

MCHA

Legal Update 2021

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Agenda

- COVID-19
- Time Off
- Fair Employment
- Compensation
- “Catch-All”
- Questions

California's 2020 Legislative Activity

- 682 Senate Bills introduced. 137 made it to the governor's desk and 117 were signed.
- 1,541 Assembly Bills introduced. 291 made it to the governor's desk and 255 were signed.

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COVID-19

COVID – 19 Vaccination

- Current: California residents age 65 and older have priority, also health care, teachers, agriculture. . .
- Can employer require workers to get a vaccine?
- What exceptions would exist?

Cal/OSHA Emergency Standard

- New standard applies to all employees and places of employment.
- Does not apply to:
 - Places of employment with one employee who does not have contact with other persons
 - Employees working from home
 - Employees already covered by Cal/OSHA's aerosol transmission standard (health care facilities, labs, etc.)

Cal/OSHA Emergency Standard

- If employee off work for COVID and has exhausted paid time off, employer to maintain employee's earnings
- Written COVID-19 Prevention Program (WCPP)
- Notice of Exposure and Cases
- Physical Distancing
- Face Coverings

Cal/OSHA Emergency Standard

- Testing Requirements
- Return to Work Criteria
- Outbreaks
- Employer-Provided Housing and Transportation

COVID Paid Leave Programs

- FFCRA (federal program, less than 500 employees)
 - Up to 80 hours of paid sick leave for own COVID-illness/quarantine
 - 12 weeks to care for child whose school/childcare is closed
- SPSL (California program, more than 500 employees)
 - Up to 80 hours of paid sick leave for own COVID-illness/quarantine

Requirement to provide Ended December 31, 2020; Employers may continue through March 2021.

AB 685 Cal/OSHA and COVID

- Requires employers who receive notice of potential exposure to their workforce of COVID-19 must, within one business day, give written notice all employees at a worksite
 - Notice of potential exposures
 - Information about COVID-19 related benefits and protections
 - Information about the disinfection and safety measures that will be taken at the worksite in response to the potential exposure.
- Employers must notify local public health agencies of outbreaks within 48 hours of becoming aware of the outbreak (3+ lab-confirmed cases of COVID among employees who live in different households within a two-week period).

Sunsets January 1, 2023.

SB 1159 – Workers Comp & COVID

- Codifies Gov. Newsom's Executive Order N-62-20 and adds 2 new rebuttable presumptions re COVID illness and occupational injury.
- Presumptions (including some specific to first responders/ health care workers).

SB 1159 – Workers Comp & COVID

- For other employers:
- Rebuttable presumption applies only if the employee works for an employer with 5+ employees and the employee tests positive for COVID within 14 days after reporting to work during an outbreak at workplace.
- “Outbreak”:
 - 100 or fewer employees and 4 test positive
 - More than 100 employees and 4%+ test positive
 - Worksite ordered to close by public health, Cal/OSHA, etc.

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Time Off

AB 2017 – Kin Care Leave

- Labor Code 233 provides that employees must be allowed to use at least half of their annual accrual of employer-provided sick leave for kin care.
- New law provides that it is in the **employee's sole discretion** to designate leave to use for this purpose.

SB 1383 – CFRA Expansion

- CFRA expanded to require employers with **as few as 5 employees** to provide up to 12 weeks of unpaid leave to employees for covered reasons.
- Adds qualifying exigencies of being called to active duty as a covered reason.
- Eliminates “2 parents, 12 weeks total” rule.
- Eliminates ability of employers to limit reinstatement for key employees.

AB 1867 – Pilot Program for Family Leave

- Supplemental Paid Sick Leave law also requires the DFEH to create a small employer family leave mediation pilot program for employers with between 5 and 19 employees.
- Employers will have 30 days from receipt of right-to-sue notice to request mediation.
- Civil action cannot go forward until mediation is complete; SOL tolled.

AB 2992 – Expanded DV Protections

- Provides victims of violent crimes:
 - Time to recover without fear of job loss
 - Expanded unpaid protected leave.

“Unlimited” (!) Vacation Pay

- “No accrual” policies are permitted.
- Need a **written policy**
 - Clearly explains that paid time off is not a form of additional wages for services performed, but part of flexible work schedule
 - Describes rights and obligations of employer and employee and consequences for failing to schedule time off
 - Allows sufficient opportunity for employee to take time off, or work fewer hours in lieu of taking time off
 - Fairly administered so not a “use it or lose policy” or creates inequities.

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Fair Employment

AB 2143 - No Rehire / Settlement

- Last year: Employer cannot include a “no-rehire” term in settlements of employment disputes.
- AB 2413: “No-Rehire” term permitted **if** aggrieved party engaged in criminal conduct.
 - Employer must have documented the conduct **before** the aggrieved filed a claim.
 - “No Re-hire” provisions still permitted when no claim filed.

Fair Employment – Sex, Gender, Orientation

- Is Title VII of the Civil Right Act of 1964 violated by an employer that terminates an employee merely for being gay or transgendered?
- Yes! Such actions are discrimination “because of . . .sex.”
- All employers subject to Title VII now must abide by the requirements of federal law. . .

Bostock v. Clayton County

Fair Employment – Disability Discrimination

- Anthony sued TRAX, alleging she was terminated for her disability.
- TRAX then learned Anthony did not have the Bachelor's degree she put on her application; degree required for job (esp. with government contracts).
- EEOC argued that court should disregard EEOC's own rules that the person have all the skills, experience, education, etc. to do the job. Court disagreed.
- Also: TRAX not required to engage in the interactive process because Anthony was not otherwise qualified.

Anthony v. TRAX International Corp.

Fair Employment – Disability Discrimination

- Glynn had to stop driving due to eye condition and couldn't continue as a pharma sales rep. He asked to be moved to a position that did not require driving but was never reassigned.
- Glynn went out on disability leave and while out was terminated from employment.
 - Temporary HR employee terminated him when he became eligible for LTD – but had not applied.
- Glynn complained and later filed suit; then the company offered to reinstate him but with no specifics.

- Glynn was terminated because of a mistake, but he didn't need to prove animus or discriminatory intent to show that was disability discrimination.
 - Discrimination doesn't always require a "villain"!

Glynn v. Superior Court

Fair
Employment –
Disability
Discrimination

- Prior pay is not a defense to pay disparity!
- School district: Relying on past salary was relying on “any other factor other than sex” and thus permitted.
- Court: No. Defense of “any other factor other than sex” is limited to job-related factors only. Prior pay is not job-related, and often carries the effects of prior sex-based discrimination.

Rizo v. Yovino

Fair
Employment –
Equal Pay

SB 973 – Pay Data Reporting

- Private employers with 100 + employees must submit a pay data report to DFEH by March 31, 2021 and annually.
- Numbers of employees, by race, ethnicity and gender, in specified job categories.
- Wage data.

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Compensation

Minimum Wage Increases

- Employer with at least 26 employees in pay period:
 - \$14 per hour starting January 1, 2021
- Employer with 25 or fewer employees:
 - \$13 per hour starting January 1, 2021

Exempt Salaries

Exempt Employees:

- \$54,080 (25 or less)
- \$58,240 (25 + employees)
- Duties!

California Computer Professional:

- \$98,907.70 annually (\$8,242.32 monthly) or an hourly wage of \$47.48
- Exemption from OT only. Still need meal and rest breaks.

AB 2557 – Exemptions to AB 5 and Dynamex

- “Revises and recasts” parts of AB 5.
- Took effect in September 2020.
- Even if AB 5’s ABC test doesn’t control, the relationship is governed by the multifactor test of *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

- Worker is an employee under the Wage Orders unless the hiring entity establishes all of the following:
 - free from the control and direction of the hirer in connection with the performance of the work; and
 - performs work that is outside the usual course of the hiring entity's business; and
 - is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

The “ABC Test”

AB 2557 – Contractors “Generally”

- Musicians
- Artists
- Writers
- Photographers
- Underwriting inspectors for insurance
- Manufactured housing sales
- International exchange visitor program
- Consulting services
- Animal services
- Competition judges
- Licensed landscape architects
- Specialized performers teaching master classes
- Registered professional foresters
- Real estate appraisers
- Home inspectors
- Feedback aggregators
- Certain referral agencies / relationships
- B2B relationships between 2+ sole proprietors

Prop 22 – Exemptions to AB 5 and Dynamex

- Classifies drivers for app-based transportation (rideshare) and delivery companies as “independent contractors,” not “employees,” unless company:
 - sets drivers’ hours,
 - requires acceptance of specific ride and delivery requests, **or**
 - restricts working for other companies.

SB 1384 Wage Claims / Arbitration

- Labor Commissioner can represent an employee in opposing an employer's petition to compel arbitration and/or in any arbitration ordered for resolution of the claim.
- Claimant must request representation and must show they are financially unable to afford lawyer.
- Labor Commissioner must determine claim has merit based on an initial investigation.

AB 1512- On-Call Rest Breaks – Security Guards

- Amends California rest break law to allow **UNIONIZED** security guards to remain on-call during rest breaks.

AB 1947 – More time for DLSE Claims

- Employee has one year, instead of six months, to file claim with Labor Commissioner that they were discriminated against or separated for complaining.

Military Assist PFL

- California's Paid Family Leave program is expanded.
- PFL Military Assist benefits will be available to eligible Californians who need time off work to participate in a qualifying event because of the military deployment of their spouse, registered domestic partner, parent, or child to a foreign country.
- EDD's web site has more information

Compensable Time

- Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags or personal technology devices voluntarily brought to work purely for personal convenience compensable as hours worked?
- Yes!

Frieken v. Apple, Inc. (9th Cir. 2020)

Call-in for Shift

- An employee need not physically report to work in order to be eligible for reporting time pay.
- Telephone expenses for calling in? TBD

Herrera v. Zumiez

- Employee's settlement and dismissal of underlying Labor Code claims does not deprive that individual the ability to later assert a representative action under PAGA – even if about the same underlying conduct.

Kim v. Reins Int'l Cal., Inc

PAGA Settlements



“Catch-All”

AB 979 - Board Diversification

- 2018: Publicly traded corporations with principal executive office in California must have at least one female on board of directors by end of 2019. The number must increase, based on size of board by end of 2021.
- AB 979: Expands the diversification requirement. Companies need one board member from an underrepresented (minority) community by end of 2021 and increasing thereafter.

Noncompete Agreements

- Employees entered into a noncompete agreement with employer Techno Lite that covered *while they were employees*.
- Techno Lite sued employees for siphoning off accounts and diverting business to their own company, Emcod, *while they were employees*.
- A promise not to compete with an employer *while employed* is not void under B&P 16600.

Techno Lite, Inc. v. Emcod, LLC

AB 1281 – CCPA Exemptions

- Extends the employer exemption from parts of the California Consumer Privacy Act (CCPA) to January 1, 2022.
- Employers ARE RIGHT NOW covered by the notice provision of CCPA, requiring them to provide notice to applicants / employers of personal information collected and purposes for which it is used.



Questions?



Thank you!

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