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NEW EMPLOYMENT LAW UPDATES

The time for passing new laws in 2021 has expired and now we know what will be new for 2022. Outlined below are the new laws most likely to affect our clients. We have not included every new law that may impact your organization but, instead, highlight a few industry-specific laws as a reminder that you should always check for any new laws that may specifically impact your organization.

These new laws will become effective on January 1, 2022 unless otherwise noted.

For a full copy of the new laws covered here, simply click on the bill number. Let us know if you have specific questions about the new laws or how they affect your organization.

COVID-Related Laws

[AB 654](#); [SB 93](#); [SB 95](#); [Cal-OSHA ETS](#)

There have been many changes to the laws and regulations related to COVID-19 over the last year. It is always important to be on the lookout for changes in the law, but that is especially true for all things COVID-19 related. Below is a brief summary of current employer obligations related to COVID-19 as of the date of this newsletter. Please note this is not an exhaustive list of all COVID-19 related obligations. There are also local ordinances that may impose additional obligations to employers.

Exposure Notification Obligations

- When an employer receives notice of a potential exposure to COVID-19, the employer must provide written notice of the potential exposure within one (1) business day to all employees who were on the premises during the infectious period. This notification must include information about time off benefits available to the employee as well as the cleaning and disinfection plan the employer is implementing to combat COVID-19 in the workplace.
- Most employers have an obligation to report to the local public health agency if the number of COVID-19 cases in the workplace meets the definition of an outbreak, as defined by the State Department of Public Health. This reporting must occur within 48 hours, or one business day, whichever is later. Certain licensed entities are exempt from the COVID-19 outbreak reporting requirements, including, but not limited to community clinics, adult day health centers, community care facilities, and child daycare facilities.
- The COVID-19 exposure notice obligations and outbreak reporting obligations remain in effect until January 1, 2023, unless later extended.

Sick Leave and Cal-OSHA Exclusion Pay

- From January 1, 2021 to September 30, 2021, employers were obligated to provide employees with up to 80 hours of job-protected paid sick leave, in addition to other paid sick leave obligations. Employers were required to note this supplemental sick leave as a separate line item on employee wage statements. Employees who were utilizing the supplemental sick leave on September 30, 2021 and who had a balance of supplemental sick leave remaining were entitled to use the remainder of their supplemental sick leave balance, even after September 30, 2021. (So, if an employee used supplemental sick leave for the first time on September 30, their last potential day of eligibility for

supplemental sick leave was October 14, 2021.)

- Under the Cal-OSHA Emergency Temporary Standards, originally adopted November 30, 2020 and revised June 17, 2021, employers must exclude employees from the workplace if the employee is diagnosed with COVID-19 or after an employee who is not fully vaccinated has close contact with a person with COVID-19 during the infectious period. If an employee is excluded from work because of a workplace COVID-19 exposure, the employer is obligated to compensate the employee at the regular rate of pay during the exclusion period, unless: the employee can (and is assigned) telework; or the employee receives disability payments or worker's compensation temporary disability payments during the exclusion period.

Safety Procedures to Limit the Spread of COVID-19

- Employers are required to have a written COVID-19 Prevention Plan. This can be a stand-alone document or incorporated into the employer's existing written Illness and Injury Prevention Plan. Employers are required to adopt safety procedures to help limit the spread of COVID-19.
- Employers are required to provide N95 or higher masks to any employee upon request. Employees who are not fully vaccinated are required to wear a mask while working indoors, unless working in a closed room or vehicle by themselves. Employers may impose stricter mask requirements if desired.
- Employees in healthcare facilities and who provide in-home health or support services are required to be vaccinated.

Rehiring Obligations

- Employers in certain hospitality industries are required to give rehiring preference to eligible employees whose most recent separation with the employer was due to COVID-19, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic (non-disciplinary) reason associated with COVID-19.
- Within five (5) business days of the position being created/becoming available, the employer must make a written offer of the position to any eligible laid-off employee if the employee is qualified for the position. (It is assumed the employee is qualified if they were doing a similar position before being laid off.) The laid-off employee has five (5) business days to accept or decline the position. If multiple laid-off employees qualify for the position, the employer may offer it to multiple laid-off employees but if multiple individuals accept, the employer must rehire the individual with the most seniority prior to the layoff.
- If an employer does not offer an eligible laid-off employee a position due to the employee not being qualified, the employer must notify the laid-off employee in writing within 30 days of filling the position. The written notice must include: a list of all employees hired for the position, their length of service with the employer, and the employer's explanation as to why the employer did not rehire the laid-off employee. In addition, employers must maintain records of all laid-off employees for at least three years. The rehiring and record-keeping obligations remain in effect until December 31, 2024.

Expansion of Personal Protective Equipment Requirement and Employee Training for Wildfire Smoke Events

AB 73

- Existing law requires the State Department of Public Health and Office of Emergency Services to establish a stockpile of personal protective equipment (PPE) to address pandemics and other health emergencies.
- Existing law requires the Department consider, among other things, the amount and type of PPE required for healthcare workers and other "essential workers" during a 90-day period to determine the amount to stockpile.
- This bill broadens the scope of health emergencies to include wildfire smoke events and expands the definition of essential worker to include agricultural workers.
- This bill also requires the Division of Occupational Safety and Health to review and update wildfire smoke training requirements for employers, including ensuring the training is provided in a language and manner that is readily understandable by employees.
- This bill is effective immediately.

Varied Topics Related to Employment and Unemployment

AB 138

- Existing law limits the use of information obtained by the Employment Development Department (EDD) in the administration of the Unemployment Insurance Code.
- This bill permits the Department of Fair Employment and Housing to obtain and use EDD's information to carry out its duties, including equal pay compliance.
- Existing law defines the calculation of payments to eligible employees who are temporarily disabled and unable to work. Existing law provided for increased disability payments through January 1, 2022.
- This bill extends the increased disability payments through January 1, 2023.
- Existing law establishes the California Workforce Development Board as the body responsible for assisting the Governor in the development, oversight, and continuous improvement of California's workforce investment system and the alignment of the education and workforce investment systems to the needs of the 21st century economy and workforce.
- This bill requires the Board to consider economic trends that impact the labor market, including climate change. The bill requires the Board to develop "high road" employment opportunities defined as, those achieving economic growth, economic equity, shared prosperity, and a clean environment.

Warehouse Distribution Centers

AB 701

This bill applies to employers with 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in the state of California.

- This bill imposes several new requirements on employers that utilize a quota system as a performance standard for which an employee can be disciplined or terminated for failing to meet. The bill requires employers to provide written notice of the quota, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. The written notice must be provided to all current employees no later than October 22, 2021 and all new employees at the time of hire. Employees cannot be required to meet a quota that prevents compliance with meal and rest periods, prevents the use of restroom facilities, including the reasonable time to walk to/ from the restroom to the workstation, or prevents compliance with occupational health and safety laws in the Labor Code or Cal-OSHA regulations.
- The bill requires that any actions taken by an employee to comply with occupational health and safety laws in the Labor Code or Cal-OSHA regulations be considered time on task and productive time for purposes of any quota or monitoring system.
- If a current or former employee believes that meeting a quota caused a violation of their rights related to meal and rest periods or safety, the employee has the right to request a copy of the quota and their own personal work speed data. Such requests may be made orally or in writing. Employers have twenty-one (21) days to comply with all requests. For former employees, the employer shall provide work speed data for the ninety (90) days prior to the date of separation. Former employees are only entitled to one such request.
- Under this bill, there will be a rebuttable presumption of unlawful retaliation if the employer discriminates, retaliates, or takes any adverse action against any employee within ninety (90) days of a) the employee's first request for personal work speed data in a calendar year, or b) the employee making a complaint internally, to a governmental agency, or in superior court, alleging a violation of this bill.
- This bill provides that a current or former employee may bring an action for injunctive relief for violations of this provision, and if successful, recover attorney's fees and costs. This bill is also subject to enforcement via a Private Attorneys' General Act (PAGA) action, although it does allow an employer to cure a violation.
- The Labor Commissioner may adopt regulations for employee complaints under this bill, as well as enforcement. Additionally, the Labor Commissioner may seek an injunction in superior court against an employer for violations of this provision, and if successful, recover attorney's fees and costs to do so.
- This bill mandates coordination between the Labor Commissioner, Department of Industrial Relations, Cal-OSHA, and the Division of Worker's Compensation to collect data and report on warehouse employee injuries. If a particular worksite or employer is found to have an annual employee injury rate of at least 1.5 times higher than industry average, Cal-OSHA must notify the Labor Commissioner, and the Labor Commissioner will determine whether an investigation is needed.

Wage Theft

AB 1003

- Existing law regulates the payment of wages and makes the violation of certain wage and benefit payment rules a misdemeanor.
- Existing law defines "grand theft" as the theft of money, labor or property valued at more than \$950 and makes the violation punishable as either a misdemeanor or as a felony.
- This bill makes the intentional theft of wages or benefits from an employee or independent contractor in an amount greater than \$950, or from two or more such individuals in an amount greater than \$2,350 in any consecutive 12-month period, punishable as grand theft.
- This bill defines "theft of wages" as the intentional deprivation of wages, gratuities, benefits, or other compensation by unlawful means with knowledge that such wages, gratuities, benefits, or other compensation are due to the employee(s).
- This bill provides that any wages, gratuities, benefits, or other compensation subject to prosecution under the bill may be recovered by the employee(s) as restitution in the criminal action or may be recovered through civil or administrative action.

CFRA Change and Mediation

AB 1033

- Existing law, commonly known as the California Family Rights Act (CFRA), generally requires employers with five or more employees to provide those employees who have at least 1,250 hours of service with that employer during the previous 12-month period, up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave.
- Existing law requires employers to provide CFRA leave to care for a family member, which is defined as, grandparent, grandchild, parent, sibling, spouse, domestic partner, and child (including biological, adopted, foster, stepchild, legal ward, child of domestic partner, and person who the employee stand in loco parentis).

- This bill expands the family member list to also include parent-in-law.
- Existing law requires the Department of Fair Employment and Housing (DFEH) to create a small employer pilot mediation program and to initiate mediation for alleged violations of CFRA provisions following issuing a right-to-sue notice if requested by the employee or the employer. The program is applicable to employers with between 5-19 employees and shall remain in effect only until January 1, 2024.
- This bill requires the DFEH to notify the employee in writing of the requirement for mediation prior to filing a civil action if mediation is requested by the employee or employer.
- This bill adds specific mediation rules and timelines applicable to the pilot program.
- This bill provides that a defendant in a civil action that did not receive a mediation notice as a result of the employee's failure to contact the DFEH's alternative dispute resolution division shall be entitled to a stay the employee's civil action or arbitration until mediation is complete or is deemed unsuccessful.

Expansion of Exemptions from ABC Independent Contractor Test

[AB 1506](#); [AB 1561](#)

- Existing law requires a three-part test commonly known as the "ABC" test to determine if workers are considered "employees" or "independent contractors" for purposes of certain employment laws. Under the ABC test, a worker is considered an employee by default unless the hiring entity demonstrates that the worker is (A) free from the control and direction of the hiring entity in connection with the performance of the work, (B) the person performs work that is outside the usual course of the hiring entity's business, and (C) the person is customarily engaged in an independently established trade, occupation, or business.
- Existing law exempts certain occupations from the ABC test and specifies another more relaxed test of independent contractor status.
- Under existing law certain occupations are exempt until January 1, 2022 including manicurists, construction company subcontractors, and newspaper distributors and carriers.
- These bills extend the exemption for manicurists, construction company subcontractors, and newspaper distributors and carriers until January 1, 2025.
- These bills change the exemption applicable to data aggregators.
- These bills expand the exemption within the insurance industry by including individuals performing claims adjusting or third-party administration work, as defined.
- These bills clarify the statutory duties imposed on a manufactured housing dealer under the Health and Safety Code are not factors to be considered under the independent contractor test for manufactured home salespersons.

Garment Industry

[SB 62](#)

- Existing law imposes a number of special regulations on employers in the garment manufacturing industry, including making garment manufacturers liable for guaranteeing the payment of wages to the employees of the manufacturers' contractors.
- This bill expands the definition of garment manufacturing to including dyeing, altering a garment's design, and affixing labels. This bill also expands the types of persons and entities that may be liable for wage payment by including and defining "brand guarantors."
- This bill prohibits employers without a specific union contract from using a piece-rate system of pay unless the piece-rate is an incentive paid on top of a legal hourly rate.
- This bill creates expanded penalties for violations and requires garment manufacturers to maintain specified employment and contracting records for a period of four years.

Confidentiality Agreements

[SB 331](#)

- Existing law prohibits a provision in a settlement agreement that prevents the disclosure of factual information relating to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action.
- This bill expands the law by prohibiting any provision in settlement agreements that prevents or restricts the disclosure of factual information relating to claims regarding any form of harassment, discrimination, and retaliation.
- Existing law prohibits an employer, in exchange for a raise, bonus, or as a condition of employment or continued employment to require an employee to sign a non-disparagement agreement or other document that purports to deny the employee's right to disclose factual information relating to unlawful acts in the workplace.
- This bill expands this prohibition to any non-disparagement agreement or other document that has the purpose or effect denying the employee's right to disclose factual information relating to unlawful acts in the workplace. Unlawful acts in the workplace are defined as information pertaining to harassment, discrimination, or any conduct that the employee has reasonable cause to believe is unlawful.
- This bill provides that if an employer has a non-disparagement or other contractual clause that restricts an employee's ability to disclose conditions in the workplace, the clause must include the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you

- have reason to believe is unlawful.”
- This bill further requires an employer offering an employee or former employee an agreement related to the separation of employment to notify the employee of their right to consult an attorney regarding the agreement and to provide the employee with a reasonable time period of not less than five business days in which to do so.
- The provisions of this bill are effective for agreements entered into January 01, 2022 or later.

Labor Commissioner – Real Property Liens

SB 572

- Existing law authorizes the California Labor Commissioner to create a lien on the real property of employers who have been adjudicated to have violated wage and hour laws and owe money to employees.
- This bill expands the Labor Commissioner’s authority to create real property liens to secure amounts due to the Labor Commissioner pursuant a final citation, finding, or decision.
- This bill specifies the Labor Commissioner’s duty to issue a certificate of release upon the payment of the amounts owed by the employer.

Expansion of Cal-OSHA’s Enforcement Power

SB 606

- Existing law, commonly known as Cal-OSHA, requires the Division of Occupational Safety and Health to issue a citation for a violation of a provision relating to any standard, rule, order, or regulation established pursuant to specified provisions of the California Occupational Safety and Health Act of 1973, if the Division believes the employer has committed a violation.
- Existing law imposes monetary penalties up to certain maximum amounts depending on whether the violation is serious, uncorrected, willful or repeated.
- Existing law authorizes the Division to seek an injunction restraining certain use or operations of employment that constitute a serious menace to the lives and safety of persons by the Division establishing prima facie showing to warrant the granting of the temporary restraining order.
- This bill creates a rebuttable presumption that a violation committed by an employer at a single site that has multiple worksites, can be considered an enterprise-wide violation at each of the employer’s worksites if the employer has a written policy or procedure that violates the provisions or the Division has evidence of a pattern or practice of the same violations at more than one worksite.
- This bill expands the categories of violations to add an “egregious employer” which is defined as either one or more of the following:
 - the employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation,
 - the violations resulted in worker fatalities, a worksite catastrophe (defined as inpatient hospitalization, regardless of duration of 3 or more employees), or a large number of injuries or illnesses,
 - the violations resulted in persistently high rates of worker injuries or illnesses,
 - the employer has an extensive history of prior violations considered egregious,
 - the employer has intentionally disregarded their health and safety responsibilities,
 - the employer’s conduct amounts to a clear bad faith in performance of their duties ,
 - the employer has committed a large number of violations to undermine the effectiveness of any safety and health program in place.
- This bill authorizes the Division to issue separate citations with higher citation amounts to an egregious employer violation for each instance an employee is exposed and will be considered separate violations.

Minimum Wage – Persons with Disabilities

SB 639

- Existing law allows the Labor Commissioner to issue a certificate to individuals with physical or mental disabilities allowing those individuals to be paid at a rate lower than established minimum wage. Such licenses are issued for one year and can be renewed annually. The Labor Commissioner is charged with setting a special minimum wage for the licensee. In addition, the Labor Commissioner may issue a special license to a nonprofit organization, such as a sheltered workshop or rehabilitation facility, to permit the employment of mentally or physically disabled individuals at a wage of less than minimum wage, without each individual employee obtaining a license.
- This bill prohibits the issuance of new special licenses to individuals after January 1, 2022. No individual licenses may be renewed after January 1, 2025 or after the State Council on Developmental Disabilities issues a multiyear phaseout plan, whichever occurs later.
- Nonprofit organizations will not be permitted to obtain or maintain a license to pay individuals with disabilities less than minimum wage after January 1, 2025.
- By January 1, 2025, or after the State Council on Developmental Disabilities issues a multiyear phaseout plan, whichever occurs later, all individuals, including those individuals with mental or physical disabilities, must be paid at least minimum wage in accordance with state and local law.
- This bill also establishes the requirements and benchmarks for the multiyear phaseout plan requirements from the State Council on Developmental Disabilities.

PAGA Exemption – Janitorial Employees

SB 646

- Existing law authorizes an aggrieved employee to bring a civil action to recover civil wage and hour penalties on behalf of the employee and other current or former employees under the Private Attorney General Act (PAGA).
- Existing law requires employers who employ one or more janitors, or who contract for the provision of janitorial services, to register with the Labor Commissioner.
- This bill provides that PAGA shall not apply to any janitorial employee who is represented by a labor organization where the collective bargaining agreement meets certain criteria.
- The bill authorizes the exception until the collective bargaining agreement expires or until July 1, 2028, whichever is earlier.

Electronic Distribution of Required Employment Information

SB 657

- Existing law requires employers to physically post certain employment-related information for its employees.
- This bill permits employers to provide copies of these documents to its employees by email.
- This bill instructs that providing employees copies of the documents by email does not relieve the employer of continuing to physically post the information.

Labor Related Liabilities: Direct Contractors

SB 727

- Existing law provides that a direct contractor who makes or takes a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other work, is liable for any unpaid wages and fringe benefits of the employees of subcontractors performing work on the contract.
- Existing law provides that the direct contractor's liability is limited to unpaid wages, fringe benefits, and interest, but does not extend to penalties or liquidated damages. In certain instances, the direct contractor may also be liable for the plaintiff's reasonable attorney's fees and costs.
- The bill applies to all contracts entered into on or after January 1, 2022.
- This bill extends the direct contractor's liability to penalties, liquidated damages, and interest owed by subcontractors if the direct contractor knew about the subcontractor's failure to pay the specified wage, fringe, or other benefit payment or contribution.
- The bill extends the direct contractor's liability to penalties, liquidated damages, and interest owed by subcontractors if the direct contractor failed to do the following:
 - Periodically review payroll records. The records must contain information sufficient to apprise the direct contractor of the subcontractor's payment status in making fringe or other benefit payments or contributions to a third party on the employees' behalf.
 - If direct contractor becomes aware of the subcontractor's failure to pay, the direct contractor must halt or rectify the failure.
 - Prior to making final payment to the subcontractor, the direct contractor must obtain an affidavit, signed under penalty of perjury, that the subcontractor has paid the wage, fringe, or other benefit payment or contribution due to employees for all work performed on the private construction project.
- The Division of Labor Standards must notify the direct and subcontractor within 15 days of receipt of a complaint of a subcontractor to pay the specified wage, fringe, or other benefit due to workers.
- The statute allows for enforcement through an administrative or civil action and allows the following parties to bring a claim: (1) the Labor Commissioner; (2) a third party owed fringe or other benefit payments or contributions on a wage claimant's behalf; or (3) a joint labor-management cooperation committee, provided the committee provides the direct contractor and subcontractor that employed the wage claimant with at least 30 days' notice by first-class mail of the general nature of the claim, the project name, name of the employer and provide that any liquidated damages awarded by the labor commissioner or the court shall be payable to the aggrieved employees.
- The bill specifically excludes work performed by an employee of the state, a special district, a city, a county, a city and county, or any political subdivision of the state. The bill also requires an action be brought within one year of the earliest: (1) recordation of the notice of completion of the direct contract; (2) recordation of a notice of cessation of the work covered by the direct contract; or (3) actual completion of the work covered by the direct contract.

Contracts and Arbitration Agreements

SB 762

- Existing law generally governs contract formation with specific laws directed towards employment and consumer arbitration agreements. Existing law requires employers to pay all fees and costs associated with arbitration with employees. If the employer does not pay said fees and/or costs within thirty (30) days, the employer is in breach of the arbitration agreement and waives the right to compel arbitration. The employee can then make a motion to have the matter heard in court. In such instances, the court is required to issue sanctions to the employer. Additionally, the employee can recover all attorney's fees and costs incurred in arbitration. Alternatively, the employee can elect to continue to

arbitrate, assuming the arbitration provider is willing. In such instances, the arbitrator must sanction the employer for not timely paying all fees and costs.

- This bill requires that after an employee or consumer meets the filing requirements necessary to initiate arbitration, the arbitration provider must immediately provide an invoice for the fees and costs associated with commencing arbitration to all parties to the arbitration, served on all parties the same day and in the same manner as one another. The employer must pay all fees and costs within thirty (30) days or will be in breach of the arbitration agreement. Similarly, if there are fees and costs associated with continuing arbitration, the arbitration provider is required to provide an invoice for all fees and costs to all parties to the arbitration proceeding. Failure to pay the fees and costs of continued arbitration within thirty (30) days constitutes a breach of the arbitration agreement, with the same consequences as failing to pay the initial fees and costs within thirty (30) days.
- This bill also requires that in adhesion contracts (e.g., a standard contract prepared by one party without negotiating the terms with the other party), any time limit specified for the performance of an act must be reasonable.

Enforcement of Civil Rights: Department of Fair Employment and Housing

SB 807

- Existing law establishes various civil rights in employment and housing, as well as the deadlines to file claims related to alleged violations of those rights. Employees who desire to assert a claim for violation of the Fair Employment and Housing Act (FEHA) must submit a claim with the Department of Fair Employment and Housing (DFEH). The FEHA requires employers to maintain employment records for a minimum of two years.
- Existing law allows employees to make class/representative claims to the DFEH for alleged violations of the FEHA. The DFEH has discretion whether to treat the claims individually or on a class/representative basis. Existing law provides for an extension of time for the DFEH to investigate class/representative claims.
- This bill makes several procedural changes to how the DFEH enforces various civil rights laws including lengthening the requirement for employers to maintain employment records for a minimum of four years. If an employee files a complaint with the DFEH, the employer must maintain records until the last date a civil action could be filed, or until after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.
- This bill tolls the statute of limitations for an employee to file a claim for certain violations (e.g., sex trafficking, gender violence, interference with the exercise of rights, etc.) while the DFEH is investigating the allegations.
- For those instances when the DFEH elects to treat a claim as a class or representative complaint, this bill extends the time for the DFEH to complete its investigation and issue a right-to-sue notice from one year to two.
 - This bill tolls the statute of limitations to file a civil action for the duration of any voluntary or mandatory referral to the DFEH's mediation program.

Please let us know if we can support you and we will be your partner in navigating through the changes.

Sincerely,

Holden Law Group

Our Services

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Newsletter**

