Tucker Ellis LLP

CLIENT ALERT

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2021: WHAT YOU DON'T KNOW MAY HURT YOU

DECEMBER 2020

"*A truly wise man does not play leapfrog with a unicorn.*" – Gautama Buddha

With the upcoming new year comes a host of new California employment laws that will take effect on January 1, 2021 and beyond.

The new laws address several topics, including:

- Anti-Retaliation and Whistleblower Protections
- Settlement Agreements
- Leaves of Absence, Sick Leave and Kin Care
- COVID-19 Responses and Reporting
- Independent Contractor Status for Gig Workers
- Arbitration Agreements

While a number of these new laws are not expressly considered "coronavirus legislation," it is clear the coronavirus pandemic influenced the legislature's decision to further expand certain rights for employees in one of the most employee-friendly states in the nation. All employers with operations in California should be aware of these new laws, understand how these laws may affect them, and consult with counsel to address any compliance questions.

LEGISLATION PROHIBITING RETALIATION AND ADVERSE ACTIONS

ASSEMBLY BILL (AB) 1947 PROVIDES EXTENDED FILING PERIOD FOR DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE) CLAIMS AND INCREASES INCENTIVE FOR WHISTLEBLOWER CLAIMS

California law contains various provisions prohibiting retaliation against employees who exercise their rights or engage in protected activities. AB 1947 amends Labor Code section 98.7 by extending the time period (from six months to one year from the date of violation) within which persons can file retaliation claims with the California Labor Commissioner's Office. AB 1947 also authorizes courts to award attorney's fees to plaintiffs who successfully bring a lawsuit for violations of another whistleblower law (Labor Code section 1102.5), which prohibits retaliation against workers who come forward to disclose legal violations taking place in the workplace or who refuse to participate in any activity that violates the Labor Code. Previously, workers who prevailed in such lawsuits were obligated to pay their own attorney's fees. The extended time to raise a complaint for retaliation and the authorization of attorney's fees for what will likely be a companion "whistleblower" claim will likely result in increased claims and lawsuits, as workers will have more time to bring claims and attorneys will have a financial incentive to take these matters to court.

AB 2143 ALLOWS NO-REHIRE CLAUSES IN SOME SETTLEMENT AGREEMENTS

AB 2143 provides some modifications to the recently enacted Section 1002.5 of the California Code of Civil Procedure, which imposes significant restrictions against the use of "no-rehire clauses" in settlement agreements. Section 1002.5, which became effective on January 1, 2020, generally prohibits an agreement to settle an employment dispute from containing a provision that prohibits or restricts a settling party who is an aggrieved person (person who filed a complaint against an employer internally, with the court, or before an administrative agency) from working for the employer against which the person has filed a claim. One year after its enactment, AB 2143 amends Section 1002.5 to require the person to have filed his/her claim in good faith in order for the no-rehire clause prohibition to apply.

Prior to AB 2143, the statute included an exception from the prohibition on no-rehire clauses if the employer made a good faith determination that the person engaged in sexual harassment or sexual assault. AB 2143 amends the statute to allow a no-rehire provision if the aggrieved party has engaged in "any criminal conduct." However, in order for the existing sexual harassment/sexual

assault exception and the new broader criminal conduct exception to apply, the employer must have documented its good faith determination that an aggrieved party engaged in sexual harassment/sexual assault/criminal conduct *before* the aggrieved party filed the claim against the employer.

EMPLOYMENT DISCRIMINATION LEGISLATION

SENATE BILL (SB) 973 GOVERNS EEO-1 PAY DATA REPORTS AND WILL RESULT IN "TARGETED ENFORCEMENT" ACTIVITIES

This new law requires private employers with more than 100 employees to report data on workers' race, ethnicity, gender, pay, and position to the California Department of Fair Employment and Housing ("DFEH") on or before March 31, 2021 and each subsequent year. California seeks this information for "targeted enforcement of equal pay or discrimination laws." The objective of the legislation is to require the reporting of more information, which will allow the DFEH and other state agencies to scrutinize these annual reports for signs of wage and hour violations and discrimination, especially pay inequities under California's equal pay law (Labor Code section 1197.5). This will most certainly result in additional enforcement activities and litigation.

Employers who are required to file an Employer Information Report EEO-1 ("EEO-1") under federal law now must submit a pay data report to DFEH. The reporting categories are the same as previously required under the federal EEO-1, and apply to executives 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. Employers would count individuals in these groups by looking at a single pay period between October 1 and December 31 of the prior calendar year. Employers must also report the previous year's W-2 earnings and hours worked for all employees identified in that pay period in a searchable and sortable format. Critics of SB 973 point out that the statistical data is incomplete and does not sufficiently account for variables in job types. While the federal EEO-1 data reporting requirements have been temporarily suspended, California's new law goes into effect January 1, 2021 and requires this information to be reported by March 31, 2021. Employers covered by this law must act quickly to prepare these reports.

LEAVE OF ABSENCE LEGISLATION

SB 1383 RADICALLY EXPANDS FAMILY LEAVE PROTECTIONS

Newly signed SB 1383 dramatically expands family leave for employees and related obligations for employers under the California Family Rights Act ("CFRA") and New Parent Leave Act ("NPLA"). The law mandated 12 weeks of unpaid and protected family leave within a 12-month period for qualifying employees of companies with 50 or more employees within the state. If the employer had less than 50 employees within 75 miles of the worksite, it could refuse to grant leave. Additionally, if both parents worked for the employer, the company was only required to grant 12 weeks of leave in total for the parents.

Most significantly, SB 1383 applies to private employers with **five or more employees**, eliminates the 75-mile rule, and broadens the definition of "family member" to include siblings, grandparents, grandchildren, and domestic partners. The new version of CFRA includes the following additional protections for employees:

- An employer who employs both parents must grant 12 weeks of protected leave to each parent;
- Employees may take leave to care for an adult child;
- It is now unlawful to refuse to grant 12 weeks of unpaid protected leave for any qualifying employee;
- The law now defines an employee "as an individual who has at least 1,250 hours of service with the employer during the previous 12-month period."

California clarified that pre-existing and new leave requirements are separate and distinct from an employer's obligation to permit female employees "disabled by pregnancy, childbirth, or a related medical condition to take leave for up to 4 months." These changes will come as a shock for smaller employers and may conflict and overlap with other obligations under federal and California law.

AB 2992 EXTENDS LEAVE TIME TO VIOLENT CRIME VICTIMS

California has traditionally extended protected leave rights to employees who are victims of crime and abuse. The past law, "prohibit[ed] an employer from discharging, or discriminating or retaliating against, an employee who is a victim of domestic violence, sexual assault, or stalking, for taking time off from work to obtain or attempt to obtain

[judicial] relief to help ensure the health, safety, or welfare of the victim or victim's child." The new AB 2992 prevents an employer from taking action against an employee who takes time off to address the injuries of such crimes, including time to care for physical and mental injuries.

AB 2992 amends Labor Code sections 230 and 230.1 and contains several key definitions, including definitions of the terms "crime" and "victim." Under the new law, a "victim" includes the following:

> (A) A victim of stalking, domestic violence, or sexual assault;
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> (B) A victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury;
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> (C) A person whose immediate family member is deceased as the direct result of a crime; or
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> (D) For the purposes of subdivision (b) only, any person against whom any crime has been committed.

Employers should act with caution because California defines "crime" broadly and the new legislation is intended to protect victims (and their family members). Specifically, under AB 2992, "crime" is broadly defined as "a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult" and "**regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime**."

With these ambiguities concerning what constitutes a crime, it provides opportunities for employees to take protected time off work for being a victim of any crime, even one where the person committing the crime is not arrested or prosecuted. This increases the liability exposure for employers.

Police reports, courts orders, and notes from medical professionals are sufficient to substantiate time off. Additionally, it is critical for employers to keep employee information regarding these crimes strictly confidential.

AB 2017 ALLOWS EMPLOYEES TO CONTROL KIN CARE DESIGNATIONS FOR SICK LEAVE

AB 2017, effective January 1, 2021, is another new legislation affecting California's sick leave laws. Sick leave has been a focus of the California Legislature this session due to the lasting impact of COVID-19. This new sick leave law relates directly to the care of family members.

Existing law requires an employer who provides sick leave for employees to permit an employee to use the employee's accrued and available sick leave entitlement to attend to the illness of a family member, also known as and commonly referred to as kin care, and prohibits an employer from denying an employee the right to use sick leave or taking specific discriminatory action against an employee for using, or attempting to exercise the right to use, sick leave to attend to the illness of a family member. Family member means any of the following:

- a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis;
- a biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner;
- a spouse or registered domestic partner;
- a grandparent;
- a grandchild; or
- a sibling.

This bill adds language to Section 233 of the California Labor Code to expressly provide that the designation of the sick leave taken for kin or personal care is at the sole discretion of the employee. Therefore, the employer may not designate sick leave as kin care leave by itself in order to quickly deplete the kin care leave available. This is especially important if the employer makes available different amounts of leave for kin care versus personal care. Any kin care leave policies and related practices should be updated accordingly.

WAGE AND HOUR LEGISLATION

AB 3075 EXPANDS SUCCESSOR LIABILITY FOR EMPLOYERS

Governor Gavin Newsom signed AB 3075 into law on September 30, 2020. AB 3075 amends the California Labor Code by adding Section 200.3 to allow employees to collect wage and hour judgments not only from their employers, but also from certain successor businesses that assume operations when the employers fail to pay their judgment debts. AB 3075's legislative history states that one goal of the law is to prevent business owners who

violate the Labor Code from escaping liability by discarding one business and starting a new one with the purpose of not paying its debts.

This new law defines the term "successor" to cover various scenarios, and successorship is established upon meeting any of the following criteria:

> (1) The successor uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor;
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> (2) The successor has substantially the same owners or managers that control the labor relations as the judgment debtor;
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> (3) The successor 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
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> (4) The successor operates a business in the same industry and the business has an owner, partner, officer, or director who is an immediate family member of any owner, partner, officer, or director of the judgment debtor.

In accordance with the purpose of the law, AB 3075 also requires businesses to disclose whether certain key owners or managers have wage judgments against them. Companies will be required to attest in the statement of information they file with the California Secretary of State's Office that no officer, director, or LLC member / manager "has an outstanding final judgment issued by the California Division of Labor Standards Enforcement or a court of law … for the violation of any wage order or provision of the Labor Code."

PROPOSITION 22 PERMITS RIDESHARE AND DELIVERY COMPANIES TO CLASSIFY WORKERS AS INDEPENDENT CONTRACTORS

On November 3, 2020, California voters passed Proposition 22, which allows app-based rideshare and food distribution delivery companies to classify its drivers as independent contractors instead of employees. Several app-based companies funded Proposition 22 in response to AB 5 and resulting litigation. The California Legislature passed AB 5 in 2019, which codified the 2018 decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018) and established a test that presumes workers are employees unless an employer can satisfy a three-part test called the "ABC" test.

Proposition 22's passage makes rideshare and food distribution delivery companies exempt from AB 5's employee classification statute. Proposition 22 adds a chapter to the Business and Professions Code, which will be called the "Protect App-Based Drivers and Services Act," and deems app-based drivers independent contractors. As such, the workers are not covered by various state employment laws – including minimum wage, unemployment insurance, and workers' compensation; however, Proposition 22 does provide certain protections to workers, including health care benefits and an earnings guarantee. The following is a summary of some of the requirements under the new law:

- **Rest Policy.** Proposition 22 prohibits drivers from working more than 12 hours in any 24-hour period for a single rideshare or delivery company unless the driver has already logged off for an uninterrupted period of six hours.
- **Health Insurance Stipend.** Companies are required to assist drivers who normally work more than 15 hours per week (not including waiting time), with a subsidy to help drivers pay for their health insurance.
- **Compensation for Injuries Incurred While Driving.** Companies are required to pay medical costs and replace some lost income when a driver is injured while driving or waiting. Accidental death insurance is also available to the families of drivers who are online with the company's application or platform when an injury happens that results in death.
- **Minimum Earnings.** Companies are required to pay 120 percent of the local minimum wage for each hour a driver spends driving, but not time spent waiting.
- **Additional Requirements.** Proposition 22 also prohibits workplace discrimination. It requires that companies use the following measures to protect its independent contractors: (1) develop sexual harassment policies, (2) mandate safety training for drivers, and (3) conduct criminal background checks.

CA SUPREME COURT BROADENS THE SCOPE OF COMPENSABLE WORK TIME

***Frlenkin v. Apple Inc.*, 8 Cal.5th 1038 (2020)** – Earlier this year, in *Frlenkin*, the California Supreme Court ruled that the time an employee spends at the employer's premises waiting for and undergoing mandatory exit

searches of their personal belongings voluntarily brought to work for personal use is an employer-controlled activity compensable as "hours worked" within the meaning of IWC Wage Order No. 7. The multi-factor test to determine whether "onsite employer-controlled activities" must be deemed compensable time includes the following:

- The mandatory nature of the activity.
- The location of the activity.
- The degree of the employer's control.
- Whether the activity primarily benefits the employee or employer.
- Whether the activity is enforced through disciplinary measures.

This decision reinforces the importance of companies operating inside of California to ensure their policies address California-centric compensation rules that go beyond federal standards. Additionally, because the Court specifically ruled that this decision has retroactive application, employers who have not properly compensated employees for time spent on security checks could face legal liability for past actions.

COVID-19 PANDEMIC AND WORKERS' COMPENSATION LEGISLATION

AB 685 REQUIRES EMPLOYERS TO PROVIDE NOTICE OF POTENTIAL COVID-19 EXPOSURE

Effective January 1, 2021, AB 685 requires employers to notify employees and subcontracted employees of potential COVID-19 exposure within one day of receiving notice of the potential exposure. The notice must be communicated in a format that the employer reasonably believes the employees will receive within one business day of delivery. The notice must be in English and any other language understood by a majority of employees. In addition to the notice, employers must provide potentially exposed employees with information regarding federal, state, and local benefits related to COVID-19, including workers' compensation, COVID-19 leave, company sick leave, state-mandated leave, supplemental sick leave, and anti-retaliation and anti-discrimination protections. They must also share their disinfection and safety plan.

In addition to the employee notice, employers must notify the local public health agency of any outbreak within 48 hours, including the names, number, occupation, and worksite of "qualifying individuals." An outbreak is defined as at least three probable or confirmed COVID-19 cases within a 14-day period. A "qualifying individual" is defined as any person who has: (1) a laboratory-confirmed case of COVID-19 as defined by the State Department of Public Health, (2) a positive COVID-19 diagnosis from a licensed health care provider, (3) a COVID-19-related order to isolate provided by a public health official, or (4) died due to COVID-19, in the determination of a county public health department or "per inclusion in the COVID-19 statistics of a county." Cal/OSHA will now have discretion to issue citations for violations related to COVID-19 or shut down an entire worksite or worksite area posing an imminent hazard related to COVID-19.

AB 1867 ESTABLISHES COVID-19 SUPPLEMENTAL PAID SICK LEAVE

AB 1867 requires employers with 500 or more US employees to provide their California employees supplemental paid sick leave for COVID-19-related absences. This includes absences due to: (1) a federal, state, or local quarantine or isolation order issued due to COVID-19; (2) a health care provider's recommendation that the employee self-quarantine or self-isolate due to COVID-19; or (3) an employer's requirement that an employee not work due to concerns about the potential transmission of COVID-19. *This law became effective September 19, 2020*, and was enacted to fill gaps left by the federal Families First Coronavirus Response Act (FFCRA), which applies to private sector employers with 499 or fewer employees. The FFCRA requires qualifying employers to offer up to 80 hours of emergency paid sick leave and also expanded Family and Medical Leave Act (FMLA) benefits for specified reasons related to COVID-19.[1]

Under AB 1867, full-time employees or employees whose work schedule was at least 40 hours/week in the two weeks prior to the leave are entitled to 80 hours of COVID-19 supplemental paid sick leave. Part-time employees' supplemental sick leave can be calculated by: (1) the total number of hours the employee would normally be scheduled to work over two weeks if consistent; (2) 14 times the average number of hours worked by the employee each day in the six months prior to leave, or if the employee has been with the company for less than six months, the average over that time; (3) the total number of hours the employee has worked if they started less than 14 days prior to the leave. Wage statements or a separate writing must advise employees of the amount of supplemental paid sick leave available to them.

Employees using COVID-19 supplemental paid sick leave shall be compensated at the highest of (i) their regular rate of pay for their last pay period, (ii) the state minimum wage, or (iii) the local minimum wage to which the employee is entitled, but capped at $511 per day and $5,110 total.

SB 1159 CREATES REBUTTABLE PRESUMPTION OF WORKERS' COMPENSATION COVERAGE OF ILLNESS OR DEATH RELATED TO COVID-19

On September 17, 2020, Governor Newsom signed SB 1159 into law. Codified in Labor Code section 3212.86, SB 1159 creates a rebuttable presumption that an illness or death resulting from COVID-19 arises out of and in the course and scope of employment for workers' compensation benefit purposes. The law remains in effect through January 1, 2023 after which the traditional workers' compensation framework is presumed to apply.

In particular, SB 1159 establishes a rebuttable presumption for:

- employees who tested positive or were diagnosed with COVID-19 between March 19, 2020 and July 5, 2020 if the positive test or diagnosis occurred within 14 days of reporting to their place of employment;
- certain employees in the health care or public safety industry who tested positive or were diagnosed with COVID-19 on or after July 6, 2020 if the positive test or diagnosis occurred within 14 days of reporting to their place of employment; or
- any employee who tested positive or was diagnosed with COVID-19 on or after July 6, 2020 if the positive test or diagnosis occurred within 14 days of reporting to their place of employment and as a result of an "outbreak" at the workplace.

For purposes of the third presumption, an "outbreak" exists when:

- the employer has 100 employees or less at a specific place of employment and four employees have tested positive for COVID-19;
- the employer has more than 100 employees at a specific place of employment and 4% of employees have tested positive for COVID-19; or
- the place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

If the requirements of the presumptions are met, the employee is eligible to receive workers' compensation benefits and coverage; however, it is important to note that the presumptions are rebuttable and the employer may dispute workers' compensation coverage by presenting evidence that the employee did not contract COVID-19 at the workplace. For diagnoses occurring before July 6, 2020, the employer has only 30 days from the date of the workers' compensation claim to submit evidence rebutting the claim. For diagnoses occurring on or after July 6, 2020, the employer has 45 days from the date of the claim to submit disputing evidence.

SB 1159 also requires employers to report if an employee tests positive for COVID-19 to their claims administrator within three business days of learning of the diagnosis. Employers that fail to report or provide false information to their claims administrator may be subject to a penalty of $10,000.

Going forward, employers should familiarize themselves with SB 1159's reporting requirements and act quickly to dispute a claim if they have reason to believe an employee's illness did not arise out of and in the course of employment. Employers should also take appropriate measures within the workplace, including providing employees with sanitation products, requiring facial coverings, and enforcing social distance guidelines, in order to limit the potential for workers' compensation claims under SB 1159.

EMPLOYEE HANDBOOK / ARBITRATION AGREEMENTS

Conyer v. Hula Media Services, LLC – On August 26, 2020, the California Court of Appeal in *Conyer v. Hula Media Services, LLC*, ruled that an arbitration agreement contained in an employee handbook is a valid and enforceable contract, and that employers do not have an affirmative duty to apprise employees of the existence of the arbitration agreement. This is welcome news for employers, but one to watch, as it may not hold up to further scrutiny before the California Supreme Court. The Court granted Plaintiff's Petition for Review on December 16, 2020 and depublished the Court of Appeal's opinion, which appeared at 53 Cal.App.5th 1189 (2020).

In *Conyer*, plaintiff Michael Conyer filed suit against his former employer, Hula Media Services, LLC, alleging, among other things, claims for sexual harassment and discrimination. In response, Hula filed a motion to compel

arbitration on the grounds that the employee handbook given to Plaintiff contained a binding arbitration provision. In particular, Plaintiff signed the handbook's receipt and acknowledgement page, which indicated that he assented to the terms and conditions set forth in the handbook, including the arbitration agreement. Ultimately, the *Conyer* Court granted Hula's request to compel arbitration and ruled that the arbitration clause was binding on Plaintiff despite the fact that Hula did not explicitly inform him that the employee handbook contained an arbitration clause. The Court reasoned that a party who signs a contract is assumed to have read and understood its terms. Therefore, in signing the receipt and acknowledgement page, Plaintiff consented to be bound to all terms, including the arbitration agreement. The Court also ruled that any unfair terms in the arbitration agreement were severable, or could be removed from the agreement, and did not render the arbitration agreement, itself, unenforceable.

The Court's ruling in *Conyer* highlights the importance of well-drafted receipt and acknowledgement forms in employee handbooks and urges employers to be mindful of any unequal or unfair terms in arbitration agreements.

***Collie v. The Icee Company*, 52 Cal.App.5th 477 (2020)** – The Court of Appeal has further confirmed the significant distinction between the litigation of class actions and claims under the Private Attorneys General Act of 2004 ("PAGA"). Indeed, although arbitration agreements that contain class action waivers can preclude class-wide adjudication of claims, they do not bar PAGA actions because of the unique nature of a PAGA claim.

In *Collie*, the employee filed a PAGA complaint on behalf of himself and other aggrieved employees against his employer Icee. The trial court denied the employer's motion to compel arbitration on the basis of a predispute arbitration agreement. The Court of Appeal affirmed the trial court's ruling, agreeing with previous decisions, which determined that the State of California – the real party in interest in a PAGA action – is not bound by an employee's agreement to arbitrate. The Court stated that it did not matter that Icee wanted to compel arbitration of Collie's cause of action on "an individual basis," as opposed to as a representative of other aggrieved employees. "Either way, Collie is suing 'as a proxy for the state [and] only with the state's acquiescence.'" Accordingly, the Court ruled that the employee's predispute arbitration agreement does not encompass Collie's PAGA action.

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The burdens of employing people in California continue to rise. As a result, it is becoming increasingly important for employers to proactively determine, before they get sued, where they are vulnerable. 2021 will be interesting for businesses of all sizes, and Tucker Ellis will continue to carefully monitor the impact of these new laws and decisions. Happy 2021!

[1] The recently passed Bipartisan-Bicameral Omnibus COVID Relief Bill did not extend the paid leave mandate of the FFCRA that provided 14 mandatory paid sick days for workers who fell ill with COVID-19 or who had to care for someone with the virus beyond December 31, 2020. However, the new bill provides a refundable tax credit that allows employers the option to continue to voluntarily offer FFCRA paid leave.

ADDITIONAL INFORMATION

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