

## Updates

October 25, 2021

### 2021 California Labor, Employment, and Independent Contractor Legislative Update

With the 2021 California legislative year closed, it is now time to examine the new legislation that will affect California companies. We have summarized the key new legislation below, with relevant action items noted. Companies should work with experienced legal counsel to determine the best approach for their organization to ensure compliance with the latest California developments.

## **Wage and Hour/Classification**

### California Minimum Wage Increase

*Effective Date:* January 1, 2022. California's minimum wage threshold increases to \$14.00 per hour for employers with 25 or fewer employees and \$15.00 per hour for employers with 26 or more employees. Exempt employees must be paid a salary of no less than two times the California minimum wage for full-time work (based on a 40-hour workweek). [Labor Code Section 515](#). The salary threshold for [computer software employees](#) and [licensed physicians and surgeons](#) also increased.

*Action item:* Employers should review compensation amounts for both exempt and nonexempt employees.

### **Phase Out of Specially Licensed Employer Permission for Lower Wage Rates for Disabled Employees ([SB 639](#))**

*Effective Date:* January 1, 2022. The Industrial Welfare Commission will not issue any new special licenses permitting the employment of a mentally or physically disabled employee at a wage less than the minimum wage. Existing licenses may be renewed for those meeting requisite benchmarks but will be phased out by January 1, 2025.

*Action item:* Specially licensed employers should either pay minimum wage to these employees by January 1, 2022, or consult counsel regarding the Industrial Welfare Commission's phase-out plan and employer obligations during the phase-out period.

### **Criminal Charges for Wage Theft ([AB 1003](#))**

*Effective Date:* January 1, 2022. This bill adds a new type of grand theft to the Penal Code for an intentional theft of wages (deliberate failure to pay all amounts due), if greater than \$950 (from any one employee or independent contractor), or \$2,350 (in the aggregate) in a 12-month period. Further description of the law is found [here](#).

*Action item:* Employers should review their wage-and-hour practices, including bonuses, tips, and gratuities and consider implementing an annual wage-and-hour audit with the assistance of counsel.

### **Prohibition on Delivery Platform Tip Retention and Price Inflation ([AB 286](#))**

*Effective Date:* January 1, 2022. Online food delivery platforms may not retain any portion of amounts designated as a tip or gratuity; all such amounts must be paid to the person delivering the food or beverage (or to the facility in the event of a pickup order). Further, it will be unlawful for a food delivery platform to charge a customer a higher price for food or beverage than the price posted on the platform's website by the food facility

at the time of the order.

*Action item:* Food delivery platforms should review their policies, compensation practices, and software coding to ensure compliant practices.

### **No Warehouse Production Quotas That Compromise Breaks ([AB 701](#))**

*Effective Date:* January 1, 2022. Employers cannot require nonexempt employees at warehouse distribution centers to meet production quotas that prevent compliance with meal or rest periods, use of bathroom facilities (including reasonable travel time to and from bathroom facilities), or occupational health and safety laws, and cannot take adverse action against employees for failing to reach any such illegal quotas. For a more in-depth discussion, see our [prior post](#) on this legislation.

*Action item:* Employers with warehouse distribution center employees should review any production quotas with experienced counsel.

### **Extended Contractor Exemption for Newspaper Industry Employees ([AB 1506](#))**

*Effective Date:* January 1, 2022. AB 1506 extends the existing exemption from the "ABC" independent contractor/employee test for newspaper distributors and newspaper carriers through January 1, 2025. This means that the more expansive *Borello* test (described [here](#) in question 5) will continue to apply in this context. The new law also requires newspaper publishers and distributors to report specified information to the Labor and Workforce Development Agency (LWDA).

*Action item:* Newspaper publishers and distributors should review the applicability of the *Borello* test to any independent contractor relationship and should review the new reporting requirements to the LWDA.

### **Modification to Other Contractor Exemptions ([SB 1561](#))**

*Effective Date:* January 1, 2022. Several of the exemptions from the "ABC" independent contractor/employee test have been modified. The bill addresses data aggregators, licensed manicurists, subcontractors in the construction industry, underwriters, and manufactured housing dealers.

*Action item:* Employers with questions about whether workers should be classified as independent contractors or employees should contact counsel to evaluate on a case-by-case basis.

### **Ban on Garment Industry Piece-Rate Pay ([SB 62](#))**

*Effective Date:* January 1, 2022. Employers in the garment manufacturing sector can no longer pay employees purely on a piece-rate basis. Employers may still implement incentive-based bonuses. Record keeping obligations are extended from three to four years.

*Action item:* Garment manufacturing employers should adopt an hourly rate payment system. Employers still may offer production-based incentive bonuses and should work with counsel to carefully structure and implement such incentives.

### **Janitorial Union Employees Not Covered by PAGA ([SB 646](#))**

*Effective Date:* January 1, 2022. Janitorial employees represented by a labor organization for work performed under an existing collective bargaining agreement with grievance and arbitration provisions are excepted from the Private Attorneys General Act (PAGA).

*Action item:* Employers of janitorial employees represented by a labor organization should consult counsel to determine if the collective bargaining agreement contains the required provisions to except such employees from the PAGA.

## **Procedure**

### **Ban on Confidentiality Provisions Regarding Harassment, Discrimination, or Retaliation ([SB 331](#))**

*Effective Date:* January 1, 2022. In 2019, the California legislature enacted legislation to prohibit confidentiality provisions in employment-related settlement agreements on all forms of sexual harassment or discrimination. This new bill expands the prohibition to all forms of workplace discrimination, harassment, and retaliation and provides specific language for use in separation agreements and nondisclosure agreements. SB 331 further has requirements regarding notification to employees in separation agreements of the right to consult with an attorney and provide at least five days within which to do so. Further discussion of SB 331 is found [here](#).

*Action item:* Companies with employees in California should review the company's use of settlement agreement confidentiality terms and review nondisclosure agreements.

## **Arbitration**

### **Arbitration Fees and Costs Payable Before Arbitration Unless Otherwise Specified ([SB 762](#))**

*Effective Date:* January 1, 2022. Employment and consumer arbitration providers must now provide invoices for fees and costs required before the arbitration can proceed, or during the pendency of an arbitration, to all parties on the same day and by the same means, due upon receipt unless the arbitration agreement specifies otherwise. For fees and costs due during the pendency of the arbitration, SB 762 requires any extension of time for the due date to be agreed upon by all parties.

*Action Item:* Employers negotiating arbitration agreements should consider specifying a preferred time for payment of initiation or pendency fees, if desired.

## **COVID-19**

### **COVID-19 Reporting by Employers ([AB 654](#))**

*Effective Date:* October 5, 2021. AB 654 changes existing law to allow an employer, when giving notice to the local public health agency of a COVID-19 outbreak, to give that notice within 48 hours or one business day, *whichever is later*. The bill would expand the type of employers exempt from the COVID-19 outbreak reporting requirement to various licensed entities, including, but not limited to, community clinics, adult day health centers, community care facilities, and child day care facilities. The bill will repeal these provisions on January 1, 2023.

*Action item:* Employers should consult with experienced counsel to determine their reporting requirements and ensure compliance with ever-changing legislation.

### **Rehire Rights for Certain Hospitality and Airport Employees ([SB 93](#))**

*Effective Date:* April 17, 2021. Employers in covered sectors (e.g., airport, airport hospitality operation, airport service provider, building service, hotels, private clubs, and event centers) are required to first rehire employees laid off due to COVID-19 or otherwise justify the decision to not rehire a laid-off employee.

*Action items:* Employers in covered sectors should review their records for all laid-off employees and consult counsel to identify which employees are qualified employees under this bill and establish hiring protocols with regard to laid-off employees.

## **Workplace Safety**

### **Expansion of Cal/OSHA Enforcement Powers ([SB 606](#))**

*Effective Date:* January 1, 2022. This bill expands Cal/OSHA's enforcement powers to use injunctions and subpoenas against employers. It also establishes a rebuttable presumption that an employer's violation is enterprise-wide if the employer has a written policy or procedure that violates the relevant health and safety regulation or if there is evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer's worksites. Enterprise-wide citations carry the same penalties as willful or repeated Cal/OSHA citations, up to \$134,334 per violation. This bill establishes a new penalty category of "egregious violation," which can be used by Cal/OSHA when a business satisfies any of seven different factors. Once an egregious violation is established, the bill allows for per-employee penalties for the violation.

*Action items:* Employers should review their Cal/OSHA policies to avoid enterprise-wide citations and work with experienced counsel before and during any Cal/OSHA enforcement activity.

## **Discrimination, Harassment, and Retaliation**

### **Extended Recordkeeping and Statute of Limitations Periods for FEHA Violations ([SB 807](#))**

*Effective Date:* January 1, 2022. Employers, labor organizations, and employment agencies that are required to retain employment-related records under the Fair Employment and Housing Act (FEHA) will now be required to keep such records for four years (up from the previous two-year requirement). The bill also makes a number of changes to the Department of Fair Employment and Housing (DFEH) authority. In addition, this bill extends the period in which an individual can file a civil action for violations of certain statutes, by tolling that period while the DFEH investigates and/or takes action on a complaint. This bill extends to two years the period of time that the DFEH has to complete its investigation and issue a right-to-sue notice for employment discrimination complaints treated by the DFEH as a class or group complaint.

*Action Item:* Employers should amend their record retention policies and practices to account for the new four-year employment-related record retention requirement.

## **Leave**

### **"Parent-in-Laws" Now Covered as Family Members Under CFRA ([AB 1033](#))**

*Effective Date:* January 1, 2022. This bill amends the California Family Rights Act (CFRA) to include "parent-in-law" within the definition of "family member" for eligible leave. In addition, the bill makes changes to the DFEH small employer mediation program, requiring notice of mediation before a right-to-sue letter issues, and a proactive response as to whether the individual is willing to participate in alternative dispute resolution (ADR) before suing.

*Action Item:* Employers should update internal policies, handbooks, and other documents outlining available leaves to indicate that the CFRA now includes protection for employees caring for a parent-in-law and be ready for increased mediation requests from the state agency.

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