

New Challenges for California Farm Employers

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What's Happening in 2020?

- ✓ Overtime & Minimum Wage for 2020
- ✓ Wildfire Smoke Emergency Regulation, permanent regulation to follow, but when?
- ✓ Night Work in Agriculture Proposed Regulation
- ✓ New Laws for 2020
- ✓ Not all the News was Bad...
- ✓ What's coming?



Minimum Wage & Overtime: What's Happening in 2020

Employers of 25 or fewer employees:

- ✓ Minimum Wage: \$12/hour
- ✓ Overtime: after 10 hours/day; no weekly o/t

Employers of 26 or more employees:

- ✓ Minimum Wage: \$13/hour
- ✓ Overtime: after 9 hours/day; 50 hours/workweek



Minimum Wage & Overtime: What's Happening in 2020

of employees?

- ✓ Exempt supervisors
- ✓ Trainees
- ✓ Part-timers
- ✓ Minors
- ✓ FLC employees
- ✓ If their names appears on your payroll, they count!
- ✓ Payroll period by payroll period; when you go over 25, you're "large" for that payroll period

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Wildfire Smoke Regulation

Why?

Deadly, destructive wildfires in 2017, 2018

- ✓ High Air Quality Index measurements in Sacramento County between Nov. 10 and Nov. 19 (Camp Fire) ranged from 175 (11/13) to 305 (11/15)
- ✓ **Result:** Petition to Cal/OSHA Standards Board for an Emergency Reg, effective 7/30/19

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Wildfire Smoke Regulation

- ✓ Emergency Reg re-adopted in 12/19/19
- ✓ Ofc. of Admin. (OAL) approved re-adoption on 1/16/20
- ✓ Emergency reg can be readopted for one more 90-day period
- ✓ Emergency reg can be adopted as permanent reg
- ✓ Agency proposed problematic permanent reg on August 2019, no further discussion
- ✓ Permanent reg in 2020

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Wildfire Smoke Regulation: Key Provisions

Employers must provide wildfire smoke respiratory protection when:

- ✓ **Air Quality Index (AQI) equal to or greater than 150** (Hazardous for Sensitive Groups) resulting from the **presence of particulate matter 2.5 microns or smaller (PM 2.5)** (not other pollutants that might trigger a high AQI)
- ✓ **Employer should reasonably anticipate** employees may be exposed to wildfire smoke
- ✓ **U.S. EPA AirNow; U.S. Forest Service Wildland Air Quality Response Program; California Air Resources Board/Local Air Quality Management/Air Pollution Control District**



Wildfire Smoke Regulation: Key Provisions

Trigger for requirement to protect:

- ✓ **Know the AQI** at worksite, before and during shift if you have **reason to believe AQI could trigger the reg**



Communication

Communicate with Employees:

- ✓ **Two-way communication**: Communication is vital to your efforts to protect employees
- ✓ The regulation requires you to:
 - **Alert employees** when the air quality is harmful and about the **protective measures available**.
 - **Encourage employees to inform you -- without fear of reprisal**:
 - That air quality is worsening or
 - That they are suffering from symptoms due to the air quality.



Protect Employees

Control Exposure:

- ✓ **Engineering Controls** (where feasible): can work be done in a building, enclosure, vehicle with filtered air? If so, do it there
- ✓ **Administrative Controls** (if practicable): reduce exposure by having employees work at a safe location with less-hazardous AQI if available; schedule work for times when air quality is less hazardous, reduce work hours and intensity, provide more frequent breaks



Respirators

Control Exposure:

- ✓ **Respiratory Protection:** provide N95 respirators (NIOSH-approved)
 - **Voluntary use but encourage** employees to use
 - Fit-testing and medical evaluation (as required by general respiratory protection regulations) not required by emergency reg
 - AQI exceeding 300 – implementation of full respiratory protection reg (GISO 5144)



Stockpile N-95s Now!

How many?

Assume:

- ✓ 50 employees working 8 hour shifts
- ✓ Each employee uses 2-3 N-95 respirators/shift (due to sweating, absorption of pollutants, etc.)
- ✓ At your work location, the emergency reg. is triggered-on for 4 work days

Result: You need a stockpile of at least 500 N-95s! (50 employees x 2.5 N-95s/day x 4 days = 500)



Training

Train Workers

- ✓ Use **Wildfire Smoke Protection Reg Appendix B** as a training guide
- ✓ Train on:
 - Health effects of wildfire smoke
 - Right to obtain medical treatment without reprisal
 - How employees can obtain current PM 2.5 AQI
 - What the Wildfire Smoke Protection reg requires:
 - Know the AQI
 - Provide Training
 - Lower employee exposure (if possible)
 - Provide respirators; encourage use
- ✓ **Some of Appendix B not applicable:**
 - **Fit-Testing**
 - **Medical evaluation**
 - **Shaving**



Resources

Train Workers/Get More Information

- ✓ Other Training/Information Resources:
 - **N95 Mask Commonly Asked Questions,** California Office of Emergency Services
 - FELS Tailgate Safety Training Sheet: **Protection from Wildfire Smoke**
 - **Wildfire Smoke Protection Reg:** General Industry Safety Order (GISO) 5141.1
 - “Cal/OSHA Wildfire Smoke Regulation Now in Effect” (*FELS Newsletter*, August 2019)



Night Work in Agriculture

12/3/19 Revised Proposed Reg:

- ✓ Rear light (in addition to existing requirement for front light) on self-propelled equipment (tractors, harvesters, trucks)
- ✓ Illuminate “outdoor agricultural operations except where otherwise specified...,” walkways, restrooms, storage areas” to 5 foot/candles
- ✓ Illuminate “agricultural operations that involve the use of tools that can potentially cause cuts, etc.” to 10 foot/candles
- ✓ Typical head lamp available through on-line suppliers (Amazon, Gemplers) should be more than adequate for either



Night Work in Agriculture

12/3/19 changes to proposed reg:

- ✓ Recently proposed revisions provide important clarification
- ✓ Allows any combination of hands-free portable personal lighting, equipment lighting, or area lighting to achieve required illumination
- ✓ Area lighting illumination measured 30 inches “above the floor, vertical or horizontal or sloped surface” where an employee may walk or work
- ✓ References to “task lighting” clarify that exposure to a prohibited hazard (in this case, lack of light) requires presence of an employee to be exposed
- ✓ Use of hi-visibility clothing (vests, shirts, other)
- ✓ Pre-shift safety meetings



Night Work in Agriculture Problems:

- ✓ Orchards/Vineyards/Trellis structures will interfere with propagation of area light
- ✓ Local light ordinances, building codes/standards will interfere
- ✓ How enthusiastic will CARB be about hundreds/thousands of diesel/gasoline-powered light trailers in running all night in rural areas?



Night Work in Agriculture: Problems

- ✓ How responsive will PG&E be to need to install permanent lighting?
- ✓ Absurd under-estimate of compliance cost:
 - Estimated only @ 1700 farms do night work
 - Estimated night work only occurs two-three months/year



New Laws for 2020:

Newsom signs 600 new laws

AB 5 (Gonzalez): codifies and expands the “ABC” test established by the California Supreme Court’s April 2018 *Dynamex* decision.

Three conditions to classify a worker providing services to it as an independent contractor rather than an employee:

- ✓ Contractor is free from control and direction of the hirer
- ✓ Contractor does work outside the usual course of the hirer’s business
- ✓ Contractor is engaged in an independent established trade, occupation, or business in the same nature as the work being done for the hirer

Other features:

- ✓ Complicated “business-to-business” to exempt “business service providers”
- ✓ Numerous specific exemptions – evaluate contractor v. employee using *Borello* “economic realities” test



AB 5 (Gonzalez)

Obvious concerns:

- ✓ Typical business service relationships farmers/ranchers engage in (irrigation contractors, pesticide applicators, farm labor contractors) seem to be unaffected
- ✓ Some particular activities (independent owner/operator truckers, foresters/tree fellers) may not be able to prove independent contractor status

Key Take-Aways:

- ✓ AB 5 makes it easier for a disgruntled independent contractor to sue you, claiming misclassification (i.e. should have been classified as an employee)
- ✓ Does not impose a new, general rule requiring you to classify your pesticide applicator (or other service provider) as your employee or to classify their employees as your own
- ✓ Take a close look at your service contractor relationships; should those “1099” contractors really be employees?



AB 5 (Gonzalez)

Key Take-Aways:

- ✓ Farmer or rancher receiving services:
 - under a properly written contract from a law-abiding, separately established business
 - that has and advertises for other customers/clients
 - that exclusively controls how its services are provided, and;
 - that performs its services using its own tools, vehicles, and equipment
 - organized as a corporation or an LLC

should be able to establish independent contractor status for service providers

- ✓ DIR has requested 2021 budget \$17.5 million and 130 additional staff to enforce AB 5, including simply looking for misclassification outside any other Labor Code violations



More New Laws for 2020

AB 9 (Reyes, D-San Bernardino) extends the Fair Employment and Housing Act's filing deadline for harassment and retaliation claims from one year to three years.

AB 51 (Gonzalez): bans mandatory employment-related arbitration agreements and settlement agreements paying a party a financial settlement in exchange for waiving a discrimination or harassment claim (will likely be found preempted by Federal Arbitration Act)

AB 749 (Stone) bans employment-related litigation settlement agreements that bar the employee from seeking re-employment with the employer.



More New Stuff for 2020

New Form W-4

- ✓ Employees initially hired in 2020 must use the new form
- ✓ Previously created W-4s remain valid; you can ask employees to do a new W-4, but not mandatory
- ✓ Relies on an on-line “Tax Estimator” taking into account income from more than job for married-filing-jointly
- ✓ Discontinues personal allowances
- ✓ Requires employers to manage separate withholding for “old” W-4s and “new” W-4s



More New Stuff for 2020

Proposed Indoor Heat Illness Reg Status

- ✓ Last draft reg. April 2019
- ✓ Not yet submitted for required regulatory reviews
- ✓ Applicable when indoor temp exceeds 82°
- ✓ Assessment and Control requirements will generate huge new recordkeeping requirements
- ✓ Problems with indoor to outdoor workers, buildings (like packing sheds and storage facilities) and vehicle operators



More New Stuff for 2020

Proposed Workplace Violence Standard Status

- ✓ Standards Board directed Cal/OSHA to begin drafting standard 6/14
- ✓ Last draft reg. 10/18
- ✓ No apparent movement since
- ✓ Broad requirements applicable to large and small employers alike
- ✓ No recognition of various levels of risk in different types of workplaces
- ✓ Unclear “recordability” requirement for required violent incident logs



Not all the News was Bad...

Gov. Newsom vetoed:

- ✓ Legal presumption of retaliation against an employee for taking an adverse action within 90 days of learning that employee was a domestic violence, stalking or harassment victim (Gonzalez)
- ✓ 4x increase in time to file whistleblower complaints, attorneys' fees to encourage those complaints to go to court rather than the Labor Commissioner (Kalra)



Not all the News was Bad...

Gov. Newsom vetoed:

- ✓ Requirement to post in the workplace and furnish to new employees notice of “Workers Bill of Rights” including right to refuse to live in employer-designated housing (Gonzalez)
- ✓ Allow local jurisdictions to enact and enforce anti-discrimination without state pre-emption (Bradford)



What's Coming? Two Year Bills Laid-Over from 2019

AB 555 (Gonzalez) Paid Sick Leave expansion to 5 days/40 hours

AB 1066 (Gonzalez) Unemployment Comp benefits for strikers

SB 177 (Jackson) Pay Data reporting “public shaming” bill – report pay data by gender to “demonstrate” pay discrimination



What's Coming? New in 2020?

- ✓ **AB 5 revisited?** owner/operator truck drivers? Foresters/Tree fellers?
- ✓ **More #times-up, #me-too?**



Thank You!

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