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2022 California Employment Law Round-up

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It may feel like only yesterday when it was 2020, but 2021 is now coming to an end. This means a new wave of employment laws for employers in California in 2022. Below is a brief summary of the laws employers should be aware of.

Bills that require employers to update their policies:

SB 331 – Settlement Releases and Agreements Relating to Employment

Known as the "Silenced No More Act," previously enacted in 2019 under SB 820, which prohibited confidentiality clauses relating to sex-based discrimination and harassment, SB 331 now amends that Act and imposes further restrictions for employers with respect to severance and settlement agreements. Previously, California Code of Civil Procedure section 1001, enacted as part of SB 820, prohibited confidentiality and non-disparagement agreements that would prevent the disclosure of claims relating to harassment or discrimination *based on sex*. SB 331 now expands those protections to cover harassment or discrimination *on any protected basis* and creates additional obligations for claims asserted either in civil court or with administrative agencies, as well as claims that are addressed prior to litigation, such as in separation and severance agreements. Each are discussed below.

Litigation Settlement Agreements

Effective January 2022, the settlement of litigation or administrative agency actions may not include language preventing the disclosure of factual information relating to *any type* of workplace harassment, discrimination, or retaliation (i.e., claims based on any protected characteristic under the Fair Employment and Housing Act) and not just those based on sex. The settlement agreement must also include the special language as discussed below. The amount of the settlement may still be kept confidential and the employee may still request that facts which could lead to the discovery of the employee's identity remain confidential, as previously provided under SB 820.

Separation and Severance Agreements

In addition to expanding the existing protections with respect to sex-based claims to now cover claims on any protected basis under the FEHA, SB 331 also adds Government Code section 12964.5, which applies to employers offering severance agreements, non-disparagement provisions, and separation agreements. Provisions need to be added to include language for the employee's right to disclose unlawful acts in the workplace, whether in a settlement agreement or in a separation or severance agreement. Below is the language that needs to be included:

> *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*.

Also, SB 331 now requires that all employees—even those under 40 years of age—must be provided with at least five days to consider a severance agreement and to be advised that they have the right to consult an attorney regarding the agreement. An employee can sign prior to the five-day period as long as the shortened period is "knowing and voluntary," and not induced by the employer's "fraud, misrepresentation, or threat to withdraw or alter the offer."

This law does not apply to negotiated settlements to resolve a pre-litigation claims under the Fair Employment and Housing Act (FEHA) if (1) the separation agreement is voluntary, deliberate, and informed; (2) the agreement provides consideration of value to the employee; and (3) the employee is given notice and the opportunity to retain an attorney or is represented by an attorney.

It is important to note that SB 331 does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee's separation from employment, provided the release of waiver is otherwise lawful and valid.

SB 807 – Required to Maintain Personnel Records for Four Years

SB 807 requires employers to now maintain personnel records for four years from the date of creation, instead of the prior two years, and also four years from the date of termination of an employee or non-hire of an applicant.

SB 807 also added many new technical requirements to the FEHA with respect to the procedures and time frames for filing complaints under the FEHA and litigating claims. If an employer has notice that a verified complaint has been filed against it under the FEHA, then it must preserve all records and files until (1) the time period for filing the civil action has expired, or (2) the first date after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.

SB 657 – Electronic Posting Requirements

SB 657 provides employers with alternative posting options as more employees work remotely. SB 657 allows employers to provide certain workplace postings to employees via email. Nonetheless, employers still must comply with existing California posting requirements and physically post documents in their workplace. Examples of such required postings include the appropriate California Wage Orders, regular payday schedules and the time and place of payment notices, safety rules, and employee rights under whistleblower laws, among others. This law also does not change federal posting requirements, such as the minimum wage and posting requirements under the Family Medical Leave Act ("FMLA").

AB 1033 – Minor Expansion to CFRA

The California Family Rights Act ("CFRA") currently defines "family member" to include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has a serious health condition. AB 1033 now expands the definition of "family member" to also include "parents-in-law."

AB 1033 also now requires the Department of Fair Employment and Housing ("DFEH") to notify an employee in writing of the requirement for mediation under the DFEH's small employer mediation program prior to filing a civil action, and requires an employee to contact the DFEH's dispute resolution division to indicate whether they are requesting mediation.

Bills Related to COVID-19

AB 654 – Amended COVID-19 Notice Requirements

Labor Code section 6409.6 previously required employers to notify employees, the employees' exclusive representative (such as a union), and subcontractors that they might have been exposed to COVID-19 within one business day of the employer receiving notice.

Effective January 1, 2022, employers must notify all employees, employees' exclusive representative (such as a union), and subcontractors who were "on the premises at the same worksite as the qualifying individual within the infectious period." Pursuant to the CDC, the "infectious period" for asymptomatic individuals generally is 10 days after the first positive test. For symptomatic individuals, it is 10 days after onset of symptoms and after resolution of fever for at least 24 hours and improvement of other symptoms.

The definition of "workplace" also is amended to exclude locations: (1) where the employee worked alone without exposure to other employees, (2) the employees' personal residence, and (3) an alternative work location chosen by the employee when the employee is working remotely.

AB 654 also amends notice requirements in the event of an "outbreak." Previously, if the employer was notified of the number of cases that meet the definition of "outbreak," the employer must, within 48 hours, notify the local public health agency of the names, number, occupation, and worksites of employees who meet the definition of "qualifying individual." Now, notice is required within 48 hours or one business day, whichever is later.

AB 654 also exempts additional industries from the reporting requirement, including: (1) community clinics, (2) rural health clinics, (3) federally qualified health centers, (4) chronic dialysis clinics, (5) adult day health centers, (6) home health agencies, (7) pediatric day health and respite care facilities, (8) hospices, (9) community care facilities, (10) residential care facilities for persons with chronic life-threatening illness, (11) residential care facilities for the elderly, and (12) child day care facilities. This law sunsets on January 1, 2023.

SB 93 – COVID-19 Recall Obligations

SB 93 requires certain employers to rehire employees that were laid off due to COVID-19. SB 93 applies to the following employers: (1) hotels with 50 or more guest rooms, (2) private clubs that contain at least 50 guest rooms that they offer to members for overnight lodging, (3) event centers with more than 50,000 square feet or 1,000 seats used for events, (4) airport hospitality operations, (5) airport service providers, and (6) office services that include janitorial, building or security services. SB 93 does not impose any obligations on employers who are not engaged in these specific industries.

This law applies to employees if they had been employed by the company for at least six months and were laid off due to COVID-19. Open positions must be offered to laid-off employees within five business days of establishing the position. The offer must be made in writing, by hand, or to the employees' last known physical address, and by email and text if known. The offers must be made to "qualified" laid-off employees, meaning those who held the same or a similar position.

The employee must be given at least five business days from receipt of the offer to respond. If there is more than one employee who is qualified, the employee with the most seniority must be offered the position. Multiple offers can be made to multiple laid-off employees for the same position at the same time, with employment conditioned upon seniority of those who accept. If the company hires a new employee and does not rehire a laid-off employee, then the company must provide written notice to the laid-off employee within 30 days, including the reasons for the decision and the seniority of the employee(s) hired instead.

Employers who do not comply are subject to a $100 penalty per employee, plus $500 for each day the employee's rights are violated until the violation is cured. This law is enforced by the Division of Labor Standards Enforcement, and can seek reinstatement, front pay, back pay, payment on the value of any of the benefits the employee would have received, and interest on any such amounts, in addition to fines.

SB 93 applies from April 16, 2021 to December 31, 2024.

Bills Related to Wages

AB 1003 – Wage Theft

Starting January 1, 2022, AB 1003 adds section 487m to the California Penal Code, which specifically provides for criminal penalties for wage theft by an employer. This new law defines the "theft of wages" as "intentional deprivation of wages" as defined in Labor Code section 200. Under this provision of the penal code, an independent contractor is included within the definition of an "employee." The bill specifies that the intentional theft of wages in an amount above $950 from any single employee, or $2,350 in the aggregate from two or more employees, by an employer in any consecutive 12-month period, may be punished as grand theft under state law.

AB 1561 and AB 1506 – Exemptions from AB 5

AB 1561 and AB 1506 create further exemptions from AB 5 for certain companies. AB 1561 exempts insurance claims adjusters, insurance third-party administrators, construction industry subcontractors, and manicurists from the more strict ABC test for determining whether a worker is an independent contractor. AB 1506 adds an exemption for newspaper carriers from the ABC test. These employees are instead governed by the multifactor test previously adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. These exemptions are set to expire on January 1, 2025.

AB 1561 also clarifies the relationship between data aggregators and their research subjects. Importantly, this law removes the previous requirement that research subjects are to be paid the minimum wage for the research task in which they have willingly engaged.

Minimum Wage Increase – SB 3 (2016)

Effective January 1, 2022, the California state minimum wage will increase to $15.00 per hour ($14.00 per hour for employers with 25 or fewer employees). As a result, the monthly salary for California exempt-status employees will

increase to $5,200 per month, or $62,400 annual salary (which is equal to twice the minimum wage based on a 40-hour workweek).

For computer software employees, their minimum hourly rate of pay must be at least $50.00 and minimum monthly salary must be at least $8,679.16 ($104,149.81 annually) beginning January 1, 2022. For licensed physicians and surgeons, their minimum hourly rate of pay must be at least $91.07 beginning January 1, 2022.

Industry-Specific Laws

AB 701 – Employee Protections from Warehouse Quotas

AB 701 regulates the use of quotas at warehouse distribution centers in California and provides employee protections from quotas that prevent employees from taking compliant meal and rest periods, use bathroom facilities, or encourage violations of occupational health and safety laws. The law applies to employers that have 100 or more employees at a single warehouse distribution center, or 1,000 or more employees at one or more "warehouse distribution centers" in California. A quota is defined as "a work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard."

Employers must provide each employee upon hire or within 30 days: (1) a written description of each quota that applies to the employee; (2) the quantified number of tasks to be performed or material to be produced or handled within the defined time period; and (3) any potential adverse employment action that could result from the failure to meet the quota.

Current and former employees who believe that meeting a quota caused a violation of their right to take a meal or rest period, or required them to violate an occupational health and safety law, may request a written description of each quota appliable to them. Employees—including former employees—may make this request orally and in writing, and employers then have 21 days to provide this information.

Employees may seek injunctive relief, costs and attorneys' fees. Employees also may pursue claims under the Private Attorney General Act, although employers have 33 days to cure any violations.

AB 62 – Expansion in Retailer Liability

AB 62 expands liability for "brand guarantors" for wage and hour violations committed by their manufacturing vendors, even if the brand guarantor is unaware of any such wage and hour violations. A "brand guarantor" is defined as any person contracting for the performance of garment manufacturing, which could hold clothing brands, holding companies, and even retailers liable for violations that occur in manufacturing facilities.

Bills Related to Cal/OSHA

SB 606 – Expansion of Cal/OSHA

SB 606 expands the authority of Cal/OSHA. This law addresses enterprise-wide violations and egregious violations. For employers with multiple worksites, there is a rebuttable presumption that a violation is enterprise-wide if the employer has a written policy that violates Cal/OSHA or if Cal/OSHA has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one worksite. For egregious violations, each instance of an employee exposed to the violations is considered a separate violation for purposes of fines and penalties as opposed to a per-incident basis.

This article highlights key new laws with broad impact, but employers should be aware that other new laws and amendments also may impact them in 2022. We recommend that California employers consult with employment counsel to ensure compliance, as many of these new laws expand the scope of risk for employers and require changes to existing workplace policies and practices.

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