Your CA Fast Five – Highlights on Five Major Changes to California's Employment Laws that You Need to Know Right Now

Labor & Employment Law Update

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While many California employers are challenged on multiple fronts at the moment from the ongoing pandemic and wildfires, they nonetheless need to be mindful of new employment law measures recently signed by Gov. Gavin Newsom. The major changes include stronger family leave protections, new COVID-19-related reporting requirements and rules helping essential workers get Workers' Compensation, tighter gig-work rules, and data collection requirements to help track race and gender pay gaps.

1. New Family Leave Law

On September 17, 2020, Gov. Newsom signed a bill that gives California employees at smaller businesses greater family and medical leave protections. According to Gov. Newsom, "[t]he COVID-19 pandemic has only further revealed the need for a family leave policy that truly serves families and workers, especially those who keep our economy running."

Under Senate Bill 1383, employers with five or more employees must offer 12 weeks of unpaid time off for family or medical leave as of January 1, 2021. The bill also mandates that the companies must continue employer-paid health benefits for each employee who takes leave. The reasons for leave include time to care for a newborn, a sick loved one or themselves, and now expands leave to include caring for grandparents, grandchildren, and siblings in addition to the current requirement covering an employee's parent, child, and spouse or domestic partner. California law previously only required, for example, companies with 50 or more employees to provide 12 weeks medical leave.

The law further calls for employers to grant spouses who work for the same company with 12 weeks of family leave each. Employers will not be able to compel parents to split their leave.

2. COVID-19 Reporting Requirements

On January 1, 2021, California employers' COVID-19 reporting requirements will change. Under Assembly Bill 685, employers will need to notify workers that they may have been exposed to COVID-19 within one business day if an employee tests positive. The law requires written notice to all employees and subcontracted employees who were on the premises at the same worksite within the "infectious period." The notice must contain information identifying the COVID-19 related benefits that the employee(s) may receive, and the company's disinfection protocols and safety plan to stop any further exposures.

Under the new measure, companies will be further required to notify their local public health department if the number of known COVID-19 cases qualifies as a "COVID-19 outbreak," as defined by the California State Department of Public Health. Companies will have 48 hours to send notice to the public health department. The law specifically empowers California's Division of Occupational Safety and Health (Cal/OSHA) to shut down a worksite if the virus poses an "imminent hazard."

Employers should strongly consider developing and implementing a written COVID-19 action plan to comprehensively address prevention, outbreak containment and employee rights and obligations.

3. Workers' Compensation Changes for Essential Workers

Gov. Newsom also signed into law Senate Bill 1159 addressing workers' compensation for certain essential workers. The Bill takes effect immediately and remains in place through January 1, 2023 and creates a "disputable presumption" that illness or death related to COVID-19 arose out of and in the course of employment and is compensable, under certain circumstances. The Bill also requires an employee to exhaust paid sick leave benefits and meet specified certification requirements before receiving any temporary disability benefits or, for police officers, firefighters, and other specified employees, a leave of absence. The Bill would also make a claim relating to a COVID-19 illness presumptively compensable after 30 days or 45 days, rather than 90 days. Until January 1, 2023, the bill would allow for a presumption of injury for all employees whose fellow employees at their place of employment experience specified levels of positive testing, and whose employer has 5 or more employees.

The Bill does state that the "place of employment" does not include an employee's residence if they are working at home.

The compensation to be awarded for injury pursuant to this Bill includes full hospital, surgical, medical treatment, disability indemnity, and death benefits.

4. Freelancer Exemptions Expansion

As many of our readers may recall, effective January 1, 2020, AB 5 codified what has been known as the "ABC" test, which is commonly used to determine whether a worker is an employee as opposed to an independent contractor. Specifically, under AB 5, a person providing labor or services for remuneration *shall be considered* an employee rather than an independent contractor *unless* the hiring entity demonstrates that all of the following conditions are satisfied:

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

After the enactment of AB 5, Uber filed a federal lawsuit challenging the law's constitutionality. Uber, Lyft and others also championed Proposition 22, a ballot initiative in the November 2020 election to define app-based transportation (rideshare) and delivery drivers as independent contractors.

In response to AB 5, Gov. Newsom signed into law AB 2257, a bill intended to ease some of AB 5's restrictions by creating a number of exemptions that allow freelance writers, photographers, translators and musicians to continue working as independent contractors, rather than employees. For instance, AB 2257 eliminates a 35-submission cap for freelance writers and photographers – current rules dictated that California-based freelancers who contribute more than 35 submissions to an outlet per year must be reclassified as an employee. In addition, translators, appraisers, and registered foresters have been added to the "professional services" exemption. The "professional services" exemption currently covers graphic designers, travel agents and marketers, among others. Finally, AB 2257 allows music industry workers, including recording artists, songwriters, producers, promoters and many others, to continue working as freelancers. AB 2257 went into effect as of its passage.

5. Collecting Pay Gap Data

Senate Bill 973 requires that on or before March 31, 2021, and on or before March 31 each year thereafter, a private employer that has 100 or more employees must submit a pay data report to the Department of Fair Employment and Housing (DFEH) that contains specified wage information. This Bill requires that the information is to be made available in a prescribed format. DFEH then has to maintain the pay data reports for a minimum of 10 years, and it is unlawful for any officer or employee of the DFEH to make public in any manner any individually identifiable information obtained from the report prior to the institution of certain investigation or enforcement proceedings. The Bill also requires the Employment Development Department to provide DFEH, upon its

request, the names and addresses of all businesses with 100 or more employees.

The pay data report must include information about the number of employees by race, ethnicity, and sex who are in executive or senior level, professional, technician, and administrative positions. Data should also include the same information for sales, craft and services workers as well as for laborers and helpers.

If an employer submits a copy of its Employer Information Report, otherwise known as an EEO-1 Report, containing the same or substantially similar pay data information required under the Bill, then the employer will be in compliance with the Bill.

Failure to submit the required report may result in the DFEH seeking an order requiring the employer to comply with these requirements, and pay the costs associated with seeking such an order.

In summary, California employers can be proactive and prepare for these amendments by (1) reviewing and updating employee classifications as well as existing policies and practices to ensure current compliance, (2) collecting the necessary information, if the employer does not already have it, to address the new reporting requirements, and (3) implementing necessary processes to address these developments. For our part, we will continue to monitor and communicate further developments as they occur.