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Overview of New California Employment Laws

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While employers continued to grapple with the effects of COVID-19 on their businesses, last year's California legislative actions led to relatively fewer employment law changes than usual for the upcoming 2022 year. Below find descriptions of new employment-related changes, including new rules for severance agreements, expanded limitations on confidentiality and nondisparagement provisions in settlement agreements, extended recordkeeping requirements, changes to the California Family Rights Act, arbitration, COVID-19 compliance, wage and hour, and industry-specific developments.

Equal Employment

New Rules for Settlement and Nondisparagement Agreements (SB 331)

- Current law prohibits settlement agreements from preventing disclosure of factual information relating to a civil claim or administrative action involving sexual assault, sexual harassment, workplace harassment or sex discrimination, failure to prevent such acts, or retaliation for reporting such acts. SB 331 expands this law by also applying it to claims involving all forms of unlawful workplace harassment or discrimination (not based on sex). SB 331 does not prohibit provisions that preclude disclosure of the amount paid in settlement of such claims.

- Employers offering any agreement related to the employee's separation of employment (*e.g.*, separation and severance agreements) must notify the employee of the right to consult an attorney regarding the agreement and provide a "reasonable time period of not less than five business days" to do so — although an employee may voluntarily sign before the expiration of the five-day period so long as the decision is "knowing and voluntary," and "not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer."

- Current law prohibits employers from requiring employees to sign nondisparagement agreements regarding unlawful acts in the workplace (including, but not limited to, sexual harassment or discrimination) in exchange for a raise or bonus, or as a condition of employment or continued employment. SB 331 prohibits the use of nondisparagement agreements as a condition of employment or continued employment, or in a separation agreement, unless employers specifically carve out an employee's ability to disclose information related to conditions in the workplace that the employee has reason to believe is unlawful by including 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.*

- This limited restriction on nondisparagement provisions does not prohibit employers from protecting trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace (*e.g.*, discrimination, harassment, retaliation). It also does not apply to "negotiated" settlement agreements to resolve an employee's claim that is filed in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process so long as the agreement is (1) voluntary, deliberate, and informed; (2) provides consideration of value to the employee; and (3) the employee is given notice and opportunity to retain an attorney or is represented by an attorney.

Takeaway

- Employers should update their settlement and separation agreements and limit the scope of any confidentiality or nondisparagement provisions.

- Employers should provide employees with at least five days to consider separation agreements and remind them of the right to consult with an attorney.

Recordkeeping and Disclosures

Maintenance of Personnel Records (SB 807)

- Current law requires employers to maintain employment-related personnel records for at least two years. Among other changes related to the DFEH's handling of complaints, SB 807 increases these recordkeeping requirements to four years from the date the records were created or the date the employment action was taken. If an employer is notified that a complaint is filed with DFEH, the employer must maintain and preserve personnel records until (1) the complaint is fully resolved (including any civil actions or appeals) or (2) the first date after the period for filing a civil action has expired.

Email Distribution of Workplace Posters (SB 657)

- Employers may distribute required postings or notices via email. Employers must continue to physically display such information at the worksite regardless of email distribution.

Leave

Changes to California Family Rights Act (AB 1033)

- AB 1033 adds "parents-in-law" to the definition of family members for use of family care and medical leave under the CFRA.

- AB 1033 creates the opportunity for mediation before an employee can proceed with a civil action under CFRA.

Prior to filing a civil action, employees will be required to contact the DFEH's dispute resolution division to indicate whether they are requesting mediation, and the DFEH must provide written notice to all respondents of the alleged violation and mediation requirement. Small employers (with five to 19 employees at the time that the alleged violation occurred) can stay a pending civil action or arbitration until mediation is complete or deemed unsuccessful if the complainant fails to contact the DFEH's alternative dispute resolution prior to filing a civil action.

Takeaway

- Update CFRA policies, practices, and training to allow for use of leave to care for a parent-in-law.

Arbitration

Timely Payment of Arbitration Fees (SB 762)

- Under current law, delayed payment of arbitration fees waives the right to compel arbitration. Those fees must be paid within 30 days of the due date.

- SB 762 requires arbitration providers to immediately provide invoices for all fees and costs to all parties to the arbitration "on the same day and by the same means" once the employee meets the filing requirements to initiate arbitration. Invoices must be issued as "due upon receipt" unless the arbitration agreement expressly provides a due date for payment. For fees and costs due during the pendency of the arbitration, any extension of time for the due date must be agreed upon by all parties.

Takeaway

- Ensure timely payment of arbitration fees and costs during arbitration and consider revising arbitration agreements to provide for specific due dates for payment of arbitration fees and costs.

Mandatory Arbitration Agreements (AB 51 Update)

- AB 51 would make it a crime for employers to propose mandatory arbitration agreements, but this new law never went into effect and currently remains enjoined, pending further litigation.

COVID-19/Workplace Safety

Notification Requirements for COVID-19 Exposure (AB 654)

Effective October 6, 2021 through January 1, 2023:

- Current law requires that employers provide written notice to local public health agencies within 48 hours of receiving notice of a COVID-19 outbreak in the workplace, even if the deadline falls on a weekend or holiday. AB 654 softens this deadline by allowing employers to provide this notice either within 48 hours or one business day, whichever is later. AB 654 also exempts certain employers from COVID-19 outbreak reporting requirements, including community clinics, adult day health centers, community care facilities, residential care facilities for chronic life-threatening illness and the elderly, hospices, home health agencies, dialysis clinics, rural health clinics, federally qualified health centers, pediatric day health and respite care facilities, and child day care facilities.

Takeaway

- Employers should note the various definitions of what constitutes an "outbreak" under SB 1159, the State Department of Public Health, and the Cal/OSHA COVID-19 Emergency Temporary Standards. For purposes of AB 654, the definition of "outbreak" defers to the State Department of Public Health, which is currently at least three (3) COVID-19 cases at the same worksite within a 14-day day period in a non-health care setting. Instead of the previous 48-hour notice period, employers now have an additional grace period of one business day and do not need to report on a weekend or holiday (for example, if the employer receives notice of an outbreak on a Thursday or Friday).

Cal/OSHA Expanded Authority and Citations (SB 606)

- SB 606 authorizes Cal/OSHA to issue two new types of violations:
  - (1) "Enterprise-wide" violations, which impose the same penalties as willful or repeated violations.
    - Creates a rebuttable presumption that an occupational safety and health violation committed by an employer with multiple worksites is enterprise-wide if (1) the employer has a written policy or procedure that violates specified occupational health and safety provisions, or (2) Cal/OSHA has evidence of a pattern or practice of the same violation involving more than one of the employer's worksites. Cal/OSHA will issue an "enterprise-wide" violation and require enterprise-wide abatement if the employer cannot rebut this presumption.
  - (2) "Egregious" violations where one or more of the below applies. Each employee exposed to an egregious violation will be considered a separate violation.
    - The employer intentionally, through conscious, voluntary action or inaction made no reasonable effort to eliminate the known violation;
    - The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;
    - The violations resulted in persistently high rates of worker injuries or illnesses;

        - The employer has an extensive history of prior violations;
        - The employer has intentionally disregarded health and safety responsibilities;
        - The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties; or
        - The employer has committed a large number of violations so as to significantly undermine the effectiveness of any safety and health program that may be in place.
    - SB 606 also authorizes Cal/OSHA to issue and enforce subpoenas if an employer fails to promptly provide requested information within a reasonable period of time and to seek an injunction restraining certain uses or operations if there are grounds to issue a citation.

Takeaway

- Employers should revisit their safety and health policies, practices, and documented training, including their Injury Illness Prevention Plans, to ensure compliance. Employers also should ensure that they comply with the Cal/OSHA COVID-19 Emergency Temporary Standards, which can form the basis for violations.

Wage and Hour

Unpaid Wages Can Be Criminal Grand Theft (AB 1003)

- AB 1003 makes an employer's intentional theft of wages (including gratuities) punishable as criminal grand theft if the amount is greater than $950 from one employee or $2,350 from two or more employees in a consecutive 12-month period. Independent contractors also are included within the meaning of employees for purposes of this statute.

Lien on Real Property to Collect Unpaid Wages (SB 57)

- SB 57 authorizes the labor commissioner to create a lien on real property to recover any amounts owed under any final citation, findings, or decision.

Minimum Wages For Disabled Employees (SB 639)

- Current law permits the Industrial Welfare Commission to issue a special license, authorizing the employment of a mentally or physically disabled employee at a wage rate below the minimum wage. SB 639 prohibits any new special licenses issued after January 1, 2022, with a complete phaseout of such licenses by January 1, 2025.

2022 State Minimum Wage and Salary Threshold

- 25 or less employees
  - Minimum wage for nonexempt: $14.00/hour
  - Salary threshold for exempt: $58,240/year or $4,853.33/month
- 26 or more employees
  - Minimum wage for nonexempt: $15.00/hour
  - Salary threshold for exempt: $62,400/year or $5,200.00/month

Calculation of Premiums for Missed Meal and Rest Breaks

- In July 2021, the California Supreme Court clarified that the "regular rate of compensation" for meal and rest break premiums is synonymous with the "regular rate of pay" used to calculate overtime payments. This ruling means that when calculating missed-break premiums, employers must include all forms of nondiscretionary compensation (*e.g.*, commissions, nondiscretionary bonuses), rather than base it solely on the base hourly rate. This ruling applies retroactively.

Industry-Specific Developments

Warehouse Distribution Centers (SB 701)

- Requires warehouse distribution centers with 1,000 or more employees at one or more warehouses in the state to provide written production quotas to employees upon hire or by January 31, 2021, including any potential adverse employment action that could result from failure to meet the quota. The written notice must include (1) the quantified number of tasks to be performed or materials to be produced or handled; (2) the defined time period; and (3) any potential adverse employment actions for failure to meet the quota.
- Creates a right for current and former employees to request written production quotas and copies of the employee's personal work speed data if an employee believes that meeting a quota caused a violation of the right to a meal or rest period or violation of any occupational health and safety law or standard.
- Prohibits employer requirements to meet production quotas to the extent that it prevents employee compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws.
- Prohibits employers from taking adverse action against employees for failure to meet a quota that has not been disclosed or that does not allow a worker to comply with meal or rest periods or occupational health and safety laws.

- Requires any action taken by an employee to comply with occupational health and safety laws or division standards be considered productive time for purposes of any quota or monitoring system.

- Allows employees to seek injunctive relief, costs, and attorneys' fees for violations, including by way of a PAGA claim (but employers have the right to cure any violations).

Takeaway

- Affected employers should ensure compliance and be prepared to distribute written notices of any production quotas to employees by January 31, 2022, especially since violations of AB 701 can form the basis for a PAGA claim.

Tips for Food Delivery (AB 286)

- Prohibits food delivery platforms from retaining any portion of amounts designated as a tip or gratuity and requires that the platforms pay any and all tips or gratuities for a delivery order to the person delivering the food or beverage and to the food facility.

Contractor Liability for Unpaid Wages (SB 727)

- Imposes liability on direct contractors of private construction contracts for any debts owed by a subcontractor, including for unpaid wages, fringe or other benefit payments or contributions, penalties or liquidated damages, and interest owed on account of the performance of the labor.

Classification of Newspaper Distributors and Carriers (AB 1506)

Effective January 1, 2022 through January 1, 2025:

- Extends the exemption under the "ABC" test for newspaper distributors working under contract with a newspaper publisher and newspaper carriers to January 1, 2025.

- Newspaper publishers or distributors that hire or directly contract with newspaper carriers must submit information related to their workforce to the LWDA on or before March 1, 2022, March 1, 2023, and March 1, 2024.

Additional Industry-Specific Worker Classification (AB 1561)

- Extends the exemption under the "ABC" test for licensed manicurists to January 1, 2025.

- Extends the exemption under the “ABC” test for the licensed construction subcontractors and for construction trucking services to January 1, 2025.

- Clarifies an exemption under the “ABC” test for relationships between data aggregators and their “research subjects” without the need to be compensated at minimum wage if certain statutory conditions are satisfied.

- Expands an exemption under the “ABC” test for exception to claims adjusters and third-party administrators in the insurance and financial service industries.

- Clarifies the exemption under the “ABC” test for manufactured housing salesperson, which shall no longer consider the statutorily imposed duties of a manufactured housing dealer under the Health and Safety Code, as factors under the Borello test.

Janitorial Union Employees Excepted From Private Attorneys General Act of 2004 (SB 646)

Effective January 1, 2022 through July 1, 2028:

- Creates an exemption from PAGA for janitorial employees represented by a labor organization and employed by a janitorial contractor with respect to work performed under a valid collective bargaining agreement in effect before July 1, 2028 that expressly provides for the wages, hours of work, and working conditions of employees, and provides premium wage rates for all overtime hours worked, amongst other requirements.

COVID-19 Layoffs and Rehiring for Hotels, Clubs, Airports, Event Centers, and Building Services (SB 93)

Effective April 16, 2021 to December 31, 2024:

- SB 93 applies to the following employers: (1) hotels with 50 or more guest rooms, (2) private clubs with at least 50 guest rooms or suites offered 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 facilities, and (6) building services (including janitorial, building maintenance, or security services).

- Requires employers in these industries to offer information to employees who were laid off for COVID-19-related reasons about job positions that become available for which the laid-off employees are qualified, and to offer positions to those laid-off employees based on the greatest length of service. To be eligible under the statute, the laid-off employee must have (1) worked at least two hours of work and (2) been employed for at least six months in the 12 months preceding January 1, 2020.

- Employers must make job offers in writing to qualified laid-off employees within five business days of establishing a position and give employees at least five business days from receipt of the offer to respond. Employers must keep records for three years, including records of communications regarding the employment offers. An employer that declines to recall a laid-off employee on the grounds of lack of qualifications and hires someone else must provide the laid-off employee a written notice within 30 days, including specified reasons for

the decision, and other information on those hired.

- Prohibits an employer from refusing to employ, terminating, reducing compensation, or taking other adverse action against any laid-off employee for seeking to enforce their rights under SB 93, such as by filing a complaint with the DLSE.

Takeaway

- Employers in these affected industries must proceed with caution when rehiring any former positions and ensure compliance with the written notice and recordkeeping requirements.

Garment Manufacturing (SB 62)

- Prohibits any garment manufacturing employee to be paid by piece rate and imposes damages of $200 per pay period that an employee is paid by the piece rate, except where employees are covered by a collective bargaining agreement that expressly provides for wages, hours of work, and working conditions; premium wage rates for overtime hours and a regular hourly rate of pay of not less than 30% more than the state minimum wage; stewards or monitors; and a process to resolve disputes concerning nonpayment of wages.

- Imposes joint and several liability for garment manufacturer, contractor, or “brand guarantor” (defined as any person contracting for performance of garment manufacturing) with any manufacturer and contractor for wage and hour violations of employees who performed any manufacturing operations, including unpaid wages, other compensation due, attorney’s fees, and civil penalties.

- Creates a four-year record retention requirement for every garment manufacturing and brand guarantor employer, including contracts, invoices, purchase orders, work orders, style or cut sheets, and any other documentation under which garment manufacturing work was, or is being, performed.

Takeaway

- Expands liability for wage and hour violations to any entities in the manufacturing supply chain that contract for the performance of garment manufacturing, which may potentially include clothing brands and retailers.

Agricultural Workers: Wildfire Smoke (AB 73)

Effective September 27, 2021:

- Current law requires the State Department of Public Health and Office of Emergency Services to establish personal protective equipment stockpile for all health care workers and essential workers during a 90-day pandemic or other health emergency. AB 73 expands these protections to agricultural workers and specifically

includes wildfire smoke events as health emergencies.

For 2022, the relatively fewer changes in employment legislation provide some welcome relief for California employers, especially as laws regulating the response to COVID-19 in the workplace continue to evolve. Troutman Pepper's California Labor and Employment Practice Group is available to assist with ensuring that your employment policies and practices are current and up to date with these recent developments to kick off the new year.

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