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Blog Post

California's Sweeping Expansion of Employment Laws

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California has enacted a host of new laws impacting family and medical leave, coronavirus reporting obligations, workers compensation, pay gap data, worker classifications, and more. Here are the highlights, including when employers must abide by the new laws.

I. Effective Immediately

A. SB 1159: Coronavirus Workers' Compensation Bill

Under SB 1159, more employees may now receive workers' compensation benefits if they suffer illness or death resulting from COVID-19 on or after July 6, 2020 up until January 1, 2023. The bill both codifies Executive Order N-62-20, issued by Governor Newsom on May 6, 2020, and provides two new rebuttable presumptions that an employee's illness related to COVID-19 is an occupational injury and therefore eligible for workers' compensation benefits if specified criteria are met.

The first rebuttable presumption extends Executive Order N-62-20, which allowed any employee who reported to their place of employment between March 19, 2020 and July 5, 2020, and who tested positive for or was diagnosed with COVID-19 within the following 14 days during that time period to

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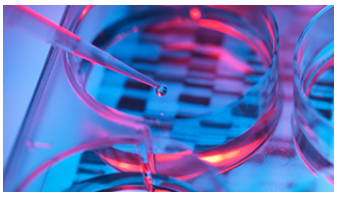
receive workers' compensation. This rebuttable presumption is extended beyond the July 5, 2020 deadline for first responders and health care workers.



The second rebuttable presumption provides that all other employees not initially covered by N-62-20 may qualify for workers' compensation coverage for COVID-19 illnesses, so long as:

1. the employer has five or more employees; and
2. the employee tests positive for COVID-19 within 14 days after reporting to their specific workplace (not including an employee home or residence) during an outbreak. The law defines an "outbreak" to occur:

    a) if the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; or

    b) if the employer has more than 100 employees at a specific place of employment, four percent (4%) of the number of employees who reported to the specific place of employment, test positive for COVID-19; or

    (c) a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, or the Division of Occupational Safety and Health due to a risk of infection of COVID-19.

If the presumption applies, the employee is entitled to "full hospital, surgical, medical treatment, disability indemnity, and death benefits." However, SB 1159 requires an employee to exhaust any COVID-19 related paid sick leave benefits, such as Emergency Paid Sick Leave under the Family First Coronavirus Response Act (FFCRA), and meet certain certification requirements before receiving temporary disability benefits.

B. AB 5: Continues to Evolve with New Exemptions and Clarifications from AB 2257

While the controversial independent contractor ABC Test codified by AB 5 remains intact, AB 2257 makes several significant changes that are effective immediately. The amendment clarifies the requirements for existing exemptions for writers, still photographers, and journalists, and adds many new exemptions and limitations to the original law. Added exemptions include, but are not limited to, real estate appraisers and home inspectors, manufactured housing salespersons, certain animal services workers, individuals providing underwriting inspections and other services for the insurance industry, licensed landscape architects, and certain occupations in connection with the music industry.

The law also makes several changes to the business-to-business exemption. The original business-to-business exemption required that the business service provider provide services directly to the contracting business rather than to customers. However, AB 2257 adds that this restriction does not apply if the business service provider's employees are solely performing services under the name of the business service provider and the business service provider regularly contracts with other businesses. The law goes on to clarify that the business-to-business exemption will apply to business relationships between two (2) or more sole proprietors and that the service provider may use proprietary materials of the contracting agency that are necessary to perform the services of the contract. Each contract with a business service provider must also include the payment amount, rate of pay, and the due date for the payment.

AB 2257 loosens AB 5's requirement that a business service provider "actually" contract with other businesses and provide similar services to simply state that business service providers "can" contract with other businesses. Therefore, if a business

service provider holds itself out to the public, it does not actually need to contract with more than one business service provider at any given time, if it chooses not to.

The law further broadens the types of services covered by the business-to-business and referral agency exemptions to *any* type of service being provided, by adding the phrase "including but not limited to," and adding multiple additional examples of services to the exemption list (with everything from wedding planning and graphic design to dog walking and pool cleaning). To go along with these changes, the referral agency exemption also has been modified so that service providers are free to provide services to other clients but are not required to maintain a varying clientele. Notably, AB 2257 provides that this expansion does not apply to industries where workers are at "high-risk" of misclassification, including janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services, other than minor home repair.

In sum, the California legislature is attempting to address the employment classification of many specific job titles with this amendment. In addition to these changes, the upcoming election may bring further changes to the infamous statute. Not only have gig economy giants like Uber and Lyft spent an exorbitant $185 million on Proposition 22 in order to continue to categorize drivers as independent contractors, but Democratic presidential nominee Joe Biden has also made a vow to enact federal laws that are modeled after the ABC Test that could make California's changes to independent contractor status national. With this ever-changing environment, employers must continue to remain flexible and consult with counsel on how to properly categorize employees and contractors on a going forward basis.

C. AB 979: Diversity in Leadership

In response to the call for greater social justice and diversity initiatives from companies, the California legislature enacted AB 979, which requires publicly held corporations headquartered in California to diversify their boards of directors with directors from "underrepresented communities" by December 31, 2021.

AB 979 defines "director from an underrepresented community" as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender."

In order to comply with the law, publicly held corporations with principal executive offices in California must have at least one director from an underrepresented community on their boards by December 31, 2021. For companies with a board of nine or more directors, there must be a minimum of three directors from underrepresented communities by December 31, 2022. Similarly, corporations with boards of more than four but less than nine directors must have a minimum of two directors from underrepresented communities.

Companies who fail to comply risk a fine of $100,000 for the first violation and $300,000 for subsequent violations, starting no later than March 1, 2022. To put even more weight behind the goal of the new law, the California Secretary of State will also publish annual reports on its website documenting compliance with these diversification requirements.

II. Effective January 1, 2021

A. SB 1159: New Coronavirus Reporting Requirements to Claims Administrator

SB 1159 also imposes new reporting requirements on an employer. Namely, when an employer "knows or reasonably should know that an employee has tested positive for COVID-19," the employer must report

certain information to its workers' compensation claims administrator within three business days. The employer must notify the administrator:

1. That an employee has tested positive. The employer shall not provide any personally identifiable information regarding the employee who tested positive unless the employee claims the infection is work-related or has filed a claim form pursuant to Labor Code Section 5401;
2. The date the employee tests positive, which is the date the specimen was collected for testing;
3. The address or addresses of the employee's specific place(s) of employment during the 14-day period preceding the date of the employee's positive test; and
4. The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

Employers may be subject to civil penalties of up to $10,000 for intentionally submitting false or misleading information, or for failing to report required information.

B. AB 685: Notice Requirements to Employees and Right to Shut Down

Under AB 685, within **one day** of an employee testing positive for or being exposed to COVID-19, an employer must provide written notice to:

1. all employees who were at the worksite when a potentially infected individual was there and who may have been exposed to the virus as a result; and
2. the employees' exclusive representative, if applicable.

Employers with multiple locations, buildings or floors do not necessarily need to provide notice of potential exposure throughout the entire company—the notice requirement is limited to the specific "worksite" the qualifying individual entered, such as "Building 1" and not necessarily the entire facility site.

The notice must inform all employees that they may have been exposed to COVID-19 and must alert them to any leave entitlement or benefits under any federal, state, or local laws, such as COVID-19-related benefits, workers' compensation benefits and paid sick leave. The employer must also identify antiretaliation and antidiscrimination protections available to the employee.

Finally, the employer must notify all employees of its plans for implementing disinfection protocols and safety plan to eliminate further exposures pursuant to the federal Centers for Disease Control guidelines, and retain records of the notifications for at least three years.

The written notice may be sent in the manner that the employer normally uses for employee communication (i.e. email or mail) and must be in both English and the language understood by the majority of employees. Employers must be sure not to release any private information in the notice, such as the name of the employee who tested positive.

Equally important, employers must notify the local public health agency in the jurisdiction of a worksite of a qualifying "outbreak," as defined by the State Department of Public Health, within 48 hours.

Failure to comply with these requirements may subject the employer to a civil penalty.

AB 685 also allows the state's Division of Occupational Safety and Health (Cal/OSHA) to shut down a work site if the coronavirus poses an "imminent hazard." However, any restrictions

imposed by Cal/OSHA must be limited to the immediate area where the imminent hazard exists and cannot prohibit any entry into or operation within a workplace that does not cause a risk of infection. This provision of AB 685 sunsets on January 1, 2023.

While AB 685 is not in effect until January 2021, employers are encouraged to start developing a "COVID-19 Plan" to address how they will deal with exposures, and consult counsel whenever there is a positive confirmed case of COVID-19 for guidance on the proper notification/contact tracing requirements.

C. SB 1383: California Fair Rights Act Expands to Small Employers and Includes Additional Leave Eligibility

Under the current version of the California Family Rights Act (CFRA), employees may only qualify for CFRA leave if their worksite has 50 or more employees in a 75-mile radius. Similarly, an employee would not be able to take "baby bonding" leave under the New Parent Leave Act (NPLA) if their worksite had fewer than 20 employees within a 75-mile radius.

Effective January 1, 2021, SB 1383 significantly expands CFRA leave law by applying it to all California employers with at least five employees and effectively repeals the NPLA by requiring employers with at least five employees to permit use of CFRA leave for baby bonding instead.

In addition to expanding CFRA to small employers, SB 1383 allows employees to take covered leave to care for grandparents, grandchildren, and siblings in addition to the original covered family members of spouse, registered domestic partner, child, or parent. SB 1383 also amends the definition of "child" to eliminate the previous restrictions that only allowed an employee to care for an adult child over 18 years of age with a serious health condition if the child was unable to care for him/herself because of a

physical or mental disability. The new definition will now deviate from the federal Family and Medical Leave Act (FMLA) and allow a qualified employee to take CFRA leave to care for any dependent adult child with a serious health condition.

SB 1383 furthermore creates an additional leave entitlement for a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces; a move which more closely mirrors the FMLA.

With these changes, employers may find there are more opportunities for employees to take leave under both the federal FMLA and CFRA, to potentially allow for up to 24 weeks of protected leave in a 12-month period if the leaves do not run concurrently. For example, an employee may be able to take 12 weeks of leave to care for their own serious condition under the FMLA and an additional 12 weeks of leave to care for a grandparent under CFRA, as leave for this purpose is not contemplated by the FMLA.

Additionally, the law eliminates the existing portion of CFRA that allows an employer that employs both parents to limit their amount of CFRA leave to a total of 12 weeks for bonding with a newborn child, adopted child, or foster care placement combined. As a result of this change, each parent in a couple is now entitled to a total of 12 weeks for his or herself, irrespective of whether the other parent takes CFRA leave, for baby bonding.

Finally, the law no longer allows an employer to refuse reinstatement of "key employees" under exigent circumstances and instead requires an employer to provide the right to reinstatement to all employees.

For smaller employers who have not previously been covered under CFRA, it will be critically important to significantly modify policies, and train

human resources employees to deal with the complexities of monitoring leave entitlements and coordinating short term disability insurance and other medical benefits. On the other hand, larger employers will need to revise existing FMLA/CFRA leave policies to include the additional leave entitlements and ensure employees are trained to properly track when FMLA and CFRA leaves may or may not run concurrently and diligently notify employees of the same to ensure proper notice.

D. AB 2017: Sick Leave – Kin Care

Under Labor Code section 233, employers were already required to permit an employee to use accrued and available sick leave entitlement to attend to the illness of a family member. While the existing law did not outline whether the employer or the employee had the right to designate the leave as kin care leave, AB 2017 now provides that the choice to do so is made at the *sole discretion* of the employee.

E. AB 1947: Gives Employees More Time to File Complaints with the DLSE and Makes Attorneys' Fees Available for Employees with Whistleblower Complaints

AB 1947 makes two key changes to the Labor Code that are likely to further incentivize civil litigation of employment disputes in the courts, in the place of the processes provided by federal and state enforcement agencies.

Under California Labor Code Section 98.7, employees who believe they may have been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the California Division of Labor Standards Enforcement (DLSE) are currently able to file a complaint with the DLSE within six months after the occurrence of the alleged violation. AB 1947 increases the employee's timeline to file and gives them a full year to file a complaint with the DLSE. While filing with the DLSE was

typically seen as a faster recourse than proceeding with traditional litigation in court, this extended deadline to file diminishes the advantage that filing with the administrative agency once provided and increases an employer's chances of seeing the courtroom.

The law also adds financial incentives for employees and attorneys to pursue whistleblower retaliation claims under Labor Code section 1102.5, as AB 1947 authorizes a court to award reasonable attorneys' fees to a plaintiff who brings a successful action for a violation of Labor Code section 1102.5. Now that plaintiffs' attorneys are entitled to fees and more time to file lawsuits, employers should be prepared to see an uptick in the number of retaliation and discrimination cases proceeding in court that might otherwise have been filed with the DLSE.

F. SB 1384: Expands Labor Commissioner Representation to Arbitrations

SB 1384 amends Labor Code 98.4 to allow the Labor Commissioner to step in for a claimant who is financially unable to afford representation in connection with opposing an employer's petition to compel arbitration of the claim, and/or in any arbitration hearing ordered for resolution of the claim. The Labor Commissioner is able to undertake this request after it determines the claim has merit based on an initial investigation. SB 1384 requires that a petition to compel arbitration of a claim that is pending under Section 98, 98.1 or 98.2 be served on the Labor Commissioner in order to effectuate this requirement.

G. AB 2143: Expands No Rehire Provisions in Settlement Agreements Exemption for Criminal Conduct

AB 2143 builds on last year's enactment of Code of Civil Procedure section 1002.5 prohibiting the inclusion of no rehire provisions in settlement agreements of employment disputes. AB 2143

requires any employer who seeks to prevent the rehire of an employee who is found to have engaged in sexual harassment or sexual assault to document such good faith findings *before* the employee files any claim leading to a settlement agreement.

AB 2143 also creates an additional exception to the prohibition of no rehire clauses in settlement agreements for employees found to have engaged in criminal conduct.

H. SB 973: Pay Gap Data

Another noteworthy new law, SB 973, is aimed at eradicating pay discrimination. This new law requires private employers with 100 or more employees to report employee pay data by race, ethnicity, and gender and submit that information to the California Department of Fair Employment and Housing on an annual basis: on March 31, 2021 and every March 31 thereafter.

III. Conclusion

With all of the sweeping changes, employers must be prepared to update their employee handbooks and practices to comply with these new obligations. For assistance with handbooks, policies, training procedures, or issues that relate to COVID-19, contact your Akerman attorney.
