CALIFORNIA LEGISLATIVE UPDATE

What’s New for the Workplace in 2021

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KDG California Legislative Digest: What's New in the Workplace 2021

Jay L. Rosenlieb[1]

I. Introduction

Democrats have supermajorities in both California legislative chambers and Governor Newsom is pursuing his previously announced policy agenda. As a result, there will be many changes impacting the relationship between California employees and their employers. Further, the 2020 legislative session saw substantial use of the option to mark legislation as "urgent" and therefore effective immediately. To the surprise of few, much of the legislation passed during the 2020 legislative session addressed COVID related issues.

California employers are well advised to familiarize themselves with the new statutory requirements so they can be ready to go as of January 1, 2021.[2, 3]

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[1] Great appreciation and thanks are expressed to KDG Associate Gustavo Maya and Donna Thrasher, SPHR, Senior Human Resources Consultant at KDG, for their contributions in the preparation of this summary of legislation from the 2020 Legislative Session. Special thanks are also extended to Cindy Oliver and Annamarie Oddo for their preparation of the materials.

[2] Disclaimer and Advisement: The analysis and information provided in this Digest is general in its nature and content and cannot be applied to any specific situation without further analysis and gathering of facts. Users of this document are urged to consult with legal counsel.

[3] Unless otherwise stated, all legislation has an effective date of January 1, 2021.

II. Wage and Hour

A. **Reminder: Minimum Wage Increases:** Minimum wage increases to $14.00 per hour as of January 1, 2021 for employers of 26 or more employees and $13.00 per hour as of January 1, 2021 for employers of 25 or fewer employees.

B. *URGENCY LEGISLATION EFFECTIVE SEPTEMBER 9, 2020:* **Assembly Bill 736: Adjunct Professors at Nonprofit Private Colleges are Classified as Exempt**

Current Law: Wage Orders 4 and 5 provide criteria for status exempt from overtime and various other aspects of the wage orders.

New Law: Adjunct faculty are now considered to be exempt if:

1. The adjunct faculty are employed in a professional capacity;
2. The adjunct faculty is compensated on a salary basis; and
3. Compensation is:
   a. If the employee is employed at least 40 hours er week and is paid at least twice California's minimum wage; or
   b. If paid by the classroom room hour, then no less than $117 per hour and increasing each year thereafter.

C. *URGENCY LEGISLATION EFFECTIVE SEPTEMBER 4, 2020*: **Assembly Bill 253: Revisions and Expansions to AB 5: Independent Contractors**

Current Law: Current law (AB 5) defines "independent contractor" consistent with the *Dynamex* ABC test and creates categories and protocols for exemptions

New Law: Although this new law makes no changes to the ABC test, does reorganize and revise current exemptions and creates some new exemptions. Specifically:

1. The business to business exception is revised:
   a. Expanded definition of sole proprietor to include individual workers;
   b. Requires that the written contract include the payment amount, rate of pay, and due date of payment;
   c. Specifies that the worker's place of business may include the worker's place of residence; and
   d. There is no longer a requirement to "actually contract" with others for the same or similar services—only need to have the right to contract with others.
2. The referral agencies exception is revised:
   a. The referral agency must certify that the service provider:
      i. Has a business license or tax registration; and
      ii. Has a permit to perform the work, if such a permit is otherwise required.
   b. The referral agency cannot require that the service provider work under the name of the referral agency.

c. The service provider must be able to set/negotiate his/her own rates.
d. The service provider cannot be penalized by the referral provider for rejecting work.
e. The list of specified areas of work for service providers is expanded.

3. The professional services exception is expanded.
4. New exceptions are added for "single event engagement services, recording artists, lyricists, data aggregators, those who provide feedback to data aggregators, and sign language interpreters.
5. The exceptions are deemed to be fully retroactive to the extent that they would relieve an employer of liability.

D. *URGENCY LEGISLATION EFFECTIVE SEPTEMBER 30, 2020*: Assembly Bill 1512: Rest Period Carveout for Unionized Security Officers

Current Law: Existing law prohibits an employer from requiring an employee to work during a mandated meal or rest or recovery period. Existing law requires an employer who fails to provide an employee a mandated meal or rest or recovery period to pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period was not provided.

New Law: Effective until January 1, 2027, AB 1512 creates a collective bargaining agreement (CBA) carveout for unionized security officers from current meal and rest period requirements. Specifically, AB 1512 authorizes an employer to require security officers, covered by a valid CBA, to remain on the premises and to remain on call, and carry and monitor a communication device, during rest periods. AB 1512 specifies that the security officers subject to a collective bargaining agreement may begin their rest period anew if that period is interrupted. If such a security officer is permitted to restart a rest period anew as soon as practicable if the officer's rest period is interrupted, that second uninterrupted rest period satisfies the rest period obligation. As such, no missed rest break penalties are assessed.

The term "interrupted", for purposes of this subdivision, means any time a security officer is called upon to return to performing the active duties of the security officer's post prior to completing the rest period, and does not include simply being on the premises, remaining on call and alert, monitoring a radio or other communication device, or all of these actions.

AB1512 applies only to those persons employed as a security officer who is registered pursuant to the Private Security Services Act, and whose employer is a registered private patrol operator, who also meet the following criteria:

1. The employee is covered by a valid collective bargaining agreement.
2. The valid collective bargaining agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for rest periods for those employees, final and binding arbitration of disputes concerning application of its rest period provisions, premium wage rates for all overtime hours worked, and

a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate.

This subdivision does not apply to existing cases filed before January 1, 2021.

In enacting the legislation adding this subdivision, it is the intent of the Legislature to abrogate, for the security services industry only, the California Supreme Court's decision in Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, to the extent that decision is in conflict with this subdivision.

E. Assembly Bill 2479: Extension of Rest and Meal Period Exemption for Safety-Sensitive Positions at Petroleum Facilities

Current Law: Current law prohibits an employer from requiring an employee to work during a meal, rest, or recovery period but exempts safety-sensitive positions at petroleum facilities ("petroleum refineries, marine and onshore terminals handling crude oil and petroleum products, bulk marketing terminals, asphalt plants, gas plants, catalyst plants, carbon plants, and any other facility involved in the processing, refining, transport, or storage of crude oil or petroleum products.") The exemption is set to expire on January 1, 2021.

New Law: Extends the exemption for employees in safety-sensitive positions at petroleum facilities to January 1, 2026.

F. Assembly Bill 2765: Expansion of Prevailing Wage Coverage: Charter Schools

Current Law: For purposes of regulating public works contracts, "public works" is defined as construction, alteration, demolition, installation, or repair work done under contract and paid, in whole or part, from public funds. Workers on public works projects may not be paid less than the general prevailing rate of per diem wages. Not clear if this definition includes construction work on charter schools.

New Law: The definition of public works is expanded to specifically include work on a charter school paid for from the proceeds of conduit revenue bonds issued on or after January 2021.

G. *VETOED BY GOVERNOR*: Assembly Bill 3053: Labor Commissioner: unpaid wage claim process.

Current Law: Current law establishes the Division of Labor Standards Enforcement and authorizes the Labor Commissioner to collect unpaid wages and monetary benefits due to an employee. The Labor Commissioner must report annually the amount of wages unlawfully withheld from workers and the amount of unpaid wages recovered for workers.

Proposed Law: The proposed law would have required the Labor Commissioner to create an online portal that would allow wages claimants to file unpaid wage claims, track those claims, and submit requested documents regarding those claims.

Veto Message: In his veto message, the Governor stated: **"**I fully support measures to improve outcomes for workers who have been denied their hard-earned wages. The Labor Commissioner's Office has already launched a low-wage industry initiative to address lasting backlogs. The goal of this initiative is to build industry-specific expertise among wage enforcement deputies dedicated to those industries. This initiative will improve outcomes for workers and help cut through the backlog of claims, through enforcement deputies and hearing officers who understand industry-specific practices and commonly alleged violations. We should allow time for these existing efforts at the Labor Commissioner's Office to show some results."

H. Assembly Bill 3075: Public Notification of Judgment for Wage Violations

Current Law: Current law provides for the formation and governance of business entities and requires the filing of specified documents disclosing information to the Secretary of State (SOS) including a statement of information (SOI). Certain information is required on the SOI, and it must be signed under penalty of perjury. A successor employer of property services workers is liable for any wages, damages, and penalties its predecessor owed to employees if the successor meets certain criteria. Under current law, the Labor Commissioner enforces wage requirements.

New Law: Beginning January 1, 2022, or upon certification by the SOS that California Business Connect is implemented, the SOI must also contain a statement indicating whether any officer, director, member, or manager has an outstanding final judgment from the Division of Labor Standards Enforcement or a court of law for the violation of any wage order or the Labor code. The SOS must post notice on its website if California Business Connect is implemented before January 1, 2022. A successor to any judgment debtor is liable for wages, damages, and penalties. Under the new law, local jurisdictions are expressly authorized to enforce local standards relating to payment of wages that are more stringent than state standards.

I. *VETOED BY GOVERNOR*: Assembly Bill 3216: Unemployment: Rehiring and Retention: State of Emergency.

Current Law: Current law governs employment relations, defines the contract of employment, and establishes the obligations of employers to their employees.

Proposed Law: An employer would have been required to offer information about job openings to laid-off employees for which they qualify and to offer positions to laid-off employees based on a preference system. "Laid-off employee" would have been

defined as any employee who was employed by the employer for 6 months or more in the 12 months preceding the state of emergency giving rise to the application of the bill's provisions and whose most recent separation from active service was due to a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reasons related to the state of emergency. The bill would also have required successor employers in specified industries, regardless of the existence of a state of emergency, to give preference in hiring to employees of the incumbent employer by seniority.

Veto Message: In his veto message, the Governor stated: **"**I recognize the real problem this bill is trying to fix-to ensure that workers who have been laid off due to the COVID19 pandemic have certainty about their rehiring and job security. But, as drafted, its prescriptive provisions would take effect during any state of emergency for all layoffs, including those that may be unrelated to such emergency. Tying the bill's provisions to a state of emergency will create a confusing patchwork of requirements in different counties at different times. The bill also risks the sharing of too much personal information of hired employees. There must be more reasonable tools to effectively enforce the recall provisions. Finally, the hospitality industry and its employees have been hit hard by the economic impacts of the pandemic. I believe the requirements of this bill place too onerous a burden on employers navigating these tough challenges, and I would encourage the legislature to consider other approaches to ensure workers are not left behind."

III. Employee Leaves and Benefits

A. ***URGENCY LEGISLATION EFFECTIVE SEPTEMBER 9, 2020:*** Assembly Bill 1867: Expansion of federal COVID related leave

Current Law: Federal law (FFCRA) requires employers of fewer than 500 employees to provide paid leave to employees who are ill with or isolated or quarantined as a result of COVID 19.

New Law: Requires California employers, who are part of an employer with 500 or more employees, to provide paid leave to employees who are ill with or isolated or quarantined as a result of COVID 19 (California Emergency Paid Sick Leave or CEPSL). Specifically:

1. Employees who are covered:
    a. Work in California
    b. For an employer of 500 or more employees nationwide (29 C.F.R. section 826.40(a)(2) and 825.104(c)(2); and
    c. **<u>Leaves his or her home to perform their work</u>**.
2. CEPSL triggering events (upon the written or oral request of the employee stating that):
    a. The covered employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or

   b. The covered employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
   c. The covered employee is prohibited from working by the covered worker's hiring entity due to health concerns related to the potential transmission of COVID-19.
3. CEPSL benefits:
   a. Leave
      i. For employees who work or are scheduled to work at least 40 hours per week: 80 hours of supplemental paid sick leave
      ii. For employees who work or are scheduled to work less than 40 hours per week:
         1. If the employee has a regular schedule, then CEPSL benefits equal to the number of hours that the employee is regularly scheduled to work over two weeks
         2. If the employee does not have a regular schedule, then CEPSL benefits equal to 14 times the average numbers of hours the covered employee worked each day for the hiring entity in the six previous months
   b. Pay
      i. For each hour of CEPSL taken, the employee shall be paid the higher of their regular rate of pay or the applicable minimum wage; but
      ii. Not more than $511 per day nor more than $5,110 for all CEPSL hours in the aggregate
4. Expiration: Expires December 31, 2020 or upon the expiration of any extension of the FFCRA, whichever occurs later.
   a. If an employee is on CEPSL at the time of expiration, the employee may continue to take CEPSL until it is exhausted.
5. NOTES:
   a. CEPSL is in addition to any other employer offered sick leave, vacation leave, PTO, and California Mandatory Paid Sick Leave or income replacement programs such as State Disability Insurance and Paid Family Leave.
   b. CEPSL is available immediately upon the employee's written or oral request
   c. Cannot require employee to take vacation, sick, or PTO prior to taking CEPSL.
   d. Post the DLSE proscribed poster at all work locations. Can also post on-line.
   e. Date to begin offering CEPSL: September 19, 2020 (Labor Code Section 248(e).)
      i. May be offered retroactively
   f. No reimbursement mechanism for employers through tax credits or otherwise.
   g. Integrated employer factors test 29 CFR 825.104(c)(2):
      i. Common management
      ii. Interrelation between operations
      iii. Centralized control of labor relations; and
      iv. Degree of common ownership/financial control

B. Assembly Bill 2992: Expansion of Rights to Leave for Victims of Crime or Abuse

Current Law: Employers are prohibited from discharging, discriminating, or retaliating against employees who take time off from work to seek help for themselves or children for domestic violence, sexual assault, or stalking. Unless it is unfeasible, employee victims of domestic violence, sexual assault, or stalking must provide reasonable advance notice to an employer of the employee's intention to take time off. An employer is prohibited from taking any action against an employee when an unscheduled absence occurs if within a reasonable time after the absence the employee provides certification to the employer that the employee was undergoing treatment for specific injuries. Employers with 25 or more employees are prohibited from discharging, discriminating, or retaliating against employees seeking relief for domestic violence, sexual assault, or stalking for taking time off from work.

New Law: Employee-victim protections are expanded to generally include victims of a broader range of crime and abuse.

C. Senate Bill 1383: Expansion of California Family Rights Act

Current Law: Employers of 20 or more employees are required, pursuant to the New Parent Leave Act, to provide employees more than 12 months of service, at least 1250 hours of service within the past 12 months, and works at a worksite in which the employer employs 20 or more employees within 75 miles, with up to 12 weeks of unpaid protected leave to bond with a new child.

New Law: Expands the protections of the CFRA to cover employers of 5 or more employees to allow employees 12 weeks of unpaid job protected leave during any 12 month period to bond with a new child or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner. This law also provides for CFRA leave 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. The 75-mile radius requirement is deleted. In the case of both parents working for the same employer, simultaneous leave may be permitted, but is not required.

D. Assembly Bill 2017: Expansion of Kin Care Rights

Current Law: Existing law, Labor Code section 233 (commonly referred to as the "Kin Care" law), requires an employer **who** provides sick leave for employees to allow an employee to use up to half of their accrued and "available" sick leave for the purposes of attending to the illness of a family member and prohibits an employer from denying an employee the right to use sick leave or taking specific discriminatory action against an employee for using, or attempting to exercise the right to use, sick leave to attend to such an illness.

New Law: Clarifies that employees shall solely decide and designate when they are using their sick leave to care for a sick family member or for obtaining relief if the employee is a victim of domestic violence, sexual assault, or stalking. This avoids an erroneous designation of the use of sick days as kin care (and the depletion of kin care) when the sick days were actually taken for a personal illness. Assembly Bill 2017 does not alter Labor Code Section 233 insofar as employees are prohibited from taking discriminatory action against an employee for requesting or using sick leave. The new law imposes no new requirements on employers, other than ensuring employees designate when they are using their sick leave to care for a family member. This may require revision of sick leave policies and procedures to ensure employees are aware of the right to designate. Employers may still limit employees to half their accrued sick leave to care for a family member.

IV. Miscellaneous

A. Assembly Bill 685: Authorizes Closure of Business Due to COVID Risk

Current Law: The California Occupational Safety and Health Act, requires the Division of Occupational Safety and Health, when, in its opinion, a place of employment, machine, device, or equipment is in a dangerous condition, is not properly guarded, or is dangerously placed so as to constitute an imminent hazard to employees, to prohibit entry or use and to attach a conspicuous notice of that condition. Current law requires that this prohibition be limited to the immediate area in which the imminent hazard exists. Further, current law creates a rebuttable presumption that a "serious violation" exists in a place of employment if DOSHA demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The rebuttable presumption is created if the division sends, at least 15 days before issuing such a citation, a standardized form containing descriptions of the alleged violation. Current law permits an employer to rebut the presumption.

New Law: In light of COVID-19, the legislature and governor, have broadly expanded DOSHA's abilities to close all or a portion of a business based on COVID-19 risks. Specifically, through December 31, 2022:

1. DOSHA is now authorized to close all or a portion of a business when, in the opinion of DOSHA, the business or portion of the business exposes workers to the risk of infection with COVID-19, so as to constitute an imminent hazard to employees. The bill requires DOSHA to provide notice to the employer, to be posted in a conspicuous place at the place of employment. The prohibition is to be limited to the immediate area in which the imminent hazard exists.
2. Employers (public or private) or representative of the employer, that receive a notice of potential exposure to COVID-19 are required to provide notification of potential exposure to employees within one business day of the notice of potential exposure. Employers are required to provide prescribed notice to all employees, the employers of subcontracted employees, and union

representatives, who were on the premises at the same worksite as potentially infected person, within the infectious period, that they may have been exposed to COVID-19. Employers are now required to notify all employees, the employers of subcontracted employees, and any exclusive representative on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control. Employers are required to maintain records of notifications for at least 3 years. A civil penalty could be imposed on an employer that violates the notification requirements.

3. Employers are required, if the employer or representative of the employer is notified of the number of cases that meet the definition of a COVID-19 outbreak (as determined by the California Department of Public Health), within 48 hours, to report names, numbers, occupation, and worksite of employees to the local public health agency in the jurisdiction of the worksite. Employers, that have an outbreak, are required to continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite. Health facilities are exempt from this reporting requirement.
4. The California Department of Public Health will make the information on outbreaks publicly available on its internet website.
5. COVID related closures are exempt from use of the 15 day pre-citation standardized form.

B. *VETOED BY GOVERNOR:* Assembly Bill 1066: EDD Claims Reform

Current Law: Under existing law, if an employer fails to keep and furnish to the EDD any required records or reports necessary for a full determination, decision, or other proper disposition of a claim for unemployment benefits within a reasonable time as the EDD may by rule, regulation, or procedure prescribe, it is to be conclusively presumed that the claimant is entitled to the maximum total amount of benefits payable unless the director deems sufficient a lesser total amount is due and owing to the claimant.

Under existing law, employer contributions to the Unemployment Fund are required to be paid by each employer to the department for deposit in the Unemployment Fund, and become delinquent if not paid in accordance with specified timeframes and procedures. Under existing law, any employer who, without good cause, fails to pay required contributions is subject to a penalty of 15% of the amount of those contributions, in addition to payment of interest and other specified penalties.

Proposed Law: This legislation would have, effective on and after January 1, 2021, required employers to provide all documentation serving as the basis for denial of an EDD claim within 10 days and, If the employer failed to furnish the required records to the EDD, it would have been conclusively presumed that the claimant was entitled to the maximum total benefits payable, unless the director determined, based on evidence, that the claimant was entitled to a lesser amount.

The director would have been authorized to extend the 10-day deadline on a determination of good cause or a delay in furnishing the required records for a full determination of a claim for unemployment benefits.

This legislation would have authorized the Attorney General to collect UI benefits owed by employers with 500 or more employees and with 5 or more claimants. It would have required that the Attorney General collect the entire required contribution from the employing unit, including interest and penalties, and this amount be deposited into the UI Fund.

AB1066 was intended to expedite handling of unemployment claims, given the recent high volume of claims. Also, it was intended to collect UI Fund contributions from those companies that may misclassify their employees as independent contractors.

Veto Message: The proposed legislation created an unrealistic, arbitrary and inflexible 10 day time period by which an employer would have to respond (and provide required documentation) to an Employment Development Department (EDD).

C. Assembly Bill 2537: COVID Fallout: Public and Private hospitals Must Stockpile PPE and Report Usage

Current Law: Employers must ensure that employment and places of employment are safe and healthful and to establish and maintain effective injury prevention programs. The Department of Industrial Regulations (DIR) regulates the use of personal protective equipment (PPE) and practices in health care facilities related to aerosol transmissible diseases.

New Law: Public and private employers must provide employees in a general acute care hospital who provide direct patient care or support direct patient care with PPE in compliance with DIR regulations. Employers must ensure that employees use the PPE provided to them. Employers must maintain a three-month supply of PPE and provide an inventory of its stockpile. Employers may be fined up to $25,000 for each violation of the stockpile requirement. On or before January 15, 2021, a general acute care hospital must be prepared to report to the DIR its highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year. State hospitals are exempt from the reporting requirement. Employers must establish and implement written procedures for determining the quantity and types of PPE typically used.

D. *URGENCY LEGISLATION EFFECTIVE SEPTEMBER 28, 2020:* Assembly Bill 1731: Unemployment Insurance Work Sharing Program Reforms

Current Law: California has a work sharing program pursuant to which an employer may apply to participate as a temporary alternative to layoffs if the business' production or services have been reduced. This program helps employers minimize or eliminate the need for layoffs in nearly all types of businesses and industries and allows employers to

keep trained employees, quickly recover when business financial conditions improve, and avoid the cost of recruiting, hiring, and training new employees.

With work sharing, both full- and part-time employees whose hours and wages have been reduced can receive unemployment compensation benefits, keep their current jobs, avoid financial hardships, and maintain health and retirement benefits.

New Law: AB 1731 requires the EDD to create an online process pursuant to which employers may apply to, and participate in, California's work sharing program, including providing for an automatic one-year approval of applications.

Further, AB 1731 requires that the EDD to approve all work sharing plans upon receipt for 12 months if the plan is submitted between September 15, 2020 and September 1, 2023, unless a shorter period is requested.

If the employer uses the online work share application process, the EDD must provide claim packets to an eligible employer for each participating employee within five business days following approval of the application.

Finally, AB 1731 permits the EDD to collaborate with the Governor's Office of Business and Economic Development (GO-Biz) and the California Infrastructure and Economic Development Bank (IBank) to implement strategic outreach to increase participation by employers in the state's work sharing program. This legislation expires January 1, 2024.

E. Assembly Bill 2588: Hospitals Must Pay for Training Programs

Current Law: Employer must indemnify employee for all necessary expenditure or losses directly related to discharge of employee's duties or obedience to employer's direction even if unlawful unless employee believed the directions to be unlawful.

New Law: An educational program or training provided or required by a general acute care hospital for an employee providing direct patient care or to an applicant for a direct patient care position constitutes a necessary expenditure or loss incurred by the employee/applicant directly related to the discharge of the employee's duties. An employer is prohibited from retaliating against an employee refusing to enter into a contract that violates these provisions. A prevailing plaintiff suing under these provisions may be awarded reasonable attorney's fees and costs.

F. Assembly Bill 2658: COVID Fallout: Expansion of Protections for Employees Who Refuse to Work in Unsafe Conditions

Current Law: Employees are prohibited from being laid off or discharged for refusing to work in violation of safety standards that create a real and apparent hazard to employees. Employees laid off or discharged for such a refusal have a cause of action for wages. Household domestic service is excluded as employment for these purposes.

New Law: The exclusion of household domestic work is eliminated except for such work that is publicly funded. It is a crime to willfully and knowingly direct an employee to remain in or enter an area closed because of public health or safety after receiving a notice to evacuate or leave.

G. ***URGENCY LEGISLATION EFFECTIVE SEPTEMBER 25, 2020:*** **Assembly Bill 3175: Expansion of Sexual Harassment Training in the Entertainment Industry**

Current Law: Before receiving an entertainment work permit, a parent or legal guardian of a minor and age-eligible minors must receive training in sexual harassment prevention, retaliation, and reporting resources. Employers of 5 or more employees must provide at least 2 hours of interactive training regarding sexual harassment to all supervisory employees and at least 1 hour of such training to all nonsupervisory employees.

New Law: Parents or legal guardians must ensure that minors who hold an entertainment work permit and aged 14-17 years old receive sexual harassment training and certify to the Labor Commissioner that the training has been completed. Training for these provisions must be conducted in a language understood by that person. It takes effect immediately as an urgency statute.

H. ***URGENCY LEGISLATION EFFECTIVE September 28, 2020:*** **Assembly Bill 2043: COVID Fallout: OSHA Ag Employer COVID-19 Response**

Current Law: Under existing law, the California Occupational Safety and Health Act of 1973, provides the Division of Occupational Safety and Health within the Department of Industrial Relations with the power, jurisdiction, and supervision overall employment and places of employment necessary to enforce and administer all occupational health and safety laws and standards and to protect employees. Under the act, the Occupational Safety and Health Standards Board within the division is authorized to adopt, amend, or repeal occupational safety and health standards and orders.

New Law: AB 2043 requires agricultural employers to comply with all Cal/OSHA-issued COVID-19-related guidance, keep themselves informed of the statistical data related to COVID-19 on Cal/OSHA's website, and ensure their and their employee's understanding of the COVID-19 Guidance Documents. AB 2043 requires the Division of Occupational Safety and Health (Cal OSHA) to disseminate, in both English and Spanish, information on best practices for COVID-19 infection prevention consistent with the Guidance Documents available on its website. Requires Cal OSHA to work collaboratively with community organizations, unions and employer representative groups to conduct a statewide outreach campaign, targeted at agricultural employees, to assist with the statewide dissemination of the best practices information and to educate employees on any COVID-19-related employment benefits to which they are entitled, including access to paid sick leave and workers' compensation. Requires Cal/OSHA to routinely post, via its website, information relating to the results of any investigation relating to practices

or conditions prescribed in the Guidance Documents or a COVID-19 illness or injury at a workplace of agricultural employees. As part of the campaign, Cal/OSHA, in partnership with community organizations and employee representatives, will make public service announcements on local Spanish radio stations and distribute workplace signs for employers to post in both English and Spanish.

I. Senate Bill 275: COVID Fallout: Health Care Employers Required to Stockpile PPE

Current Law: The California Department of Public Health implements various programs relating to public health. Every employer is required to furnish and use safety devices and safeguards, and to adopt and use practices that are reasonably adequate to render the employment and place of employment safe and healthful.

New Law: The California Department of Public Health and the Office of Emergency Services in coordination with other agencies must establish a personal protective equipment (PPE) stockpile along with guidelines for its procurement, management, and distribution. Beginning on January 1, 2023 or one year after the adoption of specified regulations, health care employers (clinics, health facilities, and home health agencies) must maintain an inventory of new, unexpired PPE for use in a declared state of emergency designed to last for 45 days of surge consumption. The Department of Industrial Relations is authorized to exempt health care employers unable to maintain a PPE stockpile due to supply chain limitations. The new law also establishes the Personal Protective Equipment Advisory Committee to recommend guidelines for procuring, managing, and distributing PPE.

J. *VETOED BY GOVERNOR:* Senate Bill 1102: Employers: Labor Commissioner: Required Disclosures.

Current Law: At the time of hiring, an employer must provide an employee with a written notice in the language normally used to communicate information to the employee. The Labor Commissioner must prepare and make available to employers a template containing the information specified above. Employers must provide employees compensation for travel time, bathroom access, meal and rest break areas, and protections from high heat, pesticide exposure, and other safety measures.

Proposed Law: An employer of H2-A employees would have been required to provide a specified notice about state and federal declared disaster information or applicable to the counties where the employees will be working. An employer would also have been required to provide an H-2A employee a written notice in Spanish containing specified information related to an H-2A employee's rights under federal and state law. The Labor Code would have been amended to include the full language of the required notice and to require the agency to issue a template that is "substantially similar."

Veto Message: In his veto message, the Governor stated: "While I applaud the intent of this bill to create accessible and easy to understand notifications, this statutory construction departs from previous H2-A notice requirements like those found in Labor

Code Section 2810.5 and prevents the agency from amending the template when new laws are passed or new court decisions affect the rights and obligations of H2-A employers and workers. Therefore, I am directing my Labor and Workforce Development Agency to develop and maintain a template contemplated in this bill to make available to H2-A employers, and I am returning SB 1102 without my signature."

K. ***URGENCY LEGISLATION EFFECTIVE SEPTEMBER 17, 2020:*** **Senate Bill 1159: Worker's Compensation: Creates Disputable Presumption that Cases of COVID-19 Were Acquired in the Workplace and New Reporting Requirements**

Current Law: Executive Order N-62-20 created a disputable presumption for any employee that was required to report to work and within 14 days was diagnosed with COVID-19. This Executive Order expired July 6, 2020.

New Law: As a general matter, SB 1159, provides for the following:

1. A disputable presumption that covered workers who contract COVID-19 did so in the course of employment.
2. A shortened time window to respond to workers compensation claims regarding COVID (30 or 45 days versus the usual 90) before the illness is presumptively compensable.
3. If the date of injury is before July 6, 2020 the claims administrator has 30 days to deny the claim.
4. If the employee is an essential employee such firefighters, peace officers, employees of health care facilities who provide patient care or custodial services, nurses, EMT's, and employees who provide direct patient care for home health agencies the 30-day claim denial window applies regardless of the date of COVID-19 illness.
5. a presumption of injury if an employee contracts COVID during a workplace **outbreak** if you have 5 or more employees
    a. Outbreak is defined as 4 or more employees in workplaces of fewer than 100 and 4% of the employee census for employers of 100 or more employees.
6. Specific issues:
    a. Conditions for the presumption of work-related infection
        i. The employee tests positive for COVID-19 within 14 days of the date on which the employee last worked at your place of employment
        ii. This date was on or after July 6, 2020
        iii. The employees positive test occurred during an outbreak at the place of employment

    Note that a place of employment typically excludes employee's home e.g. if telecommuting unless they are performing something like home health care services at a home.

b. Disputing the presumption: For employers to effectively dispute a presumption that an illness or death resulting from COVID-19 has occurred in the course and scope of employment, it must be able to present evidence such as:
    i. The measures in place to reduce the potential transmission of COVID-19 in the workplace
    ii. The employee's no-occupational risks of COVID-19 infection (e.g. presence in community)
    iii. Statements made by the employee (e.g. of others outside work with COVID such as family, friends; or that they go nowhere other than work and home)
    iv. Any other evidence normally presented to dispute a work-related injury
c. Use of FFCRA Sick Leave Benefits: Employees eligible for sick leave benefits available in response to COVID like FFCRA benefits must exhaust those first before using any workers compensation temporary disability payments. If the employee does not have these benefits, then they must receive temporary disability payments without the traditional three-day waiting period.
d. Certification of Disability: If an employee tests positive for COVID after May 6, 2020 they must be certified for temporary disability by a licensed physician within 15 days after diagnosis and recertified every 15 days for the first 45 days after diagnosis. If the employee tested positive before May 6, 2020, the employee must have obtained certification no later than May 21, 2020 documenting the period they were unable to work. The recertification requirements every 15 days for 45 days apply in these cases as well.
e. Reporting Requirements for Employees who Contract COVID: If the employer either knows or reasonably should have known that an employee has tested positive for COVID, within 3 business days, the employer must notify their workers compensation carrier. The following information must be included in the notification to their workers compensation carrier:
    i. An employee has tested positive. (exclude name or id number unless the employee asserts the infection was work related)
    ii. The date the employee tested positive (i.e. the date the specimen was collected versus results received)
    iii. The address of the place of employment during the 14 days prior to the COVID test.
    iv. The highest number of employees who reported to work at that work location in the 45-day period preceding the last day the employee with the positive COVID test worked there.

f. Retroactive Reporting Requirement: The employer must go back and report any positive COVID tests amongst their employees dating back to July 6, 2020 to their worker's compensation carrier. The above information must be provided for any of these prior COVID cases. Your workers compensation carrier can assist the employer in determining if the disputable presumption applies.

L. ***VETOED BY GOVERNOR:*** **Senate Bill 1257: Employment Safety Standards: Household Domestic Services**

Current Law: Current law requires employers to comply with certain standards relating to healthy and safe working conditions and charges the Division of Occupational Safety and Health with enforcing the act. The definition of employment creates an exception for household domestic service.

Proposed Law: The proposed law would have expanded the jurisdiction of the Division of Occupational Safety and Health to cover household domestic service employees working in residential dwellings, with the exception of services that are publicly funded.

Veto Message: In his veto message, the Governor stated: "I strongly share the belief of the bill's author and proponents that, like all other California workers, domestic service employees deserve protections to ensure that their workplaces are safe and healthy. That is why I was proud to sign legislation last year that extended collective bargaining rights to California's childcare workers and continue efforts through the Future of Work Commission to expand safety and opportunity for these workers. However, new laws in this area must recognize that the places where people live cannot be treated in the exact same manner as a traditional workplace or worksite from a regulatory perspective. SB 1257 would extend many employer obligations to private homeowners and renters, including the duty to create an injury prevention plan and requirement to conduct outdoor heat trainings. Many individuals to whom this law would apply to lack the expertise to comply with these regulations. The bill would also put into statute a potentially onerous and protracted "investigation by letter" procedure between Cal-OSHA and private tenants and homeowners. In short, a blanket extension of all employer obligations to private homeowners and renters is unworkable and raises significant policy concerns."

M. ***VETOED BY GOVERNOR:*** **Assembly Bill 2092: Emergency Ambulance Employees: Subsidized Protective Gear**

Current Law: Current law requires employers to furnish and use safety devices and safeguards and adopt and use practices that are reasonably adequate to render the

employment and place of employment safe and healthful. Existing law makes a violation of those requirements a crime.

Proposed Law: Would have required an emergency ambulance provider to establish a voluntary personal protective equipment (PPE) program that allows for the purchase of subsidized multi-threat body protective gear that is bullet, strike, slash, and stab resistant by an emergency ambulance employee pursuant to an employer-funded stipend. This legislation would have authorized an employee to voluntarily participate in a PPE program and to wear the PPE while on duty. An emergency ambulance provider would have been required to notify employees upon employment and annually of the opportunity to purchase multi-threat body protective gear.

Veto Message: The Governor indicated that existing regulations impose an affirmative obligation on employers to evaluation workplace hazards and provide PPE as appropriate at no cost to employees. This bill would hold employers responsible for only part of the multithread body protective gear, which conflicts with longstanding law for employers to furnish safety devices to protect their employees. It is unclear how these provisions contribute effectively towards the goal of maximizing safety for EMS personnel.

N. Assembly Bill 323: Newspaper Worker Status: Independent Contractors

Current Law: Newspaper workers (distributors and carriers) exempt from AB 5 test until January 1, 2021.

New Law: Amends Labor Code § 2750.3: Extends the exemption of specified newspaper distributors and newspaper carriers from the AB 5 ABC test by a year, to January 1, 2022. Deletes the condition that a newspaper carrier work under contract either with a newspaper publisher or distributor.

O. Assembly Bill 1947: Employment Violation Complaints: Extension of Time to Complaints

Current Law: Existing law authorizes people who believe that they have been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner to file a complaint with the Division of Labor Standards Enforcement ("DLSE") within six months after the occurrence of the violation. The Labor Commissioner then has three years to commence actions to enforce labor standards.

New Law: This law amends Labor Code section 98.7 to extend the period of time within which people may file complaints subject to the six-month deadline, described above, to within one year after the occurrence of the violations. This law also authorizes a court to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions

P. Assembly Bill 2143: Settlement Agreements: No Rehire Provisions

Current Law: Last year, California enacted a new law (Code of Civil Procedure 1002.5) prohibiting the inclusion of a no rehire provision in settlement agreements of employment disputes

New Law: AB 2143 makes some modest changes to this law, including creating an exception for employees found to have engaged in criminal conduct. This new law adds a requirement that the aggrieved person's (the employee) claim against the employer must have been filed in good faith, for the "no hire" clause prohibition to apply. In order for the sexual harassment/sexual assault/criminal conduct exception to apply, the employer must have documented the conduct before the aggrieved person files their claim, and also expands the exception to a documented good faith determination, before the employee filed his or her claim against the employer.

Q. Senate Bill 973: Employers: Annual Report: Pay Data

Current Law: Private employers with 100 or more employees is required to file an EEO-1 report with the EEOC annually.

New Law: This bill requires a private employer, that has 100 or more employees and is required to file an annual Employer Information Report (EEO-1) under federal law, to submit a pay data report to the Department of Fair Employment and Housing (DFEH) that contains information about employees' race, ethnicity and gender in various job categories on or before **March 31, 2021** and on or before March 31 each year thereafter. The DFEH is given related enforcement authority. This essentially creates California's version of the federal EEO-1 information that some employers must submit to the federal Equal Employment Opportunity Commission (EEOC).

It also authorizes the DFEH to receive, investigate, conciliate, mediate, and prosecute claims related to unequal pay based on gender or race. Further, it provides for the EDD to provide the DFEH with the names and addresses of all businesses with 100 or more employees.

If the DFEH does not receive the required report from an employer, it may seek an order requiring the employer to comply. The DFEH will maintain the pay data reports for a minimum of 10 years and it will be unlawful for the DFEH to make public any individually identifiable information obtained from the report prior to the institution of certain investigation or enforcement proceedings.

R. Assembly Bill 2399: California Paid Family Leave: Qualifying Exigency

Current Law: Employees may apply for wage replacement benefits under Paid Family Leave for individuals who need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner. Benefits are also available to parents who need time to bond with a new child entering their life either by birth, adoption, or foster care placement.

New Law: AB 2399 expands the reasons for which wage replacement benefits are available under California's Paid Family Leave program to include benefits during leaves taken to participate in qualifying exigencies related to covered active duty or call to covered active duty of the employee's spouse, domestic partner, child or parent in the Armed Forces of the United States.

S. Assembly Bill 979: Corporations: Board of Directors: Underrepresented Communities

Current Law: Existing law requires a publicly held domestic or foreign corporation whose principal executive office is located in California to have a minimum of one female director on its board. Existing law, no later than the close of the 2021 calendar year, additionally requires such a corporation with 5 directors to have a minimum of 2 female directors and such a corporation with 6 or more directors to have a minimum of 3 female directors. Existing law authorizes the Secretary of State to impose fines for violations of these provisions, as specified, and requires the moneys from these fines to be available, upon appropriation, to offset the cost of administering these requirements.

New Law: This law requires publicly held corporations whose principal executive office is in the state of California to include at least one director from underrepresented communities on its board by the end of 2021. By the end of 2022, boards with five to

eight directors must include two directors from underrepresented communities, and boards with more than nine directors must include a minimum of three directors from underrepresented communities. A member of an underrepresented community is defined as anyone who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual, or transgender.

T. Assembly Bill 1963: Child Abuse or Neglect: Mandated Reporters

Current Law: Existing law, the Child Abuse and Neglect Reporting Act, requires a mandated reporter, as defined, to report whenever they, in their professional capacity or within the scope of their employment, have knowledge of or observed a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Failure by a mandated reporter to report an incident of known or reasonably suspected child abuse or neglect is a misdemeanor punishable by up to 6 months of confinement in a county jail, by a fine of $1,000, or by both that imprisonment and fine. Under existing law, employers are strongly encouraged to provide their employees who are mandated reporters with training in these duties, including training in identification and reporting of child abuse and neglect.

New Law: This law would add a human resource employee of a business with 5 or more employees that employs minors to the list of individuals who are mandated reporters. The law also adds, for the purposes of reporting sexual abuse, an adult whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace of a business with 5 or more employees to the list of individuals who are mandated reporters. It also requires those employers to provide their employees who are mandated reporters with training on identification and reporting of child abuse and neglect.

U. Senate Bill 1384: Labor Commissioner: Financially Disabled Persons: Representation in Arbitration

Current Law: Existing law provides in a superior court proceeding challenging a Labor Commissioner decision, the Labor Commissioner has the discretion to represent a claimant who is unable to afford their own counsel and has requested such representation. In addition, if the claimant is only seeking to uphold an amount awarded by the Labor Commissioner and is not objecting to any part of the Commissioner's order, the Labor Commissioner must represent the claimant in the superior court proceeding.

New Law: This law expands the Labor Commissioner's discretion to represent a claimant who is unable to afford their own counsel such that it also includes arbitration proceedings that are applicable to the claim in lieu of a judicial forum. In addition, SB 1384 also provides that any claimant who is unable to afford legal counsel and who has a claim normally adjudicated by the Commissioner that is now subject to arbitration can have the Labor Commissioner represent them in the arbitration. In such cases, the Labor Commissioner, upon request, must represent such a claimant who is unable to afford counsel if the Labor Commissioner determines that the claim has merit after conducting an informal investigation. Finally, SB 1384 requires that any petition to compel arbitration of a claim pending before the Labor Commissioner be served on the Labor Commissioner. The bill then gives the Labor Commissioner the authority to represent the claimant in any such proceedings to determine the enforceability of the arbitration agreement.

V. Assembly Bill 1281: Privacy: California Consumer Privacy (CCP) Act

Current Law: Existing law, the California Consumer Privacy Act of 2018, grants, commencing on January 1, 2020, a consumer various rights with regard to personal information relating to that consumer that is held by a business. The act, among other things, requires a business that collects personal information about a consumer to disclose the consumer's right to delete personal information in a form that is reasonably accessible to consumers and in accordance with a specified process. The act, until January 1, 2021, exempts from its provisions certain information collected by a business about a natural person in the course of the natural person acting as a job applicant, employee, owner, director, officer, medical staff member, or contractor, as specified. The act also, until January 1, 2021, exempts from specified provisions personal information reflecting a written or verbal communication or a transaction between the business and the consumer, if the consumer is a natural person who is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, nonprofit, or government agency and whose communications or transaction with the business occur solely within the context of the business conducting due diligence regarding, or providing or receiving a product or service to or from that company, partnership, sole proprietorship, nonprofit, or government agency.

New Law: This law extends both exemptions until January 1, 2022. Employers must still comply with the CCPA's requirement to provide notice before, or at the time of, collecting personal information from an applicant or employee that describes every category of information that will be collected and the purposes for which it will be

used. CCPA regulations describing how employers can give a compliant notice are now in effect.

W. Recommended Action Items to prepare for 2021:

1. Review and update your employee handbooks, specifically including policies on family and medical leave, paid sick leave, leave for crime victims, and paid family leave benefits.

2. Make sure you understand your COVID-19 notice and reporting obligations.

3. Determine whether they are required to provide COVID-19 supplemental paid sick leave and develop policies for providing it,

4. Review your independent contractor arrangements to ensure you have applied the correct test.

5. If you are a public corporation with headquarters in California, ensure your board of directors has the appropriate number of directors from underrepresented communities.

6. If you are a private employer with 100 or more employees, make sure to submit a pay data report to the DFEH by March 31, 2021.

7. If you have minor employees, be aware of your mandated child abuse reporting obligations and provide training on the subject to human resources and supervisors.

8. If you file a Statement of Information, remember to include whether any officer or director, or for LLC's manager or member, has an outstanding final judgment for any wage and hour violation.

9. Ensure you are in compliance with state and local minimum wage laws. On January 1, 2021, the state minimum wage goes up to $14 an hour for employers with 26 or more employees ($13 an hour for employers with fewer than 26 employees). Local minimum wages may be higher.