



**LABOR
LAW**

SOUND ADVICE

FOR EMPLOYERS

2021 MID-YEAR EMPLOYMENT LAW UPDATE

Richard C. Rybicki
Rybicki & Associates | P.C.

www.rybickiassociates.com

© 2021 Rybicki & Associates, P.C.

INTRODUCTION

Topics Covered

- Covid-19 Legislation (in effect in 2021)
- Expansion of State Non-COVID-specific Leaves of Absence
- Independent Contractor Developments
- Laws Affecting Specific Types of Workers
- Wage and Hour Developments
- Employment of Minors
- Administrative Claims and Agencies
- Corporate – Entity Obligations
- Privacy
- Equal Pay – EEO Related Requirements
- Other Legislative Changes

Additional Topics

- Federal Agency Changes
- A Few Significant Court Cases
- Issues to Watch For: On the Horizon

COVID-19

FFCRA Expiration

Continued Tax Credit

FFCRA Expires

- Federal COVID-related leave rights *and* pay ended on December 31, 2020
- Employees do not have continuing right to leave under federal law (unless something changes)
- *But* employer reimbursement for voluntary leave continues for some employers through September 30
- DOL FAQ at www.dol.gov/agencies/whd/pandemic/ffcra-questions

FFCRA Expires

- American Rescue Plan Act extends tax credits for employers with fewer than 500 employees
- Covers: paid sick and family leave, leave to take or recover from vaccination
- Employer documentation is required, *see* IRS guidance
 - <https://www.irs.gov/newsroom/employer-tax-credits-for-employee-paid-leave-due-to-covid-19>

COVID-19 Notification and Reporting

AB 685: Reporting Requirements

- AB 685 (2020) created a new set of reporting requirements effective January 1, 2021
- The bill added sections to the Labor Code and incorporated public health department definitions
- Covers employee notification, local health department notification, and Cal-OSHA enforcement/citations

AB 685: Reporting Requirements

- The law is focused on actual outbreaks and COVID measure
- Most employers will be more affected by Cal-OSHA emergency standards
- But employers should also be aware of AB 685

AB 685: Reporting Requirements

- California Department of Public Health has published guidance at:
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Questions-about-AB-685.aspx>
- Cal-OSHA has published guidance at:
<https://dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html>

AB 685: Reporting Requirements

- The requirements should be viewed in coordination with Cal-OSHA's emergency regulations
- DOSH has issued guidance on the temporary regulations:
<https://dir.ca.gov/dosh/coronavirus/ETS.html>
- Model CPP:
www.dir.ca.gov/dosh/dosh_publications/ CPP.doc

Single Potential COVID Exposure

- The law has different requirements for notices of single potential exposures compared to “outbreaks”
- Non-outbreak: If an employer **receives notice of a potential exposure** to COVID-19
- The employer must make disclosures to other employees and representatives ***within one business day***

Definitions

- Notice of Potential Exposure includes:
 - Notification from a public health official or licensed medical provider that **an employee was exposed to a “qualifying individual”** at the worksite
 - Notification from an employee or emergency contact that the **employee is a “qualifying individual”**
 - **Discovery through an employer’s testing protocol** that an employee is a qualifying individual
 - Notification that a **“qualifying individual”** was on the worksite

Definitions

- Exposures include a “qualifying individual” who:
 - Has a **laboratory-confirmed case** of COVID-19;
 - Received a **positive COVID-19 diagnosis** from a licensed health care provider;
 - Received a **COVID-19-related order to isolate** provided by a public health official; or
 - **Died** due to COVID-19

Definitions

- “Worksite” includes:
 - building, store, facility, agricultural field, or other location where a worker worked during “the infectious period”
 - *does not include* buildings, floors, or other locations of the employer that a qualified individual did not enter
 - need only notify employees who were at **the same worksite** as the “qualified individual”

Notification Requirements

- Provide written notice to **employees** and **employers of subcontracted employees**, who were on the premises at the same worksite as the qualifying individual within the **infectious period** (as defined by the State Department of Public Health)
- In a manner the employer normally uses to communicate employment-related information
- Such as personally, email, or text message if **reasonably anticipated to be received** within one business day of sending
- In English and the language understood by the **majority** of the employees

Notification Requirements

- Provide written notice to **any union representing the employees (in the same form as a Cal-OSHA Form 300 if possible)**
- Provide employees and union(s) **information regarding COVID-19-related benefits** to which the employee may be entitled under applicable federal, state, or local laws
- Provide **information on potential COVID-19-related leave**, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions
- Cover **antiretaliation and antidiscrimination protections**

Notification Requirements

- Notify employees and union(s), and the employers of subcontracted employees, of **the disinfection and safety plan that the employer plans to implement and complete** per CDC guidance

COVID Outbreak

- If notified of the number of cases that meet the definition of a **COVID-19 outbreak** (per the State Department of Public Health – currently 3 cases at the same site in 14 days)
 - **Within 48 hours**: Notify the local public health agency of the names, number, occupation, and worksite (including NAICS industry classification) of employees who **tested positive for, have received an isolation order for, or died due to COVID-19** (“qualifying individual”)
 - Notify the local health department of any **subsequent laboratory-confirmed cases of COVID-19** at the worksite

Other Requirements

- May not require employees to **disclose medical information** unless otherwise required by law
- **May not retaliate** against a worker for disclosing:
 - a positive COVID-19 test
 - COVID-19 diagnosis
 - or order to quarantine or isolate

Other Requirements

- Maintain records of written notifications to employees and union(s) for **three years**
- State Department of Public Health will publish workplace industry information received from local public health departments on its internet website
 - This will the public to track COVID-19 cases and outbreaks **by** industry but identifiable employee information will not be posted

Exclusions

- Applies to public and private employers except “health care facilities” (Health & Safety Code § 1250 – such as hospitals, nursing and care facilities, hospice)
- “Outbreak” defined separately for healthcare workplaces
- Does not apply to employees who **conduct COVID-19 testing or screening or provide direct patient care or treatment** to individuals who are known to have tested positive for, are under investigation for, or are in quarantine or isolation related to COVID-19, **unless the qualifying individual is an employee at the same worksite**

Cal-OSHA Changes

- Cal-OSHA may shut down and prohibit entry to workplaces where it determines the risk of infection creates an **imminent hazard** to employees
- **Limited to immediate area** in which hazard exists – no others
- May not materially interrupt **critical governmental functions** or the delivery of **electrical power or water**

Cal-OSHA Changes

- Cal-OSHA (DOSH) “serious” citations are both expensive and can support expensive “Serious and Willful” workers’ compensation claims
- Existing law creates a “rebuttable presumption” that a violation is serious when DOSH establishes that a “realistic possibility that death or serious physical harm could result from the actual hazard created by the violation”
- DOSH usually must consider a variety of factors about the workplace prior to issuing serious violation citations and usually satisfies the requirement by forwarding notice to an employer at least 15 days before issuing them

Cal-OSHA Changes

- AB 685 **eliminates the prior notice** procedure for COVID-19 related citations
- This **still requires DOSH to consider the factors** but makes it likely that COVID-related serious violation citations will be issued **without prior notice**, requiring immediate assessment (and post-citation action) by employers
- Changes expire after **December 31, 2022**

AB 685 Takeaways

- The law only applies when an employer receives notification – so it is not as immediate as general Cal-OSHA standards
- The new Cal-OSHA standards do not eliminate the law so notice still must be provided to vaccinated workers
- There may still be *local* laws such as in Santa Clara County:
 - <https://covid19.sccgov.org/news-releases/pr-06-21-2021-phase-out-May-18-health-order-per-new-CalOSHA-workplace-regulations-and-vaccination>

Cal-OSHA Standards

Cal-OSHA Standards

- Cal-OSHA *finally* issued Emergency Temporary Standards (“ETS”) effective June 17, 2021
- ETS resources are published on the DOSH website:
 - <https://dir.ca.gov/dosh/coronavirus/ETS.html>
- Prior guidance is at:
 - https://www.dir.ca.gov/dosh/dosh_publications/06-16-21-ETS-Revisions.pdf

ETS Requirements

- ETS **apply to all workplaces** except:
 - workers who have no contact with other persons
 - workers who work remotely at locations of their choice
 - locations covered by the Aerosol Transmissible Diseases standard (such as hospitals, outpatient facilities, group care, public health, and law enforcement)

ETS Requirements

- 1. **Physical distancing requirements have been eliminated** except where an employer determines there is a hazard and for certain employees during major outbreaks
- 2. **Fully vaccinated employees do not need to wear face coverings** except for certain situations during outbreaks and in settings where the California Department of Public Health requires them (such as public transit, schools, childcare, healthcare settings, correctional facilities, and shelters)

ETS Requirements

- 3. Employees are **not required to wear face coverings when outdoors** regardless of vaccination status except for certain employees during outbreaks
- 4. **Employees who are not fully vaccinated must wear face coverings indoors and in vehicles, and the employer must provide face coverings at no charge**
- 5. **Fully vaccinated employees** may request face coverings at no cost from the employer and wear them, even when not required, when feasible

ETS Requirements

- 6. Employees who are **not fully vaccinated may request respirators** (rather than “face coverings”) at no cost. “Respirator” is more protective than “face covering,” requiring an N95 or better device. Cal-OSHA will not immediately cite employers who cannot obtain N95 or better respirators so long as they are trying in good faith to get them
- 7. **Employers must document the vaccination status of fully vaccinated employees** if they do not wear face coverings indoors

ETS Requirements

- **7. Employers must document the vaccination status of fully vaccinated employees if they do not wear face coverings indoors**
- **8. Fully vaccinated employees do not need to be offered testing or excluded from work after close contact unless they have COVID-19 symptoms**
- **9. Employees who are not fully vaccinated and exhibit COVID-19 symptoms must be offered testing by their employer**

ETS Requirements

- 10. Employers must **review the Interim guidance for Ventilation, Filtration, and Air Quality in Indoor Environments**
- 11. Employers must **evaluate ventilation systems** to maximize outdoor air and increase filtration efficiency, and evaluate the use of additional air cleaning systems (Employers should document this evaluation.)

Other ETS Issues

- “Documentation” of employee vaccination status is undefined
- DOSH guidance notes that an employer may:
 - Require a copy of information showing vaccination
 - Require written certification from the employee
 - Simply record an employee’s verbal self-certification

Other ETS Issues

- “Face coverings” include surgical masks, medical procedure masks, respirators, or “a tightly woven fabric or non-woven material of at least two layers”
 - They must cover both nose and mouth
 - *do not include* a scarf, ski mask, balaclava, bandana, turtleneck, collar, or single layer of fabric
- “Fully vaccinated” means the employer has documented that the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine

Other ETS Issues

- Unvaccinated employees who cannot wear an approved face covering due to a medical condition or disability must wear “an **effective non-restrictive alternative**, such as a face shield with a drape on the bottom” if possible
- Unvaccinated employees who fall into an exemption and cannot wear a face covering or alternative, and do not maintain physical distancing, must be **tested weekly at the employer’s expense**
- The **ETS do not interfere with other state and local requirements** that are more protective

ETS Discussion

- Discussion on our blog site at:
 - <https://www.rybickiassociates.com/post/cal-osha-eliminates-most-requirements-for-vaccinated-employees-continues-other-covid-protections>

Workers Compensation Presumption

Workers Compensation Presumption

- SB 1159 codified Governor Newsom's Executive Order N-62-20 creating a rebuttable presumption that contraction of COVID-19 within 14 days of working in an employer's workplace is an occupational illness
- Creates Labor Code sections 3212.86, 3212.87 and 3212.88
- *See* www.dir.ca.gov/dwc/Covid-19/FAQ-SB-1159.html

Workers Compensation Presumption

- For illness contracted **on or after July 6, 2020**, the presumption will apply to:
 - First Responders and Health Care Workers who test positive within 14 days of work, and
 - **Employees whose employers have five or more employees** and who test positive during **“a period of outbreak”** at their specific workplace

Workers Compensation Presumption

- “Outbreak” definition is *different* than under AB 685 (above): outbreak exists if within 14 days *one* of the following occurs:
 - **four employees test positive** if the employer has 100 employees or fewer;
 - **four percent (4%) of the number of employees who reported to the specific place of employment test positive** if the employer has more than 100 employees; or
 - **a specific place of employment is ordered to close** by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection of COVID-19

Workers Compensation Presumption

- The rebuttable presumption may be overcome by evidence that COVID-19 was not contracted in the workplace
- Employers may introduce evidence regarding all measures they have taken to reduce potential transmission, as well as other evidence or “evidence of an employee’s nonoccupational risks of COVID-19 infection”

Workers Compensation Presumption

- General employers with (with five or more employees) who **know or reasonably should know** that an employee has tested positive for COVID-19 must **notify their workers' compensation administrator via email or facsimile within three business days** that:
 - An **employee has tested positive** (without personally identifiable information unless the employee asserts the infection is work related or has filed a claim form);
 - The **date the employee tested positive** (the date the specimen was collected for testing);
 - The **address(s) of the employee's specific place(s) of employment** during the 14 days preceding the positive test; and
 - The **highest number of employees who reported** to each specific place of employment in the 45 days prior to the employee's last day worked at each specific place

Workers Compensation Presumption

- Failure to report or providing false or misleading information to workers' compensation administrator is subject to a civil penalty up to ten thousand dollars (assessed by the Labor Commissioner)
- Employees must use all “benefits specifically available in response to COVID-19” before receiving any temporary disability benefits
- If none are available, or are exhausted, the employee *shall* be provided benefits **without a waiting period**

COVID - Paid Sick Leave

COVID - Paid Sick Leave

- Labor Code section 248.2 adopted to apply Supplemental Paid Sick Leave
 - Applies to employers with **26 or more employees**
 - “Covered employees” include those who cannot work or telework because:
 - Employee is subject to **isolation or quarantine**, or **has symptoms and is seeking a diagnosis**
 - Employee is **caring for a family member** in isolation or quarantine
 - Employee is **caring for a child whose school or place of care is unavailable** due to COVID-19
 - Employee is attending a **vaccine appointment** or cannot work or telework due to **side effects**

COVID - Paid Sick Leave

- Full-time workers receive **80 hours of leave**
- Part-time workers receive a **pro rata** amount based on average hours worked (there are a few methods discussed in DIR guidance)
- Leave is at the regular rate of pay (there are a few methods for this as well) capped at \$511 (\$5110 total)

COVID - Paid Sick Leave

- Leave provided under a *local COVID ordinance* counts toward the entitlement
- But it is *in addition to ordinary paid sick leave*
- Leave voluntarily provided by an employee counts
- Employees *may not be required* to use vacation or PTO
- But employers may take the *federal tax credit* for pay

COVID - Paid Sick Leave

- Additional conditions:
 - For child care: the school or place of care must have been closed due to “concern that a person who had been present on the school or daycare premises on or after January 1, 2021, was exposed to, or had contracted, COVID-19
 - Does not apply to general ‘stay at home’ ordinances
 - Covers January 1 through September 30, 2021 (and an employee may ask for *retroactive* credit for leave taken prior to March 31 effective date)
 - Cannot deny leave solely due to lack of documentation unless other information suggests that leave may not be for a valid purpose

COVID - Paid Sick Leave

- Guidance provided by the Department of Industrial Relations:
 - <https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html>
- Mandatory posting at:
 - <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>

RECALL RIGHTS

Limited Right to Recall

- Labor Code section 2810.8: recall rights for employees in the **hospitality industry** and in **building services** who were separated due to pandemic
- Applies to:
 - Hotels (50 or more rooms, including private clubs)
 - Event centers (1000 plus seats)
 - Airport service providers and hospitality operations
 - Building service providers (janitorial, maintenance, security)

Limited Right of Recall

- Employees must have:
 - Been employed for at least six months in the year before January 1, 2020
 - Have worked at least two hours per week
 - Most recently separated from employment because of any non-disciplinary reason related to the COVID

Limited Right of Recall

- Requires notice in writing, and via email and text, of open positions that are the same or similar to that held by employees when laid off
- Preference to those with greatest length of service, employer may send conditional notice to employees so long as it observes preference
- Employee has at least five business days to respond

Limited Right of Recall

- If employer hires another person instead, must forward notice within 30 days including length of service of person hired and why decision was made
- Law applies to successor owners as well!
- Guidance at:
 - <https://www.dir.ca.gov/dlse/COVID19Resources/FAQs-on-Recall-Rights.html>

NON-COVID DEVELOPMENTS

MINIMUM WAGE

Minimum Wage

- State minimum wage continues to rise each year:
- 2021: \$13.00 (25 or fewer employees)
 \$14.00 (26 or more)
- 2022 \$14.00 (25 or fewer employees)
 \$15.00 (26 or more)

Minimum Wage

- This also effects other issues:
 - Minimum salary = \$54,080 or \$58,240
 - Minimum rest and meal period penalties, split shift payments (e.g., tipped employees)

Agricultural Workers

- Agricultural workers (Wage Order 14):
- Employers with 26 or more employees:
 - Overtime after 8.5 hours a day or 45 hours per week (2021)
 - Overtime after 8 hour a day or 40 hours per week (2022)
- Employers with 26 or more employees:
 - Overtime after 9.5 hours a day or 55 hours per week (2022)

LEAVES OF ABSENCE

California Family Rights Act

California Family Rights Act

- California Family Rights Act (CFRA) models the requirements of the federal Family Medical Leave Act
 - 12 weeks leave for employee or family members' serious medical conditions or "baby bonding"
 - Continuation of health benefits and seniority
 - Applicable to employers with 50 or more employees

California Family Rights Act

- AB 1383 extends CFRA to employers with *five or more employees*
- Adopts prior requirements such as minimum service, minimum hours, notice and certification
- But: eliminates usual geographic requirement that an employee work within 75 miles of other employees

California Family Rights Act

- Also eliminates the baby-bonding exception for **parents who work for a single employer** (and would have been required to share the 12 weeks between them)
- **Adds additional family members:** non-dependent adult child, child of a domestic partner, grandparent, grandchild, or sibling.
- Adds “qualifying exigency” related to **covered active duty** of an employee or spouse, domestic partner, child, or parent
- Eliminates limitation on **highly compensated** employees’ reinstatement rights

California Family Rights Act

- The revisions implement a small business mediation program for complaints to the DFEH
- But the amendments create an entirely new scope of coverage for the CFRA applicable to employers with 5 to 49 employees
- Discussion by the DFEH can be viewed at:
https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/11/Coming-Soon_Expanded-Family-And-Medical-Leave_ENG.pdf

Crime or Abuse Victims

Crime – Abuse Victims

- AB 2992 expands Labor Code section 230 crime victim protections to include “time off work to obtain or attempt to obtain any relief”
- Relief includes (but is not limited to):
 - Temporary restraining order, Restraining order or other injunctive relief,
 - To ensure health, safety or welfare of the victim or victim’s child

Crime – Abuse Victims

- AB 2992 also **expands Labor Code section 230.1 protections** for employers with **25 or more employees** to include victims of *any crime* (not limited to domestic violence, sexual assault, and stalking)
- Permits time off without retaliation for a victim:
 - To **seek medical attention for injuries** caused by crime or abuse;
 - To **obtain services** from a domestic violence shelter, program, rape crisis center, or victim services organization or agency as a result of the crime or abuse;
 - To obtain **psychological counseling or mental health services** related to an experience of crime or abuse; or
 - To **participate in safety planning and take other actions to increase safety** from future crime or abuse, including temporary or permanent relocation.

Crime – Abuse Victims

- “Victim” includes anyone who is:
 - A victim of stalking, domestic violence, or sexual assault;
 - A victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury; or
 - A person whose immediate family member is deceased as the direct result of a crime.

Crime – Abuse Victims

- Both changes continue to require appropriate notice when possible and certification
- Leave is not meant to expand or extend beyond the amount allowed under the Family Medical Leave Act (e.g., 12 weeks)
- Written notice must be provided at the start of employment and on demand

Kin Care

Kin Care

- Labor Code section 233 allows employees to use employer-provided sick leave, up to half their current annual accrual rate, for qualified family members' illness or preventative care
- SB 2017 amends Section 233 to clarify that the employee has the sole right to designate whether a day is being used for self or for family care
- Amendment does not prohibit employer discipline if an employee misrepresents the nature of the leave

INDEPENDENT CONTRACTORS

Refinement of ABC Test

ABC – The New World

- 2019's AB 5 adopted "ABC" standards for determining independent contractor status
- Labor Code section 2750.3 now applies the "ABC" standard to Labor Code and Workers Compensation contexts
- Where Section 2750.3 does not apply, traditional common-law standards (the *Borello* test) will still apply

ABC – The New World

- ABC: Entity must establish three independent contractor factors:
 - (A) The worker is free from **control and direction** in connection with the work
 - (B) The work is **outside the usual course of the entity's business**
 - (C) The worker is customarily engaged in an independently established trade, occupation or business **of the same nature as the work performed**

Refinement of ABC Test

- The change caused problems because it contains exceptions for certain **occupations, Professional Services Contracts, Business-to-Business relationships,** and other carved-out situations.
- Dozens of proposed changes were introduced but only AB 2257 was adopted.

Refinement of ABC Test

- AB 2775 creates a new set of Labor Code sections clarifying or amending parts of the initial law:
 - The ABC Test (new Labor Code § 2775)
 - **Business-to-Business relationships** (§ 2776)
 - Referral Agencies (§ 2777)
 - **Professional Services** (§ 2778)
 - [new] **Single Engagement Event** (§ 2779)
 - [new] Recording Industry (§ 2780)
 - Construction Industry (§ 2781)
 - Data Aggregator (§ 2782)
 - Specified Occupations (§ 2783)
 - Motor Club (§ 2784)
 - **Effective Date and Effect** (§ 2785)
 - Enforcement (§ 2786)

Refinement of ABC Test

- **Business-to-Business** exception (Labor Code § 2776):
 - Changes “actually contracts” to “**can contract with** other businesses to provide the same or similar services ...’
 - Allows service providers to provide services to an entity’s clients if **using their own name** (not the contracting entity’s) and a **provider regularly contracts with other businesses**

Refinement of ABC Test

- **Business-to-Business** exception (Labor Code § 2776):
 - **Deletes language prohibiting individuals** (sole proprietors) to act as service providers
 - Uses the basic ABC test to determine **which bona-fide business an individual is employed** by – the service provider or the contracting entity.

Refinement of ABC Test

- **Professional Services** exception (Labor Code § 2776):
 - **Clarifies and expands the definition** of specific types of services that may qualify as Professional Services
 - **Eliminates controversial 35-work annual limitation** on freelance writers, photographers, photojournalists, videographers, translators, editors, illustrators and cartoonists

Refinement of ABC Test

Professional Services exception adds positions such as:

- Expanded definition of **fine artist**
- **Digital content aggregator**
- Specialized performers teaching short “**master class**”
- **Appraisers**
- Registered **professional foresters**
- **Real estate** licenses (already regulated by California law)
- **Home inspectors**
- **Repossession agency contractors** (already governed by law)
- **Musicians and groups** performing for single engagement live performance
- Individual **performance artist**
- Insurance underwriting **inspectors**
- and more ...

Refinement of ABC Test

- **Single Engagement Event** (Labor Code § 2779)
 - Does not apply to the relationship between two individuals where each is acting as a sole proprietor or other separate business entity
 - Each is engaging for a stand-alone non-recurring event in a single location or a series of events no more often than once a week

Refinement of ABC Test

- **Single Engagement Event** (Labor Code § 2779)
 - Each has the independence generally required (own tools, separate business and required licenses, can contract with other entities)
 - Does not apply to **high-hazard industries** or to **janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care or non-minor non-home construction projects**

Refinement of ABC Test

- **Effective Date and Effect** (Labor Code §2785)
 - Clarifies that the amendments “shall apply retroactively to existing claims and actions”
 - If an entity can demonstrate compliance with all the conditions of the *new* law, then neither the prior law nor the Supreme Court’s *Dynamex* standards apply!

Refinement of ABC Test

- View bill text at:
 - https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257

SPECIFIC CLASSES OF WORKERS

Health Care Workers

Health Care Workers

- AB 2537 adopts Labor Code section 6403.3, requiring employers with workers who provide direct patient care in a general acute care hospital, to:
 - provide **all DOSH-required Personal Protective Equipment,**
 - to employees who provide **direct patient care or provide services that directly support patient care** in a general acute care hospital
- Employers must also “ensure that employees use the personal protective equipment supplied to them”

Health Care Workers

- Starting April 1, 2021, employers with workers who provide direct patient care in a general acute care hospital must also maintain a three-month stockpile (at normal consumption levels) of:
 - N95 filtering facepiece respirators;
 - Powered air-purifying respirators with high efficiency particulate air filters;
 - Elastomeric air-purifying respirators and appropriate particulate filters or cartridges;
 - Surgical masks;
 - Isolation gowns;
 - Eye protection; and
 - Shoe coverings

Health Care Workers

- AB 2588 added Labor Code section 2802.1, requiring employers of employees providing direct patient care in a general acute care hospital to:
 - Reimburse the expense of any employer-provided or employer-required educational program or training;
 - Includes, but is not limited to, residencies, orientations, or competency validations necessary for direct patient care employment
 - Does not include (1) requirements for a license, registration, or certification necessary to legally practice in a specific employee classification, or (2) education or training that is voluntarily undertaken by an employee or applicant solely at their discretion.

Health Care Workers

- Employers may not retaliate against refusal to enter into an employment contract that does not provide required reimbursements
- Expenses are deemed necessary and reimbursable under Labor Code section 2802; successful suit for violation of Section 2802.1 permits attorneys' fees and costs

Food Service Workers

Food Service Workers

- AB 1867 added a handwashing provision to the Health & Safety Code (Section 113963)
- Food employees working in any food facility must be permitted to **wash their hands every 30 minutes** and additionally **as needed**
- Includes a facility that “stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level”

WAGE AND HOUR

SUCCESSOR EMPLOYERS

Successor Employers

- AB 3075 adds successor liability as Labor Code section 200.3:
 - Successor employer is liable for any wages, damages, and penalties owed to a predecessor's former workforce pursuant to a final judgment
 - Section does not limit other successor liability theories

Successor Employers

- Successorship is established where an entity:
 - Uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the predecessor (not including successor service contracts under Labor Code section 1060 *et seq*)
 - Has substantially the same owners or managers that control the labor relations as the predecessor,
 - Employs as a managing agent any person who directly controlled the wages, hours, or working conditions of the predecessor workforce, or
 - Operates a business in the same industry and the business has an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the predecessor

Security Guards

Security Guards

- AB 1512 addresses security guards – who have been held to be subject to rest breaks even when working alone (*Augustus v. ABM Security Services*)
- Allows **licensed guards** who work for **private patrol providers** to carry communication devices during rest periods so long as they can take another break if interrupted
- But applies *only* to private patrol operators and *only* to unionized employees – **little practical effect statewide**

Petroleum Facilities

Petroleum Facilities

- Similar to the security guard exception: allows **employees at petroleum facilities** to remain on call during rest periods
- Includes “**safety sensitive**” employees who may need to **respond to emergencies** at petroleum refineries, marine and onshore terminals, bulk marketing terminals, asphalt plants, gas plants, catalyst plants, carbon plants, and any other facility involved in the processing, refining, transport, or storage of crude oil or petroleum products.
- But *also* applies only to **unionized employees** with qualifying **collective bargaining agreements**.

EMPLOYMENT OF MINORS

Mandated Reporting

Mandated Reporting

- AB 1963 designates **human resources professionals** at employers with five or more employees as **mandated child abuse reporters**
- Includes individuals designated by the employer to **accept any complaints of misconduct** under the Fair Employment & Housing Act
- There is no distinction between HR and teachers, law enforcement, physicians – HR becomes a full-fledged mandatory reporter under Penal Code § 1165.7

Mandated Reporting

- Mandated reporters must report to authorities *all reports of suspected child abuse or neglect*
- Reports may be made to:
 - Police or sheriff's department
 - County probation department (if designated by the county), or
 - County welfare department

Mandated Reporting

- “Child abuse or neglect” includes:
 - physical injury or death inflicted by other than accidental means upon a child by another person,
 - sexual abuse,
 - neglect,
 - the willful harming or injuring of a child or the endangering of the person or health of a child, and
 - unlawful corporal punishment or injury
- Does not include a mutual altercation between minors
- See California Penal Code § 11165.6

Mandated Reporting

- “willful harming or injuring of a child” includes “unjustifiable physical pain or mental suffering”
 - *See California Penal Code § 11165.3*
- “sexual abuse” is also broadly defined to include various acts that could be alleged in the workplace
 - *See California Penal Code § 11165.1*

Mandated Reporting

- Reports are required when an HR designee “within the scope of the mandated reporter’s employment, has knowledge of or observes a child whom the mandated reporter **knows or reasonably suspects** has been the **victim of child abuse or neglect**”
 - *See California Penal Code § 11166*
- Report must be made “immediately or as soon as is practicably possible” with “a written follow-up report within 36 hours of receiving the information concerning the incident”
- “Reasonable suspicion” means that it is **objectively reasonable** for a person to entertain a suspicion, it does not require certainty that child abuse or neglect has occurred: **any “reasonable suspicion” is sufficient**

Mandated Reporting

- Failure to report is punishable by up to six months in or \$1000 fine, or both
- Failure to report that results in death or great bodily injury has higher penalties

Mandated Reporting

- AB 1963 will place training, notice and written material obligations on entities that employ them
- Resources for reviewing obligations include:
 - <https://www.cdss.ca.gov/inforesources/child-care-licensing/resources-for-providers>
 - <https://cdss.ca.gov/cdssweb/entres/forms/English/SOC341A.pdf>
 - <https://www.cde.ca.gov/ls/ss/ap/childabusereportingguide.asp>
 - <https://mandatedreporterca.com/>

Mandated Reporting

- As a practical matter, this may require immediate reporting of matters that would otherwise be handled via internal investigation
- This will result in swift involvement of law enforcement or local authorities
- Employers should seriously consider the continued viability of minor employees, interns, volunteers, etc.

ADMINISTRATIVE CLAIMS

DLSE Discrimination and Retaliation

DLSE Discrimination and Retaliation

- AB 1947 amends Labor Code section 98.7
- Extends limitations period from six month to one year for reporting alleged retaliation for violation of any law under the jurisdiction of the DLSE (Office of the Labor Commissioner)
- The DLSE may also initiate an investigation, without receiving a complaint, when it suspects discrimination in the course of an adjudication, field investigation, or immigration-related complaint

DLSE Discrimination and Retaliation

- AB 1947 also amends Labor Code section 1102.5
- Creates a right to attorneys' fees for successful plaintiffs
- One-way statute – eliminates prior absence of fees provision for Section 1102.5 retaliation claims

DLSE Representation in Arbitration

DLSE Representation in Arbitration

- SB 1384 allows DLSE involvement in petitions to compel arbitration of wage and wage-related claims
 - Federal law has been held to require arbitration of wage claims that could otherwise be adjudicated by the DLSE
 - [Note: California Supreme Court has held that requiring arbitration of administrative claims is one indicator that an agreement is unconscionable and unenforceable]

DLSE Representation in Arbitration

- Labor Code section 98.4 amended to provide:
 - DLSE shall represent a claimant who is financially unable to afford counsel in arbitration, if the Division believes the claim has merit
 - DLSE may represent claimants in petitions to compel arbitration either in court or in arbitration
 - Petitions to compel arbitration of claims for wages, penalties or liquidated damages filed with the DLSE must be served on the Labor Commissioner

DLSE Representation in Arbitration

- Likely litigation under the Federal Arbitration Act on the bases that:
 - The Labor Commissioner cannot be made an effective party without all other parties' express consent
 - Labor Commissioner participation exceeds the state's limited power to treat arbitration agreement the same way it treats other contracts under state law

CORPORATE OBLIGATIONS

Corporate Boards of Directors

Corporate Boards

- Not principally an *employment* law
- Current law requires minimum numbers of female directors on **publicly traded** boards
- AB 979 creates benchmarks for members of underrepresented communities – roll on from 2021 to 2022

Corporate Boards

- Underrepresented communities include people who self-identify as:
 - Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native,
 - or who self-identifies as gay, lesbian, bisexual, or transgender.

Wage Judgment Reporting

Wage Judgment Reporting

- AB 3075 (above) also requires additional filing information by corporations and other limited liability entities stating whether any **officer or any director** has an outstanding final judgment issued by the DLSE for the **violation of any wage order or provision of the Labor Code**
- **Entities need not disclose judgments under appeal**

PRIVACY

Consumer Privacy Act

California Consumer Privacy Act

- The CCPA allows consumers to request identification and request deletion of personal information collected by businesses (with more than \$25m in annual revenue or that collect/sell information about many consumers)
- Also allows consumers to request deletion of information
- Language potentially applies to employees and applicants – who might request deletion of material in their own personnel files!

California Consumer Privacy Act

AB 1281 extended employer exemptions for an additional year, excluding:

- Personal information collected “in the course of” an individual being a job applicant, employee, director or officer, or contractor
- “Emergency contact information”
- Information necessary to administer employee benefits

California Consumer Privacy Act

- Individuals may still ask what information a business possesses regarding them
- Covered employers must still disclose prior to or at the time of collection *what categories* of information they will collect and the *purposes* for which it will be used for
- Covered employers should be familiar with the disclosure requirements applicable to them during 2021

EQUAL PAY AND EEO CLAIMS

Pay Data Reporting

Pay Data Reporting

- SB 973 requires businesses with 100 or more employees, who file federal EEO-1 reports, to report wage and demographic information to the Department of Fair Employment and Housing
- Reports due by March 31, 2021, and annually after
- Must be formatted and filed as required by the DFEH

Pay Data Reporting

- Report must show:
 - The number of employees by race, ethnicity, and sex in each of various job categories;
 - The number of employees by race, ethnicity, and sex within each Bureau of Labor Statistics pay band (drawn from a single pay period in the prior year's final quarter);
 - Total number of hours worked by each employee counted in each pay band;
 - Reports for separate establishments and a consolidated report for all employees including the employer's NAICS code; and
 - Clarifying remarks if desired

Pay Data Reporting

- Agencies are *coordinated* under SB 973:
 - Reports must be provided to the DLSE (Office of the Labor Commissioner) upon request
 - Government Code section 12930 amended to allow the DFEH to investigate and administer California Equal Pay Act claims (which are also enforced by the DLSE)
- Discussion at: <https://www.dfeh.ca.gov/paydatareporting/>

No-Rehire Provisions

No-Rehire Provisions

- AB 2143 clarifies Code of Civil Procedure section 1002.5, which prohibits “No-Rehire” provisions in settlement agreements resolving employment disputes
- Section 1102.5 does not apply when an employer determines that an individual engaged in sexual harassment, sexual assault, or any criminal conduct

No-Rehire Provisions

- Amendment requires that employer **made and documented** a good faith determination, **before the claim was made**, that the aggrieved person engaged in sexual harassment, sexual assault, or any criminal conduct
- Section 1002.5 still allows a **legitimate non-discriminatory or non-retaliatory reason** for refusal to rehire a person

OTHER CHANGES

Other Changes

- AB 2231: public works *de minimus* exception limited to projects below \$600,000 *and* less than 2% of project cost
- AB 1864: Protection for employee complaints or reports regarding consumer financial protection laws
- AB 3364: FEHA amended to clarify protection for military or veteran status (rather than “*and ...*”)
- AB 908: allows minor work permits without physical appearance at school
- AB 1731: Alternative EDD work sharing procedures
- AB 3175, 3369: Training and entertainment industry work permits
- AB 2399: Extends family temporary disability insurance benefits to a family member’s military service
- AB 2403: Cal-OSHA COVID outreach to agricultural worker communities

FEDERAL AGENCIES

Department of Labor

- Federal Department of Labor immediately reconsidered issues such as joint employment
 - *Rescinded* Trump-era regulation on independent contractors
 - *Published* regulatory agenda promising increased minimum wage requirements for federal contractors and new rules protecting tipped employees

Department of Labor

- Employers should consider coming federal changes and greater enforcement on:
 - Independent contractors and ‘leased’ employees
 - Tip pooling practices
 - Migrant and seasonal worker conditions
 - Employee benefit plan compliance

National Labor Relations Board

- Biden administration *fired* the NLRB General Counsel immediately after inauguration
- New staff is likely to reverse course on recent NLRB authorities: use of employer email and electronic resources, handbooks and arbitration agreement language, multiple employer and independent contractor status

Other Agencies

- New administration rolled back other changes such as EEOC conciliation reforms
- Employers may see a rapid uptick in federal enforcement, which is rare in California
- Watch for developments and ensure compliance with both state and federal law when necessary – especially when an employer works on projects receiving any federal funding!

COURT CASES

Meal Break Rounding

- California Supreme Court addressed “rounding” of meal periods
- “Rounding” is expressly allowed under state and federal law for time worked – employers may round to the nearest minute, tenth, quarter, etc. so long as done in a way that is fair
- AMN Services did that for lunch breaks: it rounded meal periods to the nearest time, resulting in consistent “30 minute” break records

Meal Break Rounding

- Court found that meal period are *different* than time worked in general
- Meal period are meant to be *at least* a certain period, so rounding could hide periods that were slightly *less* than the minimum requirement
- Court found that allowing time-rounding for general time worked did not also permit it for breaks!

Meal Break Rounding

- Note: the court did not find liability – it found that the employer could not rely on the rounded times in litigation but would have to show compliance some other way
- Employers should now abandon systems that round meal periods
 - **Donohue v. AMN Services, LLC, 11 Cal. 5th 58 (2021)**

Other Issues

- Arbitration agreements:
 - Courts strong enforcement of arbitration agreements *with* class-action limitations
 - Consider whether some employees are not covered by the federal arbitration act
- Retroactivity:
 - Courts continue to clarify that cases tend to act “retroactively” – so employers should move quickly to account for cases *and* significant upcoming issues

ON THE HORIZON

© 2021 Rybicki & Associates, P.C.

On the Horizon

- There are many more changes likely
- Various laws are also likely to be addressed such as additional state laws affecting arbitration agreements, family and child care
- NLRB likely to move pro-employer, state PERB likely to move pro-union/employee

Be Prepared

- WATCH for interpretations by agencies over the coming months (DFEH, Labor Commissioner, etc.)
- READ postings and newsletters from chambers and industry organizations
- REVIEW policies and materials to ensure compliance with these new laws

RYBICKI & ASSOCIATES | P.C.
LABOR AND EMPLOYMENT ATTORNEYS

THANK YOU!

Richard C. Rybicki
10 Executive Court, Suite 204
Napa, CA 94558
(707) 222-6361
rrybicki@rybickiassociates.com