EPSTEIN BECKER GREEN

Employment, Labor & Workforce Management

ACT NOW ADVISORY

# Annual California Employment Law Update: New Laws for 2021 Provide COVID-19 Protections and Expand Family Leave

**October 6, 2020**

**By David M. Prager, Jennifer L. Nutter, Alice Kwak, and Mary T. Vu**

This year, Governor Gavin Newsom signed numerous employment-related bills passed by the California Legislature. Major changes affecting employers with California operations in the coming year include:

- requiring COVID-19 supplemental paid sick leave for food sector workers, certain health care providers and emergency responders, and persons employed by private businesses of 500 or more employees;
- creating a rebuttable presumption for purposes of workers' compensation that a covered employee contracted COVID-19 at work;
- expanding job-protected family leave for employees of companies with five or more employees; and
- requiring certain private employers to submit annually a data report to the Department of Fair Employment and Housing ("DFEH") containing specified wage information.

Unless otherwise stated, all the new laws discussed below will take effect on January 1, 2021.

## COVID-19

**COVID-19 Supplemental Paid Sick Leave.** Effective immediately, AB-1867 requires that employers with 500 or more employees nationwide provide up to 80 hours of COVID-19 supplemental paid sick leave ("SPSL") to employees who leave their homes to perform work. The law also applies to health care employees and emergency responders whose employers opted out of compliance with the federal Families First Coronavirus Response Act ("FFCRA").

For purposes of determining whether an employer has 500 or more employees in the United States, employees are counted in the same manner as they are counted under the FFCRA, meaning that either this law or the FFCRA will apply to employees working in California.

The amount of SPSL available depends upon the covered worker's schedule. A worker with a regular schedule of less than 40 hours per week is entitled to SPSL in an amount equal to the total number of hours the worker is normally scheduled to work over a two-week period. There are additional requirements for calculating the amount of leave due to an employee with a variable schedule. Covered workers scheduled to work, on average, 40 hours per week over the two-week period preceding SPSL are entitled to the full 80 hours. Firefighters can be entitled to more than 80 hours of SPSL if they were scheduled for more than 80 hours in the preceding two weeks.

SPSL may be used for any of the following reasons:

- The worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The worker is prohibited from working by the hiring entity due to health concerns related to the potential transmission of COVID-19.

Employees are entitled to pay for SPSL at the highest of (1) the worker's regular rate of pay for the last pay period, (2) the State minimum wage, or (3) the local minimum wage (capped at $511 per day and $5,110 in the aggregate).

The Department of Labor Standards Enforcement ("DLSE") has issued FAQs stating that employers may not require or condition leave on an employee obtaining a medical certification.

The DLSE FAQs also reflect that if an employer has at least 500 employees, it must provide food sector workers who are classified as independent contractors with SPSL.

SPSL is in addition to any paid or unpaid leave, paid time off, or vacation time provided by the hiring entity. Employers are entitled to an offset for any supplemental COVID-19 leave provided to an employee for the covered reasons since March 4, 2020, such as COVID-19 leave provided pursuant to an executive order or local ordinance, or voluntarily by an employer.

The existing pay stub requirement for paid sick leave has been expanded to require that available SPSL also be reflected on employees' pay stubs or by a separate writing provided on the designated pay date with the employee's payment of wages.

Required posters may be found for food sector workers here and for other employees here.

The SPSL requirement will end as of December 31, 2020, or when the FFCRA expires, if later.

This bill also added an enhanced handwashing requirement for retail food facilities, permitting them to wash their hands every 30 minutes and additionally as needed.

Finally, the bill requires the DFEH to create a small employer family leave mediation pilot program for employers with between five and 19 employees. Employers will have 30 days from receipt of a right-to-sue letter to request mediation. Civil action may not be pursued until mediation is complete, and the statute of limitations will be tolled during this process.

**Enhanced Enforcement and Employer Reporting Requirements.** AB-685 allows Cal/OSHA to issue Orders Prohibiting Use to shut down entire worksites, or specific worksite areas, that expose employees to an imminent hazard related to COVID-19. The law also enables Cal/OSHA to issue citations for serious violations related to COVID-19 without giving employers 15-days' notice before issuance.

Employers must immediately (within one business day of the notice of potential exposure) provide written notification to all employees at a worksite of potential exposures, COVID-19-related benefits and protections, and the disinfection and safety measures that will be taken at the worksite in response to the potential exposure.

In addition, employers must also notify local public health agencies of outbreaks within 48 hours of becoming aware of the "outbreak," which is defined as three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period.

AB-685 sunsets on January 1, 2023.

**COVID-19 Workers' Compensation Presumption**. SB-1159 creates a rebuttable presumption that any COVID-19-related illness of an employee arises out of, and in the course of, the employment for purposes of awarding workers' compensation benefits. This presumption, as created by Governor Newsom's Executive Order N-62-20, was set to expire on July 5, 2020. SB-1159, however, extends this presumption beyond July 6, 2020, for firefighters, peace officers, fire and rescue coordinators, and certain kinds of health care and health facility workers, including in-home supportive services providers who provide services outside their own home. For all other employees, the rebuttable presumption is applied only if the employee works for an employer with five or more employees and the employee tests positive for COVID-19 within 14 days after reporting to his or her place of employment during a COVID-19 "outbreak" at the employee's specific workplace.

As defined by this statute, an "outbreak" exists if (1) the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (2) the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or (3) a specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

Additionally, the law imposes reporting requirements on employers for purposes of the outbreak presumption. 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 claims administrator. Employers may be subject to civil penalties of up to $10,000 for violating these reporting requirements.

SB-1159 takes effect immediately and remains in effect through January 1, 2023.

## FAMILY LEAVE

**Kin Care.** Current law requires an employer that provides sick leave for employees to permit an employee to use at least half of the employee's accrued and available sick leave to attend to the illness of a family member ("kin care"). AB-2017 amends the kin care law to provide that the designation of the sick leave is at the "sole discretion" of the employee. AB 2017 does not require employers to provide any additional paid time off—it simply clarifies who designates which type of sick leave is used when an employee uses a sick day.

**Job-Protected Family Leave.** SB-1383 expands the California Family Rights Act ("CFRA") and the New Parent Leave Act ("NPLA") to make it an unlawful employment practice for any employer with *five* or more employees to refuse to grant a request by an employee to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child of the employee or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner. The law also eliminates the 75-mile radius for purposes of counting employees (but keeps the requirement that to be eligible for leave the employee must have at least 1,250 hours of service with the employer during the previous 12-month period). Previously, the CFRA and NPLA applied only to employers with 50 or 20 employees (respectively) within a 75-mile radius.

In addition, the law requires an employer that employs both parents of a child to grant leave *to each employee*. Currently, an employer is only required to grant both employees a *combined total* of 12 workweeks of unpaid protected leave during the 12-month period.

A detailed discussion of SB-1383 can be found here.

**Protected Time Off for Domestic Violence, Sexual Assault, or Stalking Victims.** AB-2992 amends Labor Code sections 230 and 230.1 to provide the victims of violent crimes

and families of homicide victims (1) time to recover without fear of job loss and (2) expanded unpaid leave. The bill expands the prohibition of discharging, discriminating, or retaliating against employees for taking time off who are victims of domestic violence, sexual assault, or stalking to include “or other crime or abuse” “that caused physical injury or that caused mental injury and a threat of physical injury” and “a person whose immediate family member is deceased as the direct result of the crime.” The bill defines “crime” as “a crime or public offense as set forth in Section 13951 of the Government Code, and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime.”

In addition, the bill prohibits employers with 25 or more employees from discharging, discriminating, or retaliating against an employee who is a “victim,” as defined, for taking off work to seek medical attention for injuries caused by crime or abuse, to obtain services from prescribed entities as a result of the crime or abuse, to obtain psychological counseling or mental health services related to an experience of crime or abuse, or to participate in safety planning and take other actions to increase safety from future crime or abuse.

## WAGE HOUR, HIRING, AND WORKFORCE MANAGEMENT

**Classification of Independent Contractors.** Effective immediately, AB-2257 amends AB-5 to revise and add exceptions to the “ABC Test” used to determine whether a worker is properly classified as an employee or independent contractor.

Among the significant changes are removal of the annual 35-submission limit for freelancer writers, editors, newspaper cartoonists, still photographers, and photojournalists, though a variety of other requirements still must be met.

New exceptions have been added for workers who create, market, promote, or distribute sound recordings or musical compositions, and for certain single-engagement live musical performances. Other additions include workers who provide underwriting inspections and other services for the insurance industry, a manufactured housing salesperson, people engaged by an international exchange visitor program, consulting services, animal services, and competition judges with specialized skills. The bill also creates exceptions for licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, and feedback aggregators.

The bill revises the conditions under which business service providers providing services pursuant to contract to another business are exempt, and the criteria for the referral agency exemption. An exemption for business-to-business relationships between two or more sole proprietors has also been created.

All of these exemptions and revisions are subject to specific requirements, as set forth in the bill. And, as before, if an exemption applies, the worker must still satisfy the multi-factor *Borello* test in order to be properly classified as an independent contractor.

**Employer Pay Data Reporting Requirement.** SB-973 requires, on or before March 31, 2021—and on or before March 31 each year thereafter—a private employer that has 100 or more employees to submit a pay data report to the DFEH that contains specified wage information.

Covered employers are required to report the number of employees by race, ethnicity, and sex in each of the following job categories: executive or senior-level officials and managers, first or mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers. Employers are also obligated to report the number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey. Employers must also report the total number of hours worked by each employee in each pay band.

SB-973 authorizes the DFEH to seek an order requiring an employer to comply, and recover the costs associated with seeking the order for compliance, if it does not receive the required report from the employer.

**Settlement Agreements in Employment Disputes.** AB-2143 amends Code of Civil Procedure section 1002.5 (prohibiting the use of no-rehire provisions in settlement agreements of employment-related disputes, except if the employer has made a good faith determination that the aggrieved party engaged in sexual harassment/assault) to allow an exception, permitting a no-rehire provision if the aggrieved party has engaged in criminal conduct. In order for the sexual harassment/sexual assault/criminal conduct exception to apply, however, an employer must have documented the conduct before the aggrieved party filed the claim against the employer.

AB-2143 also amends section 1002.5 to clarify that an employee must have filed his or her claim against the employer in good faith in order to be considered an "aggrieved party" who is entitled to the protections of the statute's restriction against no-rehire provisions in a settlement agreement. As with the prior law, no-hire agreements are permissible where there has been no claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

**Statute of Limitations for Labor Code Complaints.** Current law provides that a person who believes that he or she has been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner must file a complaint with the DLSE within six months after the occurrence of the violation. AB-1947 extends the time period to file such a complaint to one year.

**Labor Commissioner's Representation of Financially Disabled Persons.** SB-1384 modifies Labor Code section 98.4, which previously provided only that the Labor Commissioner could represent indigent claimants in *de novo* proceedings (appeals of Labor Commissioner wage claim awards). The bill expands the Labor Commissioner's

representation to arbitrations for claimants who cannot afford counsel, requires employers to serve petitions to compel arbitration on the Labor Commissioner, and allows the Labor Commissioner to represent claimants in proceedings to determine whether arbitration agreements are enforceable.

**Statements of Information.** Current law requires businesses to file a statement of information with the Secretary of State, disclosing certain information about the entity. AB-3075 requires the statement of information to disclose whether any officer or director (or in the case of a limited liability company, any member or manager) has an outstanding final judgment for the violation of any wage order or provision of the Labor Code. The bill requires that the Secretary of State post notice of the certification on the homepage of its internet website.

The bill also provides that a successor to a judgment debtor will be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment, after the time to appeal therefrom has expired and for which no appeal therefrom is pending. Successorship is established upon meeting one of several factors outlined in the law.

## INDUSTRY-SPECIFIC AND OTHER BILLS

**Boards of Directors.** Existing law requires publicly held domestic or foreign corporations whose principal executive office is located in California to have a minimum number of female directors on their boards depending on the total number of directors. AB-979 will require that such corporations also have at least one director from an underrepresented community by the end of 2021. By the end of 2022, such corporations with between five and nine directors must have at least two directors from underrepresented communities, and such corporations with 10 or more directors must have at least three directors from underrepresented communities. Being from an underrepresented community means that the individual "self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native" or "self-identifies as gay, lesbian, bisexual, or transgender."

**Classification of Educational Employees.** AB-736 expands the professional exemption set forth in Wage Orders Nos. 4-2001 and 5-2001 of the Industrial Welfare Commission to include part-time or "adjunct" faculty at private, nonprofit colleges and universities in California. Covered employees are exempt from the wage and hour provisions of those Wage Orders, as well as specified provisions of the Labor Code, if the employees satisfy a two-part "duties" and "salary" test.

The law became effective immediately, adding section 515.7 to the Labor Code. Covered institutions with adjunct faculty who are classified as exempt should review their employees' duties and compensation structure to ensure they satisfy this new test. Our earlier discussion of AB 736 can be found here.

**Rest Breaks for Security Guards.** AB-1512, which amends Labor Code section 226.7, authorizes a person employed as a security officer who is registered pursuant to the Private Security Services Act, and whose employer is a registered private patrol operator, to be required to remain on the premises during rest periods and to remain on call, and carry and monitor a communication device, during rest periods. The bill requires a security officer to be permitted to restart a rest period anew as soon as practicable if the officer's rest period is interrupted and provides that a subsequent uninterrupted rest period satisfies the rest period obligation. If a security officer is not permitted to take an uninterrupted rest period of at least 10 minutes for every four hours worked or major fraction thereof, the bill requires the officer to be paid one additional hour of pay at the employee's regular base hourly rate of compensation.

This law only applies to security officers covered by a valid collective bargaining agreement that expressly provides for (1) the wages, hours of work, and working conditions of employees; (2) rest periods for those employees; (3) final and binding arbitration of disputes concerning application of its rest period provisions; (4) premium wage rates for all overtime hours worked; and (5) a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate.

The provisions of the law became effective immediately, but will not apply to cases filed before January 1, 2021. AB-1512 remains in effect only until January 1, 2027.

**Sexual Harassment Training for Minors in the Entertainment Industry.** AB-3175 amends Labor Code section 1700.52 to require that a parent or legal guardian accompany age-eligible minors during employer-provided sexual harassment training made available online by DFEH, and certify to the Labor Commissioner that the training has been completed. The training must be conducted in the language understood by the minor and his or her parent or legal guardian "whenever reasonably possible."

The law became effective immediately, and covered employers should review and update their policies to ensure compliance with this new law.

**What California Employers Should Do Now**

These new laws impact employers of all sizes and industries. Employers with a California workforce should:

- familiarize themselves with the notification requirements regarding potential exposures to COVID-19,
- determine whether they are required to provide COVID-19 supplemental paid sick leave and develop policies for providing it,
- evaluate whether workers currently classified as independent contractors are properly classified, and

- review and revise employee handbooks to ensure that they are otherwise up to date.

Finally, employers should make sure that they 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.

****

For more information about this Advisory, please contact:

**David M. Prager**
Los Angeles
310-557-9523
dprager@ebglaw.com

**Jennifer L. Nutter**
Los Angeles
310-557-9518
jnutter@ebglaw.com

**Alice Kwak**
Los Angeles
310-557-9531
akwak@ebglaw.com

**Mary T. Vu**
Los Angeles
310-557-9546
mtvu@ebglaw.com

*This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.*

**About Epstein Becker Green**
Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

© 2020 Epstein Becker & Green, P.C. Attorney Advertising