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WEBINAR SERIES

CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

New California Employment Legislation
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COVID-19

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AB 685: COVID-19 Notice and Reporting

- Amends Labor Code section 6325 and adds section 6409.6.
- Expands Cal-OSHA's authority to issue stop work orders for COVID-19 exposure.
  - May issue order if worker exposure to the risk of infection constitutes an "imminent hazard."
- Employers must provide written notice to be received within 24 hours to all employees who were on premises if there was a potential COVID-19 exposure.
  - Must provide notice of benefits and options (*e.g.*, workers' comp, sick leave) to potentially exposed employees, and notice of safety protocols to all employees.
  - Notice also must also be provided to subcontractors and/or to union representatives.
  - Must maintain notification records for at least 3 years.
- Must report a "COVID-19 outbreak" to local public health agency within 48 hours.
  - "Outbreak" is currently defined by the State Department of Public Health as "at least three probable or confirmed COVID-19 cases within a 14-day period," but may change.
- Effective January 1, 2021 through January 1, 2023.

SB 1159: Rebuttable Presumption of Workers' Compensation Eligibility for COVID-19 Illness

- Adds Labor Code section 3212.86, 3212.87 and 3212.18
- Codifies rebuttable presumption in Executive Order N-62-20 that an employee's COVID-19 illness is a workplace injury and eligible for workers' compensation benefits
  - Applies if the employee worked at his or her place of employment between March 19 and July 5, 2020
- Provides two new rebuttable presumptions for employees who get sick from COVID-19 from July 6, 2020 through January 1, 2023
- "Outbreak" Presumption (applicable to employers with 5 or more employees)
  - Presumption applies to employee who tests positive for COVID-19 during an "outbreak" at their specific worksite
  - "Outbreak" exists at a specific worksite if any of the following occurs within a 14-day period:
    - Worksites with 100 or fewer employees: 4 employees test positive for COVID-19
    - Worksites with more than 100 employees: 4% of employees who reported to the worksite test positive for COVID-19
    - The worksite is ordered to close by a local public health department, CA DPH, Cal-OSHA, or a school superintendent
- First Responders and Healthcare Workers Presumption
  - Presumption applies to certain first responders and frontline healthcare employees who test positive for COVID-19 within 14 days of working at their place of employment, even if there is no "outbreak"

SB 1159: Reporting Requirements

- Employers may dispute the presumption with certain evidence, including:
  - Measures to reduce potential transmission
  - Employee's non-occupational risks of COVID-19 infection
  - Employee's statements
  - Any other evidence normally used to dispute a work-related injury
- Employer's Reporting Requirements
  - Must report to its claims administrator within 3 business days of when the employer "knows or reasonably should know that an employee has tested positive for COVID-19" within 14 days after working at the employee's place of employment (excludes home)
  - Failure to timely comply with the reporting requirement or intentionally reporting false or misleading information may subject employer to civil penalties of up to $10,000

AB 2537: Personal Protective Equipment; Healthcare Employees

- This bill creates Labor Code Section 6403.3, which requires public and private employers of workers in general acute care hospitals to supply those employees who provide direct patient care (or provide services that directly support personal care) with PPE.
  - The bill also requires these employers to ensure that the employees use the PPE supplied to them.
- Beginning April 1, 2021, these employers must maintain a supply equal to 3 months of normal consumption of the following specified equipment: N95 filtering face piece respirators; powered air-purifying respirators with high efficiency particulate air filters, elastomeric air-purifying respirators and appropriate particulate filters or cartridges, surgical masks, isolation gowns, eye protection, and shoe coverings.
  - These employers must provide an inventory of their stockpile and a copy of their written procedures to Cal-OSHA upon request. The bill would authorize the assessment of a civil penalty of up to $25,000 for each violation to maintain the required stockpile.
- This bill also requires general acute care hospitals, on or before January 15, 2021, to be prepared to report to the Department of Industrial Relations their highest 7-day consecutive daily average consumption of PPE during the 2019 calendar year.

SB 275: Mandatory PPE Stockpiles

- The State Department of Public Health and the Office of Emergency Services are required to establish a PPE stockpile.
- Beginning the later of Jan. 1, 2023, or after adoption of specified regulations, requires health care employers (including clinics, health facilities, and home health agencies) to maintain an inventory of new, unexpired PPE sufficient for at least 45 days of "surge consumption" in the event of a declared state of emergency.
- Civil penalties may be assessed for non-compliance, but potential for exemption from penalties if supply chain obstacles beyond the employers control prevent the employer from obtaining required levels of PPE.

AB 2043: Agricultural Workplace Health and Safety

- Adds Labor Code section 6725
- Requires Cal-OSHA to:
  - disseminate, in both English and Spanish, information on best practices for COVID-19 infection prevention, consistent with Cal/OSHA agricultural industry guidance, and contact information for Cal/OSHA that employees can use to report workplace safety complaints;
  - Work with community organizations to conduct an outreach campaign targeted to agricultural employees to educate re: available COVID-19-related employment benefits (e.g., paid sick leave or workers' comp); and
  - Compile and report the results of any investigations about practices or field conditions
- Effective immediately and until state of emergency is lifted

AB 2658: Hazards Protection for Household Domestic Workers

- Existing law prohibits laying off or discharging an employee for refusing to perform work in violation of prescribed safety standards, where the violation would create a real and apparent hazard to the employee or fellow employees. "Employment" is defined for these and other purposes to exclude household domestic service.
  - AB 2658 amends Labor Code Section 6310 so that "employee" is now defined to include a domestic work employee for purposes of the statute's hazard provisions, except for a person who performs household domestic service that is publicly funded.
- AB 2658 also amends Labor Code 6311.5 to make it a crime for a person, after receiving notice to evacuate or leave, to willfully direct an employee to remain in, or enter, an area closed under specific provisions of law due to a menace to the public health or safety. For these purposes, the term "employee" includes a person who performs household domestic service, including household domestic service that is publicly funded.

AB 107: FTB COVID-19 Reporting

- Adds section 19551.2 to the Revenue and Taxation Code, and amends other laws.
- Requires the Franchise Tax Board, upon request, to disclose, in an anonymized manner, tax return information to the state's Employment Development Department (EDD) to verify income for the EDD's administration of programs related to the COVID-19 (e.g., the CARES Act and other emergency relief).
- Effective immediately.

Cal-OSHA

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California Emergency COVID-19 Standard – What's New?

- Employers must conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards.
- Training required on various subjects related to COVID-19 prevention.
- Employers must develop a written COVID-19 prevention plan.
- Employees are required to maintain six feet of separation except where an employer can demonstrate that six feet of separation is not possible, and except for momentary exposure while persons are in motion.
- Employers shall provide face coverings and ensure that employees wear them over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and when required by other laws.

California Emergency COVID-19 Standard – What's New?, cont'd.

- Employees cannot share equipment or PPE to the extent feasible. When it is not feasible to prevent sharing, sharing must be minimized and such items and equipment must be disinfected between uses by different people.
- Mechanical ventilation systems must maximize the quantity of outside air provided to the extent feasible.
- Employees exposed to COVID-19 *must be offered COVID-19 testing at no charge* during working hours.
- Provide notice to workers regarding possible COVID-19 exposure within one business day (like AB 685, but effective immediately).
- Extensive requirements for employer-provided transportation and housing.

California Emergency COVID-19 Standard – Outbreak Requirements

- There are detailed procedures required for responding to outbreaks. Cal-OSHA now recognizes 2 types of outbreaks: an "outbreak" and a "major outbreak."
  - An "outbreak" occurs when there are three or more COVID-19 cases in an exposed workplace within a 14-day period.
  - A major outbreak occurs when there are twenty or more COVID-19 cases in an exposed workplace within a 30-day period.
- During an outbreak, the employer must provide testing to all employees at the worksite once a week; for a major outbreak, twice a week.
- Each outbreak triggers additional steps, including contract tracing, investigations, surveillance testing, and possible remedial actions.
- These requirements apply until there have been no new cases at the workplace for a 14-day period.

California Emergency COVID-19 Standard – Paid Sick Leave

"For employees excluded from work [due to being a "COVID-19 case" or "exposure to COVID-19"] and otherwise able and available to work, **employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status**, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation." 8 CCR 3205(c)(10)(C).

- This does not apply where the employer demonstrates that the COVID-19 exposure is not work-related.
- At the time of exclusion, provide the employee with information with their rights under Section (c)(10)(C) (above) and information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws.

Leaves

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AB 1867: COVID-19 Supplemental Paid Sick Leave

- AB 1867 created two new sections of the Labor Code mandating COVID-19 Supplemental Paid Sick leave:
  - **Cal. Lab. Code § 248** codifies COVID-19 paid sick leave requirements for food sector workers originally granted by Governor's Executive Order N-51-20
    - Retroactive to April 16, 2020 (date Executive Order went into effect)
  - **Cal. Lab. Code § 248.1** grants COVID-19 supplemental paid sick leave to many employees outside of food sector
    - Employers required to begin providing leave on September 19, 2020
- These provisions expire on December 31, 2020, or upon the expiration of the FFCRA (including any extension), whichever is later.

AB 1867: Who's Covered by LC 248.1?

- We're focusing on Cal. Lab. Code § 248.1 (covering employees outside of food sector)
- Cal. Lab. Code § 248.1 generally covers:
  - Any person employed by a private company with 500+ employees who leaves his or her home or residence to perform work for the employer, and
  - Any person employed as a healthcare provider or emergency responder ***whose employer has elected to exclude the employee from emergency paid sick leave under the FFCRA***, and who leaves his or her home or residence to perform work for the employer
    - Includes employers with less than 500 employees
    - Includes private and public employers
- Caution: Clause regarding leaving the employee's home/residence to perform work might not be as broad as most employers hope – could cover many employees who have the option to work from home

AB 1867: Qualifying Reasons for Leave

- Qualifying reasons for leave:
  - The worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  - The worker is advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
  - The worker is prohibited from working by the covered worker's hiring entity due to health concerns related to the potential transmission of COVID-19.

- Note:
  - For 1st qualifying reason, quarantine/isolation order must be specific to worker's circumstances
  - 3rd qualifying reason relatively unique compared to other prior COVID-19 supplemental paid sick leave laws
  - Leave relating to unavailability of school or childcare provider not included
  - Applies immediately to all employees; no service requirements.

AB 1867: Amount of COVID-19 Supplemental Paid Sick Leave Required

- Amount of Leave Required:

Full-Time/FT Equivalent Schedule	Part-Time
• 80 Hours • Applies to "full time" employees or • Employees scheduled to work, on average, 40+ hrs/week in the ***2 weeks preceding*** the date when the employee takes COVID-19 supplemental paid sick leave	•PT with regular schedules: total hours normally scheduled over 2 weeks •Variable schedules: 14x the average number of hours worked each day in the 6 months preceding the date when the employee takes COVID-19 SPSL •If employee has worked less than 14 days, then the total number of that the hours employee has worked for the company

AB 1867: COVID-19 Supplemental Paid Sick Leave – Required Rate of Pay

- Covered workers must be paid the highest of the following:
    1. Covered worker's regular rate of pay for the last pay period, including amounts in any applicable collective bargaining agreement (CBA);
    2. State minimum wage; or
    3. Local minimum wage.
- Pay capped at $511 per day or $5,110 in the aggregate.
- Payment must be made no later than the payday for the next regular payroll period after the leave was taken.

AB 1867: COVID-19 Supplemental Paid Sick Leave - Interaction with Other Forms of PSL

Interaction with Other Forms of PSL, Including Offset:

- COVID-19 supplemental PSL granted by AB 1867 is in addition to any "regular" PSL required under the California state PSL law, Cal. Lab. Code § 246.
- Employees can't be required to use any other paid/unpaid leave, PTO, or vacation before using, or in lieu of using, COVID-19 supplemental PSL.
- ***Employers can offset supplemental paid sick leave hours previously provided*** for the above reasons, which was paid at no less than the rate required under the new law.
- If the employer provided supplemental paid leave between March 4, 2020 and September 9, 2020 at a rate lower than required under the new law, ***the employer may retroactively provide supplemental pay sufficient to make up the difference***

AB 1867: Wage Statement & Notice Posting Requirements

Available leave must be displayed on or with wage statement:

- The amount of COVID-19 supplemental PSL available must be noted on a pay stub or a separate writing as provided in Cal. Lab. Code § 246(i).

Notice Posting Required:

- The notice posting requirements under Cal. Lab. Code § 247 apply to COVID-19 supplemental paid sick leave granted under AB 1867.
- If there are any employees who do not frequent the workplace, the notice requirement can be satisfied by disseminating the notice electronically.
- The required poster for non–food sector workers is available here: https://www.dir.ca.gov/dlse/COVID-19-Non-Food-Sector-Employees-poster.pdf

AB 1867: Other Provisions

- Small Employer Family Leave Mediation
  - This bill adds Gov't. Code Section 12945.21, which requires the DFEH to create a small employer family leave mediation pilot program.
    - The pilot program would authorize a small employer (5-19 employees) or the employee to request all parties to participate in mediation through the DFEH's dispute resolution division within 30 days of receipt of a right-to-sue notice.
    - An employee is prohibited from pursuing civil action until the mediation is complete if an employer or employee requests mediation. The statute of limitations for the employee's claim is tolled from receipt of a request to participate in the program until the mediation is complete.
    - These provisions will be repealed on January 1, 2024.
- Handwashing
  - Existing law requires food employees to keep their hands and exposed portions of their arms clean, washing as specified, and regulates the provision of handwashing facilities. This bill adds Health & Safety Code Section 113963, which requires a food employees working in any food facility to be permitted to wash their hands every 30 minutes and additionally as needed.

AB 2017: Employee Sick Leave and Kin Care

- Bill amends Labor Code § 233, which provides that accrued and available sick leave may be used for an employee's or his or her family member's illness or for obtaining relief if the employee is a victim of domestic violence, sexual assault, or assault.
- Under Labor Code § 233, employers are prohibited from:
  - 1) denying the employee's right to take sick leave, or
  - 2) discriminating against the employee for using or attempting to use sick leave to attend to the family member's illness.
- AB 2017 adds that it is at the "sole discretion of the employee" to designate his or her use of sick leave for the purposes described above.
- Effective January 1, 2021.

AB 2399: Expands Paid Family Leave

- The California Paid Family Leave program provided wage replacement benefits to employees taking time off to care for a seriously ill family member or bonding with a minor child within one year of the child's birth or placement.
- AB 2399 now includes covered time off for participation in a qualifying exigency related to the active duty or call to active duty of the employee's child, spouse, domestic partner, or parent in the Armed Forces of the United States.

AB 2992: Expanded Protections for Victims of Crime or Abuse

- Under Labor Code §230, employers are prohibited from discharging an employee for taking time off to serve on a jury or appear in court pursuant to a subpoena or court order.
- Labor Code §230.1 requires employers of 25 or more employees to allow an employee who was a victim of domestic violence, sexual assault, and/or stalking to take time off to seek medical attention or related services.
- AB 2992 expands the protections under Labor Code §§230 and 230.1 to expand existing protected leave to victims of any violent crime, and to immediate family members of homicide victims, and further allows additional reasonable forms of documentation to verify that a crime or abuse occurred to determine employee eligibility for protected leave.
  - "Crime" is defined broadly as any offense under Section 13951 of the Government Code, under which "crime" means a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult.

SB 1383: Amendments to California Family Rights Act

- Background
  - The California Family Rights Act (CFRA), modeled after the federal Family Medical Leave Act (FMLA), requires an employer with 50 or more employees to grant a request by an employee with at least 1,250 hours of service with the employer during the previous 12-month period to take 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 himself or herself, a child, a parent, or a spouse. The employer may refuse to grant the request if the employer employs fewer than 50 employees within 75 miles of the worksite where the employee is employed.
  - New Parent Leave Act (NPLA) currently requires an employer to grant a request by an employee to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child as long as the employee has more than 12 months of service with the employer, has at least 1,250 hours of service with the employer during the previous 12-month period, and works at a worksite in which the employer employs at least 20 employees within 75 miles.

SB 1383: Amendments to California Family Rights Act, cont'd.

- SB 1383 repeals the NPLA and amends the CFRA
  - As of January 1, 2021:
    - Private employers with 5+ employees and certain public employers are covered.
    - Covered employers must provide eligible employees with up to 12 workweeks of unpaid protected leave during any 12-month period.
    - SB 1383 eliminates the "50 employees within 75 miles of the worksite where the employee is employed" qualification.
    - Employees still must have at least 1,250 hours of service with the employer during the previous 12-month period to be eligible for the leave.

SB 1383: Amendments to California Family Rights Act, cont'd.

- SB 1383 expands the definition of "family member."
  - Under the CFRA, eligible employees may take unpaid leave to care for a "family member" with a serious health condition. "Family member" includes a minor child (unless the child is an adult dependent child), a spouse, domestic partner, or a parent.
  - Now "family member" includes the employee's children, spouse, parents, siblings, grandparents, grandchildren, and domestic partners.
  - The definition of "child" covers all adult children, whether or not they are dependent or the children of a domestic partner.

SB 1383: Amendments to California Family Rights Act, cont'd.

- Additional CFRA Changes Under SB 1383
  - Under current law, an employer that employs both parents need only grant 12 weeks of total leave to both employees in connection with the birth, adoption, or foster care placement of a child. SB 1383 now requires the employer to grant 12 weeks to each parent for such leave to care for a child.
  - SB 1383 makes it an unlawful employment practice for any employer to refuse to grant a request by an employee to take up to 12 workweeks of unpaid 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.
  - SB 1383 provides that family and medical leave requested by an employee is not deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon termination of the leave.

SB 1383: Amendments to California Family Rights Act, cont'd.

- Possible Increase in Protected Leave for Some Employees
  - For employers and employees already covered by the FMLA, SB 1383's expansion of the definition of "family member" appears to create a situation where employees could have 12 weeks of FMLA leave and an additional 12 weeks of CFRA leave. While leaves under FMLA and CFRA generally run concurrently, SB 1383 adds coverage for leaves to care for siblings, grandparents, grandchildren, and adult nchildren not covered under the FMLA.
  - Where an employee has exhausted FMLA leave for his or her serious medical condition but also requests leave to care for a sibling under the CFRA, the employer would be faced with providing 24 weeks of protected leave to the employee with continued health insurance benefits and a guaranteed right of reinstatement.

SB 1383: Amendments to California Family Rights Act, cont'd.

- The "key employee" exception to CFRA allows an employer to refuse to reinstate an employee at the end of the leave if:
  - the employee was salaried and among the highest paid 10% of employees within 75 miles of the worksite;
  - refusal to reinstate is necessary to prevent substantial economic injury; and
  - the employee received timely notice of the intent not to reinstate and an opportunity to return early but did not do so.
- This limited exception will be removed from CFRA as of January 1, 2021.

SB 1383: Amendments to California Family Rights Act, cont'd.

- Key takeaways:
  - Smaller employers previously excluded from CFRA will need to prepare to follow CFRA's requirements after January 1, 2021.
  - Employees already covered by the CFRA should update their leave policies to include the new definition of "family member" and other new provisions of the law.
  - As before, CFRA leave will run concurrently with leave under the FMLA (CFRA's federal counterpart) *except* when the leave is for a purpose not covered by the FMLA. This means that an employee will still have remaining FMLA leave that was unused while taking leave that was only available under CFRA's more expansive coverage.

Discrimination, Harassment, and Retaliation

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AB 2143: Modifies the Prohibition of No-rehire Provisions in Settlement Agreements

- Section 1002.5 of the California Code of Civil Procedure prohibits the use of "no-rehire" provisions in settlement agreements to resolve employment disputes executed after January 1, 2020 where the employee has made an official complaint.
  - An exception applies to when the employer has made a good-faith determination that the employee had engaged in sexual harassment or sexual assault.

AB 2143: Modifies the Prohibition of No-rehire Provisions in Settlement Agreements, cont'd.

- AB 2143 amends Section 1002.5 by expanding the exception to the prohibition on "no re-hire" provisions while adding additional requirements applicable to employees and employers.
  - The exception now applies to employees who have engaged in "any criminal conduct," in addition to the previous exception for sexual harassment or sexual assault.
  - For employees: The official complaint must have been made in good faith before "no re-hire" provisions would be unlawful settlement terms as to that employee.
  - For employers: For the exception to apply, the employer must have documented the good-faith determination of covered misconduct by the employee before the employee files the complaint.

AB 3364: Omnibus. You Can Say That Again!

- AB 3364 makes more than 20 changes to existing provisions of state law.
- Notable among these changes for employers . . .
  - The Government Code is amended to recognize military status as a civil right under the FEHA (California's anti-discrimination statute)

AB 3364: What Is Military Status?

- Military status (along with veteran status) is defined as being a member (or veteran) of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

AB 3364: What Does This Mean for Employers?

- Discrimination on the basis of one's military status is an unlawful employment practice just as is discrimination on the basis of one's race, religious creed, color, national origin, disability, sex, age, etc.
- This includes discrimination based on the perception that an individual is a member of the military or is associated with a person who is a member of the military.
  - Can't discriminate against Employee A because he/she likes to wear military paraphernalia or because he/she is friends with military members

SB 493: Student Sexual Harassment Prevention and Investigation at Colleges and Universities

- Applies to postsecondary institutions that receive state financial assistance
- Required Training and Obligations for Employees and Campus Residential Staff
  - Must designate at least one employee (e.g., Title IX coordinator) to coordinate efforts to comply with this law
  - Must notify employees of their obligation to report sexual harassment to appropriate school officials
  - Training for all employees on identification of sexual harassment and reporting
  - Training as specified under Education Code §67386(b)(12) for all employees engaged in grievance procedures, including trauma-informed practices and implicit bias
  - Annual training for all on-campus housing staff (including student staff) on trauma-informed handling of reports of sexual harassment
- Must adopt certain grievance procedures that provide for prompt and equitable resolution of sexual harassment complaints filed by students

SB 493: Student Sexual Harassment Prevention and Investigation at Colleges and Universities, cont'd.

- Must adopt rules and procedures for sexual harassment prevention with the following elements:
  - Primary concern is student safety.
  - Duty to respond to all incidents of sexual harassment involving covered individuals, including off-campus incidents.
  - Duty to promptly investigate and respond to all possible sexual harassment by covered individuals of which it knows or reasonably should know, even if there is no formal complaint.
  - School must take complainant's confidentiality request seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment.
- Required Notices and Publication
  - Disseminate a notice of nondiscrimination to (1) employees, (2) volunteers, and (3) individuals or entities under contract with the institution.
  - Publish certain information on website, including contact information for Title IX/Compliance coordinator and other officials with authority to investigate and respond to complaints, and grievance procedures.
- Effective January 1, 2022.

SB 973: Equal Pay Report Requirement

- Covered Employers Must Submit Pay Data Report to DFEH
  - Applies where have more than 100 employees
  - Reporting year is calendar year
  - Choose single "snapshot" pay period Oct-Dec
  - First report due by March 31, 2021
  - Searchable format
- Report Contents
  - Number of employees categorized by race, ethnicity and sex
  - Categorized in each of the EEO-1 defined job types
  - Include previous year W-2 earnings and hours worked
  - Categorize pay in bands used by US Bureau of Labor Statistics
  - Required for each establishment and consolidated report that includes all employees

SB 973: Equal Pay Report Requirement, cont'd.

- Confidentiality and Retention
  - State and agencies required to keep unique employer data confidential
  - Information considered confidential under California Public Records Act
  - State may report and publish aggregated data
  - Agency must retain data for 10 years
- Enforcement
  - DFEH required to make reports available to DLSE upon request
  - EDD required to provide DFEH upon request names and addresses of all covered businesses
  - DFEH can use the list to determine compliance with reporting
  - DFEH may seek an order compelling compliance by employers and recover costs

SB 973: Equal Pay Report Requirement, cont'd.

- Plan Now for Compliance
  - May submit EEO-1 report if contains same or substantially similar pay data
  - Adjust systems to ensure data will be available in format required
  - Prepare report at the direction of counsel to preserve privilege
  - Consider proactive pay equity analysis to address any areas of concern

Wage and Hour

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AB 736: Expands Professional Exemption to Adjunct Faculty at Private Colleges and Universities

- Applies to private, non-profit colleges and universities
- Adjunct, or part-time, professors and other faculty may be classified as exempt professional employees if they satisfy both a duties test and a salary test
- Duties Test
  - Primarily engaged in an occupation commonly recognized as a "learned or artistic profession" as defined in the statute
  - Customarily and regularly exercises discretion and independent judgment in the performance of duties
- Salary Test
  - Paid a monthly salary that is at least twice the state minimum wage for full-time employment
  - If employed per course or laboratory taught, paid a salary for the course/laboratory that is calculated by classroom hours in accordance with the minimum hourly rates specified in the statute
  - If employed under a collective bargaining agreement, paid pursuant to the CBA if it expressly provides in clear and unambiguous terms the classification of employment in a professional capacity
- Effective September 9, 2020

AB 1512: New Rest Period Requirements for Security Officers

- AB 1512 amends Labor Code Section 226.7 to carve out a special exception in the security services industry in response to the California Supreme Court's 2016 decision in *Augustus v. ABM Security Services, Inc.*
- In *Augustus*, the California Supreme Court held that a private security company had failed to provide compliant rest periods under the Labor Code to security guards by requiring that guards keep their pagers and radio phones on or remain on call during a rest break.

AB 1512: New Rest Period Requirements for Security Officers, cont'd.

- AB 1512 allows certain employers of certain security officers to require that the officers remain on premises and on call and to carry and monitor a communication device during their rest periods.
- If the rest period is interrupted, the officer may start a rest period anew as soon as practicable and the obligation to provide a rest period is satisfied if the restarted rest period is not interrupted.
  - An "interruption" occurs when the officer is called upon to perform the active duties of the post.
  - Remaining on premises, remaining on call and alert, or monitoring a radio or communication device are not "interruptions."

AB 1512: New Rest Period Requirements for Security Officers, cont'd.

- If the security officer cannot take an uninterrupted rest period of at least 10 minutes for every four hours worked or major fraction thereof, then the officer must be paid one additional hour of pay at the "regular base hourly rate of compensation."
- These carveouts to the rest period requirements only apply if:
  - the security officer is registered under the Private Security Services Act;
  - the employer is a private patrol operator registered under the Private Security Services Act; and
  - the security officer is covered by a valid collective bargaining agreement that meets the conditions set forth in amended Labor Code Section 226.7(f)(3)(B).

AB 1512: New Rest Period Requirements for Security Officers, cont'd.

- AB 1512's amendments to Section 226.7 do not apply to any lawsuits filed before January 1, 2021.
- The amendments to Section 226.7 will remain in effect until January 1, 2027, when they will be automatically repealed.

AB 1947: Employment Violation Complaints: Requirements: Time

- AB 1947 extends the time limit under which employees can file a complaint with the DLSE alleging that they "have been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner."
- The time limit would be extended from six months to one year after the occurrence of the alleged violation(s).
- This bill authorizes a court to award attorney's fees to a plaintiff who brings a successful claim.

AB 2257: Changes to AB 5

- AB 2257 limits the ABC test's reach under AB 5, and clarifies when the Borello test applies.
- Provides additional exemptions for enumerated occupations, including, as a non-exhaustive example:
  - Certain competition judges and master class teachers;
  - Insurance underwriters;
  - Real estate appraisers and home inspectors;
  - Some licensed professionals (e.g., landscape architects, foresters); and
  - Musicians and related occupations (subject to specific conditions).
- Creates new exemption for two individuals who partner for a single-engagement event.
- Creates new exemption for the relationship between a data aggregator and an individual providing feedback to the data aggregator.
- Effective September 4, 2020. Applies retroactively to existing claims and actions insofar as its application would relieve an employer from liability.

AB 2257: Changes to AB 5, cont'd.

- Revises the Business-to-Business (B2B) Exemption (Labor Code §2776)
  - Now includes B2B relationships involving sole proprietors.
  - Permits a business service provider (BSP) to operate out of their residence.
  - Limits the requirement that the BSP provide services directly to the contracting business, rather than the contracting business's customers, to certain situations.
  - Requires that the contract specify the payment amount, rates of pay, services to be performed, and due date for payment of services.
  - No longer requires a BSP to actually contract with other businesses, just that the BSP can contract with other businesses and can negotiate its own rates.
  - The BSP must provide its own tools, vehicles, and equipment to perform the services, but does not include necessary proprietary materials.

AB 2257: Changes to AB 5, cont'd.

- Revises the Referral Agency Exemption (Labor Code §2777)

  The *Borello* test will apply to the relationship between a referral agency and a service provider if the service provider meets certain criteria, including:

  - Certifies to the referral agency that it has any required business licenses, tax registration, professional licenses, permits, certifications, or registration, which the referral agency must keep for at least 3 years;
  - Is not required to deliver services under the referral agency's name;
  - Provides its own tools and supplies;
  - Sets its own hours and terms of work or negotiates its hours and terms of work directly with the client; or
  - Sets its own rates, negotiates its 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, without deduction by the referral agency.

AB 2257: Changes to AB 5, cont'd.

- Revises the Referral Agency Exemption (Labor Code §2777)
  - The referral agency must not restrict the service provider from maintaining its own clientele.
  - Excludes services provided in an industry designated by the Cal-OSHA as a high-hazard industry, or for referrals for businesses that provide, among other things, janitorial, delivery, transportation, trucking, and in-home care services;
  - To qualify as a "client," a business now may only contract with a service provider for services that are otherwise not provided on a regular basis by employees at the client's business location or services that are outside of the client's usual course of business.
  - The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency.

AB 2257: Changes to AB 5, cont'd.

- Revises the Professional Services Exemption (Labor Code §2778)
  - Revises the list of services that qualify as professional services, such as "fine artists."
  - Amends the still photographer/photojournalist exception:
    - Eliminates 35-submission limit;
    - Includes videographers and photo editors;
    - Services must be performed under written contract, and must not directly replace an employee performing the same work at the same volume; and
    - The service provider must not primarily perform work at hiring entity's location.
  - Exempts specific enumerated occupations
  - Amends the freelancer exemption

AB 2479: Meal and Rest Period Exemption for Safety-Sensitive Positions at Petroleum Facilities

- AB 2479 extends the exemption from meal and rest period requirements under the Labor Code to January 21, 2026 for employees who hold a safety-sensitive position at a petroleum facility to the extent that they are required to carry and monitor a communication device and to respond to emergencies, or required to remain on employer premises to monitor the premises and respond to emergencies.
- Effective January 1, 2021.

AB 2765: Prevailing Wages

- 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.
- Effective January 1, 2021.

AB 3075: Wages and Enforcement – Three Changes to Existing Law

Change 1:

- Statements of Information filed with the California Secretary of State must indicate whether any officer or director, or, in the case of a limited liability company, any member or manager, has an outstanding final judgment issued by the DLSE or a court for the violation of any wage order or any provision of the Labor Code.
  - Statements of Information are and will continue to be submitted under penalty of perjury.
  - Beginning January 1, 2022 or upon certification by the Secretary of State that California Business Connect is implemented, whichever is earlier.

AB 3075: Wages and Enforcement – Three Changes to Existing Law, cont'd.

Change 2: Don't get pinched!

- Adds Section 200.3 to the Labor Code, making a successor to any judgment debtor liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment.

- Successorship is found if any of the following are met:
  - Use of substantially the same facilities or workforce to offer substantially the same services
  - Having substantially the same owners or managers that control labor relations
  - Employing as a managing agent any person who directly controlled the wages, hours, or working conditions of the judgment debtor's workforce
  - Operating a business in the same industry and having an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor
- This section does not limit other means of establishing successor liability for wages, damages, and penalties.

AB 3075: Wages and Enforcement – Three Changes to Existing Law, cont'd.

Change 3:

- Currently, local jurisdictions are not precluded from enforcing local labor standards that are more stringent than state standards.
- This bill goes further to expressly authorize local jurisdictions to enforce local standards relating to the payment of wages that are more stringent than state standards.

AB 3374: Part-Time Clinical Nursing Faculty

- Under existing law, a single community college district may employ, for up to 4 semesters or 6 quarters, a person serving as full-time clinical nursing faculty or as part-time clinical nursing faculty teaching not more than 67% of the hours per week considered a full-time assignment for regular employees having comparable duties.
- AB 3374 amends Education Code Section 87482 to state that the full-time or part-time clinical nursing faculty referenced above may be employed by a single community college district for up to 4 semesters or 6 quarters within any period of 3 consecutive academic years.

SB 1384: Labor Commissioner's Representation of Claimants Financially Unable to Represent Themselves

- Under current Labor Code §98.4, the Labor Commissioner *shall* represent a claimant in an employer's appeal of the Labor Commissioner's wage order if the claimant (i) requests representation; (ii) is financially unable to represent himself or herself; and (iii) seeks to uphold the final order without objection; otherwise representation is permissive.
- SB 1384 extends such representation to arbitral forums, in addition to judicial proceedings.
- Moreover, when an employer petitions to compel arbitration of wage claims (rather than allow Labor Commissioner adjudication), SB 1384 amends Labor Code §98.4 to add the following:
  - The petition must be served on the Labor Commissioner.
  - The Labor Commissioner *may* represent the claimant in proceedings to determine enforceability of the arbitration agreement, if requested.
  - If a court compels arbitration of a wage claim, the Labor Commissioner *shall* represent the claimant in arbitration of the wage claim if (i) the claimant requests representation, (ii) the claimant is financially unable to represent himself or herself, and (iii) the Labor Commissioner determines that the wage claim has merit (after an informal investigation).
- Effective January 1, 2021

Miscellaneous

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AB 979

- Requires publicly traded corporations with a principal executive office in California to diversify their boards of directors by appointing **director(s) from underrepresented communities**.
  - Defined as individuals who self-identify as "Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identify as gay, lesbian, bisexual, or transgender."
- Compliance Requirements:
  - By December 31, 2021, covered corporations must have at least 1 director from an underrepresented community on their boards.
  - By December 31, 2022, covered corporations with 9 or more directors must have a minimum of 3 directors from underrepresented communities on their boards; covered corporations with more than 4 but less than 9 directors must have a minimum of two directors from underrepresented communities on their boards.
- Companies that fail to comply will be fined $100,000 for the first violation and $300,000 for subsequent violations.
  - The California Secretary of State will publish annual reports on its website documenting compliance no later than March 1, 2022.

CCPA and Proposition 24

- CCPA requires privacy of consumer information, but exempts certain information collected by business of their employees, officers, directors, medical staff, and contractors.
- What personal information does it **exempt**?
    1) Information of workers collected in the course of acting as job applicants.
    2) Emergency contact information of job applicants.
    3) Information that is necessary to administer benefits to these workers/applicants.
- However, employers must:
    1) provide **notice** to applicants and workers (types of info, length of time).
    2) provide **security measures** to protect information.
    3) avoid using information for **other purposes** than intended.
- Proposition 24 extends these exemptions to January 2023, and **includes a new anti-discrimination/retaliation provision**

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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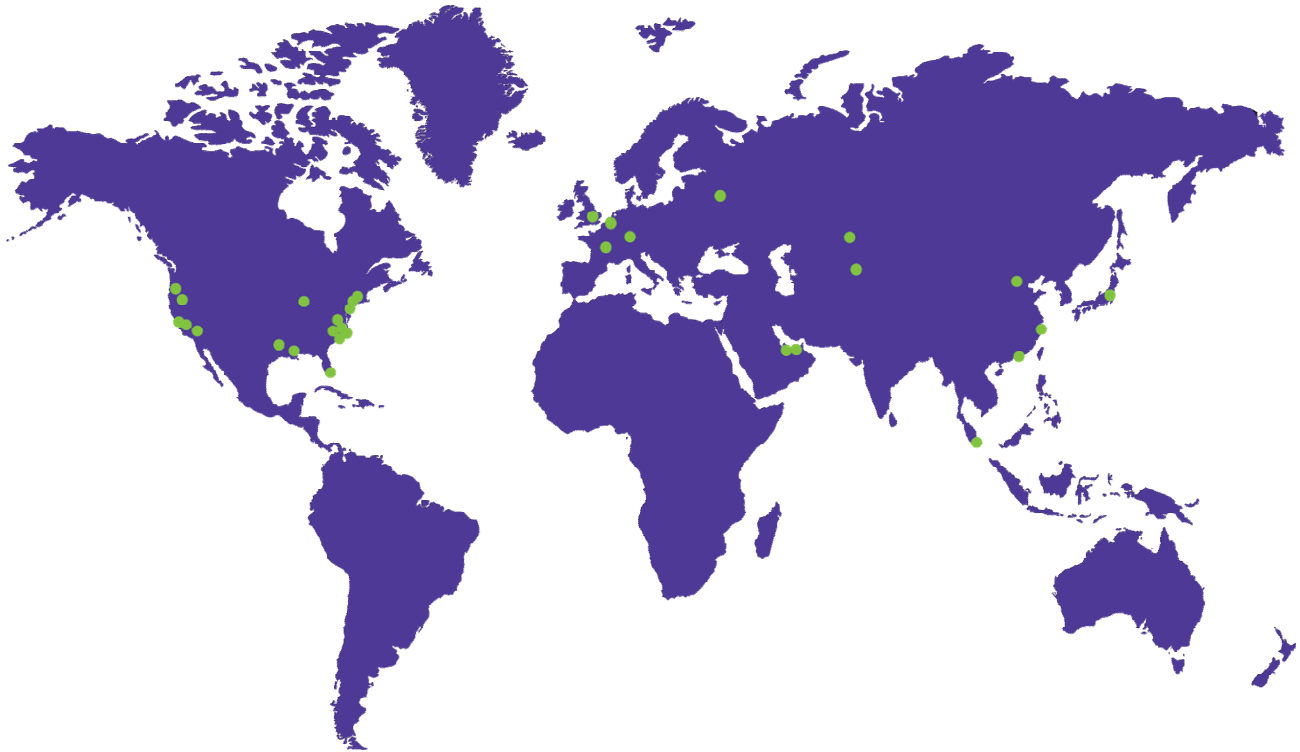

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THANK YOU