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2022 Labor & Employment Law Update for California Employers

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2021 has been another busy year for the Legislature's enactment of new laws affecting California employers. Below you will find our annual 2021 Employment Law Update.

REAL PROPERTY OWNERS MAY BECOME SUBJECT TO LIENS FOR WAGE AND HOUR VIOLATIONS

SB 572, which becomes effective January 1, 2022, provides additional enforcement mechanisms to collect wage and hour awards against California employers. Specifically, this new law allows the California Labor Commissioner to obtain a lien on real property for any wage and hour award levied against an employer. Current state law provides for the imposition of various civil penalties on employers for failure to pay minimum wages, to provide for meal and rest periods, and for failure to pay overtime, among other requirements imposed under the California Labor Code. In claims brought by employees against their employers for such wage and hour violations, existing law permits the Labor Commissioner, as an alternative to a judgment lien against that employer, to create a lien on real property to recover amounts due under final orders in favor of the employee. Under SB 572, which will add section 90.8 to the California Labor Code, the Labor Commissioner will now also be able to create and implement the same lien on real property to recover amounts due to the Labor Commissioner under any final citation, findings, or decision, for matters brought against employers by the Labor Commissioner. Unless the lien is satisfied or released, a lien would continue until 10 years from the date of creation and may be renewed for additional periods of 10 years at any time before it expires. Employers' timely and thorough responses to Labor Commissioner claims may prevent the possibility of real property judgment liens.

“WAGE THEFT” MAY CREATE CRIMINAL LIABILITY FOR EMPLOYERS

As another example of expanded liability for wage violations, California Governor Gavin Newsom signed AB 1003, which criminalizes the intentional theft of wages, including gratuities. Effective January 1, 2022, and notwithstanding Sections 215 and 216 of the Labor Code, such violations may be punishable as “grand theft” if greater than $950 from any one employee, or $2,350 in total from two or more employees. (While California's Labor Code classifies several violations as misdemeanors, AB 1003 now establishes criminal liability for violating an employment law directly inthe Penal Code.) The new law does have an intent requirement. It defines “theft of wages” as the intentional deprivation of wages, gratuities, benefits, or other compensation by unlawful means, with the knowledge that such amounts are due under the law. As California continues to further expand the reach of its regulations regarding independent contractor classificiation, the law also defines "employee" to include "independent contractor[s]."

RIGHT TO RECALL FROM LAYOFF FOR COVID-19 EMPLOYEES

On April 16, 2021, California Governor Gavin Newsom signed SB 93, which went into effect *immediately*. SB 93, commonly referred to as the “Right to Recall” law, creates California Labor Code Section 2810.8 and requires employers in certain industries to make written job offers to employees who were laid off due to the COVID-19 pandemic, prior to hiring new employees to fill previously laid-off employees’ positions. Employers covered by SB 93 must make new job positions available to “laid-off employees” within five business days of establishing the position, and give such employees five additional business days to respond to the offer. The law also requires that covered employers maintain certain records for laid-off employees for three years.

Section 2810.8 is enforced by the California Division of Labor Standards Enforcement (DLSE) and will remain in effect until December 31, 2024. Failure to comply with Section 2810.8 carries with it significant liability, including an order for reinstatement of laid-off employees by DLSE, front and back pay and benefits, and the imposition of substantial penalties and liquidated damages. Covered employers should consider implementing compliance measures such as (i) informing hiring managers of these changes to the law, (ii) creating a list of laid-off employees and a process for retaining the necessary records for such employees, and (iii) creating the necessary forms for extending a conditional offer of employment to laid-off employees or for providing notice to laid-off employees that the employer is not rehiring them because they do not qualify for the available position(s).

Covered Employers

Section 2810.8 only applies to employers who operate an “enterprise,” which the statute defines as follows:

- Companies that offer “janitorial, building maintenance, or security services” for office, retail, or other commercial buildings.
- Hotels with 50 or more guest rooms.
- Private clubs that operate “a building or complex of buildings containing at least 50 guest rooms” that are offered to members for overnight lodging.
- Event centers “of more than 50,000 square feet or 1,000 seats that [are] used for . . . public performances, sporting events, business meetings, or similar events.” Event centers include

"concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers." For purposes of this statute, event centers also include "any contracted, leased, or sublet premises connected to or operated in conjunction with the event center's purpose, including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities."

- Airport hospitality operations that provide services "in connection with the preparation of food or beverage[s] for aircraft crew or passengers at an airport." Airport hospitality operations also include businesses that provide "food and beverage[s], retail, or other consumer goods or services to the public at an airport." An airport hospitality operation "does not include an air carrier certificated by the Federal Aviation Administration [FAA]."

- Airport service providers that provide services "directly related to the air transportation of persons, property, or mail." These providers include businesses related to "security, airport ticketing, and check-in functions, ground handling of aircraft, aircraft cleaning, and sanitization functions, and waste removal." Air carriers certified by the FAA are not included in the definition of "airport service provider."

Covered Employees

Employers covered by Section 2810.8 must make new job positions available to "laid-off employees." A "laid-off employee" is any employee who has (i) worked two hours or more per week, (ii) been employed by the covered employer for six months or more during the 12 months preceding January 1, 2020, and (iii) been "separat[ed] from active service . . . due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason related to the COVID-19 pandemic."

Covered Employers' Obligation to Offer Laid-Off Employees Similar Positions and Provide Sufficient Notice

Covered employers only have an obligation to offer laid-off employees positions for which they are qualified. Section 2810.8 provides that an employee is qualified for a position "if the employee held the same or similar position . . . at the time of the employee's most recent layoff with the employer."

If a covered employer establishes a position for which a laid-off employee qualifies, the employer must offer the position in writing to the laid-off employee within five business days of establishing the position. The employer must deliver the job offer notice to the laid-off employee "by hand or to their last known physical address, and by email and text message," if the employer has this information. Section 2810.8 also provides that "[a]n employer may make simultaneous, conditional offers of employment to laid-off employees." After the date of receipt, the laid-off employee will have "five business days . . . in which to accept or decline the offer." If more than one qualified laid-off employee accepts the position, the employer must rehire the individual "with the greatest length of service based on the employee's [previous] date of hire."

Covered employers may decline to recall a laid-off employee if that employee lacks the necessary qualifications for the position. If an employer declines to recall a laid-off employee on this grounds, it must provide the laid-off employee with written notice within 30 days. The written notice must include a list of all employees hired for the position, the length of their employment with the employer, and

the employer's explanation regarding why it did not rehire the laid-off employee.

Notably, the requirements for covered employers to make recall offers to laid-off employees are not eliminated due to changes in the employers' business structure, operations, or ownership.

Section 2810.8 also contains anti-retaliation provisions that prohibit employers from retaliating against employees who mistakenly, but in good faith, allege that the employer is not complying with Section 2810.8.

Covered Employers' Obligation to Maintain Records for Laid-Off Employees

Employers must also maintain records relating to all laid-off employees for three years. This is measured "from the date of the written notice regarding the layoff, for each laid-off employee." These records must include the laid-off employee's: (i) full legal name; (ii) job classification at time of layoff; (iii) date of hire; (iv) last known address of residence; (v) last known email address; and (vi) last known telephone number. Records must also include any layoff notices and "all records of communications between the employer and the employee" regarding employment offers made under Section 2810.8's requirements.

NEW RESTRICTIONS ON SETTLEMENT AND NONDISPARAGEMENT AGREEMENTS

SB 331, known as the "Silence No More Act," builds upon the #MeToo movement and further expands existing prohibitions on settlement and nondisparagement agreements. The new law applies to all settlement agreements entered as of January 1, 2022, and amends Code of Civil Procedure Section 1001 and Government Code Section 12964.5.

Existing law prohibits a settlement agreement from preventing the disclosure of factual information relating to claims filed in a civil or administrative action which include: (i) allegations of sexual assault, sexual harassment, workplace harassment, or discrimination based on sex, failure to prevent such an act, or retaliation for reporting such an act; and (ii) an act of harassment or discrimination based on sex by the owner of a housing accommodation, or retaliation for reporting such an act.

SB 331 expands the existing prohibition to include *all forms of workplace discrimination* – not just discrimination based on sex. Thus, the prohibition will extend to include: (i) any acts of workplace harassment or discrimination not based on sex; and (ii) any acts of harassment or discrimination not based on sex by the owner of a housing accommodation.

SB 331 further makes it an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment to: (i) require an employee to sign a release of a claim or right; or (ii) require an employee to sign a nondisparagement agreement or other document which has the purpose or effect of denying the employee the right to disclose information about unlawful acts. Employers must therefore carve out an employee's right to discuss conduct the employee has reason to believe is unlawful by including the following specific language in such an agreement: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Further, the expanded requirements mandate the employer to include a minimum of five business days for the employee to consult with an attorney regarding the agreement before signing. However,

nothing prevents: (i) the employee from signing prior to the end of that five day period so long as the decision to sign in shortened time is knowing, voluntary, and not induced by fraud, misrepresentation, or threat by the employer to withdraw the offer; or (ii) the employer from including a general release or waiver of claims in an agreement related to an employee's separation from employment, provided that the release is otherwise lawful and valid.

CALIFORNIA FAMILY RIGHTS ACT: LEAVE TO CARE FOR PARENT-IN-LAW AND CHANGES TO SMALL EMPLOYER MEDIATION PROGRAM

Existing law requires employers with five or more employees to comply with the California Family Rights Act, which provides eligible employees unpaid, job-protected leave of up to 12 weeks during each 12-month period to bond with a new child or to care for themselves or a family member with a serious medical condition. Effective January 1, 2022, the scope of family members for whom an employee can take leave will be amended to include "parent-in-law."

Additionally, the new law makes changes to the existing small employer family leave mediation pilot program that is applicable to employers with between five and 19 employees, including requiring mediation of alleged violations of California Government Code Section 12945.2 (regarding family care and medical leave) prior to the Department of Fair Employment and Housing issuing a right-to-sue notice if mediation is requested by either the employer or employee.

CALIFORNIA BECOMES THE FIRST STATE TO REGULATE "QUOTAS" USED BY WAREHOUSE EMPLOYERS

On September 22, 2021, California Governor Gavin Newsom signed AB 701 into law, which regulates the use of quotas in warehouse distribution centers. Quotas are defined as "a work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard."

The new law applies to employers with 100 or more employees at a single warehouse distribution center, or 1,000 or more employees at one or more warehouse distribution centers in California. The legislation defines a warehouse distribution center as establishments that meet North American Industry Classification System (NAICS) Codes for General Warehousing and Storage (493110), Merchant Wholesalers (Durable Goods or Nondurable Goods)(423 and 424), or Electronic Shopping and Mail-Order Houses (454110). However, the law specifically exempts establishments that are classified as Farm Product Warehousing and Storage (NAICS Code 493130).

Under the law, employers must provide each employee, upon hire or within 30 days of the law going into effect, a written description of each quota to which the employee is subject. While employers may still implement quotas, employees are not required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities (including reasonable travel time to and from bathroom facilities), or occupational health and safety laws.

If a current or former employee believes that meeting a quota caused a violation of such laws, they have the right to request, and the employer is required to provide within 21 days, a written description of each quota to which the employee is subject and a copy of the most recent 90 days of the employee's own personal work speed data. Former employees are limited to one of these requests.

AB 701 creates a rebuttable presumption of unlawful retaliation if an employer discriminates, retaliates, or takes any adverse action against any employee within 90 days of the employee either: (a) initiating their first request in a calendar year for information about a quota or personal work speed data, or (b) making a complaint alleging a quota violated the Labor Code. The law also authorizes a current or former employee to bring an action for injunctive relief to obtain compliance with specified requirements, and if the employee prevails in the action, the employee may recover costs and reasonable attorneys' fees.

ENTERPRISE EXPOSURE FOR CAL/OSHA VIOLATIONS

Under existing law, the Division of Occupational Safety and Health (the Division) plays a key role in enforcing California's Health and Safety Code and Labor Code. SB 606, which takes effect January 1, 2022, gives the Division additional enforcement tools that will have a substantial effect on California employers.

Under SB 606, if the Division determines an employer with multiple worksites has committed a violation, there is a rebuttable presumption that the violation is enterprise-wide if either of the following are true:

- The employer has a written policy or procedure that violates Cal/OSHA regulations.
- The Division has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer's worksites.

In the event the employer fails to rebut the presumption, the Division can issue an enterprise-wide citation requiring enterprise-wide abatement, including penalties up to a maximum of $124,709 per violation. However, a "notice" in lieu of citation may be issued if either of the following are true:

- The violations do not have a direct relationship with the health or safety of an employee.
- The violations do not have an immediate relationship to the health or safety of an employee and are of a general regulatory nature.

Notices are not permitted if the violations are either serious, repeated, willful, or arise from a failure to abate; or the number of first instance violations found in the inspection, other than serious, willful, or repeated violations, is 10 or more violations.

SB 606 also creates a new category of "egregious" violations. The Division is required to issue a citation for any egregious violation if one or more of the following is true:

- The employer intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. "Catastrophe" means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.

- The violations resulted in persistently high rates of worker injuries or illnesses.
- The employer has an extensive history of prior violations of this part.
- The employer has intentionally disregarded their health and safety responsibilities.
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

Moreover, SB 606 now permits the Division to issue a subpoena if an employer fails to promptly provide information the Division requests pursuant to an investigation of employer practices. The Division may enforce the subpoena if the employer fails to provide the requested information within a reasonable period of time.

ELIMINATION OF PIECE RATE PAY FOR GARMENT WORKERS

Effective January 1, 2022, SB 62 prohibits employers from paying employees engaged in garment manufacturing by the piece rate method. Instead, the law requires that these workers be paid at least the minimum wage for all hours worked. (There are specific provisions for relationships governed by collective-bargaining agreements.) SB 62 does not, however, prohibit incentive-based bonuses.

The legislation establishes joint and several liability for garment manufacturers, contractors, and "brand guarantors" for all of the following:

- The full amount of unpaid minimum, regular, overtime, and other premium wages, reimbursement for expenses, any other compensation (including interest) due to the employee;
- Reasonable attorneys' fees and costs and civil penalties for the failure to secure valid workers' compensation coverage.

SB 62 defines a "brand guarantor" as "any person contracting for the performance of garment manufacturing . . . regardless of whether the person with whom they contract performs the manufacturing operations or hires contractors or subcontractors to perform the manufacturing operations." In addition, garment manufacturers and contractors who violate the law are subject to compensatory damages of $200 per employee per pay period in which the employee is paid by the piece rate.

With respect to administrative claims before the Labor Commissioner, the law shifts the burden of proof to brand guarantors, contractors, and garment manufacturers to show they did not violate wage laws. If an employee files a claim with the Labor Commissioner and provides the Labor Commissioner with labels or other credible information in support of the claim, SB 62 creates a rebuttable *presumption* that the claim is valid. In order to rebut the presumption, the brand guarantor, garment manufacturer, or contractor must provide "specific, compelling, and reliable written evidence to the contrary." A written declaration is not sufficient to rebut the presumption. In addition, if an entity

fails to timely respond to a duly-served written request for documents from the Labor Commissioner, the entity is precluded from introducing such evidence in the administrative proceeding.

SB 62 also imposes a four-year recordkeeping requirement for garment manufacturers and brand guarantors.

LIMITED PAGA EXEMPTION FOR UNIONIZED JANITORIAL EMPLOYERS

New SB 646 restricts janitorial employees from bringing a civil action under California's Labor Code Private Attorneys' General Act (PAGA) if they are covered by a collective-bargaining agreement satisfying certain conditions. Specifically, for the exemption to apply, the applicable collective-bargaining agreement must "provide[] for the wages, hours of work, and working conditions of employees, provide[] premium wage rates for all overtime hours worked," and meet other enumerated conditions, including, among others, a grievance and binding arbitration procedure to redress Labor Code violations that authorizes the arbitrator to award otherwise available remedies.

A "janitorial employee" is defined to include an "employee whose primary duties are to clean and keep in an orderly condition commercial working areas and washrooms, or the premises of an office, multiunit residential facility, industrial facility, health care facility, amusement park, convention center, stadium, racetrack, arena, or retail establishment." A "janitorial employee" does *not* include the following:

- Workers who specialize in window washing;
- Housekeeping staff who make beds and change linens as a primary responsibility;
- Workers working at airport facilities or cabin cleaning;
- Workers at hotels, card clubs, restaurants, or other food service operations;
- Grocery store employees and drug retail employees.

SB 646 is largely similar to the PAGA exemption created for unionized employees in the construction industry, which took effect in 2019.

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