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WEBINAR SERIES
CALIFORNIA EMPLOYMENT LAW
YEAR IN REVIEW
NEW CALIFORNIA EMPLOYMENT LEGISLATION
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December 2, 2021
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COVID-19

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AB 654: COVID-19 Exposure Notifications

- AB 654 clarifies and eases some of the language of AB 685 which became effective on January 1, 2021. AB 685 requires employers to notify various entities of potential COVID-19 exposures at the workplace, including employees.
- Here are the various updates to the exposure notifications laws in AB 685:
  1. Employers must provide information about COVID-19 related benefits **only** to all employees who were on the premises at the same worksite as the positive case. This includes: COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave.
  2. Employers' obligation to notify employees of the cleaning and disinfection plan now **only** involves employees who were present at the worksite with the positive case.
  3. Deadline change: Employers must notify local public health agencies of worksite outbreaks within 48 hours or one business day, whichever is later.
  4. The definition of "worksite" does not apply to buildings, floors, or other employer locations that a positive case did not enter, locations where the worker worked by themselves without exposure to others, or alternative work locations chosen when working remotely.

SB 93: Rehiring Workers Displaced Due to COVID-19

- Employers must offer their laid-off employees in writing of all job positions that become available for which the laid-off employees are qualified within five days of establishing the position.
  - Laid-off employees are those who were employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation was due to a reason related to the COVID-19 pandemic.
- The employer shall offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire for the enterprise.
- The employee must have at least five business days to accept or decline the offer.
- Employers must retain specified records for at least three years.
- There is a notification requirement for an employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee.

SB 95: COVID-19 Supplemental Paid Sick Leave

- Provides COVID-19 supplemental paid sick leave for employees who are unable to work due to certain reasons related to COVID-19. Valid reasons for taking this leave include:
  - Being advised by a health care provider to self-quarantine due to COVID-19 concerns.
  - Caring for a family member who has been advised to self-quarantine.
  - Caring for a child whose school or place of care is unavailable for COVID-19 reasons.
- An employee is entitled to 80 hours of COVID-19 supplemental paid sick leave if that employee either (1) works full time or (2) worked or was scheduled to work an average of at least 40 hours per week for the employer in the 2 weeks preceding the date when the covered employee took COVID-19 supplemental paid sick leave.
  - Other employees are generally entitled to the number of hours they are normally scheduled to work over two weeks.
- This leave must be given in addition to the paid sick leave already available to employees.

Cal/OSHA

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SB 606: Expanding Cal/OSHA Citations

- Currently, Cal/OSHA may impose various penalties to employers for violating state occupational safety or health standards. These violations are currently categorized as follows: serious, uncorrected, willful, and repeated.
- SB 606 adds two additional categories to these violations:
  - "Egregious" violations: Cal/OSHA can issue these egregious violations in several scenarios including, but not limited to, if the employer intentionally made no reasonable effort to eliminate violations, if the violations resulted in worker fatalities or large number of injuries, and the employer has an extensive history of similar violations.
  - "Enterprise-wide" violations: SB 606 creates a rebuttable presumption that an employer with multiple facilities commits an enterprise-wide violation if (1) the employer has a non-compliant written policy or procedure or (2) there is evidence of a pattern involving the same violations committed in more than one of the employer's worksites. These citations carry heavy penalties that are similar to willful or repeated citations. Additionally, the bill includes specified requirements for a stay of abatement pending appeal of these types of citations.

Independent Contractor

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SB 727: Extended Liability for Direct Contractors

- Prior to SB 727, direct contractors for private construction contracts under Labor Code 218.7 assumed and were liable for any unpaid wages and benefits of the employees of subcontractors; however, direct contractors were not liable for penalties or liquidated damages.
- For contracts entered into on or after January 1, 2022, SB 727 extends direct contractors' liability to include such penalties and liquidated damages, as well as any interest owed by their subcontractors on account of the performance of the labor.
- Under the statute, the Division of Labor Standards Enforcement (DLSE) is required to notify the contractor and subcontractor on a private works project within 15 days of the receipt by the DLSE of a complaint of the failure of a subcontractor on that private works project to pay the specified wage, fringe, or other benefit due to workers.

Wage and Hour

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AB 701: Regulating Quotas in Warehouse Distribution Centers

- AB 701 applies to all employers who have 100 or more employees at a single warehouse distribution center or 1,000 or more employees at multiple warehouse distribution centers in the state.
- This law governs **employee quotas**. Quotas include any work standards tied to speed, quantified number of tasks, or quantified number amount of material within a defined period of time. Quotas are usually tied to an adverse employment action if unfulfilled.
- AB 701 provides two new requirements tied to employee quotas:
  - First, employers must now disclose to employees upon hire (1) the exact description of each quota and (2) any potential adverse employment actions tied to the quotas.
  - Second, employers may not take any adverse employment actions on any failure to meet certain quotas that prevent compliance with Labor Code violations, OSHA standards, and the use of bathroom breaks for employees. If an employee believes that meeting a quota caused any of the above violations, the employee is entitled to written descriptions of each quota applicable to them and his/her own personal work speed data over the past 90 days.

AB 1003: Wage Theft Can Be Punishable as Grand Theft

- AB 1003 makes an employer's intentional theft of wages or gratuities in an amount greater than $950 for one employee, or $2,350 for two or more employees, and in any 12-consecutive month period where such theft is "by unlawful means" with knowledge that the wages are due, punishable as grand theft.
  - Wages includes benefits or other compensation.
  - Independent contractors are included within the meaning of employee.
  - Hiring entities of independent contractors are included within the meaning of employer.
- Thus, AB 1003 increases the penalty for a crime and creates California Penal Code Section 487(m).
- Prosecutors now have the authority to decide whether to charge an employer with a misdemeanor (imprisonment in a county jail for up to 1 year) or felony (imprisonment in county jail for 16 months or 2 or 3 years), by a specified fine, or by a fine and imprisonment.

SB 62: Increased Liability for Garment Manufacturers and Brand Guarantors

- SB 62 prohibits employers from paying employees engaged in garment manufacturing (including dyeing, altering a garment's design, and affixing a label to a garment) to be paid by the piece or unit, or by the piece rate. The law requires such employees to be paid at an hourly rate not less than the applicable minimum wage.
- SB 62 also creates liability for a "brand guarantor," which is defined as "any person contracting for the performance of garment manufacturing."
  - "[A] garment manufacturer, contractor, or brand guarantor who contracts with another person for the performance of garment manufacturing operations **shall be jointly and severally liable** with any manufacturer and contractor who performs those operations for the garment manufacturer or brand guarantor" for wage and hour violations under the statute, reasonable attorney fees, and civil penalties.
- The bill imposes compensatory damages of $200 per employee against a garment manufacturer or contractor, payable to the employee, for each pay period in which each employee is paid by the piece rate.
- Additionally, the law creates a rebuttable presumption that the brand guarantor or garment manufacturer is liable in a claim filed with the Labor Commissioner to recover unpaid wages and penalties where an employee has provided the Labor Commissioner with labels or other information that the commissioner finds credible relating to the identity of any brand guarantor or garment manufacturer.
- The law also imposes a recordkeeping requirement on employers engaged in the business of garment manufacturing and brand guarantors to keep all contracts, invoices, purchase orders, work orders, style or cut sheets, and any other documentation pursuant to which garment manufacturing work was, or is being, performed for four years.

SB 572: Lien on Real Property (Labor Code 98.8)

- Currently, Labor Code Section 98.2 allows the Labor Commissioner to record a certificate of lien on real property for amounts due under a final order in favor of an employee.
- SB 572 expands on that by creating Labor Code 98.8, which would allow the Labor Commissioner to record a lien on real property to secure amounts based not only under a final order, but all types of final findings and decisions such as **citations**.
- The lien shall continue until ten years from the date of its creation and can be renewed for additional periods of 10 years.

Labor Code 515.5: Salary Increase for California Computer Professional Exemption

- The California Department of Industrial Relations (DIR) issued a memo on October 18, 2021 increasing the compensation threshold for exempt computer professionals by 5.3% compared to the 2021 rates, based on a commensurate increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.
- Starting January 1, 2022, California employers must pay their computer professional employees a salary of at least $104,149.81 annually ($8,679.16 monthly) or an hourly wage of $50.00 for every hour worked in order to remain exempt from paying such employees overtime compensation.
  - Note that the California exemption differs from the federal one.
  - With respect to the federal exemption for employees in computer-related occupations under the Fair Labor Standards Act (FLSA), the US Department of Labor (DOL) lists a salary level threshold of $684 per week ($35,568 per year).

Confidentiality

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SB 331: Settlement and Non-Disparagement Agreements

- Settlement Agreements: SB 331 prohibits preventing and restricting the disclosure of factual information regarding workplace harassment/discrimination related to a claim filed in a civil action or a complaint filed in an administrative action.
- Acts of workplace harassment or discrimination not based on sex are now part of the information whose disclosure cannot be prevented or restricted.
- Agreements can still bar the disclosure of the amount paid in settlement of a claim.
- The parties can include a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court*, at the request of the claimant* (provided that a government agency or public official is not a party to the settlement agreement).

SB 331: Settlement and Non-Disparagement Agreements (cont.)

- Non-Disparagement Agreements: FEHA already 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 require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment or discrimination.
  - SB 331 provides that these unlawful acts include any harassment or discrimination.
- SB 331 also prohibits an employer from requiring an employee to sign a nondisparagement agreement or other document to the extent that it has the purpose or effect of denying the employee the right to disclose information about those unlawful acts.
- Employers can still protect: trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

SB 331: Settlement and Non-Disparagement Agreements (cont.)

- SB 331 requires specific language for a nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace: "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."
- When there is a separation agreement, the employer must advise the employee of the right to consult an attorney regarding the agreement and the employee should have a period of not less than five business days in which to consult an attorney.
- Employees can sign before the five business days if certain requirements are met.

SB 762: Speeds Up Arbitration Cases

- Requires consent from all parties before the adjustment of deadlines for the payment of fees and costs due to the arbitrator during the pendency of the arbitration.
- Requires an arbitration provider to issue an invoice for any fees and costs to all parties and specify the final due date of the initiation fees as soon as a worker or consumer completes their filing requirements.
- Seeks to prevent companies from slowing down arbitration cases by withholding payment of arbitration fees.
- Remember the law already requires that employers who are obligated to pay fees and costs before arbitration can proceed or during the pendency of an arbitration, if the employer does not pay the arbitration fees within 30 days of the date they are due – the employer is in breach of the agreement, in default of arbitration, and waives its right to compel arbitration. Other sanctions can also apply.

Discrimination

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SB 807: DFEH Procedural Changes

- SB 807 adds procedural changes to DFEH's enforcement of California's civil rights laws, including the Fair Employment and Housing Act (FEHA). Here are some noteworthy changes:
  - The Statute of Limitations for individuals filing civil actions in courts based on civil rights violations is now tolled until either the DFEH files a civil action or one year after the DFEH issues written notice to the complainant that it has closed its investigation and elected not to file a civil action.
  - DFEH may now take up to two years to complete its investigation and issue a right-to-sue notice for a complaint treated as a group/class complaint.
  - The record-retention obligations for employers are now four years (instead of two) for all applications, personnel, membership, or employment referral records and files. This includes maintaining personnel files of applicants or terminated employees for up to four years after the date of the employment action taken.
  - If the DFEH brings a civil action against an employer involving class or group allegations, it may do so in any county in the state.

Miscellaneous

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SB 657: Electronic Documents Distribution

- SB 657, now Labor Code section 1207, provides that in any instance in which an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached.
- The bill specifies that this does not alter the employer's obligation to physically display the required posting.

AB 1033: Family Care and Medical Leave for Parent-in-Laws; Mediation Program for Small Employers

- The California Family Rights Act (CFRA) allows eligible employees with up to 12 weeks of unpaid, job-protected leave to care for their own serious health condition or a family member with a serious health condition, or to bond with a new child.
- AB 1033 expands family care and medical leave under the CFRA to include leave to care for a parent-in-law.
- Additionally, AB 1033 provides further information and procedural requirements regarding the small employer family leave mediation pilot program applicable to employers with 5 to 19 employees.
  - The program requires an employee of an employer with 5 to 19 employees to pursue mediation prior to filing a civil action for their employer's alleged violation of the CFRA, unless neither the employee nor employer requests mediation within the time allotted by the statute.

AB 286: Food Delivery Purchase Prices and Tips

- AB 286 makes it unlawful for a food delivery platform to charge a customer any purchase price for food or beverage that is higher than the price posted on the food delivery platform's website by the food facility at the time of the order.
- A food delivery platform must pay any tip or gratuity for a delivery order, in its entirety, to the person delivering the food or beverage.
- A food delivery platform must also pay any tip or gratuity for a pickup order, in its entirety, to the food facility.
- A food delivery platform must disclose to the customer and to the food facility an itemized cost breakdown of each transaction which includes the following information:
  - (1) The purchase price of the food and beverage.
  - (2) A notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, unless the food facility directs that the food delivery platform disclose to customers the delivery fee charged to the food facility and each fee, commission, or cost charged to the food facility.
  - (3) Each fee, commission, or cost charged to the customer by the food delivery platform.

AB 1506: Employees and Independent Contractors in Newspaper Distributors and Carriers

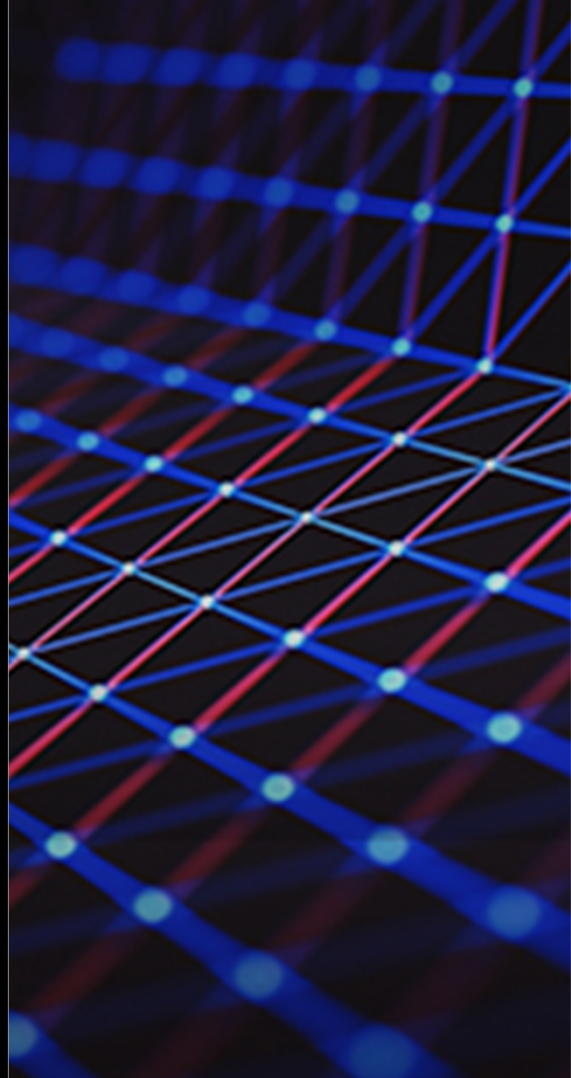
- AB 1506 extends the exemption of using the ABC test until January 1, 2025 for newspaper distributors working under contract with a newspaper publisher or a newspaper carrier. The determination of employee or independent contractor status for individuals in those occupations shall be governed by *Borello*.
- Every newspaper publisher or distributor that hires or directly contracts with newspaper carriers will be required to submit the following information to the Labor and Workforce Development Agency on or before March 1, 2022; March 1, 2023; and March 1, 2024:
  - The number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year.
  - The average wage rate paid to carriers classified as independent contractors and as employees.
  - The number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law.

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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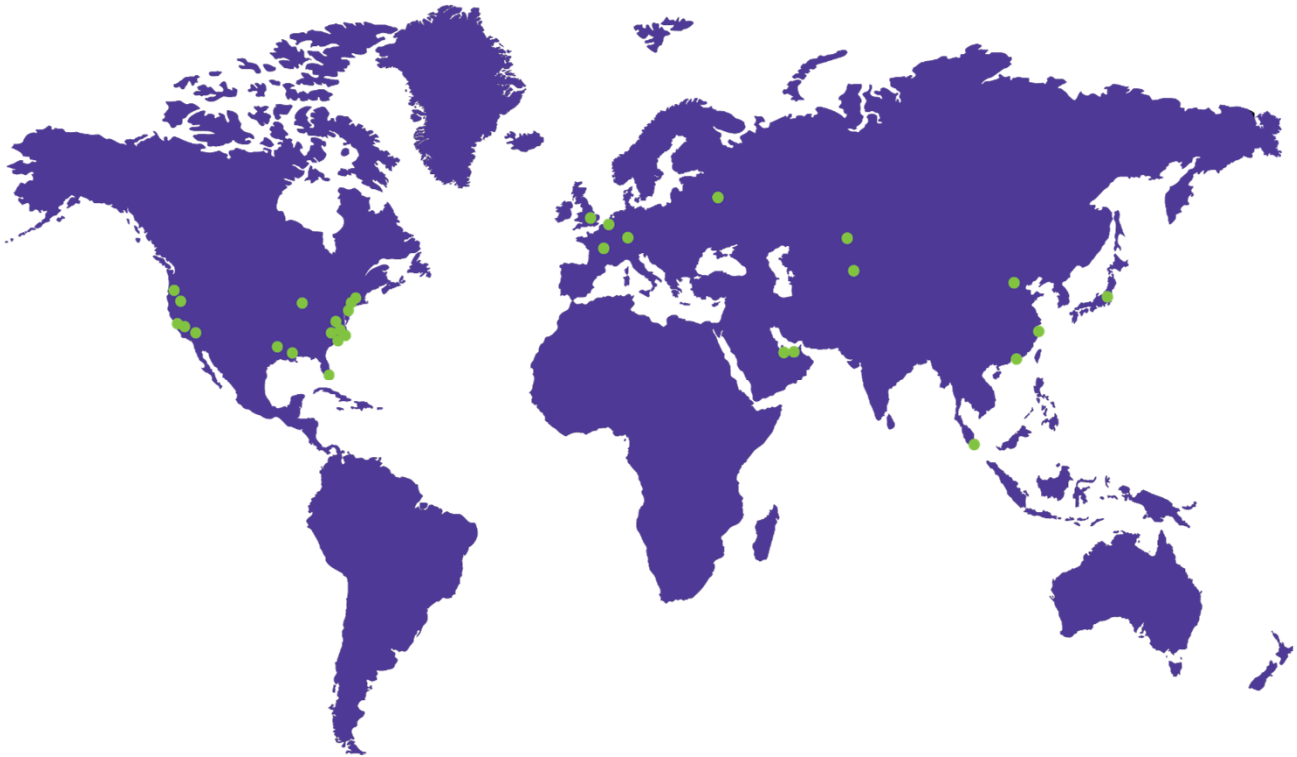

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