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Governor Newsom Signs A Slew of New Employment Laws for 2022

California Employment Law Update Blog on **October 18, 2021**

As the 2021 legislative season came to a close, Governor Gavin Newsom signed numerous bills into law. From arbitration to workplace safety, these laws will impact employers across the state. We have summarized the most important ones for you here:

Arbitration

Arbitration fees will now need to be paid upon receipt of invoice unless the arbitration agreement expressly establishes a payment schedule. The new law is meant to prevent employers from causing delay in arbitration proceedings by failing to timely pay fees or asking for extensions, unless all parties agree. The new law also provides that any time specified in a contract of adhesion for the performance of an act required to be performed shall be reasonable. (**SB 762**)

COVID-19

Employers' notification, benefits, and disinfecting requirements after COVID-19 exposure have been clarified. By way of urgency statute (i.e., the law becomes effective immediately), last year's COVID-19 notice and reporting bill (AB 685) was clarified by AB 654, which took effect on October 5, 2021. The bill revises the language in AB 685 used to describe employer's COVID-19 notice obligations to employees about COVID-19-related benefits and the disinfection and safety information after potential COVID-19 exposure. The law requires employers to send notice to all employees who were "on the premises at the same worksite as the qualifying individual within the infectious period" rather than solely to "employees who may have been exposed." The law also revises the time frame in which employers must give notice of COVID-19 outbreaks to local public health agencies from "within 48 hours" to "within 48 hours or one business day, whichever is later." The bill exempts certain licensed health facilities from the requirement to report outbreaks to local health agencies since those facilities already have other legal reporting obligations. (**AB 654**)

Recall rights for "qualified" employees have been expanded. Another urgency statute, which took effect on April 16, 2021, provides recall rights to "qualified" employees who were employed by covered employers for six months or longer during the 12 months before January 1, 2020, worked at least two hours per week, and were laid off because of any non-disciplinary reason related to the COVID pandemic. Covered employers include hotels, private clubs, event centers, airport hospitality operations, airport service providers, or building service providers (i.e., janitorial service). Covered employers must follow specific requirements to provide notice of job openings to "qualified" employees. Recall rights end on December 31, 2024. (**SB 93**)

Public health officials required to publish COVID-19 related orders and guidance on their websites. With this new law, when the State Department of Public Health issues a statewide order or mandatory guidance, or when local health officers issue an order related to preventing the spread of COVID-19, they will have to publish the order or guidance on their website along with the date the order goes into effect. (**SB 336**)

Discrimination, Harassment, & Retaliation

Nurses will be required to undertake implicit bias training. Beginning January 1, 2023, nursing programs and schools will be required to include one hour of direct participation in implicit bias training. Registered nurses (RN) will also be required to complete one hour of implicit bias continuing education within the first two years of licensure. Hospitals must also implement an evidence-based implicit bias program as part of any new graduate training program that trains new RNs. (**AB 1407**)

Record Keeping

Employers will need to retain personnel records for longer periods of time. The new law extends the current personnel records retention requirement from two to four years. If litigation has been filed, employers must retain such records until the applicable statute of limitations has run, or until the conclusion of the litigation, whichever occurs later. SB 807 also makes several changes to the filing and tolling deadlines for bringing claims for certain civil rights violations, including claims on behalf of a class. (**SB 807**)

Leave Laws

The scope of family care and medical leave rights has changed. The new law adds parents-in-law to the definition of a "parent" for purposes of family care and medical leave under the California Family Rights Act ("CFRA"), thereby expanding the scope of CFRA leave. The bill also significantly modifies the process related to the small employer family leave mediation pilot program, applicable to employers with between five and 19 employees. Among other changes, whenever an employee requests an immediate right-to-sue alleging a violation of the family care and medical leave provisions of the CFRA, the law requires the Department of Fair Employment and Housing ("DFEH") to provide notice of the pilot program and the mediation requirement prior to filing a civil action if mediation is requested by the employer or employee. (**AB 1033**)

Medical Accommodations

Health care providers face stricter requirements when providing documentation regarding emotional support dogs. Healthcare providers will be prohibited from providing "emotional support dog" documentation unless the provider: (1) possesses a valid, active license and includes certain enumerated information concerning that license in the documentation; (2) is licensed to provide services within the scope of the license in the jurisdiction in which the documentation is provided; (3) establishes a client-provider relationship with the individual at least 30 days prior to providing documentation concerning the individual's need for an emotional support dog; (4) completes a clinical evaluation of the individual regarding the need for the emotional support dog; and (5) provides verbal or written notice to the individual that knowingly and fraudulently representing themselves as the owner or trainer of a guide, signal, or service dog is a misdemeanor. (**AB 468**)

Non-Disclosure and Confidential Settlement Agreements

Prohibition of non-disclosure provisions in settlement agreements is expanded. Currently, Civil Procedure Code section 1001 ("Section 1001") prohibits settlement agreement provisions that bar disclosure of factual information regarding an administrative or civil claim for sexual assault, sexual harassment, harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act. For purposes of agreements entered into on or after January 1, 2022, the new bill expands the prohibition to include acts of workplace harassment or discrimination ***not*** based on sex. Consistent with existing law, a provision that shields the identity of the claimant and facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. Also, the law does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim. And the bill does not limit the ability of parties to agree to complete confidentiality in settlements of threatened claims that have not been filed before an administrative agency or court.

Greater limits on non-disclosure agreements for current and departing employees. In addition to Section 1001, SB 331 also amends a portion of the California Fair Employment and Housing Act ("FEHA"), Government Code section 12964.5. Under current law, FEHA 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 non-disparagement 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.

This new law provides that, after January 1, 2022, unlawful acts in the workplace include ***any*** harassment or discrimination and prohibits an employer from requiring an employee to sign a non-disparagement agreement or other document in exchange for a raise or bonus, or as a condition of employment or continued employment if it has the purpose or effect of denying the employee the right to disclose information about those acts. Further, if an employer requires employees to sign a non-disclosure agreement during employment, the new law requires that employers include the following language: " **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.**"

SB 331 also expands existing law by making it unlawful for an employer or former employer to include *in any separation agreement* a provision that prohibits the disclosure of information about unlawful acts in the workplace. Beginning January 1, 2022, any non-disparagement or other contractual provision that restricts an employee's or former employee's ability to disclose information related to conditions in the workplace must include, in substantial form, the following language: "**Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.**" Further, SB 331 requires: (1) that a separation agreement notify the employee that they have a right to consult an attorney regarding the agreement; and (2) the employer to provide the employee with a reasonable time period (at least five business days) in which to do so.

Importantly, the requirements above regarding separation agreements (i.e., the required statement and notice regarding right to counsel) do not apply to a "negotiated settlement agreement to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process." Therefore, employers must include the disclaimers and provide the required review/consideration period only in releases where employees have **not** yet filed a claim or charge with an administrative agency or in court, or pursued through an employer's internal complaint process—e.g., in routine separation agreements during a layoff or restructuring. Employers also should note that "negotiated," in this context, means that the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

Agreements or other documents that violate the new law are contrary to public policy and unenforceable. (**SB 331**)

Unfair Competition

Authority of county counsel to prosecute unfair competition cases increases. In an expansion of Sections 17204, 17206, and 17207 of the California Business and Professions Code, which authorizes the prosecution of injunctions and imposition of civil penalties against those who are engaging or have engaged in unfair competition, SB 461 allows actions to be brought by the county counsel of a county within which a city has a population in excess of 750,000 people. Prior to the enactment of SB 461, the Attorney General, a city attorney of a city having a population in excess of 750,000, and county counsel authorized by agreement with the district attorney, could already bring actions under these code sections. (**SB 461**)

Wage and Hour

Food delivery and facility personnel will keep all of their tips. The new law makes it unlawful for a food delivery platform to retain any portion of amounts designated as a tip or gratuity. Instead, food delivery platforms must pay any tip or gratuity for a delivery order to the person delivering the food or beverage. Any tip or gratuity for a pickup order must be paid in its entirety to the food facility. (**AB 286**)

Warehouse distribution centers will be required to disclose quotas to nonexempt employees. Under this new law, warehouse distribution centers will be required to provide to each nonexempt employee, upon hire, or within 30 days of the effective date of these provisions, with a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed, or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. An employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws. An employer is prohibited from taking adverse action against an employee for failure to meet a quota that has not been disclosed or for failure to meet a quota that does not allow a worker to comply with meal or rest periods or occupational health and safety laws. If a current or former employee believes that meeting a quota caused a violation of their right to a meal or rest period or required them to violate any occupational health and safety law or standard, they have the right to request, and the employer is required to provide, a written description of each quota to which the employee is subject and a copy of the most recent 90 days of the employee's own personal work speed data. A current or former employee can bring an action for injunctive relief to obtain compliance with specified requirements, and may, upon prevailing in the action, recover costs and reasonable attorney's fees in that action. The Labor Commissioner is required to enforce these provisions. (**AB 701**)

For further information please check out our recent blog post.

Intentional wage theft will be punishable as grand theft. Any employer found to have engaged in the intentional theft of wages, gratuities, benefits, or other compensation, in an amount greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees, in any consecutive 12-month period may be convicted of grand theft. These wages, gratuities, benefits, or other compensation that are the subject of a prosecution under these provisions can be recovered as restitution. For the purposes of these provisions, independent contractors are included within the meaning of employee, and hiring entities of independent contractors are included within the meaning of employer. (**AB 1003**)

Brand guarantors and garment manufacturers prevented from paying piece-rates, required to maintain records for four years, and may be held jointly and severally liable for unpaid wages to contractors. A new law imposes joint and several liability for brand guarantors, and garment manufacturers for payment of wages to employees of their contractors. It also limits garment manufacturers' ability to pay their workers piece-rates, imposing a penalty of $200 payable to the employee, for each employee when paid by piece-rate. Additionally, garment manufacturers and brand guarantors will be required to maintain all garment work-related documentation, such as contracts, invoice, and purchase orders, for four (4) years. Existing law requires employers to maintain these records for three (3) years. (**SB 62**)

Labor Commissioner authorized to record liens on real property. The new law authorizes the Labor Commissioner to create, as an alternative to a judgment lien, a lien on real property to secure amounts due to the commissioner for final citation, findings, or decision. (**SB 572**)

Sub-minimum wages permits for disabled employees will be phased out. The new law requires the development of a plan to phase out the program that currently authorizes employers with special licenses to pay less than minimum wage for employees with physical or mental disabilities under the subminimum wage certification program. SB 639 prohibits new licenses from being issued after January 1, 2022. Existing permit holders will need to meet certain benchmarks to renew their licenses in the phase-out plan. (**SB 639**)

Unionized janitorial workers will not be able to bring PAGA claims. A new law creates a limited exemption from the Private Attorneys General Act of 2004 for certain janitorial employees covered by a valid collective bargaining agreement in effect before July 1, 2018. Janitorial employees will no longer be authorized to bring civil actions under PAGA if the collective bargaining agreement ("CBA") provides for wages, hours worked (including overtime), and other specified working conditions. Existing law authorizes aggrieved employees to bring civil actions to recover civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency ("LWDA") on behalf of the employee and other current and former employees for violating certain provisions of the California Labor code. The PAGA exemption will expire the date the CBA expires or July 1, 2028, whichever is earlier. SB 646 becomes effective January 1, 2022. (**SB 646**)

Employers will be permitted to distribute required employment-related posters via e-mail. Employers will be allowed to distribute information they are required to physically post to employees via email with document(s) attached. Notably, the new law does not absolve the employer of its obligation to physically display the required postings under other state or federal laws. (**SB 657**)

Workplace Safety

Cal/OSHA directed to create an advisory committee to recommend state policies to the Department of Industrial Relations and the Legislature to protect privately funded household domestic workers' health and safety. Cal/OSHA will also be required to develop voluntary health and safety guidance to educate domestic workers and employers. (**SB 321**)

Cal/OSHA can issue citations for two new categories of health and safety violations. A new law significantly expands the enforcement power of Cal/OSHA by creating two new violation categories for which Cal/OSHA can issue citations: "enterprise-wide" violations and "egregious" violations:

Enterprise-Wide Violation: This bill creates a rebuttable presumption that a violation committed by an employer with multiple worksites is "enterprise-wide" if Cal/OSHA determines that the employer has a written policy or procedure that violates certain safety rules or Cal/OSHA has evidence of a pattern or practice of the same violation involving two or more of the employer's worksites. The employer can rebut the presumption by showing that its other worksites have different, compliant written policies and procedures. If an employer fails to rebut the presumption, Cal/OSHA may issue an enterprise-wide citation requiring abatement. An employer's appeal of an enterprise-wide violation will stay abatement. Enterprise-wide citations will carry the same penalties as repeated or willful citations, up to $134,334 per violation.

Egregious Violation: The bill gives authority to Cal/OSHA to issue a citation for an "egregious violation" if it believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order or regulation based on at least one of seven factors defined in the statute (i.e., "the employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation"). The conduct underlying the violation has to have occurred within five years of the citation. The bill requires each instance of an employee exposed to that violation to be considered a separate violation for the issuance of fines and penalties, which can add up very quickly for impacted employers.

The bill authorizes Cal/OSHA to "seek an injunction restraining certain uses or operations of employment if it has grounds to issue a citation."

The bill also gives Cal/OSHA the authority to issue a subpoena during the course of an investigation if an employer fails to "promptly" provide Cal/OSHA requested information or Cal/OSHA may enforce a subpoena if the employer fails to provide such information in a "reasonable period of time." (**SB 606**)

We will continue to monitor the application and enforcement of these new laws and provide relevant updates.

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