Employer Update

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Recent Employment Law Developments in California

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In This Issue

With a robust economy and deep pool of talent and human capital, California continues to attract business from around the world. Employers undoubtedly benefit greatly from having operations in the Golden State, but also must grapple with an ever-changing web of rules and regulations applicable to their employment relationships.

In this article, we discuss several statutes enacted by the California legislature in the past couple of years that employers should consider if they wish to comply with California law and avoid unexpected and often expensive employment law claims.

Infection Prevention Requirements

Effective January 1, 2021, AB 685 added California Labor Code Section 6409.6 which requires employers to notify employees of potential COVID-19 exposures in the workplace. If an employer or its representative receives notice of "potential exposure to COVID-19," then within one business day the employer must provide written notice to all employees (and employers of subcontracted employees) who were present at the same worksite as the individual reported to the employer as having had COVID-19 (as determined by a laboratory test, licensed healthcare provider, or public health official) during the infectious period. Section 6409.6 defers to the California Department of Public Health's ("CDPH") definition of "infectious period," which begins for symptomatic individuals two days prior to the development of symptoms and ends when all of the following conditions have been met: (i) ten days have elapsed since symptoms first appeared, (ii) 24 hours have passed with no fever and no use of fever reducing medications, and (iii) other symptoms have improved. For asymptomatic individuals who test positive, the infectious period begins two days prior to, and ends ten days after, the employee provided the test specimen.[1] Employers must provide notice written in a language understood by the majority of employees and in a manner the employer normally communicates employment-related information, such as email, personal service, or text message. The notice must inform employees of their potential exposure to COVID-19 and any disinfection or safety plan the employer plans to implement per the guidelines of the Centers for Disease Control and Prevention as well as provide information regarding COVID-19-related benefits to which the employee may be entitled under federal, state, or local laws, including but not limited to, workers' compensation, leave set forth by statute, leave provided to employees pursuant to the employer's

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policies or practices, as well as anti-retaliation and anti-discrimination protections of the employee.

Further, Section 6409.6 requires non-healthcare employers to provide notice to their local health agency within 48 hours of receiving notification that the number of cases at a worksite meets the definition of a "COVID-19 outbreak," which CDPH has defined as three COVID-19 cases at the same worksite within a 14-day period.[2] Further, any employer with a "COVID-19 outbreak" must continue giving notice of subsequent laboratory-confirmed cases of COVID-19 at the worksite.

In addition to notification requirements, AB 685 further incentivizes employers to implement appropriate COVID-19 safety protocols by lowering hurdles and increasing the speed with which California's Division of Occupational Safety and Health ("Cal/OSHA") can issue employers citations for serious violations and Stop Work Orders, also known as Orders Prohibiting Use. Prior to AB 685, Cal/OSHA had to issue a pre-citation notice to the employer at least 15 days prior to issuing a citation for a serious violation related to COVID-19, or face a negative inference finding regarding Cal/OSHA's allegations. AB 685 revised (a) California Labor Code Section 6432 to permit Cal/OSHA to cite employers for serious violations without providing the employer with 15-days' notice and an opportunity to respond and (b) California Labor Code Section 6325 to permit Cal/OSHA to close worksites that in Cal/OSHA's reasonable opinion "constitute an imminent hazard to employees" by merely providing notice to the employer and posting such notice in a conspicuous place at the worksite.[3]

Expanded Leave Entitlements

Effective January 1, 2021, SB 1383 amended California Government Code Section 12945.2 by expanding the California Family Rights Act ("CFRA") to apply to smaller employers and expand the bases for which an employee can take leave. Under the updated CFRA, it is an "unlawful employment practice" for an employer with five or more employees to refuse to grant a qualified employee's request to take up to twelve workweeks of unpaid leave, during any twelve month period, to bond with a new child of the employee or to obtain self-care or care for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has a serious health condition. SB 1383 also expands the CFRA's definition of "child" to include children older than 18 years of age and adult dependents. The CFRA also makes it an "unlawful employment practice" to refuse to grant a qualified employee's request for up to twelve weeks of leave during any twelve month period due to a "qualifying exigency," defined as "events that arise out of the covered active duty or call to covered active duty of the spouse, domestic partner, child, or parent in the Armed Forces of the United States." Qualified employees include those who have at least twelve months of service with an employer employing at least five employees and 1,250 hours of service during the twelve months leading up to the leave.

Crime Victim's Leave

Effective January 1, 2021, AB 2992 expanded the anti-discrimination protections of California Labor Code Sections 230 and 230.1. Prior to the enactment of AB 2992, California Labor Code Sections 230 and 230.1 prohibited employers from discharging, discriminating, or retaliating against employees who were victims of domestic violence, sexual assault, or stalking, and needed to take time off from work to obtain or attempt to obtain relief to help ensure health, safety, or welfare of the victim or the victim's child. California Labor Code Section 230 also requires employers to provide reasonable accommodations to victims of domestic violence, sexual assault, or stalking who request such accommodations at work, such as a modified schedule, changed work station, or lockable office. AB 2992 extends the time off protection to all victims of a crime that caused physical injury or which caused mental injury with the threat of physical injury and to employees who have had an "immediate family member" deceased as a direct result of a crime. But notably, aside from prohibiting discrimination for taking time off as described above, AB 2992 did not expand employers' obligation to provide reasonable accommodations to all victims of violent crime.

Employees taking leave pursuant to California Labor Code Sections 230 or 230.1 must provide reasonable

advance notice to the employer, unless such notice is not feasible. The law permits employers to request documentation of the employee's status as a "victim" entitled to leave under the Sections 230 and 230.1, which an employee may satisfy with any form of documentation that reasonably verifies the crime or abuse occurred, including a written statement signed by the employee. Further, pursuant to California Labor Code Section 230.1, employers with more than 25 employees must not discriminate or retaliate against a victim who takes time off from work to seek services from a domestic violence shelter or victim services organization, obtain mental health services, or to participate in safety planning or other actions to increase safety. Employees who suffer adverse employment actions in violation of California Labor Code Sections 230 and 230.1 could be entitled to reinstatement, backpay, and other appropriate equitable relief.

Employee Releases

Across the United States, employers frequently ask employees to waive any claims they may have against the employer in exchange for a promotion, raise, bonus, or other consideration. But California employers must remain cognizant of California Government Code Section 12964.5 which sets boundaries related to an employer's ability to obtain a release of claims under California's Fair Employment and Housing Act. Effective as of January 1, 2019 this statute provides that it is an "unlawful employment practice" when "in exchange for a raise or bonus, or as a condition of employment or continued employment," the employer requires the employee to release any and all claims he or she may have under California's Fair Employment and Housing Act, codified as Government Code §§12900 - 12999. The statute further prohibits an employer from "requir[ing] an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment" in exchange for a raise, bonus, employment, or continued employment.

Notwithstanding these prohibitions, Section 12964.5 does not apply to provisions in settlement agreements resolving existing claims already filed with a court, government agency, alternative dispute resolution forum, or through an employer's internal complaint process, so long as the employee received notice and an opportunity to retain an attorney and enters into the agreement voluntarily, deliberately, and informed of its contents.[4] Further, Section 12964.5 does not prohibit employers from obtaining a general release of claims, including claims under the Fair Employment and Housing Act, and nondisparagement agreements in exchange for a cash payment or other consideration separate and apart from any raise, promotion, bonus or condition of employment.[5] Thus, employers reasonably may seek such a general release in exchange for severance pay upon termination of employment or with respect to settlement of known, outstanding claims, because such a releases would not be a precondition to a "raise, promotion, bonus or condition of employment."

Confidentiality in Settlement Agreements

Also effective January 1, 2019, California Code of Civil Procedure Section 1001 prohibits including in a settlement agreement regarding workplace sex discrimination or sexual harassment, and related allegations regarding retaliation, any provision that would prevent disclosure of the factual information underlying the alleged misconduct. At the request of the alleged victim of sex discrimination or sexual harassment, however, a settlement agreement may include provisions shielding the identity of the alleged victim, except where a government agency or public official is party to the agreement. Notably, Section 1001 permits provisions in settlement agreements that preclude disclosure of the consideration paid to settle the claims of sex discrimination or sexual harassment.

[1] *Employer Guidance on AB 685 Definitions*, CAL. DEP'T OF PUB. HEALTH (Oct. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-AB-685-Definitions.aspx.

[2] *Id*.

[3] *COVID-19 Infection Prevention Requirements (AB 685): Enhanced Enforcement and Employer Reporting Requirements*, CAL. DEP'T OF INDUS. REL (November 13, 2020), https://www.dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html.

[4] Cal. Gov. Code Section 12964.5(c); *Hamilton v. Juul Labs, Inc.*, Case No. 20-cv-03710-EMC, 2020 WL 5500377, at *9 (N.D. Cal. Sept. 11, 2020) ("while a waiver of a specific existing claim as part of the resolution of such claim is permitting, preemptively waiving all [FEHA] claims, including those which may be asserted in the future, is not [permitted].")

[5] *Hamilton v. Juul Labs, Inc.*, Case No. 20-cv-03710-EMC, 2020 WL 5500377, at *9 (N.D. Cal. Sept. 11, 2020) (favorably citing legislative history which reads "[t]his bill would not impact the use of waivers and releases in the context of settlement or severance agreements").

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