment Insurance Code.

AB 2479 — Exemption from Rest Period Requirements for Safety-Sensitive Positions (Effective Jan. 1, 2021)

AB 2479 extends until January 1, 2026, the exemption from rest period requirements for specified employees who hold a safety-sensitive position at a petroleum facility, to the extent those employees are required to carry and monitor a communication device, such as a radio or pager, and to respond to emergencies, or are required to remain on their employer's premises to monitor the premises and respond to emergencies. Prior to AB 2479, the exemption was set to expire by January 1, 2021.

Under the new law, when a nonexempt employee covered by Section 226.7 of the Labor Code is affirmatively required to interrupt their rest period to address an emergency, the employer must authorize the employee to take another rest period reasonably promptly after the circumstances that led to the interruption have passed. If circumstances do not allow for the employee to take such a rest period, the employer must pay the employee one hour of pay at the employee's regular rate of pay for the rest period that was not provided. Employers who operate petroleum facilities must also include, as part of the itemized wage statement they are required to furnish pursuant to Section 226(a) of the Labor Code the total hours or pay owed to an employee covered by Section 226.7 on account of a missed rest period.

This bill amends Section 226.75 of the Labor Code.

AB 2765 — Public Works: Prevailing Wages (Effective Jan. 1, 2021)

California law requires that generally no less than the general prevailing rate of per diem wages be paid to workers employed on public works. AB 2765 expands the definition of “public works” for these purposes to include any construction, alteration, demolition, installation or repair work done under private contract on a project for a charter school when the project is paid for with the proceeds of certain bonds.

This bill adds section 1720.8 to the Labor Code.

AB 2992 – Employee Leave (Effective Jan. 1, 2021)

Existing law prohibits employers from discharging — or discriminating or retaliating against — employees who are a victim of domestic violence, sexual assault or stalking, for taking time off from work to obtain or attempt to obtain relief to help ensure the health, safety or welfare of the victim or victim’s child. AB 2992 expands existing provisions to apply to employees who are victims of a crime or abuse for taking time off from work to obtain or attempt to obtain relief which includes but is not limited to a temporary restraining order, restraining order or other injunctive relief to help ensure the health, safety, or welfare of the victim or their child. In addition to existing certification requirements, this bill provides that employers are prohibited from taking action against employees when an unscheduled absence occurs if employees provide certification that they were receiving services for certain injuries, or if the documentation is from a victim advocate (as defined).

Under AB 2992, “victim” includes: a victim of stalking, domestic violence, or sexual assault; a victim

of a crime that caused physical injury or that caused mental injury and a threat of physical injury; or a person whose immediate family member is deceased as the direct result of a crime. This bill also contains a broad definition of “immediate family member” to include “any other individual whose close association with the employee is the equivalent of a family relationship” as described.

Finally, for employers with 25 or more employees, AB 2992 prohibits the discharge of, or discrimination or retaliation against, employees who are victims and who need to take time off to seek medical attention for injuries caused by crime or abuse, obtain services from prescribed entities as a result of the crime or abuse, obtain psychological counseling or mental health services related to an experience of crime or abuse, or participate in safety planning and take other actions to increase safety from future crime or abuse. The California Labor Commissioner has published useful FAQs to assist employers.

This bill amends Sections 230 and 230.1 of the Labor Code.

AB 3075 — Successor Liability for Unpaid Wages (Effective Jan. 1, 2021)

AB 3075 expands the information corporations must include in the corporation's statement of information filed with the California Secretary of 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 Division of Labor Standards Enforcement or a court of law, for which no appeal therefrom is pending, for the violation or provision of the Labor Code. The new law also adds a section to the California Labor Code which 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, after the time to appeal therefrom has expired and for which no appeal therefrom is pending, 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. This factor does not apply to employers who maintain the same workforce pursuant to Chapter 4.5 (commencing with Section 1060) of Part 3.

- Has substantially the same owners or managers that control the labor relations as the predecessor employer.

- Employs as a managing agent any person who directly controlled the wages, hours or working conditions of the affected workforce of the predecessor employer (the term managing agent has the same meaning as in subdivision (b) of Section 3294 of the Civil Code).

- 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.

This bill amends Section 1205 of and adds Section 200.3 to the Labor Code and amends sections 1502, 2217 and 17702.09 of the Corporations Code.

SB 973 — Pay Data Collection and Reporting (Effective Jan. 1, 2021)

SB 973 requires California private employers with 100 or more employees to submit a pay data report

to the Department of Fair Employment and Housing (DFEH) by no later than March 31, 2021, and annually thereafter. Modeled after the federal EEO-1 Component 2 collection form, the state pay data report requires employers to collect aggregate W-2 earnings and report the number of employees in each of the 12 pay bands (spanning from $19,239 and under to $208,000 and over) for the 10 broad job 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), classified by race, sex and ethnicity. Employers must also report total hours worked by each employee within a given pay band during the reporting year. Employers with multiple establishments must submit a report for each establishment as well as a consolidated report that includes all employees.

As noted in our prior alert, the bill authorizes DFEH to oversee the collection of pay data and to share information of alleged pay discrimination with the agency responsible for enforcing the California Equal Pay Act, the Division of Labor Standards Enforcement (DLSE), to coordinate enforcement. The bill also requires the Employment Development Department to provide DFEH, upon its request, as specified, with the names and addresses of all businesses with 100 or more employees and authorizes the DFEH to seek an order requiring non-reporting employers to comply with SB 973.

This bill amends Section 12930 of and adds Chapter 10 (commencing with Section 12999) to Part 2.8 of Division 3 of Title 2 of the Government Code.

SB 1159 — Workers' compensation: COVID-19: Critical Workers (Effective Sept. 17, 2020)

SB 1159 codifies and supersedes Governor Newsom's Executive Order N-62-20 (signed May 6, 2020), which created COVID-19 presumptions that an employee's illness related to coronavirus is an occupational injury and therefore eligible for workers' compensation benefits if specified criteria are met. Executive Order N-62-20 covered all California employees who worked at a jobsite outside their home at the direction of their employer between March 19 and July 5, 2020.

This bill addresses employees who get sick or injured due to COVID-19 on or after July 6, 2020, and creates a presumption that any COVID-19 related illness of an employee was presumed to arise out of and in the course of employment for purposes of awarding workers' compensation benefits if all of the following requirements were satisfied: (a) the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction; (b) the day referenced in paragraph (a) on which the employee performed labor/services was on or after March 19, 2020; (c) the employee's place of employment was not the employee's home; and (d) if the employee was diagnosed (not tested), as provided in paragraph (a) above, the diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

This bill also creates a new rebuttable presumption — which relates back to cases of workers' compensation coverage if there was a COVID-19 "outbreak" at the employee's place of employment. What qualifies as an outbreak depends on the size of the employer. An outbreak occurs when: (1) if the employer has 100 employees or fewer: four employees test positive for COVID-19 within 14 calendar days; (2) if the employer has more than 100 employees: 4 percent of the number of employees test positive for COVID-19 within 14 calendar days; or (3) the place of employment is ordered closed by public authorities due to a risk of infection with COVID-19. This presumption relates back to cases arising on or after July 6, 2020.

Under this new law, employers (with five or more employees) must report certain information to their workers' compensation carrier once **they know or reasonably should know** an employee has tested positive for COVID-19, assuming the employee has been onsite at an employer's location in the 14 days prior to the employee testing positive (which is the day the employee took the test, not when the employee received the results). This reporting requirement applies regardless of whether you believe the employee contracted COVID-19 at work.

For any positive test occurring on or after September 17, 2020, an employer must, within three business days of learning that an employee has tested positive for COVID-19, report to its workers' compensation carrier in writing, sent via email or fax, all of the following information: an employee tested positive for COVID-19 (but without providing any personally identifiable information regarding the employee unless the employee asserts the infection is work-related or has filed a workers' compensation claim); the date the employee tests positive, which is the date the specimen was collected for testing; the specific address(es) of the employee's "specific place of employment"[5] during the 14-day period preceding the date of the employee's positive test; and the 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.

The law also places a retroactive reporting requirement on employers. Employers must provide a similar written report to their workers' compensation carrier for any positive test that occurred between July 6, 2020, and September 16, 2020. That report must be made to the carrier by October 17, 2020. The written report must include the same information, except instead of reporting the information in item 4 above, the employer must calculate the highest number of employees who reported to work at the specific place of employment between July 6 and September 17.

Employers can be fined up to $10,000 for failing to report the required information or providing false or misleading information.

This bill adds Section 77.8 to the Labor Code and repeals Sections 3212.86, 3212.87, and 3212.88 of the Labor Code.

SB 1383 – California Family Rights Act (Effective Jan. 1, 2021)

SB 1383 repeals the California New Parent Leave Act (NPLA) and California Family Rights Act (CFRA), and instead implements a new CFRA. Under SB 1383, the CFRA will be expanded to cover any employer with 5 or more employees. Such employers will be required to grant employees up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child of the employee or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner. Such employers will also be required to grant up to 12 workweeks of protected leave during any 12-month period due to a 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.

Notably, SB 1383 removes any requirement that the employer employ a certain number of employees within a 75-mile radius of the employee's worksite for the employee to be eligible for leave. However, it does retain the requirement that, to be eligible for leave, an employee must have at least 1,250 hours of service with the employer during the previous 12-month period. New CFRA leave will also continue to run concurrently with leave taken pursuant to the FMLA, except for any leave taken under the FMLA for disability because of pregnancy or childbirth.

SB 1383 also requires that an employer who employs both parents of a child grant up to 12 weeks of leave to each employee, whereas the old CFRA allowed an employer to only grant a **total** of 12 weeks to such employees.

This bill repeals sections 12954.6 and 12945.2 of the Government Code and instead implements a new CFRA under section 12945.2.

SB 1384 — Expansion of Labor Commissioner Representation to Arbitrations (Effective Jan. 1, 2021)

SB 1384 extends the authority of the Labor Commissioner to represent claimants who cannot afford counsel in arbitrations; requires that petitions to compel arbitration pursuant to specified statutes be served on the Labor Commissioner; and allows the Labor Commissioner to represent claimants in proceedings to determine whether arbitration agreements are enforceable.

The new law amends Section 98.4 of the Labor Code, which previously provided only that the Labor Commissioner could represent indigent claimants in de novo proceedings (appeals of Labor Commissioner wage claim awards). SB 1384 adds two new subparts to Section 98.4, which provide that:

- A claimant unable to have their claim adjudicated and decided by the Labor Commissioner under Sections 98 and 98.1 as the result of a court order compelling arbitration may request that the Labor Commissioner represent the claimant in arbitration. The Labor Commissioner must represent the claimant in arbitration if the claimant is financially unable to afford counsel and if the commissioner determines, upon conclusion of an informal investigation, that the claim has merit.

- A petition to compel arbitration of a claim that is pending under Section 98, 98.1 or 98.2 must be served on the Labor Commissioner. Upon a claimant's request, the commissioner has the right to represent the claimant in proceedings to determine the enforceability of the arbitration agreement, notwithstanding whether the adjudication of the enforceability of the arbitration agreement is conducted in a judicial or arbitral forum.

This bill amends Section 98.4 of the Labor Code.

Governor Newsom’s March 2020 Executive Order Addressing the CA WARN Act

On March 17, 2020, Governor Gavin Newsom issued Executive Order N-31-20, addressing the California Worker Adjustment and Retraining Notification (WARN) Act (Lab. Code §§ 1400, *et seq.*) and its 60-day notice requirement for an employer that orders a mass layoff, relocation or termination at a covered establishment.

Per the Executive Order, Cal. Labor Code Sections 1401(a), 1402 and 1403 (the key provisions of the CA WARN Act addressing required notice to employees) has been suspended to permit employers to act quickly in order to mitigate or prevent the spread of coronavirus, subject to satisfaction of certain conditions. These conditions include: the mass layoff, relocation or termination 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 providing notice to

affected employees in compliance with the CA WARN Act; and the notice satisfying other specific requirements identified in the Executive Order and guidance issued by the Department of Industrial Relations, Division of Labor Standards Enforcement and the Employment Development Department.

1. As a reminder, the minimum wage in California is increasing to $14.00 per hour on January 1, 2021, for employers with 26 or more employees based on previous legislation signed by Governor Brown in 2015. The minimum wage for employers with 25 or fewer employees will increase to $13.00 per hour on January 1, 2020. Also, various cities and local governments in California have enacted minimum wage ordinances exceeding the state minimum wage.

2. A “qualifying individual” is a person who: 1) has a laboratory-confirmed case of COVID-19; 2) has a positive COVID-19 diagnosis from a licensed health care provider; 3) has been ordered to isolate due to COVID-19; or 4) has died due to COVID-19.

3. For purposes of determining whether the employer has 500 or more employees in the United States, this bill incorporates the definition used by the FFCRA. *See* 29 C.F.R. section 826.40.

4. Related to AB 2257 is AB 323 which, among other things, expands the exemption applicable to newspaper carriers by deleting the condition that a newspaper carrier work under contract either with a newspaper publisher or newspaper distributor. This exemption is extended to January 1, 2022.

5. Specific place of employment means the building or facility where the employee performs work at the employer’s direction and does not include the employee’s home or residence.

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