# CALIFORNIA LEGISLATIVE SUMMARY

On September 30, 2020, the deadline for Governor Gavin Newsom to sign or veto new laws expired, bringing the 2020 California Legislative session to a conclusion. As expected, there were a number of new employment laws enacted in 2020, many of them COVID-19 related, including laws to:

- Enact "COVID-19 supplemental paid sick leave" for employers with 500 or more employees (AB 1867);
- Expand the California Family Rights Act to apply to employers with five or more employees and expand the family members for whom leave may be taken due to a serious medical condition (SB 1383);
- Amend AB 5's worker classification standard, including expanding the professional services and industries exempted from the so-called ABC Test for worker classification purposes (AB 2257);
- Create a presumption of workers compensation coverage for COVID-19 injuries and enact new employer notice requirements to claims administrators (SB1159)
- Create new employer notice requirements regarding potential COVID-19 exposure at worksite and expand Cal-OSHA stop order powers (AB 685);
- Require larger employers to annually submit "pay data reports" to the DFEH (SB 973);
- Extend for an additional year the "employment" exemptions from the California Consumer Privacy Act (AB 1281);
- Require California corporations to have directors from "underrepresented communities" (AB 979);
- Add human resources professionals and supervisors to the list of "mandated reporters" for child abuse purposes (AB 1963); and
- Expedite the process for the DIR to approve "work sharing plans" submitted by employers in lieu of layoffs (AB 1731);

In addition to these new statewide laws, the minimum wage for California and for many municipalities will increase again on January 1, 2021.

Below is an overview of the new laws California employers must prepare for which, unless otherwise indicated, take effect on January 1, 2021:

# NEW EMPLOYMENT LAWS

## COVID-19-Related Proposals

### COVID-19 Supplemental Paid Sick Leave for Larger Employers, and Small Employer Mediation Program for CFRA Claims (AB 1867)

On September 9, 2020, Governor Gavin Newsom signed Assembly Bill (AB) 1867, which:

(1) adds supplemental paid sick leave requirements for other employers (primarily larger employers with more than 500 employees);
(2) codifies existing COVID-19 supplemental paid sick leave requirements for certain food sector workers;
(3) codifies existing COVID-19 handwashing requirements; and
(4) creates a small-employer family leave mediation pilot program.

This law reflects a number of Governor Newsom's stated priorities and is immediately effective, although the various paid sick leave requirements did not take effect until 10 days after enactment and only remain in place until the later of December 31, 2020 or the expiration of the federal Families First Coronavirus Response Act (FFCRA). Notably, workers using such benefit when the law expires would still be entitled to use the full amount of COVID-19 supplemental paid sick leave.

COVID-19 Supplemental Paid Sick Leave

*For Context: Previous Federal Legislation and Local Ordinances*

In general terms, the FFCRA created a paid sick leave entitlement for COVID-19 purposes that only applied to employers with fewer than 500 employees. The FFCRA also authorized health care or emergency responder employers to exclude certain health care providers and emergency responders from the FFCRA. AB 1867's provisions regarding COVID-19 Supplemental Paid Sick Leave (COVID-19 SPSL) are intended to fill in the FFCRA's gaps in coverage.

At the municipal level, some California cities enacted local "supplemental paid sick leave" ordinances to extend the FFCRA for larger employers within California (albeit each with their own variations). These municipalities include the city of Los Angeles, Unincorporated Los Angeles County, San Francisco, San Jose, and Oakland. The ordinances enacted differ from federal law in some respects—beyond the size of the employer. Accordingly, in the wake of AB 1867, this intersection of local, state, and federal laws may require an employer's particular attention to varying nuances.

As AB 1867 extends the FFCRA for larger employers within California on a statewide basis, it similarly applies to workers for health care providers or emergency responders that had elected to exclude such employees from the FFCRA's emergency paid sick leave provisions.

*Identifying "Covered Workers"*

Accordingly, new Labor Code section 248.1 entitles "covered workers" (i.e., those satisfying the broad statutory definitions **and** who *leave their home* or other place of residence to perform work—in other words, *non-remote* employees—for the person's hiring entity) to COVID-19 SPSL (meaning paid sick leave above and beyond that already provided under California's generally applicable paid sick leave law [Labor Code section 245 *et seq.*]). A "hiring entity" (as defined, but generally meaning an entity with 500 or more employees in the United States) must provide such COVID-19 SPSL to workers who perform work for the hiring entity if that worker cannot work due to any of the following reasons:

> (A) the worker is subject to a federal, state or local quarantine or isolation order related to COVID-19;
> (B) the worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
> (C) the worker is prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19.

Notably, and in contrast with the current statewide paid sick leave entitlement, this COVID-19 SPSL is available immediately (i.e., no 30 day employment requirement, or 90 days of employment before usage), and *also* applies to those workers otherwise excluded from the general definition of "employee" for paid sick leave purposes in section 245.5(a) (e.g., CBA-covered employees, flight crew members, city/state employees, in-home support workers, etc.). Moreover, workers can use the sick leave granted upon oral or written request (i.e., no need for medical certification) and the worker determines how much to use.

*What Supplemental Paid Sick Leave is Granted to Workers?*

This "supplemental" paid sick leave would be in addition to the amount of paid sick leave provided under California's currently existing statewide paid sick leave law. Covered workers are entitled to 80 hours of COVID-19 supplemental paid sick leave if the hiring entity considers the covered worker to be "full time," or if the worker worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks preceding the date the worker took this COVID-19 supplemental paid sick leave (AB 1867 also enumerates slightly different amounts applicable to full-time firefighters and other specified public employees).

Other covered workers are entitled to differing amounts of supplemental paid sick leave depending on the type of schedules they work and/or the length of service with the hiring entity. For instance, covered workers with a normal weekly schedule are entitled to the total number of hours the covered worker is normally scheduled to work for the hiring entity over a two-week period. Workers with variable schedules are entitled to 14 times the average number of hours the worker worked each day for the hiring entity in the six months preceding the date the worker took supplemental paid sick leave. If the worker has worked less than six months but more than 14 days, this calculation is made over the entire period the worker has worked for the hiring entity. If the worker works a variable number of hours and has worked for the hiring entity for 14 or fewer days, the worker will be entitled to the total number of hours worked for the hiring entity.

*What is the Applicable Rate for Supplemental Paid Sick Leave?*

The supplemental paid sick leave is to be paid at a rate equal to the highest of either:

(A) the worker's regular rate for the last pay period;
(B) the state minimum wage; or
(C) the local minimum wage to which the worker is entitled.

However, as with the federal FFCRA, the hiring entity is not required to pay more than $511 daily and $5,110 in the aggregate for the supplemental paid sick leave taken by the worker.

The hiring entity also cannot require the worker to use other paid or unpaid leave, paid time off or vacation provided by the hiring entity before or in lieu of the worker using this supplemental paid sick leave. However, the hiring entity is not required to provide this supplemental paid sick leave if it already provides a similar benefit capable of being used for the same purposes as this supplemental benefit, excluding the paid sick leave otherwise currently required under the statewide paid sick leave law.

Many employers have expressed frustration in potentially complying with the myriad of local ordinances within California requiring COVID-19-SPSL within a particular city, or to the extent they potentially have already provided COVID-19-SPSL equivalent leave even if not previously required to. While AB 1867 does not preempt these other local ordinances, it does contain some relief for employers who have previously been trying to provide such relief. For instance, as noted above, to the extent the employer has already provided paid leave other than paid sick leave available under the Health Workplace, Healthy Families Act to comply with a federal or local law and for the same purposes as COVID-19-SPSL, then such time off may be counted against the paid time required under this new law.

Also, if a hiring entity provided time off for the purposes contemplated under this COVID-19 SPSL between March 4, 2020 and the effective date of this bill, but did not compensate the worker at the rates discussed above, the hiring entity may retroactively provide the supplemental pay to the covered worker to satisfy the compensation requirements, in which case those previously provided hours count towards the total amount of available supplemental paid sick leave.

*Notice Requirements*

California's general paid sick leave law requires (per Labor Code section 247) that employers post in a conspicuous place statutorily-enumerated information about the Healthy Workplace, Health Families Act. AB 1867 similarly contemplates that employers will display notice about the new COVID-19 SPSL and directs the Labor Commissioner to publish a model notice for employers to use. On September 16, 2020, the Labor Commissioner published this notice on its website. Notably, and reflective of the current socially-distanced workforce during this pandemic, new Labor Code section 248.1(d)(1)(C) provides that employers may satisfy this notice requirement concerning COVID-19-SPSL for workers that do not frequent the workplace by electronic means, including email.

Moreover, section 248.1(d)(1)(A) incorporates section 246(i), requiring that hiring entities provide notice within an itemized wage statement or separate writing of an employee's available COVID-19 supplemental paid sick leave. Such notice must be given each pay period. This requirement takes effect in the first pay period *following* the date of enactment of section 248.1 (i.e., the first pay period after September 9, 2020).

Food Sector Worker Paid Sick Leave

In April 2020, Governor Newsom enacted Executive Order N-51-20 which created an entitlement to paid sick leave for food sector workers (as defined). AB 1867 essentially codifies these requirements, making them retroactive to April 16, 2020 and applicable until the later of either December 31, 2020 or the expiration of the federal FFCRA. This "COVID-19 food sector supplemental paid sick leave" is codified in new Labor Code section 248 and will operate in a manner very similar to the provisions noted above regarding the more generally applicable COVID-19 supplemental paid sick leave available to almost all other workers.

Handwashing Time for Food Facility Employees

AB 1867 also amends the Health and Safety Code to specifically authorize food employees in any food facilities to wash their hands every 30 minutes, and even more often if needed.

Small Employer Mediation Program for CFRA Claims

As discussed below, Governor Newsom has also signed SB 1383, extending the California Family Rights Act to apply to employers with five or more employees (instead of the current 50 employee threshold). Perhaps anticipating the potential burden upon smaller employers, AB1867 creates, until January 1, 2024, a small employer family leave mediation pilot program. Under this program, small employers (i.e., those with between five to 19 employees) or employees may, within specified time frames (i.e., within 30 days of the receipt of a right to sue notice for CFRA claims), request all parties to participate in a dispute resolution program to be established by the DFEH. Such a request precludes the employee from initiating a civil action until the mediation is completed, but the statute of limitations for the CFRA and all related claims will be tolled.

The DLSE has recently published FAQ's regarding this AB 1867.

**New Employer Notices Regarding COVID-19 Exposure and Expanded Cal-OSHA Powers (AB 685)**

This law, effective January 1, 2021, enacts new mandatory employer notification requirements related to potential COVID-19 exposures in the workplace. Specifically, if an employer or a representative of the employer receives a "notice of potential exposure to COVID-19," the employer must provide statutorily-enumerated notices within one business day of the notice of potential exposure, and potentially may also have to provide separate notice to local public health agencies within 48 hours. It also expands, until January 1, 2023, Cal-OSHA's ability to prohibit employer access to and usage of portions of the worksite that may constitute an imminent hazard to employees due to potential COVID-19 exposure.

When Must Notice be Provided?

Citing a lack of clarity regarding employer notice requirements, new Labor Code section 6409.6 enumerates notice requirements intended to specify an employer's notice obligations and to ensure other employees receive information for their safety.

Accordingly, employers who receive a "notice of potential exposure" must provide statutorily-enumerated notices within one business day. For purposes of triggering these notice obligations, a "notice of potential exposure" will include any of the following: (a) notice from a public health official or licensed medical provider that an employee was exposed to a "qualifying individual" at the worksite; (b) notice from any employee or their emergency contact that the employee is a "qualifying individual;" (c) notice through the employer's testing protocol that the employee is a "qualifying individual;" or (d) notice from a subcontracted employer that a "qualifying individual" was on the worksite of the employer receiving notification.

In turn, a "qualifying individual" is a person who: (1) has a laboratory-confirmed case of COVID-19 (as defined by the California Department of Public Health); (b) has a positive COVID-19

diagnosis from a licensed health provider; (3) has a COVID-19-related order to isolate provided by a public health officer; or (4) has died due to COVID-19, as determined by the county public health department or per inclusion in the county's COVID-19 statistics.

"Worksite" means the building, store, facility, agricultural field or other location where the employee worked during the infectious period, but does not apply to other employer areas the qualified individual did not enter. In a multi-worksite context, the employer need only notify employees who were at the same worksite as the qualified individual.

Notices Required to Employees/Exclusive Representatives/Subcontracted Employees

If these criteria are met, the employer must provide all of the following notices within one business day after receiving notification of the potential exposure. First, the employer must provide written notice to all employees, and to 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. This notice must be in writing and made in a manner the employer normally uses to communicate employment-related information. The written notice may include, but would not be limited to, personal service, email or test message if it can reasonably be anticipated to be received by the employee within one business day of sending. This notice will also need to be in both English and the language understood by the majority of the employees.

The employer must also provide this notice to any exclusive representative for the employees receiving the above-mentioned notice. This notice to the exclusive representative would need to include the same information as would be used in a Cal-OSHA Form 300 Injury and Illness Log, even if the employer is not otherwise required to maintain such a log.

Second, the employer must notify any employees who may have been exposed and any exclusive representative about COVID-19-related benefits under applicable federal, state or local laws, including COVID-19-related leave, employer sick leave and workers' compensation, or negotiated leave provisions, as well as the employee's protections against retaliation or discrimination.

Third, the employer must also notify all employees, and the employers of subcontracted employees, and any exclusive representative, of the employer's disinfection and safety plan the employer will implement and complete per the federal CDC guidelines.

Notably, these three notice provisions presently differ regarding to whom these three notices must be provided (i.e., employees "on the premises of the same worksite," "who may have been exposed," and "all employees"), and it is not entirely clear if these differences are intentional or inadvertent. Significantly perhaps, the FAQ's issued by the enforcing agency seem to suggest the notice requirements are the same (e.g., to employees at the worksite of the potential exposures) notwithstanding the slightly different statutory language used, and there does not appear to be a compelling reason for different notice requirements. However, while preparing for the current

January 1, 2021 effective date for these new notice requirements, employers may want to keep a watch out for further clarifying regulations.

Notices to Public Health Agencies

Employers must separately provide written notice to the local public health agency if the employer is notified about the number of cases that meet the State Department of Public Health's definition of a COVID-19 "outbreak." (According to the DLSE's FAQ's (see below for link), the definition of outbreak in non-healthcare or non-residential congregate setting workplaces means three or more laboratory-confirmed cases of COVID-19 amount employees who live in different households within a two-week period).

In that instance, the employer must provide notice within 48 hours to the local public health agency in the worksite's jurisdiction of the names, number, occupation and worksite of the employees who meet the definition of a "qualifying individual." The employer must also report the business address and NAICS code of the worksite where the "qualifying individuals" work. The employer experiencing such an outbreak must also continue to update the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

The state agencies receiving this information will publish this information on their internet websites in a manner to allow the public to track outbreaks. The State Department of Public Health would also establish a procedure for employers to report COVID-19 cases and make this information available on its website.

Other Requirements and Protections under New Labor Code Section 6409.6

This new law specifically provides that employers may not require employees to disclose medical information unless otherwise required by law. It also prohibits retaliation against a worker for disclosing a positive COVID-19 test, diagnosis or an order to quarantine or isolate, and workers would be permitted to file a retaliation complaint with the DLSE. The DLSE will enforce these new requirements by issuing citations and civil penalties.

Employers will also be required to maintain records of the written notifications to their employees (and if applicable, any exclusive representatives or subcontracted employees) for at least three years.

While this law applies to public and private employers, it does not apply to "health facilities" (as defined) or to employees who, as part of their duties, conduct COVID-19 testing or screening, or provide direct patient care to individual who have tested positive for COVID-19.

Expanded Cal-OSHA Powers Concerning COVID-19 Imminent Hazards

Lastly, while Cal-OSHA presently has the authority to prohibit usage of or entry into an area posing an imminent risk to employees (a so-called Order Prohibition Usage [OPU] or Stop Work Order), this law, until January 1, 2023, expands that power to include situations when the agency determines a place of employment, operation or process would constitute an imminent hazard

of exposure to COVID-19. In such instances, the agency must provide a notice to the employer for posting in a conspicuous place at the place of employment. However, this prohibition against employer usage or entry will be limited to the immediate area in which the imminent hazard of COVID-19 exposure exists, and would not extend to other employer areas or processes which are not exposing employees to COVID-19 or is outside of the imminent hazard area. This prohibition will also not preclude the employer from entering into the area or using the process for the sole purpose of eliminating the conditions creating the imminent hazard of COVID-19 exposure.

Notably, AB 685 appears to fast track the timeline for issuing serious violations in the COVID-19 context, including dispensing with the generally-applicable requirement to first provide 15 day notice of an intent to issue such a citation.

The DLSE has also issued FAQ's regarding AB 685's new requirements.

**Rebuttable Presumption of Workers Compensation Coverage for Employees that Contract COVID-19 and New Notice Requirements to Workers Compensation Administrators (SB 1159)**

Amongst other things, this immediately effective law codifies Governor Newsom's Executive Order (N-62-20) which had expired in July but had created a rebuttable presumption of workers compensation coverage for "essential workers" who contracted COVID-19.

It also extends and create a similar presumption of workers compensation coverage to include any employee with a COVID-19-related illness under certain circumstances, with slightly different rules depending on whether the workplace exposure occurred before or after July 6, 2020. Specifically, until January 1, 2023, an employee's COVID-19-related illness will be potentially included within workers compensation coverage if all of the following applied: (1) the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor at the employer's place of employment (not including an employee's home or residence) at the employer's direction; (2) this day of labor occurred between March 19, 2020 and July 5, 2020; and (3) the diagnosis was made by a licensed physician and confirmed by a COVID-19 serologic test within 30 days of the date of diagnosis.

Such COVID-19-related illnesses that develop or manifest during this employment will be entitled to a rebuttable presumption (as defined) of having arisen out of the course and scope of employment. Responding to employer concerns it would be difficult to negate a presumption of coverage, this law specifically notes employers can point to health and safety measures adopted by the employer and non-occupational exposures the employee may have encountered.

This law also requires an employee to exhaust any paid sick leave benefits specifically available in response to COVID-19 before any temporary disability benefits or other benefits due under certain workers compensation provisions are payable. If no such paid sick leave is available, the employee will be immediately entitled (i.e., no waiting period would apply) to temporary disability benefits.

The law also enacts somewhat similar coverage rules and presumptions for certain peace officers, firefighters and health care workers, amongst other groups.

New Labor Code section 3212.88 will apply to employees who test positive for COVID-19 after working on or after July 6, 2020 and who test positive during an "outbreak" at the employee's "specific place of employment" and whose employer has five or more employees. In those instances, "injury" for workers compensation coverage will include COVID-19 illness or death if: (1) the employee tests positive within 14 days after a day the employee performed labor or services at the employee's place of employment at the employer's direction; (2) the day of work occurred on or after July 6, 2020; and (3) the employee's positive test occurred during a period of an "outbreak" (as defined) at the employee's specific place of employment. As with the similar test for work performed before July 6, 2020, such injuries will be entitled to a disputable presumption of having arisen out of and in the course of employment.

"Specific place of employment" means the particular building, store, facility or agricultural field where the employee works at the employer's direction, but generally will not include the employee's residence. If the employer directs the employee to work at multiple places of employment within 14 days of the employee's positive test, the employee's positive test will be counted to determine a possible outbreak at each of those places, and if an outbreak is found to exist at any of them, they shall be considered the employee's specific place of employment.

An "outbreak" will be deemed to exist if within 14 calendar days one of the following occurred at the "specific place of employment": (a) if the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (b) if the employer has 100 or more employees at a specific place of employment, four percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or (c) a specific place of employment is ordered to be closed by specified public health agencies or a school superintendent due to a risk of infection due to COVID-19.

Notably, this new section also requires the employer, upon learning an employee has tested positive for COVID-19, to notify their claims administrator in writing (via email or facsimile) within three business days about this result. The employer must inform the claims administrator: (1) that an employee has tested positive (without providing personally identifiable information about the employee unless the employee asserts it is work related or has submitted a claim); (2) the date the employee tested positive; (3) the address or addresses of the employee's specific place or places of employment during the 14 day period preceding the employee's positive test; and (4) the highest number of employees who reported to that location within the preceding 45 day period preceding the last day the employee worked at each specific place of employment.

As with the slightly differing tests for workers compensation coverage, the law also identifies slightly different employer notice requirements to the claims administrator for positive tests for COVID-19 that the employer learns about between July 6, 2020 and the September 17, 2020 effective date of this new law.

This section also authorizes civil penalties and potential Labor Commissioner citations against any employer who intentionally submits false or misleading information or fails to submit required information regarding these items.

This urgency statute is immediately effective as of September 17, 2020.

The DLSE has also recently published FAQ's regarding this new law.

**COVID-19 Specific OSHA Standards for Agricultural Employers and Employees (AB 2043)**

This law requires California's Occupational Safety and Health Standards Board to disseminate to agricultural employers "best practices" for COVID-19 prevention, consistent with the division's guidance or in coordination with other state agencies, including the guidance document entitled "Cal-OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees." It also requires the division to collaborate with various organizations to conduct a statewide outreach campaign targeted at agricultural employers to disseminate these best practices and to educate employees on any COVID-19-related employment benefits to which they are entitled, including access to paid sick leave and workers compensation. These provisions will be repealed when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature.

This law is immediately effective as an urgency statute.

**Leaves of Absence/Time off/Accommodation Requirements**

**CFRA Expanded to Apply to Almost All Employers and for more Family Members (SB 1383)**

The California Family Rights Act (CFRA, Government Code section 12945.2) is the state law equivalent of the Family Medical Leave Act (FMLA) and allows eligible employees to take up to 12 workweeks of job-protected leave for certain specified reasons (e.g., to bond with a newborn child, to care for the serious health condition of the employee or family member). This law expands the CFRA in several material respects. First, it drops from 50 employees to five employees the threshold number of employees for an employer to be subject to CFRA, thus creating yet another material difference between California and federal law. Because this new threshold would essentially apply to almost all employers, there would also no longer be a requirement for an employer have 50 employees within 75 miles of the employee's worksite to entitle the employee to a CFRA leave.

This law also expands the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken to provide care. For instance, while "family care and medical leave" was consistent with the federal FMLA and previously included the serious health condition of a child, spouse or parent of an employee, this law expands this list to include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner" who has a serious health condition. It also makes corresponding changes including these individuals for whom the employer may request medical certification to support the employee's request for leave to care

for a serious health condition.

The current definition of "child" is also expanded to include a child of a domestic partner and to eliminate the current requirement the child be under 18 years of age or an adult dependent child. "Grandchild" is defined as the child of an employee's child, while "grandparent" is defined as the parent of an employee's parent. "Domestic partner" will have the same definition as in Family Code section 297. Lastly, "sibling" is defined as someone related "by blood, adoption, or affinity through a common legal or biological parent."

Interestingly, the new law also defines "parent-in-law" (i.e., parent of a spouse or domestic partner) suggesting that the law contemplates allowing time off for parents-in-law even though not currently specifically enumerated in the definition of "family care and medical leave."

The definition of "family care and medical leave" is also expanded to include "qualifying exigencies" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the United States Armed Forces.

This law also deletes a current CFRA provision (current section 12945.2(q)) that provided if both parents are employed by the same employer and are otherwise entitled to leave, the employer would not be required to grant leave that is greater than 12 weeks for the birth, adoption or foster care of a child.

It also eliminates the so-called "key employee" exception (current section 12945.2(r)), which enabled employers to refuse reinstatement to salaried employees who are among the highest paid 10 percent of the employer's employees within 75 miles of the employee's worksite and if the refusal were needed to prevention substantial and grievous economic injury.

In 2017, California enacted the New Parent Leave Act (SB 63, Government Code section 12945.6) requiring employers with 20 or more employees to provide up to 12 weeks leave to bond with a child. Because SB 1383 essentially supersedes this law by expanding job protected leave for the same purpose to even smaller employers, it repeals Government Code section 12945.6. Accordingly, the dramatically-expanded CFRA would now govern parent leave.

Lastly, as discussed herein, a separate new law (AB 1867) enacts a DFEH mediation pilot program under which smaller employers (e.g., between five to 19 employees) may require employees to mediate alleged CFRA violations.

**"Kin Care" Amendments (AB 2017)**

This law amends California's so-called "kin care" statute (Labor Code section 233) to specify that the designation of sick leave for kin care purposes shall be made at the sole discretion of the employee. It is intended to ensure the employee, not the employer, gets to designate how sick leave is credited and to preclude situations where an employer charges a sick day against kin care purposes, thus reducing the amount of kin care usage available for later purposes.

**Protected Time-Off Proposals (AB 2992)**

Labor Code section 230 presently prohibits discrimination against and enumerates various protections for employees who need to take time off for various purposes, including for victims of domestic violence, sexual assault or stalking who are seeking legal relief. This law essentially extends these time-off leave provisions from applying to victims of only certain enumerated serious crimes and to instead apply broadly to almost all victims of violent crime, and to allow time off for immediate family members of homicide victims. It is also intended to expand the certification employees can provide to qualify for this protected time off.

Accordingly, it expands the definition of "victim" for many of its provisions to include any of the following: (1) victims of stalking, domestic violence or sexual assault; (2) a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury; (3) a person whose immediate family member is deceased as the direct result of a crime; or (4) for purposes of current subdivision (b) [appearing in court in response to a subpoena or court order], any person against whom any crime has been committed.

Current subsection (d) requires the employee provide advance notice where feasible, and identifies the following forms of acceptable certification to justify the absence: (1) a police report; (2) a court order; or (3) documentation from enumerated health care providers, medical professionals or domestic violence counselors. This law adds to this third category "victim advocate" defined as an individual providing services to victims "under the auspices or supervision" of either an agency or organization providing services to victims, or a court or law enforcement/prosecution agency.

While presently employees must provide a police report, court order or medical note, this law also authorizes any other documentation that "reasonably verifies" the crime or abuse occurred, including a written statement from the employee or an individual acting on their behalf, certifying the absence is authorized under section 230 or section 230.1.

While section 230 applies to employers of all sizes, Labor Code section 230.1 prohibits employers with 25 or more employees from discriminating against victims of sexual assault, domestic violence or stalking who take time off for additional purposes (e.g., seeking medical attention, obtaining services from certain agencies, obtaining psychological counseling, participating in safety planning). This law also largely incorporates the above-described changes to section 230, including its expanded definition of "victim" (i.e., broader than simply domestic violence, sexual assault or stalking) and the expanded certification for unforeseen absences.

It also expands the purposes for which the time off could be taken, expanding it from the current requirements the services relate to sexual assault, domestic violence or stalking, and instead apply for any qualifying "crime" or abuse.

**"Qualifying Exigency" Changes for Paid Family Leave Purposes (AB 2399)**

California's Paid Family Leave program currently provides wage replacement benefits for employees who take time off for certain specified purposes, including a "qualifying exigency" related to specified family member's covered active duty in the United States Armed Forces. This law revises the definitions of "care recipient," "care provider" and "family care leave" for purposes of the qualifying exigency provisions. It also defines the term "military member," including for purposes of these revised definitions relating to qualifying exigencies. It also makes conforming changes related to the documentation requirements of a qualifying exigency.

**Independent Contractors/Worker Classification**

**AB 5 Amended, Including to Exempt Additional Industries and Professional Services, and Re-Work Various Exceptions (AB 2257)**

Enacted in 2019, AB 5 codified and expanded the so-called *Dynamex* ABC Test to determine worker classification relationships, and also contained numerous exemptions for various professional services and industries, which would instead be governed by the prior so-called *Borello* test. Almost immediately, it was clear that further amendments would be needed both to address additional industries and relationships, and to clarify AB 5's language, and over 30 bills were initially introduced proposing such amendments.

Drafted by AB 5's author, this wide-ranging law encapsulates many of those separate proposals into a single law, including materially revising several of the exemptions currently contained in Labor Code section 2750.3, and adding further exemptions. Amongst other things, AB 2257 recasts and clarifies various currently existing industry-wide exemptions (e.g., the business-to-business, referral agency, professional services and single engage business-to-business exemption) and also exempts numerous additional specifically-enumerated occupations and business relationships. Please note, AB 2257's changes are both very extensive, and often very industry or exception specific, both in terms of the particular group contemplated and the potentially applicable criteria, so the reader is encouraged to review AB 2257 itself regarding any potential exemption.

Further, as a reminder, in many instances meeting the criteria for a potential exemption does not mean the worker qualifies as an independent contractor, but simply means that worker's status will be governed by the so-called prior *Borello* multi-factor test rather than AB 5's ABC Test.

Lastly, it seems almost certain there will be further amendments proposed in 2021. In the interim, below is a quick overview of some of AB 2257's changes.

New Exemptions

This law adds a number of new specifically-identified occupations that will be governed by the *Borello* multi-factor standard rather than the ABC Test for worker classification purposes.

For instance, it enacts an entirely new subsection (subsection (b)) related to various music industry occupations in connection with the creating, marketing, promoting or distributing sound records or musical compositions, which would be governed by *Borello* rather than the ABC Test. These include: (a) recording artists (but with some exceptions); (b) songwriters, lyricists, composers and proofers; (c) managers of recording artists; (d) record producers and directors; (e) musical engineers and mixers; (f) musicians (with some exceptions); (g) vocalists (with exceptions); (h) photographers working on recording photo shoots, album covers and other publicity purposes; (i) independent radio performers; and (j) any other individual engaged to render creative, production, marketing or independent music publicist services.

However, as the above notes, there are numerous carve outs to these exemptions, and there are be new limitations applicable to collective bargaining agreements and organizing rights within the music industry.

While new subsection (b) governs the creation of sounds recordings in the music industry, new subsection (c) will instead govern "single engagement live performance events," and have them governed by *Borello* under certain enumerated circumstances. The rules regarding these "live performance events" are quite detailed so the reader is encouraged to review proposed subsection (h) if potentially applicable.

This law also creates an entirely new subsection (proposed subsection (d)) regarding "individual performance artists" (as defined), who will also be subject to the *Borello* test if certain enumerated criteria are met.

One of the more controversial aspects of AB 5 was its rules regarding both photojournalists/still photographers and freelance writers/editors/cartoonists, and the limitation of only 35 submissions to any "putative employer" to qualify for an exemption to the ABC Test. AB 2257 deletes the current statutory exemptions for these particular "professional services" and replaces them with new statutory exemptions that remove the 35 submission/project cap and use alternative criteria to determine when *Borello* should apply. Very broadly summarized, it applies to photojournalists/still photographers and freelance writers/editors/cartoonists/translators who (a) work under a contract containing certain terms; (b) are not replacing an employee performing the same amount and type of work; (c) do not primarily perform the work at the hiring entity's business location; and (d) the individual is not restricted from performing work for more than one hiring entity. However, as with various other provisions, the exceptions for photographers, etc. is very detailed and has various express limitations (i.e., for those working on motion pictures), so the reader is encouraged to read the statute itself.

It also amends several provisions or definitions within Labor Code section 2750.3, including regarding "commercial fisherman" and "travel agent services."

Further, AB 2258 also amends the so-called "professional services" exemption in current subsection (d) by adding "specialized performers" hired by a performing arts company or organization to teach a "master class" (as defined) for no more than one week.

It also creates exemptions for additional professions or occupations, including for underwriting inspections, manufactured housing salespersons, international exchange visitor program workers and competition judges with specialized skills. It also create exceptions for specialized performers teaching master classes and real estate providers. It also exempts home inspectors altogether from AB 5's provisions.

It also adds proposed new subsection (k) to have the relationship between "feedback aggregators and an individual providing feedback" be governed by *Borello* if certain enumerated conditions are met.

Business-to-Business Exception Changes

Responding to criticisms that AB 5's "business-to-business" exemption was unduly confusing and complicated, AB 2257 makes numerous changes to this exception. These include deleting language that suggested a sole proprietorship could not qualify for this business-to-business exemption, and adding language clarifying that a business services provider need only have the opportunity to contract with other clients, rather than actually needing to have contracts with other clients.

It also adds language intending to make it easier for businesses to qualify when they are seemingly providing services to the contracting entity's customers under a business-to-business contract. In this regard, it adds language allowing the business entity to potentially qualify even though interacting directly with the contracting entity's customers (e.g., in the delivery context) if the business service provider if it regularly contracts with other businesses and its employees are working under the name of the business service provider.

Referral Agencies

The so-called "referral agency" exemption in section 2750.3(c) currently exempts from the ABC Test relationships between a referral agency and a "service provider" (as defined) that satisfy statutorily-enumerated conditions. As with the business-to-business exemption, AB 2257 makes numerous changes, including modifying the applicable definitions, as well as identifying certain relationships (e.g., youth sports coaching, caddying, consulting, wedding planning and interpreting services) that might qualify if the statutorily-enumerated criteria are met.

It also specifically identifies certain services that will not qualify, including those designated by Cal/OSHA as a high hazard industry, or for referrals for business that provide janitorial, delivery, transportation, trucking, and in-home care services.

This urgency bill is immediately effective. As noted, it seems unlikely, however, that AB 2257 addresses all of the issues associated with AB 5, so the reader should watch for further

amendments in 2021, and keep an eye on the various pending legal challenges as well as Proposition 22 to exempt certain rideshare companies (e.g., Uber, Lyft, etc.)

**Pay Equity Issues**

**Annual Pay Data Reports (SB 973)**

Evincing the ongoing feud between California and the federal government, this law essentially enacts in California the proposed Obama Administration regulations for revised EEO-1 reporting on pay data by race and gender that the Trump Administration challenged in 2017, and that the EEOC announced it would stop collecting in 2019. The law's author states it is intended to force large California employers to undertake self-audits of their pay structures and then report these results to enable the state to monitor the overall progress toward achieving pay equity.

Accordingly, beginning March 31, 2021, and annually thereafter by this same deadline, private employers with 100 or more employees that are required to submit an annual EEO-1 will be required to submit "pay data reports" for the prior calendar year (i.e., the "Reporting Year") to the Department of Fair Employment and Housing (DFEH), which can also then share this report with the Division of Labor Standards Enforcement (DLSE) upon request. The pay data report will need to include very specific information enumerated in proposed new Government Code section 12999, including the number of employees by race, ethnicity and sex in the following job categories: (a) executive or senior level officials and managers; (b) first or mid-level officials and managers; (c) professionals; (d) technicians; (e) sales workers; (f) administrative support workers; (g) craft workers; (h) operatives; (i) laborers and helpers; and (j) service workers.

Employers will also need to identify the number of employees, identified by race, ethnicity and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. For this particular purpose, the employer shall calculate the employee's earnings as shown on the IRS Form W-2 for each "snapshot" (i.e., during a single pay period of the employer's choice between October 1st and December 31st of the Reporting Year) and for the entire Reporting Year, regardless of whether the employee worked the entire calendar year.

Employers with multiple establishments will be required to submit a report for each establishment and a consolidated report that includes all employees.

This law permits, but does not require, employers to include a section providing any "clarifying remarks" regarding any of the information provided. Employers required to file an EEO-1 report with the EEOC or other federal agency containing the same information may comply with this new reporting requirement by submitting the EEO-1 to the DFEH, provided it contains the same or substantially similar data required by this bill. In this regard, if the federal government in the future starts collecting this same pay data, then employers subject to SB 973 presumably could comply with these California requirements by submitting a copy of their EEO-1 report.

The information submitted to the DFEH must be made available in a format that will enable the DFEH to search and sort the information using readily available software.

The law requires the department to maintain these pay data reports for at least 10 years. However, it will be unlawful for any DFEH officer or employee to publicize any "individually identifiable information" obtained through these reports prior to the initiation of any Equal Pay Act or FEHA claim. "Individually identifiable information" is defined as "data submitted pursuant to this section that is associated with a specific person or business."

Similarly, individually identifiable information submitted to the DFEH through these reports will be considered confidential information and not subject to the California Public Records Act. However, the DFEH may develop and publish annually aggregated reports based on the information provided so long as these aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

If the DFEH does not receive the required report, it may seek an order requiring employer compliance and shall be entitled to recover its enforcement costs (i.e., likely attorneys' fees). The Employment Development Department will be required, upon request, to provide the DFEH with the names and addresses of all businesses with 100 or more employees.

This law also authorizes the DFEH to "receive, investigate, conciliate, mediate and prosecute complaints" alleging equal pay violations under Labor Code section 1197.5. However, the DFEH must coordinate with the DLSE and the DIR to enforce these provisions.

**Requirement for California Corporations to Have Directors from "an Underrepresented Community" (AB 979)**

In 2018, California enacted SB 826, which required publicly held, domestic or foreign corporations with their principal executive offices in California to have a certain number of females on their board of directors, with the threshold number dependent on the applicable statutory deadline and the size of the board of directors.

This law enacts very similar provisions and requires such corporations to have at least a certain number of directors from "an underrepresented community," defined as individuals who are "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."

Thus, by no later than the close of the 2021 calendar year, each publicly held domestic or foreign corporation with its principal executive offices in California (according to the corporation's SEC Form 10-K) must have at least one director from an underrepresented community on its board of directors. The corporation will be permitted to increase the number of directors on its board to comply with this requirement. By the close of the 2022 calendar year, the corporation must have at least two such members if it has four but less than nine directors, and at least three such members if it has more than nine directors. If the board has four or fewer members, the corporation shall have at least one member from an underrepresented community.

A "publicly held corporation" means a corporation with "outstanding shares listed on a major United States stock exchange."

The law also requires the California Secretary of State to publish various reports on its web site documenting the number of corporations in compliance with these provisions, and to impose fines for non-compliance. The Secretary of State may impose fines for violating this section of $100,000 for the first violation and $300,000 for each subsequent violation. Each director seat required by this section to be held by an underrepresented director which is not held by such a member during at least a portion of a calendar year shall count as a violation, but an underrepresented community director having held a seat for at least a portion of the year shall not be a violation.

## Wage and Hour

### California's Minimum Wage Increases Again on January 1, 2021 (SB 3)

In 2016, California enacted SB 3, authorizing annual minimum wage increases until it reaches $15.00, and identifying a two-tiered schedule for the effective dates of these increases depending on whether the employer has more than 25 employees. Governor Newsom has signaled he does not intend to suspend the upcoming scheduled increases despite the COVID-19-related economic impacts. Accordingly, on January 1, 2021, the minimum wage for employers with 26 or more employees will increase to $14.00 per hour, meaning the salary threshold for exemption purposes will be $58,240 annually. On January 1, 2021, the minimum wage for employers with 25 or fewer employees will increase to $13.00 per hour, and the salary threshold exemption for those employers will be $54,080 annually.

### Expanded Statute of Limitations and Attorneys' Fees Recovery for Labor Code Violations (AB 1947)

This law amends two Labor Code provisions to make it easier or more enticing for plaintiffs to file retaliation claims. First, it amends Labor Code section 98.7 to extend from six months to one year the period for a person to file a retaliation complaint with the Labor Commissioner.

Second, it amends California's whistleblower statute (Labor Code section 1102.5) to allow a judge to award reasonable attorneys' fees to a prevailing plaintiff. Notably, in continuance of a recent trend, this amendment specifically only identifies a plaintiff as being able to recover, presumably to preclude a prevailing defendant from recovering, even if the claims were frivolous.

### Labor Commissioner Involvement in Arbitration of Wage Claims (SB 1384)

This law enables an employee who cannot have his wage claims determined by the Labor Commissioner because of an arbitration agreement with their employer to request the Labor Commissioner to represent them in the arbitration proceeding. The Labor Commissioner shall represent the employee if they are unable to afford counsel and the Labor Commissioner determines, upon conclusion of an informal investigation, that the claim has merit.

It also requires the petition to compel arbitration of a claim pending before the Labor Commissioner be served upon the Labor Commissioner. Upon the employee's request, the Labor Commissioner shall have the right to represent the employee in proceedings to determine enforceability of the arbitration agreement, either in court or with the arbitrator.

**Expanded Local Enforcement of Statutory Wage Requirements and Expanded Successor Liability, and Proposed New Corporate Law Disclosures of Outstanding Wage Judgments (AB 3075)**

This law enacts several seemingly unrelated changes, but all tied to the current trend of more aggressive wage enforcement.

First, it provide greater statutory authority to local jurisdictions (e.g., city, county or agency) to enforce labor standards. While Labor Code section 1205 presently recognizes local jurisdictions may enact wage and hour laws more stringent than the state version, this law expressly provides they may enforce labor standard requirements regarding the payment of wages that are more stringent than the state standard. It also expressly authorizes the local jurisdictions to enforce state labor standard requirements regarding the payment of wages set forth in Division 2 of the Labor Code (commencing with section 200).

This law also adds several provisions to address concerns judgment debtor employers are attempting to avoid final judgments by simply forming a new business entity. Accordingly, it also adds new Labor Code section 200.3 to expand successor liability for wages, damages or penalties owed to a judgment debtor's former workforce under a final judgment (i.e., no appeal is pending and the time to appeal has expired) beyond the current property service context and to apply generally. Specifically, the successor employer will be liable if it meets any of the following criteria: (a) it uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor (with some statutory exceptions); (b) it has substantially the same owners or managers that control the labor relations as the judgment debtor employer; (c) it employs as a managing agent (as used under Civil Code section 3294) any person who directly controlled the wages, hours or working conditions of the affected workforce of the judgment debtor; or (d) it 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 judgment debtor.

This new section provides that it does not preclude potential other means to establish successor liability for wages, damages or penalties.

In addition to expanding successor liability, it also requires business owners to potentially disclose prior wage judgments if they attempt to form a new entity by amending California's Corporation Code regarding the filing of so-called statements of information with the California Secretary of State. It requires this statement of information to also include a statement whether any officer or director (or members or managers for limited liability corporations) has any outstanding final judgment issued by the Division of Labor Standards Enforcement or a court for

any violation of a wage order or the Labor Code. These disclosures will be required upon the earlier of either January 1, 2022 or upon the Secretary of State's certification that it has implemented California Business Connect.

**Extension for Petroleum Facility Rest Period Rules (AB 2479)**

This law amends Labor Code section 226.75 and extends until January 1, 2026, the exemption from the generally-applicable rest period rules for specified employees holding safety-sensitive positions at petroleum facilities (as defined) if certain requirements are met.

**New Rest Period Rules for Registered Security Officers (AB 1512)**

This law, until January 1, 2027, amends Labor Code section 226.7 to implement new rest period rules for security officers registered pursuant to the Private Security Services Act and whose employer is a registered private patrol operator. Specifically, it permits such employers to require security officers to remain on premises during rest periods and to remain on call, and to carry and monitor a communication device during rest periods. If a rest period is "interrupted," the security officer shall be permitted to restart the rest period anew as soon as practicable, and if the security officer is then able to take an uninterrupted rest period, the security officer employer will have satisfied its rest period obligation. However, if the security officer is unable to take an uninterrupted rest period of at least 10 minutes every four hours worked (or major fraction), then the employer shall pay one additional hour of pay for each workday the rest period is not provided.

It clarifies that "interrupted" for penalty provisions means being called upon to return to active duty before completing the rest period, and does not include simply being on the premises, remaining on alert or monitoring any communication devices.

However, this subdivision only applies to such security officers that are covered by a valid collective bargaining agreement that contains specific provisions related to wages, hours of work, etc.

In effect, this law nullifies for purposes of security guards only the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, but does not apply to existing cases filed before January 1, 2021.

This law will only remain in effect until January 1, 2027, at which point it will be automatically repealed and section 226.7 will revert back to its current statutory language.

**<u>Human Resources/Workplace Policies</u>**

**Ban on "No Rehire" Provisions in Settlement Agreements Amended (AB 2143)**

In 2019, California enacted AB 749 to generally prohibit settlement agreement provisions limiting an "aggrieved employee's" ability to work for the settling employer. This law amends these prohibitions in Code of Civil Procedure section 1002.5 in two respects to address concerns raised

by both employers and employees that the other side might act in bad faith regarding these protections.

First, it requires the aggrieved employee to have filed the initial complaint "in good faith" in order to be protected by the "no rehire provision" in any settlement agreement. Second, while the current prohibition against "no rehire" provisions contains an exception if the employer has made a good faith determination the aggrieved employee engaged in sexual harassment or sexual assault, this law expands this exception to include "or any criminal conduct" but also requires this good faith determination of the alleged disqualifying conduct be made and documented before the aggrieved employee filed a complaint.

**Human Resources Required to Report Child Abuse (AB 1963)**

The Penal Code's Child Abuse and Recovery Act requires statutorily-enumerated "mandated reporters" to report to specified agencies (e.g., police or county welfare) whenever they, in their professional capacity or within the scope of their employment, observe a child they know or reasonably suspect has been the victim of child abuse or neglect. If a mandated reporter fails to report a known or reasonably suspected case of child abuse or neglect, they face misdemeanor liability, including statutory penalties and potential jail time.

This law amends Penal Code section 11165.7 to expand the list of mandated reporters to include "human resources employees" for businesses that employ minors. "Human resources employee" is defined as "the employee or employees designated by the employer to accept any complaints of misconduct" as required under the FEHA.

It also adds, for purposes of reporting sexual abuse (rather than child abuse or neglect) any adult person whose duties require direct contact with, and supervision of, minors in the performance of the minors' duties in the workplace of a business subject to the FEHA. This duty for supervisors to report sexual abuse will not obviate their obligation to also report child abuse or neglect if the individual is working in another capacity that would otherwise make them a mandated reporter.

This law also requires employers subject to these new reporting requirements to train employees who fall within this definition of mandated reporter about these reporting duties (i.e., how to identify abuse/neglect and how to report it). The employer satisfy this training requirement by completing the general online training for mandated reporters offered by the Office of Child Abuse Prevention in the State Department of Social Services.

**Expedited Work-Sharing Plan Procedures (AB 1731)**

California currently authorizes employers to participate in "work sharing" plans as an alternative to layoffs, with the affected employees able to obtain unemployment insurance benefits from the Employment Development Department (EDD) for the reduction in wages as a result of this work sharing arrangement. Presently, under Unemployment Insurance Code section 1279.5(c), employers must submit a signed written work sharing plan to the agency for approval based upon specific criteria in that section.

This law develops a faster alternative process for the submission and approval of these employer work sharing plan applications. Accordingly, the Employment Development Director will be required to accept electronically submitted applications and to develop a portal on its internet website for these applications to be submitted. Upon approval by the director, any work sharing plan applications submitted by eligible employers between September 15, 2020 and September 1, 2023 will be deemed approved for one year upon receipt.

The EDD will also be required to forward electronically to each eligible employer a claim packet for each participating employee within five business days following approval of the application. Once the claim packet documents are completed, the EDD will establish an unemployment insurance claim for each employee, with the employer and employee responsible for subsequently completing and updating any weekly certification requirements.

This law is immediately effective and will remain in effect until January 1, 2024, at which point it will be automatically repealed unless extended or replaced.

## Harassment/Discrimination/Retaliation

### Harassment Training for Minors in Entertainment Industry (AB 3175)

This industry-specific law requires that, before an entertainment work permit is issued to minors, the parents of minors aged 14 to 17 years must ensure the minors complete sexual harassment training provided by the DFEH (including its online training) or other legally-compliant training. The training must be provided in a language the person can understand whenever reasonably possible.

This law is immediately effective.

### Training Exemption for Minors in the Entertainment Industry (AB 3369)

This law clarifies that otherwise mandatory sexual harassment training for minors in the entertainment industry will remain governed by the industry specific training requirements in Labor Code section 1700.52 rather than the more generally applicable training requirements in the Fair Employment and Housing Act and Government Code section 12950.1. For those employees who had also received compliant training within the last two years, they will be required to read and acknowledge receipt of the employer's anti-harassment within six months of receiving a new position, and thereafter placed on a two year tracking schedule based on the employee's last training. If challenged, the current employer will bear the burden of proving the prior training was legally compliant with these requirements.

## Miscellaneous

### Additional One Year Extension of Portions of California Consumer Privacy Act Proposed (AB 1281)

This law grants a further one year exemption (until January 1, 2022, rather than January 1, 2021)

from the California Consumer Privacy Act (CCPA) of certain information gathered by a business about a natural person in the course and scope of that person's employment.

As background, the CCPA was enacted in 2018 and took effect in 2020 to enable "consumers" to request the personal information a "covered business" (as defined) collects or sells about the consumer, and to request that the business delete any personal information collected about them. Responding to concerns the broadly worded CCPA would apply to information about employees and enable them to request their employer delete information about them (e.g., a sexual harassment charge made against the employee), in 2019 the CCPA was amended by AB 25 to provide a one year partial exclusion form the CCPA for employees acting within their scope as an employee.

Specifically, AB 25 amended Civil Code section 1798.145(g)(1) to specify the CCPA does not apply to personal information gathered by an employer in three specific circumstances. First, it does not apply to personnel information collected by a business in the course of that person acting as a job applicant, employee, owner, director, officer, medical staff member or contractor of that business to the extent this personal information is collected and used by that business solely within the context of that person's role or former role of that business. In a similar manner, it does not apply to personnel information gathered by a business about these individuals that is either "emergency contact information" or that is necessary for the business "to retain to administer benefits" for another natural person, provided this information is collected and used solely for purposes of "having an emergency contact on file" or in the "context of administering those benefits."

However, AB 25 only provided a one year period (until January 1, 2021) for this exclusion, contemplating that further amendments would be made to the CCPA generally. AB 1281 simply extends this exemption for an additional year (until January 1, 2022). However, it is contingent upon voters not approving a ballot proposition related to the CCPA in the November 3, 2020 general election.

**Prevailing Wage Definition of "Locality" (AB 2231)**

California law requires that a so-called "prevailing wage" be paid on "public works" (as defined) that are financed by public funds, but exempts private development projects where the public funding is "de minimis." This law defines "de minimis" as both less than $500,000 and less than 2% of the total project cost.

**Personal Protective Equipment for Direct Care Workers (AB 2537)**

This law requires public and private employers of workers in general acute care hospitals (as defined) to supply those workers who provide direct patient care or that directly support personal care with personal protective equipment (PPE) necessary to comply with DIR regulations regarding aerosol transmissible diseases and ensure their usage. It also requires the employer to ensure the employee uses the personal protective equipment supplied to them. Beginning April

1, 2021, it also requires these employers to maintain a PPE stockpile equal to three months of normal consumptions. This equipment must also be new and not previously work or used.

**Retaliation Protections for "Domestic Work Employees" (AB 2658)**

Labor Code section 6311 presently precludes retaliation against employees who refuse to work in unsafe work environments. This law expands these protections to include domestic work employees, except or persons performing household domestic services that are publicly funded. While such publicly funded household domestic workers are exempted from the provisions allowing affected employees to sue, they are included within the protections imposing criminal liability upon individuals who willfully and knowingly direct any employee to work in areas that are a menace to public health or safety.

**Educational Training Costs for Direct Patient Care Employees (AB 2588)**

This law provides that the indemnification provisions in Labor Code section 2802 apply to any cost or expense of any employer-provided or employer required education program or training for an employee providing direct patient care fir an employer for a "general acute care hospital."