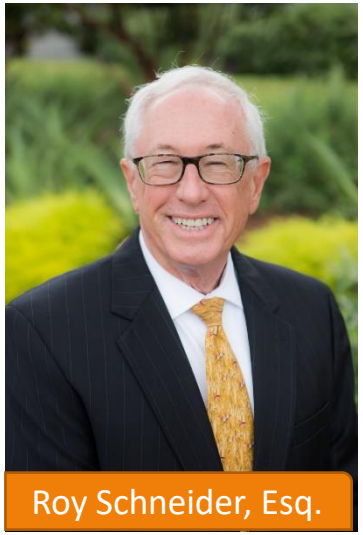
Employment Law Update, 2021

January 22, 2021



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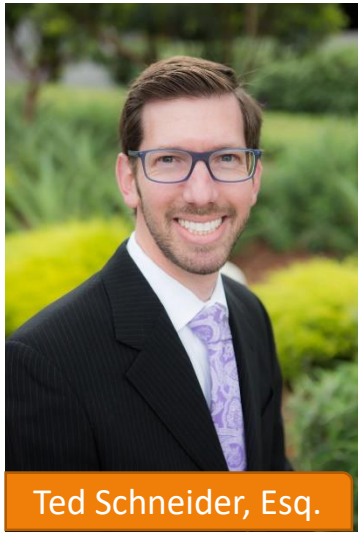

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WHAT IF AN EMPLOYEE HAS COVID-19?

AB 685 – NOTICING REQUIREMENTS

- Establishes employer reporting and noticing requirements upon notice of a potential exposure to COVID-19 at the workplace.

- If an employer receives notice of a "potential exposure to COVID-19," the employer must, within **one business day**, take the following actions:

  - Provide written notice to all employees and the employers of subcontracted employees, who were on the premises at the same worksite as the "qualifying individual within the infectious period," that they may have been exposed to COVID-19.

  - Provide "all employees who may have been exposed" with information regarding COVID-19-related benefits to which they may be entitled under federal, state or local laws, including, workers' compensation, COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, as well as anti-retaliation and anti-discrimination employee protections.

  - Notify all employees of the disinfection and safety plan that the employer plans to implement per the guidelines of the CDC.

AB 685 – NOTICING REQUIREMENTS, *continued…*

- Written notices may be hand delivered or sent electronically. Must be in English and any other language understood by the majority of employees.

- A “qualifying individual” is someone who has: (1) a lab-confirmed case of COVID-19, (2) a COVID-19 diagnosis from a licensed health care provider, (3) a COVID-19 isolation order provided by a public health official or (4) died due to COVID-19.

- Employers required to notify their local public health agency within 48 hours of a COVID-19 “outbreak” (3 or more cases within a 2-week period). Note the different definition of “outbreak” from SB 1159.

- Employers must keep records of the above notifications for three years.

- AB 685 excludes from the notice requirements employees who, as part of their duties, conduct COVID-19 testing or screening, or provide direct patient care of treatment to individuals who tested positive for COVID-19, unless the qualifying individual is an employee at the same worksite. Additionally, the outbreak notice requirements don’t apply to “health facilities” as defined by Health and Safety Code Section 1250.

SB 1159 – COVID-19 WORKERS' COMPENSATION

- Rebuttable WC presumption that certain employees (first responders and health care personnel) contracted COVID-19 at work if the worker tests positive within 14 days of working at their place of employment.
- Creates an "outbreak" presumption for employers with 5 or more employees, covering workers who test positive during an "outbreak" at the worksite.
- "Outbreak" is defined as 4 employees testing positive within a 2-week period (<100 employees), or 4% of employees testing positive within a 2-week period (>100 employees).
- Employee may be awarded workers' compensation benefits, including full hospital, surgical, and medical treatment.
- If employer "knows or reasonably should know" that an employee tested positive for COVID-19, SB 1159 requires employer to notify WC carrier w/in 3 business days.

Cal/OSHA EMERGENCY TEMPORARY STANDARDS - TESTING

Obligates employers to do the following for testing:

- As part of the written COVID-19 prevention plan, inform all employees how they may obtain testing whether it is through the employer, local health department, health plan or community testing.
- Offer no-cost testing to an employee who may have a COVID-19 workplace exposure.
- Provide no-cost periodic testing — either weekly or twice weekly depending on the severity of the outbreak — to all employees who were in an exposed workplace during the outbreak.
- Provide testing in a manner that ensures employee confidentiality.
- When obligated to test employees, employers don't have to test employees at the worksite and may satisfy the no-cost requirement by sending employees to a free testing site such as a county-run location. Cal/OSHA reminds employers that no-cost also includes paying the employees for their time to get tested as well as travel costs to the testing site.

Cal/OSHA EMERGENCY TEMPORARY STANDARDS – PAYING EMPLOYEES

- Requires employers to "maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job" if the employer excludes the employee from the workplace due to a work-related COVID-19 exposure or infection.

- Employees must be "able and available to work" in order to receive exclusion pay. Cal/OSHA provides some examples of when an employee may not be able and available to work disqualifying them from exclusion pay:

  - When the employee is symptomatic and would be unable to work due to the symptoms.

  - If the employee is out of work for more than a standard quarantine period based on a single exposure or positive test, this may be evidence that they're unable to work.

  - If the employee is receiving temporary disability benefits through workers' compensation.

  - If the employee is unable to work because of reasons other than protecting the workplace from possible COVID-19 transmissions (e.g., business closure, caring for a family member, disability or vacation).

Cal/OSHA EMERGENCY TEMPORARY STANDARDS – PAYING EMPLOYEES, *continued…*

- An employer may require an employee to use paid sick leave to cover the pay requirement. However, it is unclear if Cal/OSHA's position here is consistent with California's paid sick leave law.

- Employees are only entitled to exclusion pay under the standard if the exposure or infection was work related. To prove the exposure is not work related, employers need to show that it's more likely than not that an employee's exposure didn't occur in the workplace.

- Through February 1, 2021, Cal/OSHA will not assess monetary penalties with its citations for failure to comply with provisions of the COVID-19 temporary standard.

EMERGENCY PAID SICK LEAVE & EXPANDED FAMILY AND MEDICAL LEAVE BENEFITS UNDER FFCRA

- Obligation to provide FFCRA paid leave ended on December 31, 2020;

- Beginning on January 1, 2021, covered employers may voluntarily continue FFCRA-related paid leave to their employees and still claim a tax credit until March 31, 2021; and

- Employees are not able to reload their FFCRA leave banks in 2021. Rather, employees who did not utilize available FFCRA leave in 2020 can carry-over unused leave into 2021, but only if voluntarily permitted by their employer.

- The relief bill does not extend the FFCRA tax credit into 2021 for public employers.

As noted, the relief bill does not modify the total amount of the FFCRA leave available to employees. Therefore, employees who exhausted their FFCRA leave in 2020 do not receive a new "bank" of leave in 2021. The relief bill suggests that this holds true even if employers provide employee leave benefits based on a calendar year and choose to continue providing FFCRA leave benefits into 2021.

AB 1867 – SUPPLEMENTAL PAID SICK LEAVE

- Expands supplemental paid sick leave for COVID-19- related reasons for employers not covered by the federal Families First Coronavirus Response Act (FFCRA) – employers with 500 or more employees, as well as health care providers and first responders.

- Employees who work for covered employers can take COVID-19 supplemental paid sick leave if the worker is:

    - Subject to a federal, state or local quarantine or isolation order related to COVID-19;

    - Advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

    - Prohibited from working by the employer due to health concerns related to potential transmission of COVID-19.

- The California Supplemental Paid Sick Leave law took effect on September 9, 2020, and expired on December 31, 2020, when the FFCRA leave mandates expired.

- The supplemental sick leave expired on December 31, 2020, but workers who started leave prior to December 31, 2020, could finish using the leave they were entitled to even if it extended beyond the expiration date.

AB 2537 and SB 275– PPE REQUIREMENT

- Requires that employers provide certain employees (those working in hospitals) with Personal Protective Equipment (PPE) and maintain a three-month stockpile, and provide inventory information to Cal/OSHA upon request.

AB 2043 – OCCUPATIONAL SAFETY AND HEALTH, AGRICULTURAL EMPLOYERS AND EMPLOYEES

- Requires employers to disseminate information of best practices for COVID-19 infection prevention to agricultural employees, in both English and Spanish.
- Requires that Cal/OSHA work with employers and employees on outreach campaigns targeting agricultural employees.
- Law only applies during the state of emergency.

CAL/OSHA EMERGENCY REGULATIONS

- Cal/OSHA approved emergency regulations tailored toward health and safety protocols for employers to prevent infections and respond to cases and outbreaks. The regulations are separated into five compliance categories:
  - COVID-19 Prevention Program
  - Outbreaks
  - Major Outbreaks
  - Employer-Provided Housing
  - Employer-Provided Transportation

REMOTE EMPLOYEES

- Timekeeping Issues
  - Need clear policies that employees are recording all time worked.
  - Clocking in and out for meal breaks.
- Reimbursement for Expenses
  - Additional expenses, such as cell phone, WiFi and other resources, are the obligation of the employer.
- Precedent of Remote Work
- Recommend Remote Work Agreement

FAMILY LEAVE

AB 2399 – EXPANSION OF CALIFORNIA PAID FAMILY LEAVE

- Wage replacement benefits for employees to take time off to care for a seriously ill family member.
- Additional coverage for active military members.
- PFL expanded to include coverage for participation in a qualifying exigency related to the active duty or call to active duty of the individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States.
- Defines terms and confirmation of the documentation required for a qualifying exigency.
- Effective January 1, 2021.

SB 1383 – CALIFORNIA FAMILY RIGHTS ACT (CFRA) EXPANDED TO COVER BUSINESSES WITH FIVE OR MORE EMPLOYEES

- Effective January 1, 2021. Expands CFRA to employers with **five** or more employees and expands the scope of "family members" for whom employees can take leave to include many additional categories.

- Replaces New Parent Leave Act.

- Employers with 5 or more employees (eliminates 75-mile worksite requirement) must provide up to 12 weeks of unpaid family medical leave for employee to care for a family member with a serious health condition. Employee eligibility:

    1. Completed 12 months of employment with employer, and

    2. Worked for the employer for at least 1,250 hours in the past 12 months.

SB 1383 – CALIFORNIA FAMILY RIGHTS ACT (CFRA) EXPANDED TO COVER BUSINESSES WITH FIVE OR MORE EMPLOYEES, *continued…*

- Ability to care for a "family member" with a serious health condition: Family members expanded to include siblings, grandparents, grandchildren, and domestic partners. Definition of "child" expanded to include adult children.

- Creates a "stacking" problem with federal FMLA. Generally, leave under CFRA and FMLA runs concurrently, an employee is only eligible for a total of 12 weeks of unpaid leave under both laws. However, because SB 1383 expands the definition of "family member" in a manner inconsistent with the definition under FMLA, the two laws are no longer in sync. Situation in which an employee is eligible for 12 weeks of leave under CFRA and still remains eligible for a full additional 12 weeks under the FMLA (employers >50 employees).

WAGE AND HOUR

A new year means new changes to California's minimum wage laws. California employers should take note of the following changes to state minimum wage laws, that took effect on January 1, 2021, and will impact both nonexempt and exempt employees.

CALIFORNIA STATE MINIMUM WAGE

- On January 1, 2021, ***California's statewide minimum wage*** increased to $14 per hour for employers with 26 or more employees and $13 per hour for employers with 25 or fewer employees.

- This latest increase moves California one step closer to its goal of a $15 per hour minimum wage by 2023. *Once the minimum wage reaches $15.00 per hour wages could be increased each year up to 3.5% for inflation.*

- The applicable minimum wage depends on whether the employer has 25 or fewer employees or more than 25 employees, as demonstrated in the table below.

CALIFORNIA STATE MINIMUM WAGE

EFFECTIVE DATE	Minimum Wage for Employers With 26 or More Employees	Minimum Wage for Employers With 25 or Fewer Employees
January 1, 2021	$14.00/hour	$13.00/hour
January 1, 2022	$15.00/hour	$14.00/hour
January 1, 2023	$15.00/hour*	$15.00/hour*

*Once the minimum wage reaches $15 per hour for all businesses, wages could then be increased each year up to 3.5 percent (rounded to the nearest 10 cents) for inflation as measured by the national Consumer Price Index.

CALIFORNIA LOCAL MINIMUM WAGE

- In addition to California's statewide minimum wage increase, many cities and counties have enacted their own minimum wage ordinances that exceed state wage requirements. If a local minimum wage rate is more generous to employees than the state minimum wage rate, employers must comply with the local law.

CALIORNIA MINIMUM SALARY

- For individuals to qualify as exempt employees, California requires that:
  - They perform exempt duties more than 50% of their work time, and
  - Exempt executive, administrative, and professional employees earn a salary of no less than two times the state minimum wage for full-time employment. The minimum annual salary is based on the current state minimum wage, calculated as follows: minimum wage x 2 x 2080 hours.

CALIFORNIA STATE MINIMUM SALARY

EFFECTIVE DATE	Exemption Threshold for Employers With 26 or More Employees	Exemption Threshold for Employers With 25 or Fewer Employees
January 1, 2021	$4,853.33/month $58,240/annual $1,120/week	$4506.67/month $54,080/annual $1,040/week
January 1, 2022	$5,200/month $62,400/annual $1,200/week	$4853.33/month $58,240/annual $1,120/week
January 1, 2023	$5,200/month $62,400/annual $1,200/week	$5,200/month $62400/annual $1,200/week

*Once the minimum wage reaches $15 per hour for all businesses, wages could then be increased each year up to 3.5 percent (rounded to the nearest 10 cents) for inflation as measured by the national Consumer Price Index.

AB 1512 – SECURITY GUARD REST BREAKS

- Changes the law to provide that security guards may be required to remain on the premises during rest periods and to remain on call during the rest period.

INDEPENDENT CONTRACTORS

AB 5's "ABC" TEST TO DETERMINE IC STATUS

California courts determine whether a worker is an employee or an independent contractor by considering whether:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact;
- The worker performs work that is outside the usual course of the hiring entity's business; and
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

If a company is unable to demonstrate **any** of these three factors, then **the worker is an employee**, subject to a list of exceptions.

AB 2257 – WORKER CLASSIFICATION

- Exempts more California workers from AB 5's "ABC" test.
  - 109 categories of workers exempt from ABC test.
  - Changes to business-to-business exemption.
    - Specifies the terms required in a written contract, providing that a business service provider's residence is a permissible place of business.
  - Several new exemptions in the entertainment/music industry.
  - Exemption for businesses referring customers to providers in certain services.
    - Expands the type of qualifying services for the exemption, including graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, yard cleanup, and interpreting services.

PROP 22 - EXEMPTS APP-BASED DRIVERS FROM AB 5

- App-based ride share and food delivery companies can treat workers as independent contractors, even though they do not qualify as such under the AB 5's "ABC" Test.

- Workers are only independent contractors if the workers have freedom to determine dates and times of work, and the company does not restrict the driver from performing rideshare or delivery services for other companies.

- Numerous lawsuits and litigation pending.

CRIMINAL CONVICTIONS

APPLICANTS FOR EMPLOYMENT WITH A CRIMINAL HISTORY

- **Use of Criminal History When Considering Applicants for Employment:**
  - Must perform individualized assessment.
  - California law prohibits employers from considering criminal convictions that have been judicially dismissed in making employment decisions.
  - *(Garcia-Brower v. Premier Automotive Imports of CA, LLC, No. A156985 (2020)).*
    - Employers have obligation to investigate accuracy of criminal background checks to ensure they don't improperly consider a dismissed conviction.
    - Employers should not request information about dismissed convictions.
    - Conduct thorough investigations prior to terminating employees for misconduct.

EMPLOYEE HANDBOOKS

There are several new laws that require employers of all sizes to update their employee handbook.

- Expanded Leave Rights (CFRA).
- Changes to Crime Victims Leave and Organ and Bone Marrow Donation.
- Revise Illness & Injury Prevention Program for COVID-19.
- Adopt a COVID-19 Specific Workplace Safety Plan.
- Remote work rules.

REASONABLE ACCOMODATION UNDER CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (FEHA)

- (*Morgan v. AT&T Commc'ns of California, Inc.*, No. H044994 (Cal. Ct. App. Sept. 25, 2020)).
  - Reasonable accommodation requests because of supervisor's conduct.
  - Employees are not considered disabled and are therefore not eligible for reasonable accommodation.
  - Employers should still follow the FMLA/CRFA process to determine leave eligibility.
  - Access leave eligibility as a reasonable accommodation under FEHA.

AB 2143 – LOOSENED RESTRICTIONS ON “NO RE-HIRE” PROVISIONS IN EMPLOYMENT SETTLEMENT AGREEMENTS

- Current law prohibits “no-rehire” provisions in settlement agreements.
- AB 2143 slightly modifies California Code of Civil Procedure section 1002.5. Specifically, it requires that the aggrieved former employee must have filed the claim in good faith in order for the prohibition against "no-rehire" provisions to apply.
- Expands this "no-rehire" exception to allow no-rehire provisions when the former employee engaged in any criminal conduct, rather than limiting the exception to sexual harassment or sexual assault.
- Clarifies that, in order to qualify for the "good faith determination" exception, an employer's determination must have been made and documented before the aggrieved person filed the claim or complaint.

AB 2992 – EXPANDED PROTECTIONS FOR EMPLOYEE VICTIMS OF CRIME OR ABUSE

- Current law prohibits employers from discharging, discriminating against or retaliating against employees who are victims of domestic violence, sexual assault or stalking for taking time off from work to obtain or attempt to obtain a temporary restraining order, restraining order or other injunctive relief or to help ensure the health, safety or welfare of the victim or the victim's child.

  - Prohibits employers with 25 or more employees from discharging, discriminating or retaliating against employees from taking time off for other specified reasons.

- AB 2992 expands these protections by broadly defining "victim" as:

  1. Victim of stalking, domestic violence or sexual assault,

  2. Victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury, and

  3. Person whose immediate family member, as defined, died as the direct result of a crime. AB 2992 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.“

- Current law also provides that if an unscheduled absence occurs, an employer is prohibited from taking action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer, which may include documentation from a victim advocate as well as any form of documentation that reasonably verifies that the crime or abuse occurred such as a written statement signed by the employee or an individual acting on the employee's behalf.

SB 973 – NEW PAY DATA REPORTING OBLIGATIONS FOR EMPLOYERS WITH 100 OR MORE EMPLOYEES

- Requires employers with 100 or more employees and who are required under federal law to file an annual federal Employer Information Report (EEO-1) to submit an annual pay data report to the California Department of Fair Employment and Housing (DFEH).

- The report must include the number of employees and the hours they worked by race, ethnicity and gender in 10 federally identified job categories and whose annual earnings fall within the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey.

- Employers must submit their pay data reports to the DFEH by March 31, 2021, and annually thereafter.

- More guideline information available at https://www.dfeh.ca.gov/paydatareporting/

AB 1947 – COMPLAINTS WITH DLSE

- Current law provides that any person who believes that he or she has been discharged from employment or discriminated against in violation of any law under the jurisdiction of the DLSE may file a complaint with the DLSE within six months after the occurrence of the alleged violation.

- Doubles the time an employee has to file a complaint to one year from the date on which they are “discharged or otherwise discriminated against.”

- Amends Labor Code Section 1102.5, which prohibits retaliation against employees who report employer violations or noncompliance with local, state, or federal statutes or regulations. Labor Code Section 1102.5 does not require an actual violation, as it protects employees who have “reasonable cause to believe” that their employer violated or failed to comply with the law.

- Prevailing Plaintiffs in Whistleblower Retaliation Claims Can Recover Reasonable Attorneys' Fees. Thus, the bill provides an enhanced financial incentive for employees to file civil claims under Labor Section 1102.5 against employers instead of using the DLSE investigation process.

Vazquez v. Jan-Pro Franchising International, Inc. (Cal. Sup. Court, Jan. 14, 2021)

- *Dynamex* is retroactive because the decision did not change any "settled rule" about what test applied to the Wage Orders and doing so is not "improper or unfair" to employers.
- Opens up businesses, that acted in good faith under the universally accepted *Borello* standard, to legal exposure.
- The Court's *Vazquez* opinion states *Dynamex* applies retroactively to all cases "not yet final" as of the date of the *Dynamex* decision.
- A business that relied in good faith on *Borello* can now be liable for not following the ABC test before the *Dynamex* decision was ever issued.
- Exemptions from *Dynamex* under AB 5 also apply retroactively.

AB 3075 – EXPANSION OF SUCCESSOR LIABILITY FOR LABOR CODE JUDGMENTS

- Provides that "[a] successor to a judgment debtor shall be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgement, after the time to appeal therefrom has expired and for which no appeal therefrom is pending."
    - A "successor" is a company that:
        - Uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor,
        - Has substantially the same owners or managers that control the labor relations as the judgement debtor,
        - Employs as a managing agent any person who directly controlled the wages, hour or working conditions or the affected workforce of the judgement debtor, or
        - Operates a business in the same industry and the business has an owner, partner, officer or director with an immediate family member of any owner, partner, officer or director of the judgment debtor.
- AB 3075 also adds new obligations for a company when submitting its statement of information with the California Secretary of State, to state whether "any member or any manager has an outstanding final judgment issued by the Division of Labor Standards Enforcement or a court of law, for which no appeal therefrom is pending, for the violation of any wage order or provision of the Labor Code."

BROWN VS. TGS MANAGEMENT CO., LLC (2020)

- The California Court of Appeal struck down an employee's confidentiality agreement as void, being, in effect a "*de facto*" unlawful non-compete agreement.
- The definition of "confidential information" in the agreement was so broad it had the effect of acting as a bar to future employment in the employee's chosen field of securities trading.
- The definition included: "all information that is usable in or that relates to the securities industry" and encompassed all information used, or relating, to the business, which was virtually all subject matters pertaining to securities trading.
- Employers should review their confidentiality agreements to make sure they are not overly broad, which could render them void in California.

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