



Employment Law Updates in 2021

Debra Ellwood Meppen
Partner
Brandon Saxon
Partner
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Key Takeaways for California's New 2021 Employment Laws

Family and Medical Leave Expanded for Nearly All Employers

- SB 1383 significantly **expands** the California Family Rights Act (CFRA).
- ***Effective Date January 1, 2021.***

Expanded CFRA requires:

- Employers with ***five or more employees*** (lower threshold) to provide up to 12 weeks of unpaid leave for an employee for family care/medical leave.
- 12 weeks of unpaid leave for a qualifying exigency of employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.
- Eliminates requirement that employees work within 75 miles of the worksite.



Family and Medical Leave Expanded for Nearly All Employers (Con't.)

- Definition of “**family members**” now includes **siblings, grandparents, and grandchildren**, along with parents, spouses, domestic partners and children. Definition of “child” now **covers adult children** (whether or not dependent) and children of a domestic partner.
- SB 1383 eliminates current requirement that if both parents work for the same employer, the employer is not required to provide more than a total of 12 weeks for leave in connection with the birth, adoption or foster care placement of a child. **Now, employers will have to provide up to 12 weeks of leave for each parent.**



Family and Medical Leave Expanded for Nearly All Employers (Con't.)

- **Note:** Additional burden for employers with 50+ employees covered under the CFRA and the FMLA. Typically, such employers have one policy on family and medical leave that covers leave under the CFRA and FMLA. Leave under prior CFRA and FMLA run concurrently, making it easy to track leave taken. **Now, leaves may not run concurrently, so it will be difficult to track.**



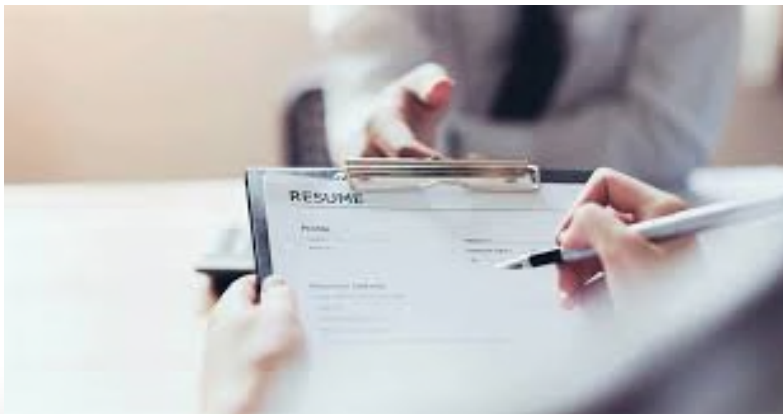
Key Takeaways:



- CFRA is complex-employers must be aware of employee eligibility requirements, the types of leave that qualify, provide the proper notices to employees, receive proper medical documentation from employees, and be prepared to hold a qualifying employee's position open for up to 12 weeks in a year.
- If employer publishes an employee handbook that describes other leaves available to employees, employers must now include a description of family and medical leave in the handbook.
- **Employers with 50+ employees should implement separate FMLA and CFRA policies and be prepared to track qualifying leave separately. Now it is possible for employee to be eligible for 12 weeks of CFRA leave and additional 12 weeks of FMLA leave in certain circumstances.**
- Employers with New Parent Leave policies should remove them from their employee handbooks and transition to a CFRA policy.

ABC Test for Independent Contractors

- AB 2257 amends AB 5 to revise & **add exceptions to the “ABC Test”** to determine whether a worker is properly classified as an employee or independent contractor.
- **Additions:** Now more than **100 distinct exceptions**, which vary in their specificity and complexity. Some are vague while others are extremely specific and narrow, qualified by multiple criteria and statutory references.
- AB 2257 went into effect immediately upon signing in 2020.



Key Takeaways:



- Even with some of the new exceptions and clarifications added by AB 2257, employers should continue using caution in classifying workers as independent contractors.
- Consult with legal counsel about the law and how it impacts specific work arrangements and circumstances, including which classification standard applies to a given arrangement, whether any of the numerous exceptions apply, and the level of risk of misclassification under the applicable standard.



Attorneys' Fees For Whistleblower Claims

- AB 1947 - the Governor signed on September 30, 2020
- Allows recovery of attorneys' fees for non-FEHA whistleblower retaliation claims. Now, "The Court is authorized to award reasonable attorneys' fees to a Plaintiff who brings a successful action for a violation of these provisions."
- **Why this is important to our practice:**
 - 1. Labor Code 1102.5 has no administrative exhaustion requirement. Meaning that **Plaintiffs who fail to timely bring a DFEH claim** (hardly likely anymore now that DFEH may be brought 3 years after wrongful conduct) **may still recover attorneys' fees on non-FEHA termination causes of action.**
 - 2. ***Shifting burden of proof.*** Defendant has the burden of proof by clear and convincing evidence that the termination was not retaliatory.
 - 3. ***Whistleblower retaliation claims*** which are otherwise very costly, are ***now potentially just as dangerous as FEHA claims.***



Key Takeaways:



- ***Be on the lookout for whistleblower claims*** in every case where attorneys' fees are otherwise not recoverable (Tameny, IIED);
- ***Expect a slew of motions to amend now pending complaints to add a claim for whistleblower*** to ensure another basis for recovery of attorneys' fees [even though statute appears to not be retroactive];
- ***Analysis should be focused on whether Defendant employer can sustain its burden of establishing by clear and convincing evidence*** that the action would have been taken even without the alleged complaint;
- This amendment may result in appellate court clarity or expansion of what constitutes a true whistleblower action when statute is finally tested.

Exemptions from Rest Period Requirements for Safety-Sensitive Positions (AB 2479)

- Effective Jan. 1, 2021
- Amends Cal Labor Code § 226.75
- Note Changes:
 - Subsection (b) “That employee” whose rest period is interrupted is entitled to another rest period
 - Subsection (c) Employers operating a petroleum facility must now include in their wage statement (§ 226) rest periods that were and were not authorized or permitted under subsection (b)
- In effect until January 1, 2026

Settlement Agreements

- AB 2143 takes effect Jan. 1, 2021
- Amends Cal Code Civ Pro § 1002.5
- A settlement agreement cannot contain a provision “prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person” from working for the party the aggrieved person/employee sued
- BUT An employer can prevent an aggrieved employee from working for the employer in the future if the employee engaged in sexual harassment, sexual assault, or criminal conduct, and such acts by the aggrieved employee were documented (in good faith) by the employer before the aggrieved employee filed his/her claim.



Leave for Victims of Crime or Abuse

- **AB 2992** took effect January 1, 2021.
- Expands prohibition on discrimination and retaliation against employee victims of crime or abuse who *need time off*.
- Allows for *time off for judicial proceedings/ medical attention* or related relief for domestic violence, sexual assault, stalking, or for any other crime that causes physical injury, mental injury & a threat of physical injury.
- Expands definition of “*crime*” to include *criminal activity* regardless of whether any person is arrested, prosecuted, or convicted.
- **Employers with 25 or more employees** must permit crime victims to take time off for additional relief, such as to obtain medical attention, obtain services from a victim services, and to obtain counseling.
- **Employers must provide employees with a written notice of their rights** under the law.

Paid Family Leave

- Existing law provides for a State-sponsored family temporary disability insurance program, also known as the Paid Family Leave program. This provides wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement. **Updates the Paid Family Leave program to include time off for participation in a qualifying exigency related to the active duty or call to active duty of an individual's spouse, domestic partner, child or parent in the Armed Forces of the United States.**

- AB 2399 took effect January 1, 2021.

Key Takeaways:

- Update employee handbooks' Paid Family Leave policy to reflect the additional basis for which employees qualify for paid leave benefits from the State.



List of Mandated Reporters Expanded

- AB 1963 took effect January 1, 2021.
- Amends Penal Code Section to **expand list of mandated reporters to include HR employees of business of 5+ employees that employ minors, and adults** who direct and supervise minors in the performance of the minors' duties in the workplace.
- Requires employers to provide mandated reporters with **training** on identification and reporting of child abuse and neglect.

Key Takeaways:

- If your clients have five or more employees and employ minors, the client must **provide mandated reporter training** to their HR staff and other employees who have direct contact with minors.



Paid Sick Leave Designation

- AB 2017 took effect January 1, 2021.
- Provides **employees the sole discretion to designate days taken as paid sick** leave under Section 233 of the Labor Code.

Key Takeaways:

- Update paid sick leave policies to state the designation of sick leave taken for qualifying reasons is made at the employee's sole discretion.
- If an employee has paid sick leave and calls out sick, employer cannot automatically deduct the time from the employee's sick leave bank.
- If an employee refuses to designate the time off as paid sick leave, employers can count the day as an unexcused absence and treat it pursuant to employers' absence policies.

Workers Compensation COVID-19 Presumption

- **SB 1159** went into effect immediately upon signing and remains in effect until January 1, 2023.
- **Rebuttable presumption** for employers with 5+ employees that employees **who test positive for COVID-19 caught it at work**, when:
 - The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee’s place of employment at the employer’s direction; and
 - The employee’s positive test occurred during a period of an “outbreak” at the employee’s specific place of employment.
- “Outbreak” for employers with fewer than 100 employees means **4 employees test positive for COVID-19 within 14 calendar days**. Presumption does not apply to employees who are working from home.

Key Takeaways:



- The **presumption of infection at work can be rebutted with evidence of measures in place to reduce potential transmission of COVID-19.** It is therefore important that employers have written policies and practices in place to mitigate the risk of spread, which are already required in any event.



Workers Compensation Reporting Requirements Related to COVID-19

- **SB 1159** -Employer with 5+ employees who “knows or reasonably should know” employee tested positive for COVID-19 to inform workers’ compensation carrier within three business days that:
 - **Employee tested positive.**
 - **The date** when the employee tested positive, which is the date the specimen was collected for testing;
 - **The specific address or addresses** of the employee’s specific place of employment during the 14-day period preceding the date of the positive test; and
 - **The highest number of employees who reported to work** at the employee’s specific place of employment in the **45-day period** preceding the last day the employee worked at each specific place of employment

Key Takeaways:



- Employers must report a positive test result to their workers' compensation carrier within three business days regardless of whether the employee makes a workers' compensation claim. Failure to comply can lead to fines of up to \$10,000.



Employee Reporting Requirements for COVID-19 Exposure in the Workplace

- **AB 685** took effect January 1, 2021.
- Establishes strict COVID-19 recording & reporting requirements when employers receive notice of potential COVID-19 in the workplace.
- Requires employers to *provide notices to different groups of employees within one business day* of a potential COVID-19 exposure.
- If an employer receives “notice of potential exposure to COVID-19,” the employer must, within **one business day**, take the following actions.
 - The employer must provide written notice to **all employees** and employers of subcontractors, **who were at the same worksite** as the “qualifying individual within the infectious period,” of their exposure to COVID-19.
 - Written notice may be provided in person, email, text message or other form of communications if the employee will receive it within one business day.
 - Notice must be in both English and any language understood by majority of employees. AB 685 requires that the notice to any exclusive representative must contain the same information required in Cal/OSHA’s Form 300.

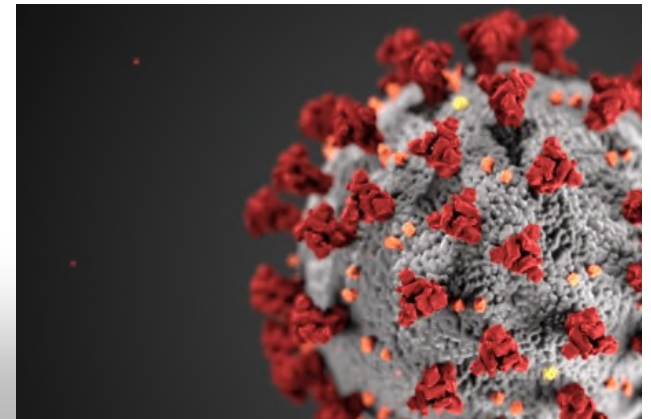
Employee Reporting Requirements for COVID-19 Exposure in the Workplace (Con't.)

- The employer must provide “all employees ***who may have been exposed***” with information on COVID-19-related benefits under federal, state or local laws, including workers’ compensation, COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave or negotiated leave provisions.
- The employer must notify ***all employees*** of the disinfection and safety plan that the employer plans to implement pursuant to CDC guidelines.
- The new law specifies detailed notice requirements with very little time to provide them, employers should be careful in developing policies and procedures.



Public Health Official Reporting Requirements for COVID-19 Exposure in the Workplace

- AB 685 requires employers to notify their local public health agency within 48 hours of a COVID-19 “outbreak,” as defined by the California Department of Public Health (CDPH).
- Notice to the local public health department must include the names, number, occupations and worksite of the “qualifying individuals” as well as the business address and NAICS worksite code of the worksite where the qualifying individuals work. Any employer who has an outbreak under the new law must continue to give notice to the local public health department of any subsequent lab-confirmed cases of COVID-19 at the worksite.



Public Health Official Reporting Requirements for COVID-19 Exposure in the Workplace (Con't.)

- Employers should note that the definition of “outbreak” under this law differs from the definition under SB 1159, which is related to workers’ compensation.
- AB 685 excludes from the notice requirements employees who, as part of their duties, conduct COVID-19 testing or screening, or who provide direct patient care or treatment to individuals who tested positive for COVID-19, unless the qualifying individual is an employee at the same worksite. Additionally, the outbreak notice requirements do not apply to “health facilities” as defined by Health and Safety Code Section 1250.



Key Takeaways:

- Because the new law specifies detailed notice requirements with very little time to provide them, employers should consult with legal counsel to develop the necessary policies and procedures.

Acute Care Hospitals and PPE Requirements



- AB 2537, creates California Labor Code § 6403.3
- Requires a general acute care hospital, on or before **January 15, 2021**, to be prepared to report to the Department of Industrial Relations its highest 7-day consecutive daily average consumption of personal protective equipment during the 2019 calendar year.
- Requires an employer to establish and implement effective written procedures for periodically determining the quantity and types of equipment used in its normal consumption.
- **Beginning on April 1, 2021**, requires “public and private employers of general acute care hospital workers to supply those employees who provide direct patient care or provide services that directly support personal care with the personal protective equipment necessary to comply with specified regulations.”
- Requires employers to ensure the employees use the PPE supplied to them.
- Requires employers in this context, **beginning April 1, 2021**, maintain a supply of specified equipment in an amount equal to 3 months of normal consumption.

EEOC Decision: Employers May Require Employees to Take the COVID-19 Vaccine

- **December 16, 2020** EEOC Decision: employers can require employees to take the COVID-19 vaccination.
- An employee will not be obligated to be vaccinated if one of the following is met:
 - The employee has a disability under the ADA that prevents the employee from being vaccinated.
 - The employee has a sincerely held religious practice or belief that prevents them from being vaccinated.
- **What happens if the employee cannot or will not be vaccinated?**
The employer may exclude the employee from the workplace if:
 - No reasonable accommodation can be made **and**
 - The employer can show there would be “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by [a] reasonable accommodation.”

Is the EEOC's Decision Permissible? Jacobson v. Massachusetts (1905) 197 US 11

- An individual cannot claim he is exempt from a vaccination law if he cannot show that he is “not a fit subject of vaccination” and/or could only show/argue that “‘quite often,’ or ‘occasionally,’ injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated.” (*Id.* at 36-37.)

Key Takeaways:

- This decision is still cited by courts today, most recently during the COVID-19 pandemic, and affirms the EEOC Decision that an employer can require its employees to take the COVID-19 vaccine.
- Be on the lookout for potential state-specific laws passed by legislatures.

Increases to Minimum Wage and Minimal Salary Thresholds for Exempt Employees

- Effective January 1, 2021, California's minimum wage is \$14 per hour for employers with 26+ employees and \$13 per hour for employers with 25 or fewer employees.
- A number of local minimum wage ordinances in California require some employers to pay a local minimum wage rate that is higher than the state rate.
- The state's minimum wage increase also means that the minimum salary that must be paid to an exempt employee also increases. The minimum monthly salary requirement for exempt executive, administrative and professional employees in California is no less than two times the state minimum wage for full-time employment. It is based on the state minimum wage, not any local minimum wage.
- Starting January 1, 2021, the minimum monthly salary for an exempt employee of an employer with 26+ employees will be \$4,853.33 per month (\$58,240 per year). The minimum monthly salary for an exempt employee of an employer with 25 or fewer employees will be \$4,506.67 per month (\$54,080 per year).

Key Takeaways:



- Be sure your clients' payrolls are set up so that any employees earning minimum wage will have their pay increased.
- Review your clients' exempt employees' salaries to determine whether their pay must be increased. The failure to increase exempt employee pay to correspond with the minimum wage increase will result in a loss of the exemption, meaning the employer is liable for overtime, meal breaks, rest breaks and other related violations and penalties.



Employee Harassment Training

- As of January 1, 2021, employers with 5+ employees must provide one hour of sexual harassment prevention training to nonsupervisory employees and two hours of such training to supervisors. These new requirements expand the prior harassment training law, which required employers with 50 or more employees to provide sexual harassment prevention training to all supervisors in California. Training must take place within six months of hire or promotion and every two years thereafter.



Key Takeaways:

- Ensure current employees receive the required training as of January 1st.
- Employees hired in 2021 must receive training within six months of hire or promotion.

Questions?

Debra Ellwood Meppen
Partner
dmeppen@grsm.com



Brandon Saxon
Partner
bsaxon@grsm.com

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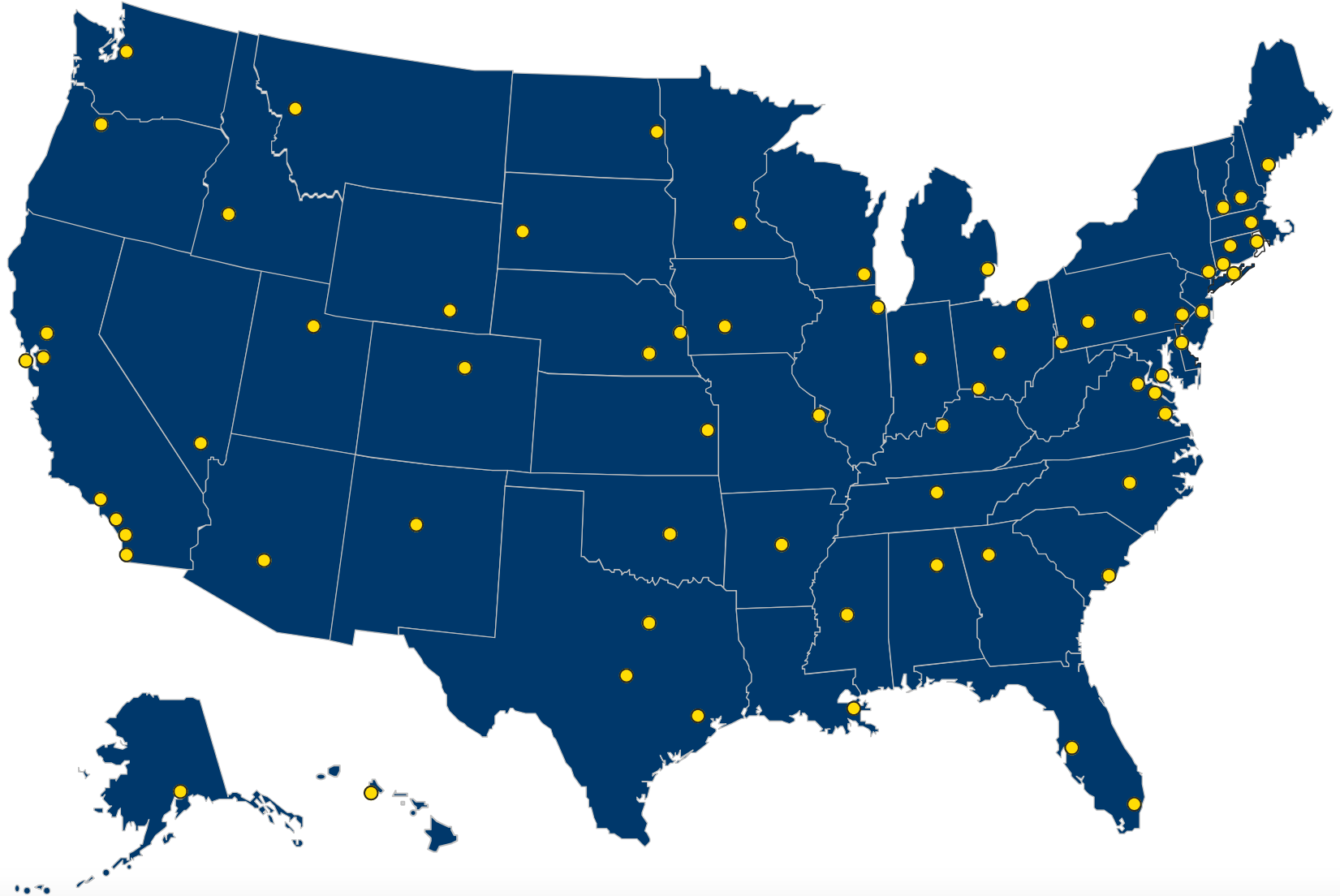
- January 14, 2021 – Cal/OSHA Emergency Temporary Standards for COVID-19
- February 2, 2021 – 2021 Employment Law Update for New York Employers
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