

# 2021 EMPLOYMENT LAW GUIDANCE FOR CALIFORNIA EMPLOYERS IN THE ERA OF COVID-19

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## Today's Agenda

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- 1) Covid-19 Statutes and Issues
- 2) Other New Statutes Enacted in the Covid-19 Era
- 3) A Few New Cases
- 4) Recent NLRB Developments
- 5) Question and Answer



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## Today's Agenda

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- 1) **Covid-19 Statutes and Current Issues**
- 2) Other Statutes Enacted in the Covid-19 Era
- 3) Recent Appellate Cases
- 4) Recent NLRB Decisions
- 5) Question and Answer



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## California COVID 19 Supplemental Paid Sick Leave

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- ▶ **Effective March 29, 2021**
- ▶ Covered Employees in the public or private sectors who work for employers with **more than 25 employees** are entitled to up to 80 hours of COVID-19 related sick leave from January 1, 2021 through September 30, 2021, immediately upon an oral or written request to their employer.
- ▶ **RETROACTIVE** - If an employee took leave for the reasons below prior to March 29, 2021, the employee should make an oral or written request to the employer for payment.

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## A covered employee may take leave if the employee is unable to work or telework for any of the following reasons:

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- ▶ **Caring for Yourself:** The employee is subject to quarantine or isolation period related to COVID-19 as defined by an order or guidelines of the California Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer with jurisdiction over the workplace, has been advised by a healthcare provider to quarantine, or is **experiencing COVID-19 symptoms and seeking a medical diagnosis.**
- ▶ **Caring for a Family Member:** The covered employee is caring for a family member who is subject to a COVID-19 quarantine or isolation period or has been advised by a healthcare provider to quarantine due to COVID-19, or is **caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises.**
- ▶ **Vaccine-Related:** The covered employee is **attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.**

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# Paid Leave for Covered Employees

80 hours for those considered full-time employees.

For **part-time employees** with a regular weekly schedule, the number of hours the employee is normally scheduled to work over two weeks.

For **part-time employees with variable schedules**, 14 times the average number of hours worked per day over the past 6 months.




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# Rate of Pay for COVID-19 Supplemental Paid Sick Leave

Non-exempt employees must be paid the **highest** of the following for each hour of leave:

- Regular rate of pay for the workweek in which leave is taken
- State minimum wage
- Local minimum wage
- Average hourly pay for preceding 90 days (not including overtime pay)
  - **Must calculate out the highest pay!!!**

Exempt employees must be paid the same rate of pay as wages calculated for other paid leave time.

Not to exceed **\$511 per day** and **\$5,110** in total for 2021 COVID-19 Supplemental Paid Sick leave.



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<https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>

POSTER REQUIREMENT!  
 \*\*SEND TO EMPLOYEES WHO WORK REMOTELY.\*\*





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## What about the Federal American Rescue Plan?

- FFCRA ended 12/31/20; voluntary through 3/31/21
- Extends payroll tax credits through 9/30/21
- Restarts the 10 day/80 limit starting **4/1/21**
- Private employers with less than 500 employees.






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# Original Reasons for FFCRA Leave

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- The FFCRA required a covered employer to provide a minimum amount of paid time off for emergency paid sick leave ("EPSL") for one of five pandemic-related reasons:
- The employee being subject to a government quarantine or isolation order.
- The employee being advised by a health care professional to self-quarantine.
- The employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
- The employee caring for an individual who is subject to a government quarantine or isolation order, or who has been advised to self-quarantine by a health care professional.
- The employee caring for a son or daughter whose school or place of care has been closed or whose childcare provider is unavailable.

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# The Rescue Plan Also Adds Three Additional Qualifying Reasons For Paid Sick Leave:

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Obtaining	Recovering	Seeking or awaiting
Obtaining a COVID-19 vaccine;	Recovering from any illness or condition related to the COVID-19 vaccine; or	Seeking or awaiting the results of a COVID-19 diagnosis or test if either the employee has been exposed to COVID-19 or the employer requested the test or diagnosis.

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# Emergency Family and Medical Leave (EFML)

Elimination of the requirement that the first two weeks of EFML be unpaid.

*EPFL is paid at 2/3 of an employee's daily wages, up to a maximum of \$200 per day.*

Now, if an employee qualifies for EFML, they are eligible for a full 12 weeks of paid leave (assuming they have not previously used any EFML or other leave under the Family and Medical Leave Act (FMLA)).

Consistently, the Revenue Plan increases the total cap for EFML from \$10,000 to \$12,000.





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# Expansion of Qualifying Reasons for EFML

Previously, employees could only use EFML if they need time off to care for a child whose school or daycare was closed due to COVID-19 related reasons.

Now EFML can be used for any of the qualifying reasons found under Supplemental Paid Sick Leave.

If an employee qualifies for Paid Sick Leave and needs leave beyond the 10-day entitlement for Paid Sick Leave, the employee could take up to an additional 12 weeks of EFML (assuming they have not previously used any EFML or time off under the FMLA).

After April 1, 2021, an employee could potentially take up to a **total of 14 weeks** of paid FFCRA leave.





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## Nondiscrimination Clause

If an employer opts to voluntarily provide FFCRA leave and discriminates with respect to leave:

- in favor of highly compensated employees;
- in favor of full-time employees; or
- on the basis of employment tenure, the employer will not be able to obtain tax credits for any leave paid under the FFCRA framework.



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## Can An Employer Opt In To Only A Part Of The Federal Plan?

Unclear

Arguably could opt into either paid leave or emergency family and medical leave or both

Cannot change the rules

Cannot pick between qualifying reasons

Cannot make changes on how rules should be applied

Expect FAQs to follow....

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## Comparing Federal and State Rules



- ▶ Employers with less than 25 employees are not required to provide supplemental paid sick leave under SB 95, but those who do are entitled to a credit against applicable employment taxes for each quarter, in an amount equal to 100 percent of the qualified sick leave wages paid during the quarter.
- ▶ Employers with between 25 and 500 employees are required to provide supplemental paid sick leave under SB 95 and are entitled to federal tax credits for such.
- ▶ Employers with more than 500 employees must provide supplemental paid sick leave under SB 95 but are not entitled to tax credits under the federal American Rescue Plan Act.
- ▶ In addition to the qualifying reasons provided under SB 95, the American Rescue Plan Act includes employees who are unable to work or telework while seeking or awaiting the results of a COVID-19 test requested by their employer.

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## Tax Credits

- ▶ Rescue Plan once again extends the 100% tax credit to a previously covered employer who voluntarily provides EPSL and EPFL from April 1, 2021 through September 30, 2021.
- ▶ These credits may be claimed on a quarterly basis against the employer's share of the Medicare taxes (i.e., taxes imposed under Code Section 3111(b)) owed by the employer.
- ▶ A refund may be claimed if the amount of the credit exceeds the employer Medicare taxes due in a calendar quarter.
- ▶ The employer also is permitted to take an advance against the tax credit when making employment tax deposits.



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In the absence of any information that a covered employee is not requesting 2021 COVID-19 Supplemental Paid Sick Leave for a valid purpose, can an employer require certification from a health care provider before allowing a covered employee to take the leave?

No. An employer may not deny a worker 2021 COVID-19 Supplemental Paid Sick Leave based solely on a lack of certification from a health care provider. A covered employee is entitled to take 2021 COVID-19 Supplemental Paid Sick Leave immediately upon the covered employee's oral or written request. The leave is not conditioned on medical certification.

Although an employer cannot deny 2021 COVID-19 Supplemental Paid Sick Leave solely for lack of a medical certification, it may be reasonable in certain circumstances to ask for documentation before paying the sick leave when the employer has other information indicating that the covered employee is not requesting 2021 COVID-19 Supplemental Paid Sick leave for a valid purpose. In any such claim, the reasonableness of the parties' actions will undoubtedly come into play.

For example, if a covered employee informs an employer that the covered employee is subject to a local quarantine order or recommendation, has to stay home, and qualifies for 2021 COVID-19 supplemental paid sick leave, but the employer subsequently learns that the covered employee was out at a park, the employer could reasonably request documentation.







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## How much 2021 COVID-19 Supplemental Paid Sick Leave is a full-time covered employee entitled to receive?

A covered employee who is considered full-time or who worked **or was scheduled to work an average of at least 40 hours per week in the two weeks before the leave is taken** is entitled to 80 hours of COVID-19 Supplemental Paid Sick Leave.









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# How do you calculate the leave entitlement for a part-time covered employee who does not have a set schedule?

## Part-Time Covered Employees with Variable Schedules Who Have Worked For an Employer Over a Period of More Than 14 Days.

A part-time covered employee who works variable hours, the covered employee may take fourteen times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took 2021 COVID-19 Supplemental Paid Sick Leave.

If the part-time covered employee has worked for the employer for fewer than six months, this calculation would be done over the entire period that the covered employee has worked for the employer.

If the variable schedule calculation results in an average work schedule of at least 40 hours per week, the variable-scheduled covered employee would be considered full time and entitled to 80 hours of leave because the laws require the employer to pay 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave to a covered employee if properly considers full time, but does not require payment for more than 80 hours.

In calculating the average number of hours worked by a part-time covered employee with a variable schedule over the past six months, the figure is determined based on the total number of days in the 6-month period, not just the number of days worked. Below is an example using a 6-month period that contains a total of 182 days (26 weeks):

<b>Total Number of Hours Worked During 6-Month Period</b>	520 hours
<b>Total Number of Days in 6-Month Period</b>	182 days
<b>Average Number of Hours Worked Each Day in 6-Month Period</b>	$520 \text{ hours} \div 182 \text{ days} = 2.857 \text{ hours}$
<b>2021 COVID-19 Supplemental Paid Sick Leave Entitlement</b>	$2.857 \times 14 = 40 \text{ hours}$



## Part-Time Covered Employees with Variable Schedules Who Have Worked For an Employer for a Period of 14 Days or Fewer.

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A covered employee who is newly hired (*i.e.*, hired 14 days or less) **and works variable hours** will be entitled to the number of 2021 COVID-19 Supplemental Paid Sick Leave hours that they have worked in the preceding two weeks.

Below is an example of the calculation where such a new covered employee has worked for a total of two days—one day for 1 hour and a second day for 6 hours over the past two weeks:

**Total Number of Hours Worked During the Two-Week Period** 7 hours

**Total Number of Days in a Two-Week Period** 14 days

**Average Number of Hours Worked Each Day in the Two-Week Period** 7 hours ÷ 14 days = .5 hours

**2021 COVID-19 Supplemental Paid Sick Leave Entitlement** .5 hours x 14 = 7 hours



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- **If an employer makes a “retroactive” payment on or after March 29, 2021 to a covered employee for leave taken before the date the 2021 COVID-19 Supplemental Paid Sick Leave law becomes effective, then does the employer receive any credit towards the requirement to provide 2021 COVID-19 Supplemental Paid Sick Leave?**

Yes, the number of hours of leave corresponding to the amount of the retroactive payment counts toward the total number of hours of 2021 COVID-19 Supplemental Paid Sick Leave that the employer is required to provide to the covered employee (see FAQs 12-14), under the following circumstances:

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1. The retroactive payment is for leave taken by the covered employee between January 1, 2021 and March 28, 2021
2. The leave taken by the covered employee was for one of the qualifying reasons under the 2021 COVID-19 Supplemental Paid Sick Leave law (see FAQ 4), and
3. The retroactive payment by the employer pays the covered employee the amount required under the 2021 COVID-19 Supplemental Paid Sick Leave law (see FAQs 12-15).



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Should 2021 COVID-19 Supplemental Paid Sick Leave be listed separately from regular Paid Sick Leave on the itemized paystub or separate writing at the time wages are paid?

**Yes.** The 2021 COVID-19 Supplemental Paid Sick Leave law is clear that the obligation to provide COVID-19 Supplemental Paid Sick Leave is in addition to regular paid sick leave. The itemized wage statement or separate writing requirement ensures covered employees understand how many separate hours they have available for 2021 COVID-specific sick leave. For example, consider a full-time covered employee who has used all of the covered employee's regular paid sick leave but is entitled to 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave. If an itemized wage statement specifies that there are 0 hours of paid sick leave and 80 hours of 2021 COVID-19 Supplemental Paid Sick Leave available, the covered employee would be on notice that they lack available paid sick leave for non-COVID-related absences. On the other hand, if the itemized wage statement simply said 80 hours of paid sick leave available without differentiating between paid sick leave and 2021 COVID-19 Supplemental Paid Sick Leave, a covered employee might take paid sick leave for non-COVID related reasons without realizing that there were no sick leave hours available.

In addition, Labor Code Section 247.5 requires that records be kept for a three-year period on regular paid sick days and 2021 COVID-19 Supplemental Paid Sick days accrued and used, and that the records be made available to the Labor Commissioner or employee upon request.



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How should an employer calculate and list 2021 COVID-19 Supplemental Paid Sick Leave on paystubs for part-time variable scheduled covered employees?

An employer with variable-scheduled part-time covered employees will have to calculate the amount of COVID-19 Supplemental Paid Sick Leave available based on when a covered employee requests it. The employer gets a credit for any 2021 COVID-19 Supplemental Paid Sick Leave that was already provided; if a covered employee is owed additional hours of 2021 COVID-19 Supplemental Paid Sick Leave under a new schedule, the covered employee therefore only receives the balance between what was available under the original schedule and any additional 2021 COVID-19 Supplemental Paid Sick Leave hours under the new schedule.

For the itemized wage statement or separate writing requirement, employers who have a variable-scheduled covered employee would be **required to calculate the initial amount of 2021 COVID-19 Supplemental Paid Sick Leave available and put (variable) next to it on the itemized wage statement or separate writing.**



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# What notice must employers provide to covered employees about 2021 COVID-19 Supplemental Paid Sick Leave under California law?

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Under California law, employers are required to display the required poster in a conspicuous place that contains information about 2021 COVID-19 Supplemental Paid Sick Leave.

If an employer's covered employees do not frequent a workplace, the employer may satisfy the notice requirement by disseminating notice through electronic means.



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# Can an employer require that an employee use 2021 COVID-19 Supplemental Paid Sick Leave when they have excluded an employee for workplace exposure to COVID-19?

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- ▶ Yes. When an employee is excluded by their employer and entitled to exclusion pay, an employer may require the use of 2021 COVID-19 Supplemental Paid Sick Leave before providing exclusion pay.



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## The American Rescue Plan Act Requires Employers to Fully Subsidize COBRA for Six Months

Eligible individuals consist of employees and their spouses and dependents who lost coverage in November 2019 or later due to the employee's involuntary termination of employment (other than for gross misconduct) or reduction of hours.

No subsidy is required for employees who voluntarily terminate employment or those who become eligible for Medicare or other employer's group health plan.



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## COBRA Cont.



Employers must notify eligible individuals about the new COBRA subsidy by May 31, 2021.

Model notices are available.

Eligible individuals who did not previously elect COBRA, and those who elected COBRA but stopped paying the premiums, must be given a second election to participate.

If they elect to participate, coverage begins April 1, 2021.

The period when employers are required to subsidize COBRA is from April 1, 2021, through September 30, 2021.

The subsidy period does not lengthen or shorten the required COBRA period.



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## COBRA Cont. – Tax Credits



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- ▶ Because employers are required to fully subsidize COBRA, they are entitled to a tax credit against their future Medicare tax liability.
- ▶ The credit is refundable, meaning that if the cost of the COBRA subsidies exceeds the employer's Medicare tax liability, they don't need to repay the excess amount.
- ▶ The credit is also advanceable, meaning employers can claim a credit before quarterly taxes are due.



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## AB 685 - Cal/OSHA New Mandated COVID19 Reporting and Imminent Hazard Enforcement

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- ▶ Cal/OSHA can now shutdown a worksite without providing advanced notice or a chance to respond where the **"imminent hazard"** is COVID-19 related.
- ▶ Effective Date: January 1, 2021
- ▶ Serious citation - Rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.



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# OSHA Serious Citation

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Before issuing a citation alleging that a violation is serious, OSHA must make a reasonable attempt to determine and consider at least the following:

Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

Supervision of employees exposed or potentially exposed to the hazard.

Procedures for communicating to employees about the employer's health and safety rules and programs.

Information that the employer wishes to provide, at any time before citations are issued.



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# AB 685 Cont.

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- ▶ Eliminates the requirement that Cal/OSHA provide to the employer its notice of intent (1BY) to issue a "serious violation" citation for COVID-19 related hazards.
- ▶ Employers no longer have a "15-day window" to respond to the notice with evidence to support their defense before a citation can be issued.
- ▶ This provision of the bill will expire on January 1, 2023.



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# AB 685 - Cal/OSHA New Mandated COVID19 Reporting and Imminent Hazard Enforcement

- ▶ Requires employers, **within one business day** of receiving notice of **potential exposure** to COVID-19 in the workplace, to:
  - ▶ Provide written notice to all employees, the employers of subcontracted employees, and exclusive representatives who were on the premises at the same worksite,
  - ▶ Provide all employees who may have been exposed and their representative, if any, with information regarding COVID-19-related **benefits** to which they may be entitled, including but not limited to worker's compensation, COVID-19-related leave, and paid sick leave, as well as the employer's anti-discrimination and anti-retaliation policies.
  - ▶ Provide notice to all employees, the employers of subcontracted employees, and the exclusive representative, if any, of the **disinfection and safety plan** that the employer plans to implement and complete, per CDC guidelines.
- ▶ Within 48 hours, employers must notify the local public health department if they become aware of an **"outbreak"** at the workplace.
- ▶ Effective Date: January 1, 2021



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# AB 685 Cont.

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- ▶ Written notice provided to employees may be by personal service, email or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.
- ▶ Within 48 hours of learning of the outbreak, employers must notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation and worksite of qualifying individuals, as well as the employer's business address and NAICS code of the worksite where the qualifying individuals worked.
- ▶ Following the reporting of an outbreak, the employer must continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.



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## Reporting to Work Comp

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- Employers (**with five or more employees**) must report to their workers' compensation carrier once **they know or reasonably should know** an employee has **tested positive** for COVID-19, assuming the employee has been onsite at an employer's location in the 14 days prior to the employee testing positive (which is the day the employee took the test, not when the employee received the results).
- This reporting requirement applies regardless of whether you believe the employee contracted COVID-19 at work.**

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## Positive EE Reporting After 9/17/20

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Employer must, within **three business days** of learning that **ONE** employee has tested positive for COVID-19, report to its workers' compensation carrier in writing, sent via email or fax, all of the following information:

- ▶ an employee tested positive for COVID-19 (but without providing any personally identifiable information regarding the employee unless the employee asserts the infection is work-related or has filed a workers' compensation claim);
- ▶ the date the employee tests positive, which is the date the specimen was collected for testing; the specific address(es) of the employee's "specific place of employment" during the 14-day period preceding the date of the employee's positive test;
- ▶ and the highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.



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## Public Health Reporting Requirements

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- ▶ Published October 16, 2020
- ▶ Employers already required to report outbreak to public health
- ▶ Outbreak = **three or more COVID-19 cases** among workers at the same worksite within a 14-day period.
- ▶ Once an outbreak has occurred, employers have **48 hours** to report it to the local health department in the jurisdiction where the worksite is located.
- ▶ Information reported should include the employer's name, business address, and North American Industry Classification System (NAICS) industry code, as well as the names and occupations of workers with COVID-19.
- ▶ Employers are also required to notify the local health department of any additional COVID-19 cases identified among workers at the worksite.



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## Positive COVID case under AB 685

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1. has a positive viral test for COVID-19;
2. is diagnosed with COVID-19 by a licensed health care provider;
3. is ordered to isolate for COVID-19 by a public health official; OR
4. dies due to COVID-19, as determined by a public health department.



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## Worksite under AB 685

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- “Worksite” means the building, store, facility, agricultural field, or other location where a worker worked during the infectious period.
- It does not apply to buildings, floors, or other locations of the employer that a qualified individual did not enter.
- In a multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.



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## Confidential Medical Information

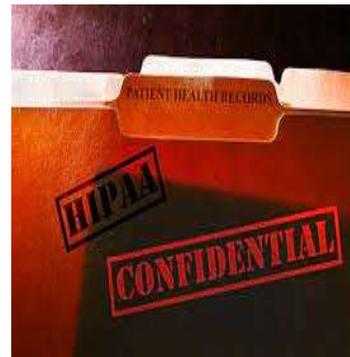
42

*“(e) An employer shall not require employees to disclose medical information unless otherwise required by law.”*

Can't compel copy of the test.

Seek no other details than what is necessary.

Info won't be given out in Public Records Act request.



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## No Retaliation Provision

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- Can't retaliate against worker for disclosing positive test or diagnosis or order to quarantine or isolate.
- Worker can file case with DLSE.
- DLSE will investigate!



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## Records Retention Requirement

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- ▶ MAINTAIN RECORDS OF NOTIFICATION REQUIREMENTS FOR AT LEAST THREE YEARS.



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# Publication of Information

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Public health  
will publish info  
to website.

No personally  
identifiable info  
will be  
published.



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▶ Codifies rebuttable presumption that an employee contracted COVID-19 in the workplace if they **worked** for the employer within 14 days of diagnosis (March 19, 2020 - July 5, 2020).

▶ From July 6, 2020 forward, creates a rebuttable presumption that an employee contracted COVID-19 in the workplace if the employee tests positive during an "**outbreak**."

▶ Requires reporting to workers' compensation claims administrators and has stiff fines for non-compliance.

▶ **Retroactive reporting required from July 6, 2020 to September 17, 2020.**

- ▶ Must complete retro reporting within 30 business days of 9/17
- ▶ Effective September 17, 2020 until January 1, 2023
- ▶ Employers can be fined up to **\$10,000** for failing to report the required information or providing false or misleading information.

**SB 1159 WORKERS' COMPENSATION: COVID-19**



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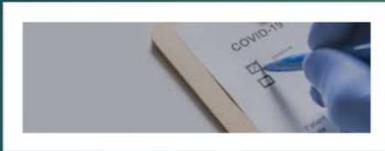


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# SB 1159 Work Comp Presumption on or after July 6, 2020 Cont.

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Creates a presumption if **all** of the following requirements were satisfied:

- ▶ (a) the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction;
- ▶ (b) the day referenced in paragraph (a) on which the employee performed labor/services was on or after March 19, 2020;
- ▶ (c) the employee's place of employment was not the employee's home; and
- ▶ (d) if the employee was diagnosed (not tested), as provided in paragraph (a) above, the diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.



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Outbreak occurs when any of the following occur:

- ▶ (1) if the employer has 100 employees or fewer: four employees test positive for COVID-19 within 14 calendar days;
  - ▶ (2) if the employer has more than 100 employees: 4 percent of the number of employees test positive for COVID-19 within 14 calendar days; or
  - ▶ (3) the place of employment is ordered closed by public authorities due to a risk of infection with COVID-19.
- ▶ This presumption relates back to cases arising on or after July 6, 2020.

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## New Rebuttable Presumption Must Be During Outbreak



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## SB 1159: COVID-19 & Workers' Comp

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- ▶ Requires the exhaustion of COVID-19 specific sick leave before any workers compensation benefits are payable.
  - ▶ Employers cannot require employees to use sick or vacation leave and must restore other leave if used.
- ▶ The **presumption may be rebutted** by evidence of health and safety measures adopted by the employer and non-occupational exposures the employee encountered.
- ▶ Applies to employers with 5 or more employees.



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## SB 1159 (cont'd): Definitions

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- ▶ **“Specific Place of Employment”** - Particular building, store, facility or agriculture field where the employee works at the employer’s direction, does not include the employee’s residence.



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# CDC Definitions

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- ▶ COVID-10 Outbreak: A COVID-19 outbreak is defined as at least three COVID-19 cases among workers at the same worksite within a 14-day period.
- ▶ Infectious Period: For an individual who develops symptoms, the infection period begins 2 days before they first develop symptoms and ends when 10 days have passed since symptoms first appeared AND at least 24 hours have passed with no fever (without use of fever-reducing medications) AND other symptoms have improved.
  - ▶ For an individual who tests positive but never develops symptoms, the infectious period begins 2 days before the specimen for their first positive COVID-19 test was collected and ends 10 days after the specimen for their first positive COVID-19 test was collected.
- ▶ Laboratory-Confirmed Case: A positive result on any viral test for COVID-19.



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## Employer Action Timeline Cheat Sheet



**Within 1 business day** – notify workers of potential exposure

**Within 48 hours** – notify public health of outbreak (3 cases in 14 days)

**Within 3 business days** - Report to work comp positive test



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## Today's Agenda

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- 1) Covid-19 Statutes and Current Issues
- 2) **Other Statutes Enacted in the Covid-19 Era**
- 3) Recent Appellate Cases
- 4) Recent NLRB Decisions
- 5) Question and Answer



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## SB 1383 CFRA Expansion



- ▶ Expands the California Family Rights Act to require businesses with as few as **five** employees to provide 12 weeks of mandatory family leave per year.
- ▶ Expands definition of child to include child of a domestic partner and removes age limit/disability requirement.
- ▶ Eliminates previous carve out for certain highly paid/key employees.
- ▶ Repeals Parental Leave Act
- ▶ Removes requirement that employer employ a certain number of employees within a 75-mile radius of the employee's worksite.
- ▶ Retains requirement that, to be eligible for leave, an employee must have at least 1,250 hours of service with the employer during the previous 12-month period.
- ▶ Problem of double leave with FMLA for different reasons granting up to 24 weeks of leave.
- ▶ Effective Date: January 1, 2021



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# CFRA Expansion

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► **Expands family care and medical leave to include leave:**

1. To care for grandparents, grandchildren, siblings, domestic partners with a serious health condition (in addition to existing leave to care for a parent or spouse), and

2. Because of a qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the US Armed forces.



► **Handbook updated needed:**

- CFRA has a mandatory written policy requirement.



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# SB 1383: EXPANDED CFRA (CONT'D)

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- Qualifying reasons for "family care and medical leave" going forward include:
- Birth, foster or adoption of a child by the employee;
- The serious health condition of a child, spouse, parent of an employee, grandparent, grandchild, sibling, spouse, or domestic partner;

The serious health condition of the employee that makes the employee unable to perform the functions of the position of that employee; or

Qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

The definition of "child" is expanded include a biological, adopted, foster child, stepchild, legal ward, a child of a domestic partner, or person to whom the employee stands in loco parentis.

- Requirement that the child be under 18 years of age or an adult dependent child is eliminated.



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# SB 1383: Expanded CFRA (cont'd)

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- ▶ Now requires employers to reinstate employees that take leave under CFRA to the “same or a comparable position.”
- ▶ A position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave.
- ▶ If both parents are employed by the same employer, each employee is eligible to request, and the employer must grant, their full entitlement of 12 workweeks of leave.
- ▶ This is separate and distinct from California’s Pregnancy Disability Leave law.



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# New CFRA Rules Create a Stacking Problem with Multiple Leaves Now Available

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## AB 2017 Paid Sick Leave Designation

- ▶ Kin Care – attend to the illness of a family member
- ▶ All employers who offer sick leave
- ▶ ½ of sick leave can go to kin care
- ▶ Provides employees sole discretion to designate days taken as paid sick leave under Section 233 of the Labor Code.
- ▶ Family member – child (any age), spouse, parent, domestic partner, grandparent, grandchild & sibling
- ▶ Effective Date: January 1, 2021



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## AB 2143 Settlement Agreements: No-hire Provisions



- ▶ Existing law, Section 1002.5 of the Code of Civil Procedure, prohibits no-hire provisions in settlement agreements unless the employer has determined in good faith that the aggrieved person engaged in sexual harassment or sexual assault.
- ▶ Revises 1002.5 to **require that the employee has filed the claim in good faith for the prohibition to apply, and that the employer has documented the determination of sexual assault or sexual harassment before the aggrieved person filed the claim.**
- ▶ Expands the exceptions to the no-hire provision prohibition to include a determination that the aggrieved person engaged in any **criminal conduct**, in addition to the existing sexual harassment and sexual assault exceptions.
- ▶ Effective Date: January 1, 2021



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# AB 1947 DLSE Complaints Statute of Limitations

Amends Section 98.7 of the Labor Code to extend the deadline for filing Labor Commissioner complaints from six months to one year after a violation.

Amends Section 1102.5 of the Labor Code to authorize courts to award reasonable attorneys' fees to plaintiffs who bring a successful Section 1102.5 whistleblower action.

Effective Date: January 1, 2021



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## AB 3075 Wages: Enforcement



New additional information regarding outstanding DLSE final judgments must be reported on corporation's statement of information.

Makes a successor to any judgment debtor liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment.

Corporation must disclose whether any **officer, director, member or manager** has outstanding judgment by DLSE or court.

By amendment to Labor Code Section 1205, authorizes local jurisdictions to enforce state labor standards requirements with respect to imposition of minimum penalties for failure to comply with wage-related statutes, as set forth in Labor Code Section 1206.

Effective Date: January 1, 2021



## Successor liable for wages, damages and penalties if successor meets **ANY** of the following:

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- ▶ Uses substantially the same facilities or substantially the same workforce to offer substantially the same services;
- ▶ Has substantially the same owners or managers that control the labor relations as the predecessor;
- ▶ Employs as a managing agent any person who directly controlled the wages, hours or working conditions of the affected work force of the predecessor employer;
- ▶ Operates a business in the same industry and the business has an owner, partner, officer or director whose is an immediate family member of any owner, officer or director of the predecessor employer.



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## SB 1384: Labor Commissioner Authority

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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.

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:

Effective January 1, 2021.

1. The employee is unable to afford counsel; and

2. The Labor Commissioner determines through informal investigation that the claim has merit.



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# SB 973 Employers: Annual Report: Pay Data 65



- ▶ Applies to private employers with 100 or more employees.
- ▶ On or before March 31, 2021, and each year after, employers must file a pay data report to the DFEH that states the number of employees by race, ethnicity, and sex.
- ▶ Must include previous year W-2 earnings and hours worked for all employees.
- ▶ Categories:
  - ▶ Officials and managers
  - ▶ Professionals
  - ▶ Technicians
  - ▶ Sales workers
  - ▶ Craft workers
  - ▶ Administrative support workers
  - ▶ Operatives
  - ▶ Laborers and helpers
  - ▶ Service workers







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# Do I have 100 employees? 66

Both California and non-California employees count toward determining if an employer meets the 100-employee threshold.

Temporary employees on payroll also count toward the 100-employee threshold.

An employer meets the 100-employee threshold by employing 100 or more employees during the snapshot period or by regularly employing 100 or more employees during the reporting year.

Employers may not cherry-pick their snapshot period to avoid the reporting requirement.

## 100 Employees









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## SB 973 Employers: Annual Report - Pay Data (Continued)

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- ▶ Report must be submitted in a searchable and sortable format.
- ▶ Employers with multiple establishments must submit a report for **each establishment** as well as a consolidated report that includes all employees.
- ▶ Requires the DFEH to make the reports available to the Department of Labor Standards Enforcement (DLSE) upon request and to maintain the pay data reports for at least 10 years.
- ▶ Critics complain that SB 973 will require California companies to report potentially incomplete or misleading pay data that the companies' adversaries could use to falsely claim wage disparities.









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## SB 973: Annual Pay Data Reports

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- ▶ Enacted to allow designated state agencies to collect wage data enabling them to identify wage patterns and increase enforcement of equal pay or discrimination laws.
- ▶ **Effective January 1, 2021, with the first deadline date of March 31, 2021, and an ongoing annual reporting obligation.**
- ▶ Employers will report on their workforce by choosing a single pay period between Oct. 1 and Dec. 31 of each "reporting year," referred to as the "**snapshot period**."









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## SB 973: Annual Pay Data Reports (cont'd)

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- ▶ In order to identify the number of employees by race, ethnicity, and sex, whose annual earnings fall within each pay band (i.e., wage range), the employer shall calculate the employee's earnings as shown on the IRS Form W-2 for the entire Reporting Year, regardless of whether the employee worked the entire calendar year.
  - ▶ "The employer shall tabulate and report the number of employees whose W-2 earnings during the "Reporting Year" fell within each pay band."
- ▶ Employers may include clarifying information regarding any of the information included in the report.
- ▶ Employers should seek legal guidance to identify potential wage disparities and evaluate if there is an underlying legitimate and lawful explanation and whether clarifying remarks should be included in the report.
- ▶ Guidance <https://www.dfeh.ca.gov/paydatareporting/>



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## SB 973: Annual Pay Data Reports (cont'd)



- ▶ DFEH can share this report with the Department of Labor Standards Enforcement (DLSE) upon request.
  - ▶ However, the information contained in the report is otherwise confidential and is **not** subject to the California Public Records Act.
- ▶ DFEH is authorized under this law to "receive, investigate, conciliate, mediate and prosecute complaints" of violation of equal pay provisions under Labor Code 1197.5.
  - ▶ Must coordinate with the DLSE and Department of Industrial Relations (DIR).
- ▶ The DFEH may request from the Employment Development Department (EDD) the names and addresses of businesses with 100 or more employees to verify compliance.
- ▶ An employer that submits a copy of the employer's EEO-1 Report containing the same or substantially similar pay data information required under this section, is in compliance.
- ▶ Failure to submit a compliant report may expose employers to enforcement orders and be required to pay the agency costs associated with seeking the compliance order.



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# Cal/OSHA Emergency Temporary Standards (ETS)

82

- ▶ New Rules:  
<https://www.dir.ca.gov/OSHSB/documents/COVID-19-Prevention-Emergency-apprvd.txt.pdf>
- ▶ FAQ:  
<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html> (will be updated!)

O S H A

Occupational

Safety

Health

Administration

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**Q: Once an employee is vaccinated, must the OSHA ETS still be followed for vaccinated persons?**

**A:** For now, all prevention measures must continue to be implemented. The impact of vaccines will likely be addressed in a future revision to the ETS.

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VACCINATIONS

MANDATORY VS. ENCOURAGED

DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHER EMPLOYEES?

MANDATORY FOR EVERYONE? IS IT REASONABLE OR NECESSARY FOR THE BUSINESS IF WORKERS ARE SPACED OUT OR WORK ALONE?



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EEOC: yes.

CA: Under the FEHA, an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation).



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IF REQUIRED - COMPENSATORY TIME & MILEAGE  
IF BONUS PAID – THEN BONUS MUST BE PAID ON OVERTIME



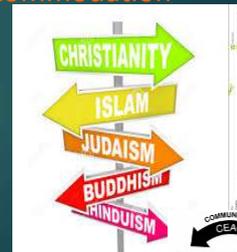
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# ADA & Religious Considerations



- a. Interactive process – Doctor supported disability or sincerely held religious belief
- b. Documentation
- c. What about incentives for those who require accommodation
- d. What does accommodation look like
  - a. Can the employee work remotely?



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# If mandatory, then work comp potential for complications

- Is this better or worse than current situation



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# Increased Plaintiff's Attorney Activity

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- ▶ Records demands (Do not handle without counsel!)
- ▶ Arbitration Agreements remain vital defense tool



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## SB1207 CAL SAVERS IMPLEMENTATION DATES FOR SMALLER EMPLOYERS

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### What is Cal-Savers?

- ▶ CalSavers is an employer-mandated IRA program for those employers who do not offer their employees a tax-qualified retirement plan.
- ▶ "Exempt Employer" means an Employer that (i) has fewer than five Employees, or *maintains or contributes to* a Tax-Qualified Retirement Plan. The government is exempt as well.
- ▶ If the employer is not exempt, it must either establish a private market retirement program (like an IRA or 401(k) or register with CalSavers.
- ▶ Eligible employers must comply with the following deadlines:

Size of business	Deadline
Over 100 employees	September 30, 2020
Over 50 employees	June 30, 2021
Five or more employees	June 30, 2022

- ▶ See [www.calsavers.com](http://www.calsavers.com) for more information.



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## SB93 REHIRE OBLIGATIONS FOR COVID LAYOFFS FOR CERTAIN INDUSTRIES

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Applies to a select specified industries, including security guard companies, janitorial companies, hotels with more than 50 rooms, airport hospitality operations and private clubs.

These enterprises must offer preference to 'laid off employees' related to the pandemic when they start rehiring.

Laid off employees includes employees who were employed by the employer for 6 months or more in the 12 months preceding January 1, 2020 and whose separation was due to the pandemic.

These specified employers must maintain records for at least three years from the date of layoff notice, the person's name, job classification at time of separation, date of hire, last known address of residence, last known email, last known phone number and a copy of the written notices regarding the layoff provided to the employee and all communications concerning offers of employment.



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## SARGENT V. BOARD OF TRUSTEES OF CAL. STATE UNIVERSITY (RETALIATION FOR MAKING SAFETY COMPLAINTS)

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### **Facts:**

Thomas Sargent was a 22 year health and safety tech at Sonoma State University. Sargent, a union member, claimed (and proved to a jury) he was retaliated against for blowing the whistle on dispersion of lead paint chips with a leaf blower near an entrance to a campus building. He was put on PIP after that incident and got lowest possible performance ratings. The second incident was complaining about asbestos in a different campus building. He got six write ups in the three months after raising concerns about asbestos. He filed a PAGA notice (for violation of Cal/OSHA laws) while still employed and was suspended thereafter. He sued in 2014 while still employed and later resigned in 2015 saying "I literally couldn't take it anymore. I wasn't sleeping..."

### **Finding:**

A jury found in his favor on his claim of unlawful retaliation and on a claim under PAGA (Labor Code Cal. Private Attorney General Act.) He was awarded \$2.9M in PAGA penalties and \$7.8M in legal fees. The legal fees award was upheld, and PAGA penalties award set aside because he was not personally affected by the underlying statutory violations.



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## SARGENT V. BOARD OF TRUSTEES OF CAL. STATE UNIVERSITY (RETALIATION FOR MAKING SAFETY COMPLAINTS)

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### Takeaways from the Sargent case:

- Be extremely careful disciplining a worker after they make a complaint as this could (and this case did) look like unlawful retaliation.
- Employees can (and sometimes do) bring claims while they are still employed. If there are adverse employment decisions afterwards, that can look like unlawful retaliation as well.
- Legal fee awards can be enormous. Here Sargent's lawyers got a lodestar as prevailing party and a multiplier of 2.0. The rate they received was approximately \$900 per hour.
- The legal fee award was due to fee shifting allowable under CA Private Attorney General doctrine as Sargent proved he conferred a significant benefit on the general public (other SSU employees.)



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## DONAHUE V. AMN SERVICES, INC. (CAL. SUPREME COURT) (NO ROUNDING OF MEAL PERIOD TIME)

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### Takeaways:

- Rounding at the beginning and end of a shift remains legal, for now.
- BUT rounding at beginning of day to meal period could result in a late meal period claim. (Not getting a meal period by the fifth hour.)
- Start meal periods well before the fifth hour of work.
- Consider extending meal periods to longer than 30 minutes.
- Use an attestation and drop-down menu for non-compliant meal punches if software allows it.
- If an employee is entitled to a meal period premium for a short, late or missed meal period, pay it!



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## VAZQUEZ V. JAN-PRO FRANCHISING (U.S. 9TH CIRCUIT) (ABC TEST RETROACTIVITY)

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### Facts:

This is a class action case (originally filed in Mass.) alleging that Jan-Pro (janitorial cleaning business) developed a tiered franchising model to avoid paying janitors minimum wage/overtime by misclassifying 'third tier' franchisees as independent contractors, not employees.

### Finding:

Dynamex's ABC test to determine whether a person was properly classified as an independent contractor applies retroactively.

Jan-Pro's tripartite system (contracting with a first tier of franchisor that contracts with a second tier of franchisors who actually do the work) may (and likely will) subject the franchisor (Jan-Pro) to liability for wage and hour claims brought by their franchisees' employees.



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## VAZQUEZ V. JAN-PRO FRANCHISING (U.S. 9TH CIRCUIT) (ABC TEST RETROACTIVITY)

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### Takeaways from the Jan-Pro case (ABC Test Refresher):

1. The Dynamex ABC test (codified in AB 5) applies retroactively. The three prongs of Dynamex are:
  - A. The worker is free from the direction/control of the hiring entity;
  - B. The employer is not engaged in the same business as the putative employee.
  - C. The worker is engaged in an independently established trade, occupation, or business of the same nature as the work performed.
2. Workers are presumed as employees and the hiring entity must meet all three prongs.
3. Under prong C, the hiring entity must prove the independent business operation is actually in existence at the time the work is performed.



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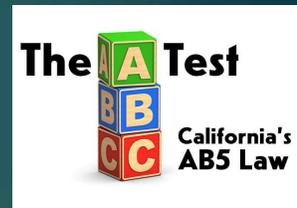
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## VAZQUEZ V. JAN-PRO FRANCHISING (U.S. 9TH CIRCUIT) (ABC TEST RETROACTIVITY)

### Takeaways from the Jan-Pro case:

1. There is a four year look back for alleged violations of the wage and hour law in California.
2. Examine your policies and practices to determine if members of their workforce have been misclassified under the new standard or whether there's an exception to AB 5.
3. The multi-pronged approach to determining independent contractor status under *Borello* is dead for wage and hour claims, unemployment insurance claims, worker's comp. claims and claims under the CA wage orders.
4. See AB 2257, which sets forth significant carveouts from AB 5 for certain independent contractor relationships.



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## ALVAREZ V. ALTAMED HEALTH SERVICES CORPORATION (MANDATORY ARBITRATION OF WORKPLACE DISPUTES)

### Facts:

A trial court refused to compel arbitration of an employee's claims on the basis that the arbitration agreement was 'substantively unconscionable'. The employer appealed.

The appellate court reversed. An arbitration agreement's appellate arbitral review provision was substantively unconscionable because it favored the employer. The provision in question provided that either party could seek appellate review of an initial arbitration award by a second arbitrator. In reality, only the employer was likely to do so (for instance in the event of a large award), thus "unilaterally adding costs and time to the arbitration proceeding by seeking this review and thereby maximizing the employer's status as the better resourced party."

The appellate court nonetheless found the offending provision "severable" so it was removed without affecting the other provisions of the agreement.

Spanish translation of the arbitration agreement was not required.



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## ALVAREZ V. ALTAMED HEALTH SERVICES CORPORATION (MANDATORY ARBITRATION OF WORKPLACE DISPUTES)

### Takeaways from the Alvarez case:

1. Arbitration agreements can be set aside if they are procedurally or substantively 'unconscionable'.
2. The court is supposed to decide whether the provisions of the arbitration agreement are sufficiently unfair in light of all relevant circumstances to negate it.
3. The agreement was mailed to the employee and she was given at least 24 hours to copy, read and consider it.
4. The arbitration agreement was only two pages long, was typed in readable print and contained short, easily understood paragraphs.
5. Spanish translation was not required because the employee, though more comfortable in Spanish, she did not show she lacked English language skills. If the worker is not comfortable in English, the agreement should be translated to the worker's native language.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

**Facts:** Rosario Contreras-Velazquez (Velazquez) was a medical records clerk. She suffered a work-related repetitive stress injury to her right upper arm. She underwent surgery to treat the injury, but the surgery was not effective. Velazquez returned to work and was transferred to a call center to work as an appointment technician.

In the call center she was required to use a headset and a computer mouse. They gave her a right-handed computer mouse and a pull-out tray on the right side of her desk. She reported pain in her right arm. She told her supervisor about her condition and requested an accommodation such as a left-handed mouse or a roller mouse. Family Health provided Velazquez a roller mouse, but it did not function properly. A week and a half after Velazquez began her new position, Velazquez' supervisor instructed her to stop coming into work, schedule an appointment with her doctor, and provide a doctor's report before returning to work.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

- ▶ **Facts:** She saw her doctor, who prepared a report indicating Velazquez complained of pain on both sides, did not feel able to do her usual job duties, and wanted to be taken completely off work because of her pain. The doctor's note also stated she could return to modified work with four restrictions:
  - ▶ (1) "Limited use of right upper extremity";
  - ▶ (2) "Repetitive hand, wrist and keyboard work limited to 10 minutes per hour";
  - ▶ (3) "No overhead lifting or reaching with the right upper extremity"; and
  - ▶ (4) "No forceful pushing and pulling with the right upper extremity."
- ▶ The report stated Velazquez was "eventually going to wind up with some fairly profound limitations in the long run" and Family Health should contact her doctor to discuss her work status because "whatever they have her doing at work is just aggravating everything, which is going to be to nobody's advantage."



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

- ▶ **Facts:** Velazquez gave the report to her supervisor and spoke with HR. HR told her to not come to work and to continue seeing her doctor. For the next three months, Velazquez did not come to work per HR's instructions. She visited her doctor once per month and provided Family Health a doctor's report after each visit.
- ▶ Family Health did not contact Velazquez's doctor to discuss possible work arrangements to accommodate her injury. An HR person searched online for employment positions that were available and suitable for Velazquez given her qualifications and work restrictions. She was unable to identify a position appropriate for Velazquez.
- ▶ Family Health terminated Velazquez's employment in April 2014. Velazquez said she wanted to remain employed and asked whether there were any job positions available for her. The human resources representative stated Family Health could not accommodate Velazquez's disability and could no longer employ her.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

### The Trial:

Velazquez sued for disparate treatment based on physical disability; failure to accommodate a physical disability; failure to engage in the interactive process; hostile work environment; retaliation; failure to prevent discrimination and wrongful termination in violation of public policy.

The jury found for the employer on all counts. Family Health did not fail to engage in the interactive process, did not fail to accommodate a disabled worker, did not retaliate against her, and found she was unable to perform the essential functions of her position.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

### After The Trial:

- ▶ Velazquez moved for a new trial on grounds that the evidence was insufficient to justify the verdict. The court granted the motion for a new trial:
- ▶ “It is not only the right, but the duty of the trial court to grant a new trial when, in its opinion, the court believes the weight of the evidence to be contrary to the finding of the jury....
- ▶ The weight of the evidence in this case was that Family Health failed to participate in a timely, good faith interactive process; she was able to perform essential job duties with reasonable accommodation for the physical disability; and Family Health failed to provide reasonable accommodation. The court ordered a new trial on the disability claims.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

 The Second Trial (after Family Health lost its first appeal and a slew of procedural motions) *went differently than the first one*. The jury found in favor of Velazquez:

\$ 1. \$915,645 in compensatory damages (past and future wages and pain and suffering);

\$ 2. \$5M in punitive damages, which the court reduced to \$1,831,290.

\$ 3. \$1.1M in attorney fees and costs.

 Despite a bevy of legal arguments, the award was upheld on appeal.



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## CONTRERAS-VELAZQUEZ V. FAMILY HEALTH CENTER OF SAN DIEGO (DISABILITY DISCRIMINATION)

### Takeaways:

- Don't fire an employee on disability leave: "Velazquez was a physically-disabled, middle-aged immigrant who did not have a college degree. After Family Health told her of its decision to terminate her employment, she literally begged Family Health to continue employing her because "it was very necessary for [her] to continue at work" and she "need[ed] [her] job."
- Be careful when relying on health and safety of the disabled employee as a reason to terminate them: Family Health claimed it terminated Velazquez to protect her from suffering further work-related injuries. This "farfetched" claim following a court finding that its conduct "show[ed] a conscious disregard of the health, safety, and rights of [Velazquez]."
- Follow up with the Worker's Doctor: Ask about potential accommodations and work arrangements. Clarify ambiguities in their report.
- Make sure the accommodations work! The defective roller mouse exacerbated her injuries.
- Don't misdocument a personnel record. A termination is not a voluntary resignation.



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## Today's Agenda

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- 2) Other Statutes Enacted in the Covid-19 Era
- 3) Recent Appellate Cases
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- 5) **Question and Answer**



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## NLRB HOT TOPICS

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### ACTING GENERAL COUNSEL RESCINDS TRUMP MEMOS

1. Termination of General Counsel Peter Robb, Peter Sung Ohr, acting General Counsel memo signaling vigorous enforcement of the concerted activity doctrine and Biden's staunch pro-union stance.
2. Section 7 of the NLRA protection applies not only to union activity and labor organizing; it covers other employees may take, like discussing or protesting wages, hours, and working conditions and actions involving "mutual aid or protection".
3. This includes employees' political and social justice advocacy when the subject matter has a direct nexus to employees' "interests as employees."
4. Examples of PCA given include a hotel employee's interview with a journalist about how earning the minimum wage affected her and employees like her, and how legislation to increase the minimum wage would affect them; a "solo" strike by a pizza-shop employee to attend a convention and demonstration where she and others advocated for a \$15-per-hour minimum; and protests of crackdowns on undocumented immigrants.



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## NLRB HOT TOPICS NLRB AMAZON ELECTION



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**NLRB Amazon Election Results as of April 9, 2021:**

Approximate number of eligible voters	<b>5,876</b>
Void Ballots	<b>76</b>
Votes cast FOR the Union	<b>738</b>
Votes AGAINST the Union	<b>1,798</b>
# of Challenged Ballots	<b>505</b>
Valid votes + challenged votes	<b>3,041</b>







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## NLRB HOT TOPICS NLRB V. TESLA



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The Tesla NLRB Case. The Musk tweet:

*“Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant UAW & everybody already gets healthcare.”*

NLRB found that Musk unlawfully threatened employees in “a manner viewable by the public without any limitations.”

The tweet was posted in Musk’s personal account, which reached his 23,000,000 followers, and was republished and disseminated in the media. Musk was ordered to remove the tweet and Tesla has to post a notice at its facilities.







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## NLRB HOT TOPICS NLRB V. TESLA



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The Tesla NLRB Case. The No Media Contact Provision:

**The provision:** *"It is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so."*

- ▶ NLRB found that Tesla infringed on employees' protected rights through this The overly-broad confidentiality agreement. The provision could be reasonably interpreted to prohibit them from discussing working conditions, labor disputes, or other terms and conditions of employment.
- ▶ The provision included a general statement that the confidentiality agreement was created in response to recent leaks of confidential Tesla information but not change the meaning of the provision.



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## NLRB HOT TOPICS NLRB V. TESLA

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### The Takeaways:

- Beware of statements that could be perceived as unlawful threats: *"give up stock options for nothing."*
- Employers may lawfully restrict talking about confidential or proprietary information, but these provisions cannot be overbroad to infringe on employees' rights under the NLRA to discuss wages, hours or working conditions with the media. Avoid a blanket provision such as "never speak to the media" provisions without authorization.
- Carefully consider any type of disciplinary action for conduct that could be considered for mutual aid or protection.

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# Questions?

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