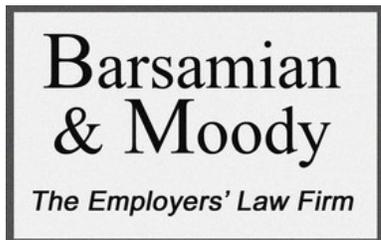


# 2021 Labor & Employment Law Update

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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with **Barsamian & Moody at (559) 248-2360** for individual responses to questions or concerns regarding any given situation.

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# WAGE AND HOUR UPDATES

## Minimum wage increases

*SB 3*

On April 4, 2016, Governor Jerry Brown signed SB 3, increasing the statewide minimum wage to \$15.00 per hour. The increase is currently being phased in from 2017 to 2023.

SB 3 increases the minimum wage according to different schedules, depending on the number of employees. Here is the schedule of new minimum wages applying to employers who employ 26 or more employees:

- January 1, 2021 – \$14.00
- January 1, 2022 – \$15.00

For an employer who employs 25 or fewer employees, each yearly scheduled increase comes one year later, beginning with January 1, 2018, and capping out on January 1, 2023.

After \$15.00 has been reached, the Department of Finance will continue to calculate a yearly minimum wage increase at either a rate of 3.5% or the rate of change in the averages of the preceding year's U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. CPI-W), whichever is the lesser amount. The adjusted minimum wage will continue to take effect on the following January 1st. The minimum wage will stay the same if that year's U.S. CPI-W is negative.

A feature of the law of particular interest is that the Governor can pause the wage hikes based on economic conditions. The law requires "the Director of Finance to annually determine whether economic conditions can support a scheduled minimum wage increase and certify that determination to the Governor and the Legislature." The Governor may suspend the scheduled increases a maximum of two times.

One thing that is critical to note is that any change to minimum wage impacts various other compensation determinations, such as the salary threshold for the white collar exemptions under California law. For 2021, large employers must pay exempt workers at least \$58,240 per year (or \$4,853.33 per month) to maintain the exempt status. Small employers must pay \$54,080 per year (or \$4,506.66 per month).

## Overtime for agricultural workers subject to Wage Order 14

*AB 1066*

In 2016, AB 1066 enacted the "Phase-In Overtime for Agricultural Workers Act of 2016," which requires employers to pay agricultural workers overtime over a four-

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year phase-in process. Beginning January 1, 2019, employers were required to pay overtime for any hours worked over 9.5 hours per day or 55 hours per workweek. Each year the hours worked triggering overtime pay will reduce, until reaching 8 hours per day, 40 hours per week, beginning January 1, 2022.

In 2021, large employers must pay agricultural employees overtime after 8.5 hours worked per day and over 45 hours per week. For small employers (those with 25 or fewer employees), 2021 is the last year that the prior Wage Order 14 thresholds—overtime after 10 hours in a day and during the first 8 hours on the seventh consecutive day in the workweek—apply.

Also beginning on January 1, 2022, any employee who works over 12 hours per day must be paid at a rate no less than double the regular rate of pay. Employers that employ 25 or fewer employees will have an extra three years to comply with the phase-in and must begin paying overtime for those employees who work over 9.5 hours in a day and over 55 hours in a week by January 1, 2022. The Governor may temporarily suspend the scheduled overtime requirement but only if the minimum wage increases are suspended as well.

### Amendments to AB 5 on worker classification

AB 2257

In yet another modification to California’s independent contractor laws, AB 2257 revises, expands, and attempts to clarify the state’s much maligned “ABC test” for independent contractors.

AB 5, which took effect on January 1, 2020, codified the ABC test for independent contractors as adopted by the California Supreme Court in the *Dynamex*<sup>1</sup> case. (Note that the court recently determined that the *Dynamex* ruling applies retroactively.) With the passing of AB 5, the ABC test became *the* test for determining independent contractor status for all claims brought under the California Wage Orders, Labor Code, and Unemployment Insurance Code. Under the ABC test, a person providing labor or services for remuneration is considered an employee rather than an independent contractor *unless* the hiring entity demonstrates that the person 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.

AB 5 makes clear that the ABC test is to be applied unless a court of law determines it cannot be applied in a particular context or an express exception applies. This

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<sup>1</sup> *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.

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remains unchanged under AB 2257; however, the new statute provides numerous exceptions and clarifications to this baseline rule.

Among AB 2257's most significant modifications are the business-to-business exceptions. Exceptions to the ABC test are provided for:

1. Business-to-business service type relationships;
2. Single-engagement business-to-business service type relationships; and
3. Referral business-to-business service type relationships.

The statute also carves out exceptions and establishes additional criteria for a variety of specific professions and occupations.

It is important to note that AB 2257's exceptions to the ABC test should not be considered outright exemptions from performing an independent contractor analysis. In almost all instances the exception creates alternate determining criteria. For example, under a business-to-business service type relationship exception, the independent contractor determination is governed, not by the ABC test, but the *Borello* test as outlined in the California Supreme Court's decision in the *S. G. Borello & Sons*,<sup>2</sup> and whether the contracting business satisfies a substantial list of criteria. It is therefore important to review each exception to understand which independent contractor analysis is to be applied to any particular occupation or situation.

### **Best practices:**

A careful reading of existing law and each of AB 2257's newly enacted exceptions should be undertaken by all employers before making any determination as to the appropriate classification of any proposed independent contractor relationship. Businesses who regularly contract for professional services or with other businesses or referral agencies to assist in meeting business obligations and objectives, are encouraged to consult with legal counsel to determine whether these relationships are that of an independent contractor or an employee.

## Successor liability wage enforcement

AB 3075

This newly enacted statute modifies existing Labor Code provisions to place successor employers in a position to pay the outstanding wage and hour judgment debts of prior business owners. The statute specifically allows "a successor to any judgment debtor [to] be liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment."

This means that new business owners will have successor liability for unpaid wage and hour judgment debts where the new business:

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<sup>2</sup> *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

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- “Uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor” (i.e., prior business owner(s));
- “Employs as a managing agent any person who directly controlled the wages, hours, or working conditions of the affected workforce of the judgment debtor;” or
- Operates “in the same industry [and employs] an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor.”

The obvious purpose behind this new statute is to prevent loss of an employee’s earned income where a business owner attempts to avoid liability by closing one business and opening another. To aid in this endeavor AB 3075 amends the California Corporations Code to require partnerships, corporations, limited liability companies, and limited liability partnerships to disclose specific information when filing their required Statements of Information with the California Secretary of State. For each new filing the company will be required to attest that no directors, managers, or members “has an outstanding final judgment issued by the California Division of Labor Standards Enforcement [(DLSE)] or a court of law . . . for the violation of any wage order or provision of the Labor Code.”

### *Best practices:*

Prospective business buyers should always make a point of expanding due diligence investigations to assist in determining whether the target business, its owner(s), partners, officers or directors are subject to any outstanding judgment debts for wages owed.

## New filing period for Labor Commissioner complaints

*AB 1947*

Newly signed AB 1947 extends the existing complaint period for an aggrieved employee filing an alleged complaint of discrimination or retaliation with the California Division of Labor Standards Enforcement (“DLSE” or “Labor Commissioner”) from six months to one year. Existing law requires the Labor Commissioner to commence an action to enforce labor standards within three years of their accrual. This three-year enforcement period remains unchanged.

The one-year statute of limitations is applicable to claims for discrimination or retaliation against an employer as to any law enforced by the DLSE.

AB 1947 also amends Labor Code section 1102.5 to allow an award of reasonable attorney’s fees to employees who brings a successful action for violation of the statute. Section 1102.5 prohibits an employer from preventing employees – by rule, policy, or regulation – from disclosing information to or testifying before any governmental entity (e.g., DLSE) concerning alleged violations of state or federal statutes, or violations of or noncompliance with a local, state, or federal law.

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### *Best practices:*

Statute of limitations vary depending on the law(s) governing the alleged violation(s). This includes other types of claims enforced by the DLSE (e.g., claims for unpaid wages are subject to a three-year statute of limitations). Considering this extension and the amendment to Labor Code section 1102.5, employers should:

- **Create and implement** a record retention policy (RRP) or internal policies governing the handling of company-wide documents and electronic data, including employee related data; or
- **Review and revise** existing RRP or internal policies governing the handling of company-wide documents and electronic data, including employee related data.

Retaining and destroying personnel related documents in accordance with an established RRP is one way to reduce legal risk and discovery costs and help protect your business. Ensure that your RRP meets all the laws that require the retention of certain records for specific durations. Additionally, note that items such as timesheets and paycheck stubs must be retained for the duration of the potential period in which litigation may be initiated, four years. A legally complaint RRP provides company-wide efficiency, safety in litigation, and confidence in compliance.

## Federal FFCRA paid leaves

### *Families First Coronavirus Response Act*

The FFCRA, which applied to employers with fewer than 500 employees nationwide, provided eligible employees with up to 80 hours of paid sick leave for COVID-19-related leaves of absence. The FFCRA leaves **expired on December 31, 2020**. On December 21, 2020, Congress passed a bill to fund the government and provide economic relief in response to the continued COVID-19 pandemic. President Trump signed the bill on December 27, 2020.

A tax credit for employers offering paid sick leave beyond the December 31, 2020, FFCRA requirement and extends the Employee Retention Tax Credit. There has not been any legislation to continue these paid leave programs.

Employers with fewer than 500 employees are subject to the Families First Coronavirus Response Act (FFCRA), which includes Emergency Family and Medical Leave Act Expansion Act and Emergency Paid Sick Leave Act.

Employees are eligible to take paid sick leave if they are unable to work or telework due to:

- Being subject to federal, state, or local quarantine/isolation order related to COVID-19.
- Doctor advises employee to self-quarantine due to COVID-19 concerns.
- Employee is experiencing symptoms and seeking medical diagnosis.
- Employee is caring for an individual subject to (1) or (2).
- Employee is caring for child affected by school or daycare closure.
- Employee is experiencing similar conditions specified by Secretary of Health and Human Services.

Fulltime employees are eligible for up to 80 hours of paid leave. For part-time employees, you take the number of hours the employee is normally scheduled to work over two workweeks.

If leave is because employee is quarantined (pursuant a government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, then leave paid at employee's regular rate of pay up to \$511 per day and \$5,110 over a two-week period.

If leave is because employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to a government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, then leave paid at two-thirds the employee's regular rate of pay up to \$200 per day and \$2,000 over a two-week period.

Employees are eligible to take Emergency FMLA if they are unable to work due to having to care for child due to child's school or child care provider being shut down or unavailable because of a COVID-19 related reason. Emergency FMLA provides 12 weeks of leave, but the first two weeks are unpaid under the Emergency FMLA leave. If an employee has already taken FMLA/CFRA leave, then FFCRA does not provide additional leave. Employers may require that employees use FFCRA leave concurrently with any leave offered under the employer's policies (e.g., vacation, paid time off, etc.) Remaining 10 weeks of leave paid at two-thirds the employee's regular rate of pay up to \$200 per day and \$12,000 over a 12-week period.

## COVID-19-related Supplemental Paid Sick Leave

*AB 1867*

The employer's duty to provide COVID-19 related supplemental paid sick leave (SPSL) expired on December 31, 2020. Employees on leave at the time of expiration were entitled to take the full amount of leave they would otherwise be entitled to absent the expiration event.

AB 1867 required covered California employers to begin providing SPSL to all employees no later than September 19, 2020. AB 1867 combined three separate laws into one legislative bill covering SPSL, mandated handwashing requirements for food service workers, and a pilot mediation program applicable to small employers. The law also contains important notice and posting requirements.

The statute applied to private sector employers with 500 or more employees nationwide as well as public and private employers of first responders and healthcare providers. AB1867 was enacted to fill the perceived gap created by the application of Emergency Paid Sick Leave, provided for under the Families First Coronavirus Relief Act (FFCRA), to employers with 500 or fewer employees.

Covered employers were required to provide up to 80 hours of paid leave for employees subject to quarantine or self-isolation orders or those who were prohibited by the employer from working due to COVID-19 related concerns.

### ***Additional requirements:***

#### **Food Sector Hand Washing**

AB 1867 provides that employers of food sector employees must allow employees to wash their hands every 30 minutes and additionally as needed.

#### **Small Employer Family Leave Mediation Pilot Program**

AB 1867 also creates the Small Employer Family Leave Mediation Pilot Program. The program is available to small employers (those employing between 5 and 9 employees) and their employees for the purpose of mediating alleged violations of the California Family Rights Act (Cal. Gov. Code Section 12945.2). Notice of the right to mediate is to be included in the employee's right to sue notice or other writing presented to the employer. This pilot program is available until January 1, 2024.

**Best practices:**

Existing paid sick leave benefits coupled with newly enacted paid sick leave mandates under federal, state and local laws have created a complex hierarchy of leave options. Penalties for violations, willful or inadvertent, can add up quickly. Enforceable through civil action is specifically allowed under AB 1867 by either the Labor Commissioner or the Attorney General; think PAGA action. It is therefore imperative that employers develop an accurate method of tracking all paid sick leave benefits.

Some employers may find it helpful to track the following information:

- Available sick time mandated under applicable federal, state, or local paid sick leave provisions;<sup>3</sup>
- Available sick time provided under your company’s COVID-19-related or existing policies;
- Notice(s) provided to all employees including:
  - Sample of notice provided
  - Date(s) notice was provided
  - Method used to communicate notice (e.g., email, text, payroll system, pay envelop, employee-only sections of company website, company intranet)

For each employee:

- Time accrued, provided, available and used under new or existing policies including applicable accrual methods;
- Date(s) leave was taken including any communications received from the employee requesting paid sick leave
- Reason for leave if taken for an expressed COVID-19-related reason
- Time remaining in the employee’s leave bank

**Tip:** The amount of time available/accrued/provided, along with time used and remaining, should be included on the employee’s wage statement (paystub) or in a separate writing accompanying the employee’s paycheck.

## Kin Care Amendment

*AB 2017*

AB 2017 amends existing California Labor Code section 233 (known to many as the “Kin Care” law) to make clear that the designation of sick leave taken under the statute is at the sole discretion of the employee. This clarification establishes the employee’s right to designate leave time provided under Labor Code 233 as leave

<sup>3</sup> The Department of Industrial Relations has prepared a helpful side-by-side comparison of COVID-19 paid leave provisions, which can be accessed at the following: <https://www.dir.ca.gov/dlse/Comparison-COVID-19-Paid-Leave.html>

for kin-care, the employee's own health condition, or for obtaining relief if they are a victim of sexual assault, stalking, or domestic violence.

**Best practices:**

To maintain compliance with this and other paid sick leave provision enacted this legislative period, existing paid sick leave policies should be revised, and notice provided to all qualifying employees.

An excellent leave resources is the Division of Labor Standards Enforcement Leave Comparison <https://www.dir.ca.gov/dlse/comparison-covid-19-paid-leave.html>

## California Family Rights Act Expansion

SB 1383

SB 1383 makes significant changes to the California Family Rights Act (CFRA). The statutes most significant changes are as follows:

- Amending the definition of “employer” to mean “any person who directly employs **five or more** persons” performing services for a wage or salary;
- Removing the CFRA original employer mandate qualifying protection to employees located “within 75 miles of the worksite where that employee is employed;”
- Expanding the definition of “child” by removing any age limits or disability requirements and expanding the definition to include the child of a domestic partner;
- Expanding the definition of “family care and medical leave” to include leave to care for:
  - Grandparents, grandchildren, siblings, domestic partners with serious health conditions;
  - Qualify exigencies relating to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent who is a member of the Armed Forces.
- Eliminating previous exceptions for highly paid “key employees.”

**Best practices:**

CFRA is one of several laws that requires all *covered* employers to have a written enforcement policy. This means that any employer with five or more employees should have a CFRA leave policy included in their employee handbook. This includes making sure you are complying with mandatory posting requirements. The Department of Fair Employment and Housing offers free Notice Posters on their website at <https://www.dfeh.ca.gov/publications/?content=posters/>.

Many employers subject to both CFRA and the federal Family Medical Leave Act (FMLA) combine CFRA/FMLA information into one employee leave policy. Given the changes to the CFRA, these employers should consider separating each into a standalone policy to avoid confusion and potential administrative mistakes.

## Expansion of protected time off for crime victims

AB 2992

Expanding existing Labor Code protections, AB 2992 provides additional protections for employees who become victims of crime or abuse. To ensure the health, safety, or welfare of victims of domestic violence, sexual assault, or stalking, existing law provides time off work to allow the victim to obtain or attempt to obtain assistance for themselves or their child. These specific protections are broadened under AB 2992 to include more generalized actions which would fall under the statutes definition of “crime” for those considered “victims.”

Protected activities for time off have also been broadened to include time off, in advance or unscheduled, to seek medical attention for injuries suffered as a result of crime or abuse, services from specific entities, psychological counseling or mental health services or engage in safety planning or other actions designed to increase safety from possible future crimes or abuses.

The employer’s right to request certification of the need for time off is still allowed. However, the requirement has also been broadened and now includes not only official police reports, court protection and related separation orders, but also documents from licensed medical professionals or in the absence of official documentation, any form of documentation – including a written statement signed by the victim – is allowed so long as it reasonably verifies a crime or abuse took place.

Prohibitions in the statute against discrimination or retaliation because of an employee’s status as a victim apply where an employer has actual knowledge of the employee’s status as a victim of a crime or abuse or the employee provides notice of the status to the employer.

### *Best practices:*

An employer’s duty to provide a reasonable accommodation to a victim of crime or abuse is triggered when the employee requests an accommodation for their safety while at work. This includes engaging in an interactive process with the employee to discuss possible reasonable accommodations to achieve that goal. Reasonable accommodations might include implementing safety measures, transfer or reassignment, modify the employees work schedule, changing workstations or work telephone number, installing locks and assisting in documenting workplace crimes or abuse.

These are just some of the reasonable accommodations suggested by the statute. Employers should remain flexible in considering what steps might be taken to reasonably accommodate a victim’s safety in the workplace.

## Paid Family Leave for Active Duty

AB 2399

# SICK PAY AND TIME AWAY FROM WORK

This statutory change is another step in California’s mission to provide members of our Armed Forces and their families with adequate leave to participate in qualifying exigencies relating to active duty or a call to active duty.

Currently California provides Paid Family Leave through its Employment Development Department (EDD). This paid leave benefit provides wage replacement to employees who take time off to care for seriously ill family members or to bond with a new child within the first year of birth or placement. AB 2399 expands this existing benefit to include time off for members of our Armed Forces and their family members who are impacted by exigencies relating to active duty or a call to active duty.

The definition of “military member” under the new statute means, a child, spouse, domestic partner, or parent of the employee, where the military member is on covered active duty or call to active duty in the Armed Forces of the United States.

***Best practices:***

Employers should update internal leave policies referencing Paid Family Leave benefits. Employers should also consider mandatory training for supervisory and administrative employees to assist in recognizing and administering leave benefits available to Armed Forces personnel and their family members.

## Cal/OSHA issues emergency COVID-19 regulation

*COVID-19 Prevention Emergency Temporary Standards (ETS)*

The California Occupational Safety and Health (Cal/OSHA) Standards Board approved an emergency temporary regulation on COVID-19 prevention governing virtually all employers and workplaces in California. While many legal scholars and industry experts argue that the new standard exceeds Cal/OSHA's legal authority, employers should begin taking immediate steps to understand and comply with the new standard unless they are willing to be a potential compliance "test" case.

This area of the law is extremely complex, so we urge you to read the actual statutes, regulations and FAQs put out by Cal/OSHA on the topic of COVID-19. It is likely that this area of the law will continue to evolve rapidly, so be sure to keep yourself up to date, and do not rely on this material to be the final word. There is pending litigation challenging Cal/OSHA's right to implement the regulation discussed below, but any court challenge will be unlikely to yield any relief in the near future.

Given the specificity of the new standard, we strongly advise you to carefully review it in its entirety.<sup>4</sup> We also encourage you to read through the FAQs issued by Cal/OSHA.<sup>5</sup> We have highlighted the most important requirements for employers to be aware of. Among other things, the new standard requires employers to:

1. In short, you have to "exclude" employees from the workplace when they have tested positive, or have been exposed in the workplace (been within 6 feet of somebody who is positive for 15 or more minutes in a 24 hour period), until they meet the return to work criteria (FAQ 47). While those employees are "excluded," you may have to pay them.

51. Q: Must an employer pay an employee while the employee is excluded from work?

A: If the employee is able and available to work, the employer must continue to provide the employee's pay and benefits. An employer may require the employee to exhaust paid sick leave benefits before providing exclusion pay, to the extent permitted by law, and may offset payments by the amount an employee receives in other benefit payments. (Please refer to the Labor Commissioner's COVID-19 Guidance and Resources for information on paid sick leave requirements.). These obligations do not apply if an employer establishes the employee's exposure was not work-related.

This FAQ, which was part of the original list, created a lot of confusion, but the Division has clarified this in the new FAQs by making clear that if the employee is

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<sup>4</sup> The text of the ETS can be accessed here: <https://www.dir.ca.gov/OSHSB/documents/noticeNov2020-COVID-19-Prevention-Emergency.pdf>

<sup>5</sup> Cal/OSHA's FAQs can be accessed here: <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

unable to work because of his or her COVID symptoms, or if the employee cannot work for some reason other than that they might infect somebody else at the workplace, they are not eligible for this paid leave (FAQs 52 and 55). Thus, to be eligible for paid leave under the ETS, these two FAQs make clear that the employee has to test positive for COVID or have been exposed at work, but must not have symptoms that would prevent them from working, and they cannot be contagious. Otherwise, they may be entitled to workers' comp benefits or SDI, but they would not be entitled to paid leave under the ETS.

Another issue that was creating a lot of confusion is that the ETS does not contain an express time limit for of the length of potential paid leave, like the FFCRA did for example. The new FAQs address this issue as well by stating that an eligible employee would "typically" be able to receive pay for the full length of a quarantine (up to 14 days in the ETS, but shortened via Executive Order to the return to work criteria issued by CDPH), but that if the employee is unable to return to work 14 days after a single exposure or positive test, they may not be "able and available to work," and therefore would no longer be eligible for paid leave under the ETS (FAQ 53). Again, such an employee may be eligible for workers' comp benefits or SDI, but not paid leave under the ETS. The FAQs expressly state that an employee receiving TDI benefits under the workers' comp system is not eligible for benefits under the ETS (FAQs 50 and 60).

One issue that did not get much clarification is how an employer can show that the employee's exposure was not work related. Keep in mind that when there is an "outbreak" under SB 1189, there is a presumption that an employee's COVID-19-related illness is an occupational injury eligible for comp coverage. In non-outbreak situations, however, there is very little guidance on how an employer is supposed to go about proving that the exposure was not work related, other than a general statement that it would be similar to the type of investigation and evidence that would rebut the presumption under SB 1189 (FAQ 57). Anecdotal evidence is that most comp carriers are denying coverage outside of the outbreak scenario, but employers may want to consult with their labor counsel before denying exclusion pay on this basis. Hopefully, this is an area that will receive further clarification in the future.

2. Require certain criteria be met before COVID-19 cases (those who have tested positive or have an order to isolate from public health authorities) can return to work. For cases with symptoms: (1) at least 24-hours must have passed since a fever of 100.4+ has resolved without the use of fever-reducing medications, (2) COVID-19 symptoms must have improved, and (3) at least 10 days have passed since symptoms first appeared. For cases without symptoms: the employee must not return to work until a minimum of 10 days have passed since the date of the specimen collection of their first positive COVID-19 test. If a public health authority issues the order to isolate or quarantine, the employee shall not return to work until either the period of isolation or the quarantine is lifted. If no period is specified, then the period shall be 10 days from the time the order to isolate was effective, or 10 days from the time the order to quarantine was effective. Finally, employers cannot require a negative COVID-19 test for an employee to return to work.

3. Prepare and implement a written COVID-19 prevention program, which can be integrated into an employer's existing Injury and Illness Prevention Program (IIPP) or maintained as a separate document. Similar to an IIPP, the requirements for a COVID-19 prevention program are defined by law and include such things as protocols for identifying, evaluating, and communicating with employees about COVID-19-related hazards; training employees; employer obligations for reporting COVID-19 cases and recordkeeping; and excluding COVID-19 cases and return to work criteria. Many insurance carriers have plans for their policy-holders, and Cal/OSHA has developed a model plan which is available online.

4. Notify employees of potential COVID-19 exposure within one business day. Many of these requirements overlap with those already in the CA COVID-19 Employer Playbook, as well as AB 685's notice and reporting requirements which we have previously provided information for. Specifically, the new Cal/OSHA standard requires employers give notice of the potential COVID-19 exposure within one business day to all employees who may have been exposed, their authorized representatives, and independent contractors and other employers who were present during the "high risk exposure period." The high-risk exposure period, as defined in the emergency standard, generally begins two days before onset of symptoms and lasts for 10 days after the symptoms first appeared, and 24 hours have passed with no fever without the use of fever reducing medication and symptoms have improved. The high-risk exposure period for those who never develop symptoms, is defined as two days before the specimen was collected that resulted in the positive test until ten days after the specimen for the positive test was collected. For purposes of this standard, an individual may have been exposed if they were within six feet of a COVID-19 case for a cumulative 15 minutes or greater within a 24-hour period at any time within the high-risk exposure period, regardless of the use of face coverings. While the new standard does not require this notice be written, AB 685 does. In addition, AB 685 identifies a slightly different group who must receive this notice, as it specifies all employees (as well as their exclusive representatives) and employers of subcontracted employees who were at the same worksite, not independent contractors or just those employees who may have been exposed. The new standard makes clear employers must give such notice without revealing any personal identifying information of the COVID-19 case. Such information generally must be kept confidential, with one key exception. The new standard provides that unredacted information and medical records related to a COVID-19 case may be provided upon request to the local health department, California Department of Public Health, the Division, the National Institute for Occupational Safety and Health, or as otherwise required by law. This is important because AB 685 and the new standard require the reporting of such confidential information to the local health department within 48 hours of a COVID-19 outbreak at a worksite (generally three cases). AB 685 only requires employers report the qualifying individual's name, number, occupation, worksite, business address, and NAICS code. However, the new standard also requires employers report the total number of cases, as well as the hospitalization and/or fatality status. Both AB 685 and the new standard require the employer to continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.

5. Follow special rules for employer-provided housing and transportation. If an employer provides housing for employees, it will be required to implement priority housing assignments based on individuals who work together from the same family (or who otherwise reside together outside of work), are on the same crew, or are on the same shift. Additionally, the employer must be able to ensure sufficient space in the units to permit social distancing while the employees are in the various units, and is responsible for ensuring the units are cleaned at least once a day. If residents are exposed to COVID-19, the employer must isolate that employee by providing a private bathroom, sleeping area, cooking and eating facility. If the employer provides transportation, employees must be screened before boarding, sit at least three feet apart, and wear face coverings during transportation.

6. Ensure all employees are maintaining a physical distance of at least six feet. The new standard contains two exceptions to this requirement: (1) where the employer can demonstrate that six feet of separation is not possible, and (2) for momentary exposures while employees are in movement. That said, even if the required physical distancing is not possible, employers must still ensure individuals remain as far apart as possible. Further, for fixed locations where physical distancing is not possible, employers must install cleanable solid partitions between employees.

7. Provide face coverings and ensure they are worn by all employees when indoors and when outdoors if less than six feet away from others. The new standard contains very limited exemptions from wearing face coverings (e.g., when an employee is alone in a room, and when eating and drinking, provided employees are at least six feet apart). For employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing impaired person, they must wear an effective alternative, such as a face shield with a drape on the bottom. But, there is a big caveat regarding employees who do not wear a face covering or face shield for any reason: they must be at least six feet apart from others at all times, unless the unmasked employee is tested at least twice weekly for COVID-19.

8. Implement general testing at the employer's cost. The emergency standard provides testing obligations and requirements that will apply to all employers. In addition, as discussed below, employers who experience COVID-19 "outbreaks" have additional testing responsibilities. First, the regulation provides that if testing is required under any portion of the regulation, the employer shall inform the effected employees of the reason for the COVID-19 testing and the possible consequences of a positive test. Second, when there has been even one COVID-19 case in the workplace, the employer must offer free COVID-19 testing during working hours to all employees who have potential COVID-19 exposure in the workplace. Finally, employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required. Under the FAQs issued January 8, 2021, employers can send employees to third-party test centers, including health departments, or can bring testing into the workplace (FAQs 30 and 32.) Additionally, they need not obtain documentation when an employee refuses testing, but it is best practice. (FAQ 31.)

9. Conduct additional testing, investigation, correction and notification of outbreaks. The new regulation imposes substantial requirements when there is an

“outbreak” in the workplace. This is defined as either: “Multiple COVID-19 Infections and COVID-19 Outbreaks,” which applies to a place of employment that has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, or “Major COVID-19 Outbreaks,” which applies when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period. In the case of “Multiple COVID-19 Infections and COVID-19 Outbreaks,” employers shall provide COVID-19 testing to all employees at the exposed workplace during the period of the outbreak or the relevant 14-day period. This testing must be offered at no charge, during employee working hours, and immediately upon being covered by this outbreak definition. Employers must then offer this same testing again one week later for the same employees. After the first two required COVID-19 tests, employers shall provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or provide testing more frequently if recommended by the local health department. In the case of a “Major COVID-19 Outbreak,” employers shall provide testing for all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. This testing must be offered at no charge, during employee working hours, and twice a week or more frequently if recommended by the local health department. In addition to the onerous COVID-19 testing requirements, employers with an outbreak under either of these definitions shall also exclude all COVID-19 cases and employees with a COVID-19 exposure from the workplace, conduct an investigation of the COVID-19 illness, and provide specific notice the local health department within no longer than 48-hours after knowledge of the outbreak. There are also hazard assessment and correction criteria depending on the outbreak definition at play, including, but not limited to assessing updates to ventilation systems, evaluating or halting operations.

10. Comply with reporting, recordkeeping, and access requirements. Employers must report information about COVID-19 cases at the workplace to the local health department whenever required by law, and shall provide any related information requested by the local health department. Additionally, employers must report immediately to the Division any COVID-19-related serious illnesses or death of an employee occurring in a place of employment or in connection with any employment. Employers also must keep a record of and track all COVID-19 cases with the employee’s name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test, and make such information available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.

## COVID-19 vaccine issues

*Federal EEOC weighs in on the issue*

California employers have the right to require employees to be vaccinated in order to protect the health and safety of their employees. However, there are two situations employers must handle carefully. Exceptions must be made for

employees who cannot be vaccinated because of disabilities or due to sincerely held religious beliefs. Note that employers do not have to accommodate secular or medical beliefs about vaccines.

On December 18, 2020, the Equal Employment Opportunity Commission, issued guidance confirming that employers may require vaccination based on safety-based standards. However, prior to issuing vaccination mandates, employers must conduct individualized assessment of: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. Additionally, they must engage in interactive process with employees with disabilities or religious beliefs preventing vaccination to find a reasonable accommodation, such as remote work, masks, etc.

If your company is considering requiring vaccination, consult legal counsel prior to communicating the requirement to employees.

## Notice of COVID-19 exposure

AB 685

Emergency legislation passed on September 17, 2020, by Governor Newsom took immediate effect to establish official COVID-19 reporting requirements for employers. This newly enacted legislation mandates that an employer provide written notification to all impacted employees within one business day of receiving notice of potential exposure to COVID-19. Should the number of potential exposures reported to the employer qualify as an “outbreak,” as defined by the California Department of Public Health, employers are required to provide notice of the outbreak to their local health department.

This emergency legislation also expands the Division of Occupational Safety and Health’s (Cal/OSHA) enforcement authority regarding COVID-19 exposure in the workplace. Cal/OSHA’s enhanced enforcement abilities include the authority to prohibit operations, processes, and prevent entry into worksites that present a risk of infection to COVID-19 so severe as to represent an imminent hazard.

### **Notice requirements:**

AB 685 imposes two distinct employer notice obligations.

#### **Notice to Impacted Employees, Subcontractors, and Union Representatives**

Employers must provide notice to employees, employers of subcontracted employees, and union representatives within one business day of the employer receiving notice that a “qualified individual” was in the workplace while considered potentially contagious. A “qualified individual,” for purposes of AB 685-notice is someone who (A) has tested positive for or was diagnosed by a licensed healthcare provider with COVID-19, (B) is subject to an isolation order, or (C) has died due to COVID-19. All employees, employers of subcontracted employees, and union representatives who were on the employer’s premises at the same worksite as the qualifying individual must receive notice of the following:

- That the employee was potentially exposed to COVID-19;

- Information on all benefits available to the employee under federal, state, or local laws and company policies (e.g., workers' compensation, paid sick leave, negotiated leave), including a statement that discrimination or retaliation on the basis of a COVID-19-related reason is prohibited; and
- Information about the employer's Centers for Disease Control and Prevention (CDC) compliant disinfection and safety plans initiated in response to the potential exposure.

This notice must be in writing and sent to all employees, subcontractors, and union representatives. The notice may be sent by letter, email, text, or any means typically used by the employer to communicate employment related information. Whatever form of communication is used it must reasonably be anticipated to be received within one business day of sending and must be in both English and the language understood by the majority of the employees.

For notice purposes, an employee worksite includes the building, store, facility, agricultural field, or other location where the qualified employee worked during their "infectious period."<sup>[1]</sup> A worksite does not include buildings, floors, or other locations that the qualified employee did not enter.

#### ***Notice to Local Public Health Department***

Within 48 hours of receiving notice that the number of worksite COVID-19 cases qualifies as an "outbreak" under the California Department of Public Health's definition,<sup>[2]</sup> the employer must send notice to the local public health department nearest the worksite.

The notice must include:

- For each qualified individual, the employee's name, number, occupation, and worksite; and
- The business address and NAICS code of the worksite where the qualifying individuals work.

Currently, the California Department of Public Health defines an "outbreak" as, "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period." Employers are strongly encouraged to continually monitor SDPH guidelines for changes and updates. Note that the definition for "outbreak" under the CDPH is different than under the Cal/OSHA COVID-19 Standard. Cal/OSHA defines "outbreak" as having been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period.

Once an outbreak has occurred, employers must continue to give notice to the appropriate local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

#### ***Best practices:***

To meet AB 685 tracking and notice mandates employers should consider implementing internal policies and procedures for capturing and recording notice of any COVID-19 qualifying event. Notice of potential exposure can be any of the following:

- Notification from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite.
- Notification from an employee, or their emergency contact, that the employee is a qualifying individual.
- Notification through employer testing protocols that the employee is a qualifying individual.
- Notification from a subcontracted employer that a qualifying individual was on the employer's worksite.

Employers should also remain mindful that expanded Cal/OSHA authority allows the Division to close down any business if it determines an "imminent hazard" exists related to potential COVID-19 transmission. Internal health and safety protocols and plans should be continually monitored and updated in accordance with Cal/OSHA and CDC guidelines.

## Cal/OSHA is required to provide COVID-19 awareness

*AB 2043*

AB 2043 places new requirements on the Division of Occupational Safety and Health (Cal/OSHA or Division) to provide agricultural employers with information on best practices for COVID-19 infection prevention. These best practices must be consistent with existing [Guidance Documents](#) currently available on the Division's website. Mandated information is to include COVID-19 awareness and prevention measures aimed at and easily understood by agricultural employees from a variety of ethnic and cultural backgrounds. All materials must be provided in both English and Spanish.

The statute requires the Division to conduct a statewide outreach campaign targeting agricultural employees to provide education on best practices and the availability of COVID-19-related benefits including paid sick leave and workers' compensation. Cal/OSHA is also tasked with compiling and reporting its findings pursuant to any COVID-19-related investigations of agricultural workplaces. All Cal/OSHA investigation findings and reports are to be made available on the Division's website.

Duties provided for under this statute will expire when the COVID-19-related state of emergency is terminated by the Governor or the California Legislature. This statute went into effect September 28, 2020.

### ***Best practices:***

Agricultural employers should review and become familiar with all Cal/OSHA-issued COVID-19-related guidance. Employers should make an effort to stay current on any COVID-19 investigation related statistical data found on Cal/OSHA's website. Up to date information on investigations and findings will provide an on-target litmus test for future investigation and enforcement trends.

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## CAL/OSHA UPDATES

Employers are also encouraged to initiate their own informational outreach to employees to provide guidance and ensure their employee's understanding of COVID-19 Guidance Documents, related benefits, and reporting procedures.

## COVID-19 workers' compensation presumption

SB 1159

SB 1159 codifies and supersedes Governor Newsom's Executive Order No-62-20 covering all California employees – including farmworkers – who worked at jobsites outside their homes between March 19 and July 5, 2020. The statute applies to California employers with five or more employees and employees who test positive for COVID-19 during an outbreak at their place of work on or after July 6, 2020.

The statute establishes a rebuttable presumption of an industrial injury or illness where the employee's positive test occurred during a period of outbreak at the employee's place of employment. Evidence controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection.

The statute also requires an employer who knows, or reasonably should know that an employee has tested positive from COVID-19, to report such information to their workers' compensation claims administrator within three days of being made aware of the positive test. This report may be made by phone, email, or fax and should provide the following information:

- The fact that an employee has tested positive. There is no need to include personally identifying information *unless* the employee claims the illness is work-related or has filed a DWC 1 claim form.
- The date the employee tested positive (e.g., the specimen collection date).
- The address(es) of the employee's worksite during the 14-day period preceding the date of the positive test.
- The highest number of employees reporting to work at the employee's worksite in the 45-day period preceding the last day the employees worked at each worksite.

It is up to the claims administrator to determine if an "outbreak" has occurred.<sup>6</sup> An outbreak occurs if, within a 14-day period one of the following occurs:

- The employer has 100 or fewer employee at a worksite and 4 employees test positive;

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<sup>6</sup> It is worth noting that SB 1159 defines "outbreak" differently than "AB 685)," which uses the CDPH's definition of outbreak, which is "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period." Additionally, the Cal/OSHA COVID-19 Standard defines outbreak as having been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period.

- The employer has more than 100 employees at a worksite and 4% of those reporting for work test positive; or
- The worksite is ordered closed by OSHA, Cal/OSHA or a local or state public health department.

A “specific place of employment” is defined in the statute as the building, store, facility, or agricultural field where an employee performs work at the employer’s direction. This definition specifically excludes the employee’s home or residence. The statute is applied retroactively to those testing positive or diagnosed with COVID-19 within 14-days of performing work at the employer’s place of business at the employer’s direction between March 19, 2020, and July 5, 2020.

The injury/illness presumption under SB 1159 remains in effect until January 1, 2023.

***Best practices:***

Employees who tested positive or were diagnosed with COVID-19 within 14 days of working at the employer’s place of business at the employer’s direction between March 19 and July 5, 2020, should be provided with the DWC-1 form. Employers who are aware of employees testing positive between July 6 and September 17, 2020, must also report specific outbreak information to their claim’s administrator within the safe harbor deadline of 30 days from September 17, 2020.

Employers seeking to rebut SB 1159’s injury/illness presumption should seek the advice of legal counsel due to risk associated with potential employee claims filed outside of workers’ compensation forum.

## Executive Order on California's WARN Act

*Executive Order N-31-20*

On March 17, 2020, Executive Order N-31-20 modified the 60-day notice requirement for an employer that orders a mass layoff, relocation or termination. Labor Code sections 1401(a), 1402, and 1403 were suspended to permit employers to act quickly in order to mitigate or prevent the spread of coronavirus.

The mass action must be caused by COVID-19-related "business circumstances that were not reasonably foreseeable at the time that notice would have been required." The employer must otherwise provide notice to affected employees in compliance with the California WARN Act and the notice satisfies other specific requirements. Additional details can be found at <https://www.dir.ca.gov/dlse/WARN-FAQs.html>.

One thing that is important to note is that the Executive Order did not suspend the requirements under the federal WARN Act, which the California law largely mirrors. Accordingly, employers conducting mass layoffs or closures of operations still need to consider the federal WARN Act's requirements.

## Pay data reporting required for employers with 100 or more employees

*SB 973*

SB 973 requires qualified (discussed below) private employers to report detailed pay-related data (e.g., hours worked data according to job category and by sex, race and ethnicity) on an annual basis to the Department of Fair Employment and Housing (DFEH) beginning March 31, 2021. California's self-assessment system mirrors that of the Equal Employment Opportunity Commission's Employer Information Report (EEO-1). The federal reporting mechanism also provides data on sex and different ethnic groups across various occupations and job classifications. With federal reporting delayed to March 2021 due to COVID-19 and longstanding legal battles, California's SB 973 attempts to bridge the gap and assure reporting continuity.

SB 973 also authorizes the DFEH to enforce the California Equal Pay Act prohibiting unjustified pay disparities. The reporting of pay data is designed to provide the DFEH an opportunity to more easily identify wage patterns and allow for effective enforcement of equal pay anti-discrimination laws.

### ***What is required:***

On or before March 2021, and annually thereafter, an employer with 100 or more employees, who is also required to file an annual EEO-1, and has at least one California employee, must submit a pay data report to the DFEH. The pay data report will cover the prior reporting period (e.g., the prior calendar year), also referred to as the 'Reporting Year.' In addition, employers are required to choose a single pay period between October 1 and December 31 of the Reporting Year which

will act as the “Snapshot Period.” The Snapshot period is to be used by the employer to then identify employees who are to be reported on in the pay data report submitted to the DFEH.

Pay data reports fall into two categories: establishment reports and consolidated reports. Employers with a single establishment (includes employees working in California or assigned to California establishments) will file one pay data report covering all employees (e.g., an establishment report). Employers with multi-establishments will submit both an establishment report and a consolidated report. For DFEH reporting purposes an “establishment” is an “economic unit producing goods or services.” Multi-establishment employers and those with work locations inside and outside of California are also subject to reporting criteria.

Consistent with federal EEO-1 filing requirements, an employer ‘establishment’ for reporting purposes is generally considered to be a single physical location where business is conducted, services or industrial operations are performed (e.g., farm, mill, store). Units at different physical locations, even if engaged in the same kind of business operations, must be reported as separate establishments. However, agricultural operations with physically disbursed activities, are not likely to be considered separate establishment unless they are treated as a separate legal entity.

*Who is required:*

For reporting purposes an employer must count as an employee, “an individual on an employer’s payroll, including part-time individuals [and those located inside and outside California], whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes. A requisite number of employees will be found where an employer: 1) employed 100 employees on a regular basis (as defined under the statute) during the Reporting Year; or 2) employed 100 or more employees in the Snapshot Period. For example, a seasonal employer with a three-month season during a calendar year, employing 100 or more employees during a regular employment season would have employed the required number of employees and would be subject to pay data reporting to the DFEH, because the employer was also required to file an EEO-1 Report. Employers who are required to file an EEO-1 Report include all private employers subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees **excluding** state and local governments, public primary and secondary school systems, institutions of higher education, American Indian or Alaska Native tribes and tax-exempt private membership clubs other than labor organizations; OR private employers subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

Part-time employees and employees on any paid or unpaid leaves of absence, are all included for purposes of determining whether an employer meets the 100 or more employee reporting threshold. Temporary workers and independent contractors meeting the statutes definition of “employee” must also be counted. Employers must be mindful that where multiple companies are affiliated or share common ownership or centralized control, the companies may be considered a single

enterprise. If that is the case, then the enterprise would be required to report if the total number of employees within the enterprise is 100 or more.

*What is included:*

The DFEH has yet to publish its sample reporting form or specify exactly what information employers will be required to report. However, it has provided examples of information which includes, but may not be limited to the following:

- The number of employees by race, ethnicity, and sex in each of the following ten job categories: Executive or senior level officials and managers; First or mid-level officials and managers; Professionals; Technicians; Sales workers; Administrative support workers; Craft workers; Operatives; Laborers and helpers; and Service workers.
- The number of employees 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.
- The total number of hours worked by each employee counted in each pay band during the Reporting Year.
- The Reporting Year, the dates of the Snapshot Period selected by the employer, the report type (establishment report or consolidated report), and the total number of reports being submitted by the employer.
- The employer's name, address, headquarters' address (if different), Employer Identification Number, North American Industry Classification System (NAICS) code, Duns and Bradstreet number, number of employees inside and outside of California, number of establishments inside and outside of California, and whether the employer is a California state contractor. If applicable, the name and address of the employer's parent company or parent companies.
- For a multiple-establishment employer's establishment reports, the establishment's name, address, number of employees, and major activity.
- For a multiple-establishment employer's consolidated report, the names and addresses of the establishments covered by the consolidated report.
- Any clarifying remarks.
- A certification that the information contained in the pay data report is accurate...and the name, title, signature, and date of signature of the certifying [individual].
- The name, title, address, phone number, and email address of someone who can be contacted about the report.

*Other considerations:*

The statute allows the DFEH to "seek an order requiring the employer to comply with" its reporting requirements, but no specific penalties are set forth in the statute except that the DFEH is "entitled to recover the costs associated with seeking the order for compliance." Data reported to the DFEH may be developed, published on an annual basis, and publicized in aggregate public reports. However, any reports provided to the public must assure anonymity as to individual business

or employee identity. Reported pay data will be retained by the DFEH for a period of not less than ten years.

***Best practices:***

To avoid confusion between state and federal reporting requirements, employers should view the reporting obligations as separate and distinct. Creating separate checklists for DFEH and EEOC reporting requirements is a great way to provide clarity and avoid confusion.

Given the DFEH mandate that information be provided in a searchable format, it is likely the use of excel spreadsheets for reporting purposes will be encouraged. Employers should take advantage of this useful tool – and their own checklists – to create a comprehensive spreadsheet that includes data requested by both state and federal agencies. This way all trackable information is contained within one easy to manage document that can be easily searched and refined for reporting purposes.

Employers should strive for consistency in reporting practices. With reinforced investigative and prosecutorial authority, and an archiving requirement of at least ten years, pay data reports will be easily obtainable for litigation purposes for years to come.

With DFEH guidance still incomplete and the March 2021 deadline fast approaching, employers should frequently check the DFEH website for current information and changes <https://www.dfeh.ca.gov/paydatareporting/>.

## Labor Commissioner authority in arbitration cases

*SB 1384*

Effective January 1, 2021, all petitions to compel arbitration on claims regarding recovery of compensation, appeal of an award, or review of an award by the superior court pending before the Labor Commissioner must be served on the Labor Commissioner. This new law also authorizes the Labor Commissioner, upon the request of an employee who cannot financially afford counsel, to request that the Labor Commissioner represent the employee in proceedings to determine enforceability of an arbitration agreement in court or by the arbitrator.

An employee may also request that the Labor Commissioner represent the employee bound by an arbitration agreement during an arbitration proceeding if:

- The employee is unable to afford counsel; and
- The Labor Commissioner determines through informal investigation that the claim has merit.

## Ban on no re-hire provisions in settlement agreement

AB 2143

Existing law prevents an employer from including a “no-hire” provision in settlement agreements except where the employer has made a good faith determination that the aggrieved person engaged in sexual harassment or sexual assault. A no-hire provision is a contractual clause prohibiting the aggrieved person from obtaining future employment with the settling employer.

AB 2143 revises the existing no-hire standard by expanding the provisions exceptions to include a determination that the aggrieved individual engaged in *any* criminal conduct.

The statute also includes a requirement that in order for the no-hire provision to apply, the employee must have filed their claim of sexual harassment or assault in good faith and the employer has documented its determination of sexual harassment or assault *before* the aggrieved individual filed their claim.

### *Best practices:*

Employers attempting to settle existing claims with aggrieved employees should be aware of the limits on including any no-hire contractual provisions. A review of any standardized settlement or severance type documents should be conducted to assure compliance with AB 2143 mandates.

## Mandated reporting for HR

AB 1963 requires human resource professionals to report child abuse

Human resource personnel in businesses that employ minors have been added to the list of mandated reporters. They must report to law enforcement or the local county Child Protective Services if they observe a child they know or reasonably suspect to be a victim of child abuse or neglect. Additionally, this new law adds requirements for any supervisor of minors who knows or should know of sexual abuse to report it.

## Corporate board of directors requirements for publicly held corporations

AB 979

AB 979 requires publicly held corporations to diversify their board of directors by appointing directors from “underrepresented communities” defined as an individual who self-identifies as: Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.” Board diversification measure must be undertaken and implemented on or before December 31, 2021. Diversity is

achieved under the statute if at least one director from an underrepresented community is appointed to the company's board of directors by December 31, 2021. However, depending on board size additional appoints may be required in subsequent years.

By December 31, 2022, boards with nine or more directors must appoint a minimum of three directors from underrepresented communities to their boards, and those with more than four but less than nine directors must appoint a minimum of two directors from underrepresented communities. The statute allows corporations to increase the number of directors on their boards to comply with these mandated requirements.

Public reporting and penalty provisions are also built into the statute. The California Secretary of State on or around March 1, 2022, will begin publishing on its website annual reports documenting diversity requirement compliance. Penalties will be assessed against companies who fail to comply: \$100,000 for the first violation increasing to \$300,000 for any subsequent violations.

***Best practices:***

Like its predecessors, AB 979 is facing various legal challenges alleging, among other things, that the new statute is an unconstitutional quota violative of the California Constitution. Nonetheless, corporations falling under the statute should begin planning for diversification in anticipation of the December 2021 deadline.

## Unemployment work sharing plans

*AB 1731*

This new legislation streamlines existing work sharing program participation through California's Employment Development Department (EDD). A work sharing plan means a plan submitted by an employer for approval by the EDD, under which an employer requests the payment of work sharing compensation for its employees as a means of avoiding potential layoffs. The program applies to an employer's business overall or more specifically to individual departments or specific shifts. The statutes expanded online reporting and forms submission provisions will make it easier for employers and employees struggling to maintain workplace operations to participate in the state's work sharing program.

Specifically, the statute requires EDD to create and implement alternate submission processes and approvals for plan applications; online submission for applications to participate or renew participation; automatic approval (unless an exception applies) for one year of participation; and online claim forms. The statute also places the burden of assuring the completeness and integrity of all work sharing certification forms on the employer.

***Best practices:***

EDD's outdated manual processes for administration of its Work Sharing Program have proven ineffective (especially since the beginning of the coronavirus pandemic) in assisting struggling employers and employees to avoid layoff scenarios. However, these mandated improvements including shortened response and approval periods, should provide a much-needed alternative to workforce layoffs.

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## OTHER LEGISLATIVE UPDATES

If your business is considering workforce layoffs you might want to visit the Work Sharing Program website found at [https://www.edd.ca.gov/unemployment/Work\\_Sharing\\_Program.htm](https://www.edd.ca.gov/unemployment/Work_Sharing_Program.htm) before making any final decisions.

## Exhausting administrative remedies

*Foroudi v. Aerospace Corporation (2020) 57 Cal.App.5th 992*

While Foroudi worked as a senior project engineer, his supervisors counseled him regarding deficiencies in his performance, placed him in the lowest ranking (bin 5) and warned him that failure to improve could result in corrective action. Aerospace began implementing a company-wide reduction in force (RIF). The pool of eligible employees was divided into those ranked in bins 4 and 5; new employees who were unranked; and employees on displaced status. Management then ranked RIF-eligible employees based on several criteria, including bin ranking, performance issues, and skills and expertise. Foroudi's managers ultimately selected him for the RIF because he was in the lowest ranking bin, he did not have a strong background in algorithmic applications, and he had received prior performance counseling. Aerospace notified Foroudi he would be laid off. Foroudi filed a lawsuit alleging that Aerospace used the RIF as a pretext to hide its motivation to terminate Foroudi because of his age and that the RIF had a disparate impact on employees over the age of 50.

Aerospace moved to dismiss Foroudi's case, claiming that he could not establish a prima facie case of age discrimination, nor provide substantial evidence that Aerospace's reasons for the RIF were a pretext for age discrimination. The California Court of Appeal dismissed the case because it reasoned that even assuming Foroudi could establish a prima facie case, Aerospace had legitimate, nondiscriminatory reasons for Foroudi's termination that Foroudi could not show were pretextual. Aerospace's evidence showed it instituted the company-wide RIF after learning it faced potentially severe cuts to its funding and selected Foroudi using standardized criteria.

The court found that Foroudi could only proceed by offering "substantial evidence" that Aerospace's reasons for terminating Foroudi were untrue or pretextual and that Foroudi had not met this burden. For example, the court noted that he was not replaced by a younger employee. Rather, Aerospace eliminated Foroudi's position and created a new position that combined Foroudi's former duties with the duties of an existing employee. Further, the court noted that for Foroudi's statistical evidence to create an inference of intentional discrimination, it had to "demonstrate a significant disparity" and "eliminate nondiscriminatory reasons for the apparent disparity." The statistical evidence Foroudi offered did not account for the age-neutral factors that were considered in connection with the RIF, such as an employee's experience, performance, and the anticipated future need for the employee's skill.

## Illegal noncompete agreement

*Brown v. TGS Management Company, LLC (2020) 57 Cal.App.5th 303*

In this case, the court reversed an arbitrator's decision finding that a former employee had violated his nondisclosure agreement (NDA) when he attached and filed confidential information regarding his employer, including its profits and bonus calculations, with his petition to compel arbitration. As a condition of his employment, the appellant signed an NDA, which included confidentiality provisions.

After his termination from TGS, the appellant filed a claim for declaratory relief, seeking a declaration that he "could compete with TGS without risking a damages claim for breaching the Employment Agreement or jeopardizing his two deferred bonuses." He also sought an injunction against enforcement of the covenant not to compete in the agreement. The arbitrator found that the appellant forfeited his right to about \$950,000 in deferred bonuses by breaching the confidentiality provisions of the Employment Agreement.

The appellate court reversed the trial court's decision and set aside the arbitration award, stating that the arbitrator's "refusal to decide his facial challenge to the legality of the confidentiality provisions under section 16600" violated the appellant's statutory rights and exceeded his authority as an arbitrator. In setting aside the award, the court held that the NDA was void because the definition of "Confidential Information" was overbroad and violated Business and Professions Code section 16600.

The court's findings are concerning for two reasons. First, arbitration decisions are not generally reviewable for errors of fact or law, and therefore usually overturned in rare circumstances. The court reasoned that because the trial court's confirmation of the arbitration award conflicts with the appellant's rights under section 16600 to pursue lawful employment, the decision was subject to judicial review *de novo*. The court's finding may have been based on the fact that the arbitrator did not decide the appellant's request for a decision on the validity of the confidentiality provisions. The *Brown* decision opens up the possibility that arbitration awards involving the adjudication of an individual's statutory rights will be subject to greater judicial review.

Second, the court analyzed the definition of "Confidential Information" and held that it was drafted too broadly, which should give employers pause when drafting their NDAs. While TGS had two exceptions to the definition of "Confidential Information," the court felt the exceptions were insufficient to allow the appellant to continue to work in the securities industry. The first exception stated "Confidential Information" did not include "information which is or becomes generally known in the securities industry through legal means without fault by" the appellant. The second exception stated that information which "was known by [the appellant] on a non-confidential basis prior to his initial engagement or employment with [TGS] as evidenced by [his] written records." The court concluded these exceptions were not meaningful because: (1) the methods behind statistical arbitrage are not generally known to the public; and (2) requiring the appellant to have written records to confirm his prior knowledge was absurd. The court concluded:

[T]he confidentiality provisions in the Employment Agreement on their face patently violate section 16600. Collectively, these overly restrictive provisions operate as a

***What this means for employers:***

de facto noncompete provision; they plainly bar [appellant] in perpetuity from doing any work in securities field, much less in his chosen profession of statistical arbitrage. Consequently, we conclude the confidentiality provisions are void ab initio and unenforceable.

This case involved a unique set of facts, and may fall into the category of decisions described as “bad facts create bad law.” While unstated, the court may have reached the result it did because it thought a forfeiture of almost \$1 million in compensation for attaching an agreement to a declaratory claim was overreaching. Given the court’s decision, employers drafting confidentiality provisions should keep the *Brown* decision in mind and limit the definition of confidential information so that it does not over-reach and prohibit post-employment competitive activity that is protected by California Business and Professions Code section 16600.

**\$17 million for termination and defamation**

*King v. U.S. Bank Nat’l Association (2020) 52 Cal.App.5th 728*

A former regional president for U.S. Bank in Sacramento is entitled to more than \$17 million in damages based on a jury’s finding that the company wrongfully fired—and later defamed—him so it wouldn’t have to pay out a bonus, a California appeals court held.

Employers must handle terminations and layoffs with care, as there has been an increase in the number of wrongful termination cases during the pandemic. This case is a good reminder of just how costly such cases can be to a business. When terminating employees, employers must always ensure that they have gathered sufficient evidence as to why the termination is warranted or not discriminatory or retaliatory in nature so that the termination can be supported.

**“Continuing violation” theory in sexual harassment case**

*Blue Fountain Pools and Spas Inc. v. Superior Court of San Bernardino County (2020) 53 Cal.App.5th 239*

Under the continuing violations doctrine, an employer is liable for actions that took place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period. Here, Blue Fountain subjected the plaintiff to a continuous course of sexual harassment for more than a decade. When plaintiff finally quit or was terminated, she sued. The trial court correctly denied Blue Fountain’s summary judgment motion brought on statute of limitations grounds. First, some of the acts of harassment took place within the normal limitations period, so summary judgment could not be granted even if the statute barred recovery for and admission of evidence about similar acts taken outside the limitations period. Second, the continuing violation doctrine tolls the statute of limitations during the period before plaintiff should realize that further

complaints are futile. Here, that period restarted when a new owner bought the business a few years before suit was filed since it wasn't obvious that complaints to the new owner would be futile even if complaints to prior management had been. Third, there was a factual dispute about when it should have become apparent to plaintiff that complaints to the new owner, likewise, would be futile.

## Exit search time is compensable

*Frlekin v. Apple Inc. (2020) 8 Cal. 5th 1038*

Frlekin is a putative class action lawsuit challenging Apple's policy requiring employees to undergo security searches of their bags and any personal effects (e.g., iPhones, etc.) whenever they leave the store for any reason (e.g., rest breaks, meal periods, end of shift). Putative class member employees estimated the searches took between five and 20 minutes regularly, and up to 45 minutes when stores were busy. Nonetheless, the district court granted Apple's motion for summary judgment, holding that the time spent waiting and undergoing a bag or security check was not compensable, reasoning that, for time to be "hours worked," it must be time in which the employer restrains the employee's action and the employee has no plausible way to avoid the activity. Because employees could avoid security checks by not bringing bags or personal effects into work, the trial court determined the activity was primarily for the benefit of the employees. Following an appeal, the Ninth Circuit certified the following question to the California Supreme Court: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of Wage Order 7?"

The Supreme Court noted California's unique definition of "hours worked," is comprised of two independent factors: (1) whether the employee is subject to the control of the employer; and (2) whether the employee is suffered or permitted to work. Here, the Court focused on control. The Supreme Court determined that time spent during bag or security checks was time subject to the employer's control because: (1) Apple made employees find and flag down a security guard to conduct the search and confined employees to the premises during the search; and (2) although the bag search was not "required" because employees could choose not bring a bag, the search was required as a practical matter because employees routinely bring personal belongings to work including their iPhones. The Court referenced Apple's CEO Tim Cook, who called the iPhone "so integrated and integral to our lives." The Court also noted that Apple's employees were subject to discipline if they did not comply with the bag-checking requirement and therefore that the waiting time is compensable.

Because "Apple's exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple's benefit, and are enforced through threat of discipline," the Court held that the plaintiffs "must be paid" for that time.

*What this means for employers:*

Compensable time is a critical concept to get right. When in doubt, time should be considered compensable because that is certainly the standard that courts seem to apply. Employers should conduct a cost-benefit analysis when working through time that is questionably compensable. Employers really need to think critically about what they stand to gain and lose by considering a potential work task as noncompensable time. For example: How much money did Apple save by doing the bag checks? Was it really necessary to protect merchandise? How much did this lawsuit cost them? The answer to these questions will help guide an employer on whether the search is worth the cost. Employers that conduct bag or similar security checks should review their policies to comply with this high court decision.

## Court affirms dismissal of discrimination lawsuit

*Arnold v. Dignity Health (2020) 53 Cal. App. 5th 412*

Virginia M. Arnold worked as a medical assistant at Dignity Health before her employment was terminated for, among other things, failure to safeguard a patient's personal health information (a HIPAA violation); display of inappropriate materials in the workplace (a picture of a bare-chested male model); careless performance of duties; failure to communicate honestly during the course of an investigation; and failure to take responsibility for her actions. In her lawsuit, Arnold alleged she was discriminated against based upon her age and her association with African-Americans. The trial court granted summary judgment to Dignity Health, and the Court of Appeal affirmed, holding that alleged comments about her age from other employees who were not materially involved in Arnold's termination did not raise a triable issue of fact – further, an employee's expressing surprise that Arnold was "that old" around the time of her birthday did not show discriminatory animus. As for Arnold's association discrimination claim, the Court found no evidence that the supervisor to whom she complained about alleged mistreatment of a Black coworker was involved in Arnold's termination. Finally, the fact that Dignity allegedly failed to follow its own disciplinary process did not create a triable issue of fact regarding Arnold's claims.

## Arbitration agreement unenforceable

*Davis v. Kozak (2020) 53 Cal.App.5th 897*

Davis filed sued individual Red Bull executives for age and sexual harassment and hostile work environment in violation of the Fair Employment and Housing Act, and for intentional and negligent infliction of emotional distress. Davis was 56 years old, had been employed by Red Bull for 15 years, and was in a mid-level managerial sales position until he was terminated.

Red Bull filed a demand for arbitration with the American Arbitration Association. The individual defendants moved to compel Davis to submit his claims to

arbitration. Davis filed a separate lawsuit against Red Bull seeking a declaratory judgment that his claims were not subject to the arbitration agreement. That agreement specified it is “intended to cover all civil claims which involve or relate in any way to [Davis’s] employment (or termination of employment) with Red Bull, including, but not limited to, claims of employment discrimination or harassment on the basis of . . . sex, age, . . . claims for wrongful discharge, [and] claims for emotional distress.”

The trial court concluded and the court of appeal affirmed that the agreement was unconscionable and unenforceable. Though it found only a minimal degree of procedural unconscionability in that the arbitration agreement was an adhesion contract, it holds that there was a high degree of unconscionability inherent in the arbitration agreement’s (a) too restrictive limitation of discovery and (b) non-mutuality. Discovery was limited to two depositions (with no mention of written discovery or document production) with added discovery on a showing of “sufficient cause” which is more than mere need. Plaintiff filed a age and sex discrimination suit targeting conduct over many years in front of many witnesses, making the two deposition limit wholly inadequate. Also, the employer exempted from the arbitration clause any suit under its employee confidentiality agreement, a claim that only it could bring, and the employer offered no business justification for the exception and later removed it from its standard arbitration agreement. Since there were two substantively unconscionable provisions, the trial court did not abuse its discretion in refusing to sever them.

*What this means for employers:*

Given the prevalence of wage and hour class actions in California, arbitration agreements are still worth obtaining from employees. However, this case makes it clear that such agreements must be carefully drafted and continually updated to be current with the ever-changing body of law pertaining to arbitration agreements. Further, employers should take care to ensure that their agreements are not overly one-sided in favor of the employer. Ultimately, if a contract provision causes a result that is patently unfair to the employee, like losing a million dollars as in the *Brown* case (above) or limiting the employee’s ability to litigate the case, then courts will be reluctant to enforce it.

## Supreme Court recognizes discrimination protection for gay/transgender employees under Title VII

*Bostock v. Clayton County (2020) 140 S. Ct. 1731*

The question for the United States Supreme Court in this (and two companion cases) was whether Title VII of the Civil Rights Act of 1964 is violated by an employer that terminates an employee merely for being gay or transgender. In a 6-3 opinion written by President Trump’s first appointee to the Court (Justice Neil Gorsuch), the Court determined that Title VII does prohibit such discrimination in that it is “because of . . . sex.” The Court came to this conclusion over spirited dissenting opinions from Justices Thomas, Alito, and Kavanaugh, who focused on

congressional intent in 1964, which everyone concedes did not include such protections. The majority noted, however, that " ... the limits of the drafters' imagination supply no reason to ignore the law's demands." As a result of this opinion, all employers subject to Title VII (including those doing business in states and municipalities that provided no protection against gay and transgender discrimination in the workplace) now must abide by the requirements of federal law with respect to such employees.

## Non-severability clause in arbitration agreement invalidated entire agreement

*Kec v. Superior Court of Orange County (2020) 51 Cal.App.5th 972*

Nichole Kec brought individual, class and Private Attorneys General Act (PAGA) claims against her employer, R.J. Reynolds Tobacco Co. Kec had signed a predispute contractual waiver of class actions and any "other representative action," including a PAGA claim. The arbitration agreement further stated that it was "not modifiable nor severable" and that if the representative waiver is found to be invalid, "the Agreement becomes null and void as to the employee(s) who are parties to that particular dispute," which the court characterized as a "blow-up provision." The trial court granted the employer's motion to compel arbitration of Kec's individual claims except the PAGA claim. Kec petitioned the court of appeal to issue a writ of mandate overturning the trial court's order compelling arbitration of her individual claims. The court of appeal issued the writ, holding that the employer could not selectively enforce the arbitration agreement by asking the court to sever the unenforceable PAGA waiver.

### *What this means for employers:*

Again, employers must have legal counsel, experienced in California labor and employment laws, draft their arbitration agreements. Employers cannot afford to cut corners in drafting arbitration agreements because it defeats the very purpose of having one in place. Downloading one from the internet, borrowing one from a neighboring farm, etc. are ways to risk not getting the protection that the company needs from the agreement.

## Hirer of independent contractor was not liable for death of contractor's employee

*Horne v. Ahern Rentals, Inc. (2020) 50 Cal. App. 5th 192*

Surviving heirs sued Ahern Rentals, a company that leased forklifts and other heavy-duty construction vehicles to its customers. The employer, 24-Hour Tire Service, provided tire repair and replacement services for Ahern's equipment. The employee was killed on Ahern's premises while he was replacing the tires on one of its forklifts. His heirs received workers' compensation benefits from 24-Hour's workers' compensation insurer. In this case, the heirs sued Ahern for wrongful death based

upon Ahern's alleged negligence in failing to provide a stable and level surface for the tire change that resulted in the employee's death. The trial court granted summary judgment to Ahern, and the court of appeal affirmed, holding that there was no evidence that Ahern affirmatively contributed to his death because a "hirer like [Ahern] may be liable for injury to an employee of a contractor only if the hirer actively directs the contractor or contractor's employee to do the work in a particular way or fails to undertake a particular safety measure the hirer promised to do. There is no such evidence in this case."

## Employees using personal vehicles to carry employer's tools and supplies to customer sites may be entitled to wages for driving time and mileage reimbursement

*Oliver v. Konica Minolta Business Solutions U.S.A., Inc. (2020) 51 Cal. App. 5th 1*

Service technicians were required to drive their personal vehicles containing their employer's tools and parts to customer sites to make repairs to copiers and other machines. Service technicians did not report to an office for work, but rather drove from home to the first customer location of the day and, at the end of the day, from the last customer location to home. They filed a wage and hour class action seeking wages for time spent commuting to the first work location of the day and commuting home from the last work location.

Employees argued that requiring supplies and tools in their personal vehicles for use at customer appointments made the commute time worktime under the "suffered or permitted to work" standard. The employer argued that the presence of tools and parts in the vehicles did not transform an ordinary commute into worktime because the technicians were not subject to employer control or engaged in work-related tasks during their commutes. The employer presented facts showing employees could leave equipment at field locations and were not required to take tools home at night, and it was undisputed that the employer did not have an express policy restricting service technicians from using their vehicles for personal pursuits during their commute time.

Considering legal principles set forth in *Morillion v. Royal Packing Co.*, (2000) 22 Cal. 4th 575 and *Frlekin v. Apple Inc.*, (2020) 8 Cal. 5th 1038 the court observed that if carrying tools and parts during the commute was optional, then the service technician was not subject to the control of the employer for purposes of determining if the commute time constituted hours worked. Additionally, had the service technicians been required to carry the tools during the commute, but were able to use the time effectively for their own purposes, such as taking a child to school on the way to the first customer site, then they are not subject to employer control. However, there was a factual dispute regarding whether service technicians were required, either strictly speaking or as a practical matter, to commute with

tools and parts in their personal vehicles. There was also a factual dispute regarding the volume of tools and parts service technicians were required to carry in their vehicles while commuting. The volume of parts the technician was required to carry might necessarily limit the technician's personal pursuits.

*What this means for employers:*

When employees are restricted to the degree that they cannot effectively use their commute time for personal pursuits (for example, when an employer's equipment/tools take up most or all of the free space in the vehicle, the employee is prohibited from taking passengers to or from other locations on her/his way to the first jobsite or returning home from the last jobsite), such commuting time is likely to be held as compensable time, and mileage for such driving must be reimbursed.

As such, employers should review their vehicle use, travel time and expense reimbursement policies with their attorneys in light of this new and different guidance.

## Employer must compensate employees for employer-mandated travel time despite collective bargaining agreement providing otherwise

*Gutierrez v. Brand Energy Servs. Of Cal., Inc. (2020) 50 Cal. App. 5th 786*

Plaintiff, who worked as a journeyman scaffold worker at gasoline refineries, filed a putative class action against his employer for alleged nonpayment of pre-shift employer mandated travel time in violation of several Labor Code provisions and the Business and Professions Code. Plaintiff alleged the employer did not compensate for the approximately 30-40 minutes employees spent: (1) badging in at the electronic gate, (2) walking to the mandatory shuttle bus stop and waiting for the bus, (3) traveling by bus to the mandatory safety meeting site, and (4) donning mandatory safety gear prior to the start of the safety meeting.

Plaintiff's employment was governed by a collective bargaining agreement (CBA), which had adopted a practice of "in on the employee's time, out on the Company's," which meant the employee's pre-shift employer-mandated travel time was unpaid and his return travel to the refinery gate was paid. Prior to class certification, the trial court granted summary judgment to the employer after finding the CBA's "in on the employee's time, out on the Company's" provision provided a complete defense to all causes of action under IWC Wage Order No. 16-2001, section 5(D), which provides: "This section shall apply to any employees covered by a valid collective bargaining agreement unless the collective bargaining agreement expressly provides otherwise." After discussing the relevant legal framework and rules of statutory interpretation, the court of appeal held that Wage Order 16, section 5(D) did not allow employers and union-represented employees to enter into a CBA to waive all compensation for employer mandated travel time.

The court noted Wage Order 16, section 5 did not say that union-represented employees and employers could opt out of paying any compensation whatsoever for employer-mandated travel time and, in particular, does not override the separate requirement under section 4(8) that employees be paid "not less than the applicable minimum wage" for all hours worked.

## Piece rate workers must be paid separately for rest periods, but may not also recover premium wages if awarded compensation of their actual damages

*Sanchez v. Martinez (2020) 54 Cal. App. 5th 535*

This case is a rare example of an employer winning any litigation related to wage and hour matters in California. The defendant prevailed at a bench trial against the plaintiffs' individual wage and hour claims. The plaintiffs appealed the decision in 2016, and the court of appeal reversed as to the plaintiffs' rest period cause of action and derivative PAGA penalties, in which the plaintiffs alleged that their employer denied their rest periods and failed to pay the one-hour premium wages when they pruned grape vines at a "piece rate." The appellate court applied the logic of *Bluford v. Safeway, Inc.*, and held that rest periods had to be compensated apart from the piece rate system at either minimum wage or a contractual rate, since rest breaks are paid work time and the workers were not being paid under the piece rate system for time during which they were not productive, and sent the matter back to the trial court. (Had the relevant events occurred after 2016, when the Legislature amended the Labor Code, the Court would have relied more on § 226.2, which codified *Bluford's* holding.) The trial court then calculated the plaintiffs' damages for rest period violations.

The plaintiffs appealed the trial court's calculations, arguing they should have recovered not only the straight time for their rest periods, but also one hour of premium pay (under Labor Code § 226.7) because they had been denied rest periods. They argued that the trial court erred by denying them premium wages based on an erroneous interpretation of a footnote in *Murphy v. Kenneth Cole Prods., Inc.* The court of appeal considered the reasoning of *Kirby v. Immoos Fire Protection, Inc.*, noting that since this action was an action for the nonpayment of wages (as opposed to the nonprovision of rest periods), one might think § 226.7 should not apply here. However, the *Sanchez* court found § 226.7 did apply, given § 226.2's requirement: "Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation."

Nevertheless, notwithstanding the logic that the plaintiffs should have been entitled to recover for both unpaid time as well as an additional hour of premium wage for denial of rest periods, the appellate court found that awarding both forms of compensation would violate the rule against double recovery. The court of appeal also found that allowing the plaintiffs to recover for both violations would

contravene the holding in *Murphy* that § 226.7 was not intended to impose a penalty on the employer, reasoning that since the plaintiffs had already recovered the value of the nonpayment of their wages, any further premium pay would not be compensatory in nature but rather would be converted “to nothing more than a penalty.” Accordingly, the court of appeal held that the plaintiffs could recover their actual damages under the logic of *Bluford* or premium wages under § 226.7, but not both. However, the court also found that while the trial court erred in denying the plaintiffs their choice of remedy, such error was harmless, as the evidence showed that the plaintiffs suffered no actual prejudice since their recovery would have been the same under either method of compensation.