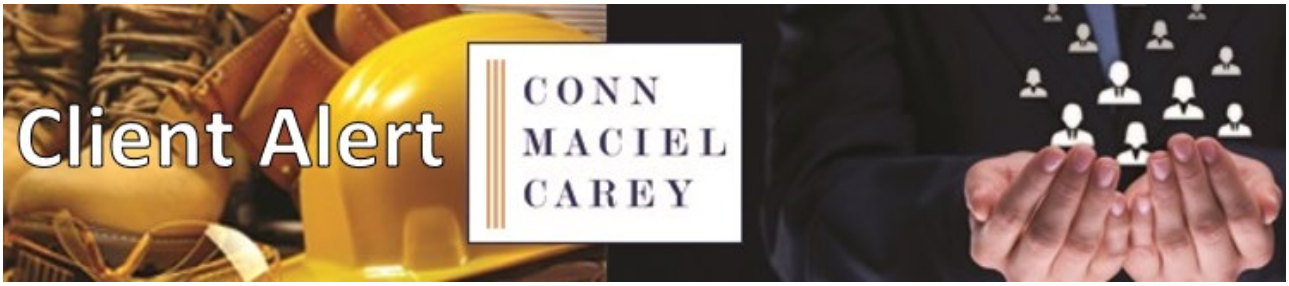

New California Employment Laws for 2021 Will Leave Their Mark

2020 has been another banner year for California employment laws, with legislation and Cal/OSHA rulemaking over COVID-19 prevention and reporting taking center stage. In this annual update of new employment laws impacting California private sector employers, we lead off with California's COVID-19 related laws given their far-reaching impact on the state's workforce during the pandemic as employers take measures to prevent the spread of COVID-19 in the workplace. We have addressed as well other substantive legislative developments, particularly in the areas of wage and hour law and reporting of employee pay data. Unless otherwise indicated, these new laws will take effect on January 1, 2021.

COVID-19 Related Rulemaking and Legislation

Temporary Emergency COVID-19 Prevention Rule

Not to be outdone by Virginia OSHA, Oregon OSHA or Michigan OSHA, Cal/OSHA adopted an onerous COVID-19 specific temporary emergency regulation *effective November 30, 2020*. Below is a detailed summary of how we got here, as well as an outline of what the rule requires.

On November 19, 2020, the California's Occupational Safety and Health Standards Board (Standards Board) voted unanimously to adopt an Emergency COVID-19 Prevention Rule following a contentious public hearing with over 500 participants in attendance (albeit virtually). The Emergency Rule was then presented to California's Office of Administrative Law for approval and publication. The Rule brings with it a combination of requirements overlapping with and duplicative of already-existing state and county requirements applicable to employers, as well as a number of new and, in some cases, very burdensome compliance obligations.

The Standards Board's emergency rulemaking was triggered last May with the submission of a Petition for an emergency rulemaking filed by worker advocacy group WorkSafe and National Lawyers' Guild, Labor & Employment Committee. The Petition requested the Board amend Title 8 standards to create two new regulations – the first, a temporary emergency standard that would provide specific protections to California employees who may experience exposure to COVID-19, but who are not already covered by Cal/OSHA's existing Aerosol Transmissible Diseases standard (section 5199, which applies generally to healthcare employers); and the second, a regular rulemaking for a permanent infectious diseases standard, including novel pathogens such as SARS-CoV-2. Note that emergency rulemakings are rare and must meet a high threshold designed to allow this abbreviated process; only when a true emergency necessitates this process.

On September 17, 2020, the Standards Board accepted the Division of Occupational Safety and Health's (Division) recommendation that the Petition be approved, finding that an emergency regulation "would strengthen, rather than complicate, [the Division's] enforcement efforts" and issued a decision granting (in part) WorkSafe's Petition. While the Board did not agree to implement

the specific proposed emergency regulation advanced by WorkSafe, it did instruct DOSH to work with Board staff to submit a new proposal for an emergency regulation.

Ultimately, the Standards Board published the Division's proposed emergency rule on November 12, 2020, giving the public only five days to comment on the 100-page rulemaking package. Conn Maciel Carey worked with a coalition of California and national employers to quickly evaluate the proposed emergency rule and develop comments that raised a number of serious concerns, not only about the substance of the rule, but also about the extremely rushed nature of the rulemaking process, which afforded the regulated community no real opportunity for meaningful input, and the Standards Board essentially no opportunity to consider comments.

Nonetheless, after a contentious public hearing, the Standards Board unanimously voted to adopt the Emergency Rule and the rule was approved by the Office of Administrative Law, California's final gatekeeper for new regulations.

Below is an outline of the Rule and a detailed list of the compliance obligations imposed on most California employers:

- ***Executive Summary***

At the heart of this emergency rulemaking is the requirement that employers develop a written COVID-19 prevention program consisting of well-established elements, such as physical distancing; face coverings; engineering and administrative controls; personal protective equipment (PPE); excluding from the workplace positive and exposed employees; return to work protocols; training; and employee communication. Consistent with California's Injury and Illness Prevention Program requirements, employers must also conduct workplace COVID-19 hazard assessments, adopt procedures for investigating and responding to every positive case, and develop procedures for correcting the hazards they identify. The rule also includes detailed reporting and recordkeeping mandates.

Additionally, California has adopted a series of unique requirements in the event of outbreaks (3 or more cases in 14 days) and major outbreaks (20 or more cases in 30 days), which include logistically challenging mandatory testing and mitigation measures.

- ***COVID-19 Prevention Program (CPP).*** Establish, implement and maintain a written COVID-19 prevention program which may but is not required to be integrated into the Illness and Injury Prevention Program.

The 11 required elements of an employer's CPP include:

- ***System for Communicating.*** Employers must do the following in a form that is readily understandable by employees:
  - Ask employees to report, without fear of reprisal, symptoms, possible exposures and possible COVID-19 hazards in the workplace.
  - Describe procedures or policies for accommodating employees with medical or other conditions that put them at increased risk.
  - Provide info about access to COVID-19 testing. If testing is required, inform affected employees of the reason for the testing and possible consequences of a positive test.
  - Communicate info about COVID hazards and the employer's policies and procedures to protect them.

- ***Identification and Evaluation of COVID-19 Hazards.***
  - Allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards.

- Develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms.
- Develop policies and procedures to respond immediately to individuals at the workplace who are a COVID-19 case (e.g., testing positive for COVID-19) to prevent/reduce transmission of COVID-19 in the workplace.
- Conduct a workplace-specific assessment of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards.
- Evaluate, for indoor workplaces, how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system.
- Review applicable orders and guidance from the State of California and the local health department, including general and industry-specific guidance.
- Evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls.
- Conduct periodic inspections as needed to identify unhealthy conditions, work practices, and work procedures related to COVID-19 and to ensure compliance with the employer's COVID-19 policies and procedures.

- ***Investigating and Responding to COVID-19 Cases.*** Adopt an effective procedure to investigate and respond to COVID-19 cases in the workplace, that includes procedures for verifying COVID-19 case status, receiving information regarding COVID-19 test results and onset of COVID-19 symptoms, and identifying and recording COVID-19 cases. Take the following actions in response to case:
  - Determine the day and time the COVID-19 case was last present and, to the extent possible, the date of the positive COVID-19 test(s) and/or diagnosis, and the date the COVID-19 case first had one or more COVID-19 symptoms, if any were experienced.
  - Determine who may have had a COVID-19 exposure (i.e., close contact).
  - Give notice of the potential COVID-19 exposure, within one business day, in a way that does not reveal any personal identifying information of the COVID-19 case, to the following:
    - All employees who may have had COVID-19 exposure and their authorized representatives.
    - Independent contractors and other employers present at the workplace during the high-risk exposure period.
  - Offer COVID-19 testing at no cost to employees during their working hours to all employees who had potential COVID-19 exposure in the workplace and provide them with the information on benefits described in training and exclusion rules.
  - Investigate whether any workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards

- ***Correction of Hazards.*** Implement effective policies or procedures for correcting unsafe or unhealthy conditions, work practices, policies and procedures in a timely manner based on the severity of the hazard, including implementing controls or policies and procedures in response to the required evaluations conducted and implementing physical distancing, face coverings and other controls.

- ***Training.*** Provide training to employees on the following topics:
  - The employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards.
  - Information regarding COVID-19-related benefits to which the employee may be entitled.
  - How COVID-19 spreads.

- Methods of physical distancing of at least six feet and the importance of combining distancing with face coverings.
- That particles containing the virus can travel more than six feet, especially indoors, so distancing must be combined with other controls, including face coverings and hand hygiene, to be effective.
- The importance of frequent hand washing with soap and water for at least 20 seconds and using hand sanitizer when employees do not have immediate access to a sink or hand washing facility, and that hand sanitizer does not work if the hands are soiled.
- Proper use of face coverings and the fact that face coverings are not respiratory protective equipment.
- COVID-19 symptoms, and the importance of not coming to work and obtaining a COVID-19 test if the employee has COVID-19 symptoms.

- ***Physical Distancing.*** All employees must be separated by at least 6 feet, except where it is demonstrated to be impossible (and except for momentary exposures while persons are moving). Separation may be achieved through recognized means such as telework, visual cues and floor markings, staggered shifts and breaks, and adjusted work practices, such as reduced production speeds. Maintain as much space as possible when 6 feet of separation is not possible.

- ***Face Coverings.*** Provide face coverings and ensure they are worn over nose and mouth when indoors and when outdoors and less than 6 feet apart from others, and that they are clean and undamaged. Face shields are not a replacement but may be used in addition. There are a number of exceptions to this requirement, including if an employee is alone in a room. Employees may remove face coverings to eat or drink, provided individuals are 6 feet apart and outside air supply has been maximized to the extent possible.
  - Adopt measures (signage, recordings, etc.) to advise non-employees of face covering requirements.
  - Develop policies and procedures to minimize exposure to individuals not wearing a face covering.

- ***Other Engineering & Admin Controls & PPE.***
  - **Barriers.** Install cleanable solid partitions where it not possible to maintain 6 feet of separation.
  - **Ventilation.** Maximize the quantity of outside air provided to the extent feasible, except when the US EPA Air Quality Index is greater than 100 for any pollutant or if opening windows or letting in outdoor air by other means would cause a hazard to employees, for instance from excessive heat or cold.
  - **Sanitation.**
    - Identify and regularly clean and disinfect high-touch surfaces, informing employees of protocols and frequency of same.
    - Prohibit the sharing of equipment and minimize when that is not possible.
    - Clean and disinfect areas, material and equipment used by COVID-19 positive individual during high-risk exposure period.
  - **Handwashing.** Evaluate handwashing facilities, determine the need for additional facilities, encourage and allow time for employee handwashing (encouraging them to do so for at least 20 seconds), and provide employees with an effective hand sanitizer.
  - **Personal Protective Equipment.**
    - Evaluate the need for PPE to prevent exposure to COVID-19 hazards, such as gloves, goggles, and face shields, and provide such PPE as needed.

- Evaluate the need for respiratory protection when physical distancing requirements are not feasible or are not maintained.
- Provide and ensure use of respirators in accordance with Cal-OSHA standards when deemed necessary by the Division through the Issuance of Order to Take Special Action.
- Provide and ensure use of eye protection and respiratory protection in accordance with section 5144 when employees are exposed to procedures that aerosolize fluids.

- ***Reporting, Recordkeeping & Access.***
  - Report information about COVID-19 cases at the workplace to the local health department whenever required by law, and provide any related information requested by the local health department.
  - Report immediately to the Division any COVID-19-related serious illnesses or death, as required by the Cal-OSHA reporting rule, of an employee occurring in a place of employment or in connection with any employment.
  - Maintain records of the steps taken to implement the written COVID-19 Prevention Program.
  - The written COVID-19 Prevention Program shall be made available at the workplace to employees, authorized employee representatives, and to representatives of the Division immediately upon request.
  - Keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test. Medical information shall be kept confidential. The information shall be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.

- ***Exclusion of COVID-19 Cases.***
  - Ensure that COVID-19 cases are excluded from the workplace until the return to work requirements are met.
  - Exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case. (Note, however, that by recent Executive Order the quarantine period for asymptomatic close contacts has been reduced from 14 days to ***10 days*** from the date of last exposure with or without testing)
  - For employees excluded from work under these rules and otherwise able and available to work, employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation.
    - EXCEPTION 1: Salary continuation does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission.
    - EXCEPTION 2: Salary continuation does not apply where the employer demonstrates that the COVID-19 exposure is not work related.

- ***Return to Work Criteria.***
  - COVID-19 cases with COVID-19 symptoms shall not return to work until:

- At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
- COVID-19 symptoms have improved; and
- At least 10 days have passed since COVID-19 symptoms first appeared.

- COVID-19 cases who tested positive but never developed COVID-19 symptoms shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.
- A negative COVID-19 test shall not be required for an employee to return to work.

- ***Multiple COVID-19 Infections and COVID-19 Outbreaks (Outbreaks)***

  - **Criteria**
    - When workplace is so designated by health department; or
    - When there are 3 or more cases in an exposed workplace, as defined, within a 14-day period; and
    - Until there are no new cases for a 14-day period.

  - **Required Actions**
    - **COVID-19 testing.**
      - Provide COVID-19 testing to all employees (at no cost, during working time) at the exposed workplace except for employees who were not present during the period of an outbreak identified by a local health department or the relevant 14-day period(s).
      - Testing shall consist of the following:
        - Immediately upon the outbreak test all employees in the exposed workplace and then tested again one week later.
        - After the first two COVID-19 tests, provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or more frequently if recommended by the local health department, until there are no new cases for a 14-day period.
        - Provide additional testing when deemed necessary by the Division through the Issuance of Order to Take Special Action.
    - **Exclusion.** Ensure COVID-19 cases and employees who had COVID-19 exposure are excluded from the workplace in accordance with the exclusion and return to work sections of the employer's CPP and local health officer orders if applicable.
    - **Investigation and Correction.** Investigate immediately and determine possible workplace related factors that contributed to the COVID-19 outbreak by reviewing potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19. Document said review.
      - Investigate new or unabated COVID-19 hazards including (1) leave policies and practices and whether employees are discouraged from remaining home when sick; (2) COVID-19 testing policies; (3) insufficient outdoor air; (4) insufficient air filtration; and (5) lack of physical distancing.
      - Renew review every thirty days that the outbreak continues, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.
      - Implement changes to reduce the transmission of COVID-19 based on the investigation and review and consider (1) moving indoor tasks outdoors or having them performed remotely, (2) increasing outdoor air supply when work is done

indoors, (3) improving air filtration, (4) increasing physical distancing as much as possible, (5) respiratory protection, and (6) other applicable controls.

- **Notifications to Local Health Department.**
  - Immediately contact local health department but no longer than 48 hours after the employer knows, or with diligent inquiry would have known, of three or more COVID-19 cases for guidance on preventing the further spread of COVID-19 within the workplace.
  - Provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, the hospitalization and/or fatality status, and NAICS Code, and any other information requested by the local health department.
  - Continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.

- ***Major COVID-19 Outbreaks (Major Outbreaks)***

  - **Criteria**
    - When there are 20 or more COVID-19 cases in an exposed workplace, as defined, in a 30-day period; and
    - Until there are no new COVID-19 cases detected in the workplace for a 14-day period.

  - **Required Actions**
    - **COVID-19 testing.** Provide twice a week COVID-19 testing (at no cost during working hours), or more frequently if recommended by the local health department to all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace.
    - **Exclusion.** Ensure COVID-19 cases and employees with COVID-19 exposure are excluded from the workplace in accordance with these provisions and any relevant local health department orders.
    - **Hazard Investigation.** Conduct an investigation and implement changes, if any, as provided in the CPP.
    - **Ventilation/Air Quality.**
      - Filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system.
      - If MERV-13 or higher filters are not compatible with the ventilation system, use filters with the highest compatible filtering efficiency.
      - Evaluate whether portable or mounted HEPA filtration units, or other air cleaning systems would reduce the risk of transmission and implement their use to the degree feasible.
      - Determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards.
    - **Closure.** Evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.
    - **Additional Controls.** Implement any other control measures deemed necessary by the Division through the Issuance of Order to Take Special Action.
    - **Notifications.** Same as non-major outbreak section.

Note that the Division has issued answers to "Frequently Asked Questions" (FAQs) seeking to address concerns over the rule's ambiguity and inconsistency, for example, over the meaning of "exposed workplace" for outbreak purposes. We anticipate the Division will continue to update the FAQs over time.

COVID-19-Related Reporting Mandates (AB 685 and SB 1159)

Legislation enacted earlier in the year has overlapped to a degree with the emergency COVID-19 rule, and the Division is expected to update FAQs to address inconsistencies between Assembly Bill (AB 685) and the temporary emergency COVID-19 rule.

AB 685 requires employers to report to the local public health agency, within 48 hours, any "COVID-19 outbreak." Under the California Department of Public Health's (CDPH) guidance, an outbreak is considered three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period. CDPH is required to make the reported information available on its website allowing the general public to "track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry."

In addition to reports to local public health agencies, AB 685 requires employers to provide written notice to employees, as well as the employer of any subcontracted workers, who were at the same worksite during the infectious period as any employee testing positive for COVID-19 and "may have been exposed to COVID-19." This written notice must contain specific categories of information and be received by the employee within one business day "in a manner the employer normally uses to communicate employment-related information." AB 685 also requires notice to the potentially exposed employee's "exclusive representative" containing the same information as would be required in an incident report per a Cal/OSHA 300 injury and illness log.

Whether an employee "may have been exposed to COVID-19" is undefined, but the Division's current FAQs indicate that notice must be provided to all employees "who were on the premises at the same worksite as the person who was infectious with COVID-19 or who was subject to a COVID-19-related quarantine order."

Additionally, Senate Bill (SB) 1159 was signed into law, effective September 17, 2020, impacting the handling of California workers' compensation claims for COVID-19 illnesses. The law creates a "disputable presumption" that a COVID-19-related illness is compensable for workers' compensation purposes essentially where (1) the employee has tested positive for COVID-19 during an "outbreak" at the employee's place of employment and within 14 days after a day that the employee was in the workplace; and (2) the employee's last day in the workplace was on or after July 6, 2020. An "outbreak" exists if within 14 calendar days any of the following has occurred: (1) for an employer with 100 or fewer employees at a specific workplace, 4 employees test positive for COVID-19; (2) for an employer with more than 100 employees at a specific workplace, 4 percent of the employees test positive for COVID-19; or (3) the workplace is ordered closed by the health department or Division due to a risk of COVID-19 infection.

SB 1159 requires that available paid sick leave benefits be used and exhausted before any temporary disability benefits are paid. Also, it is important to note that a COVID-related illness is presumed compensable where it is not rejected by the employer within 45 days of the date the claim form is filed.

Notably, for any employee who has tested positive during an outbreak, the employer must report to its claims administrator, by email or fax, the following information regarding the employee within three business days from when the employer "knows or reasonably should know that an employee has tested positive for COVID-19":

1. That an employee has tested positive, without disclosing any personal identification information (unless the employee asserts that the infection is worked related and has filed a workers' compensation claim).
2. The date when the employee tests positive.
3. The specific address of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
4. 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 the specific place of employment.

The claims administrator must then use this reported information to determine if an "outbreak" has occurred for the purpose of administering claims under SB 1159. An employer that fails to provide this report may be cited by the Labor Commissioner and subject to penalties.

Industry-Specific COVID-19 Requirements (AB 2043, AB 2537, SB 275 and AB 2658)

In addition to broad-based legislation, the state has passed COVID-19-specific laws impacting various industries. First, AB 2043 requires the Division to routinely compile and report, via its internet website, information relating to "the subject matter, findings, and results of any investigation by the Division relating to practices or conditions prescribed in the guidance documents or a COVID-19 illness or injury" at a workplace of ***agricultural employees***, as defined***.*** This information must include at least all of the following:

1. Across all investigations, statistical information, including, but not limited to, the number of investigations in each county.
2. For each investigation, summary descriptive information.
3. For each investigation, a description of the Division's response, including, but not limited to, whether the response involved an onsite inspection of the facility, a virtual or remote inspection, a letter to the employer, or any other type of action by the Division.

Second, AB 2537 was enacted to mandate specific COVID-19 prevention measures for ***public and private sector employers providing direct patient in a general acute care hospital***, as defined. Beginning April 1, 2021, such employers must maintain a stockpile of the following equipment in the amount equal to three months of normal consumption: (A) N95 filtering facepiece respirators; (B) powered air-purifying respirators with high efficiency particulate air filters; (C) elastomeric air-purifying respirators and appropriate particulate filters or cartridges; (D) surgical masks; (E) isolation gowns; (F) eye protection; and (G) shoe coverings. These employers must also establish and implement effective written procedures for periodically determining the quantity and types of equipment used in its normal consumption.

Similarly, SB 275 requires that, commencing January 1, 2023, or one year after the adoption of specified regulations (whichever is later), ***health care employers***, including clinics, health facilities, and home health agencies, maintain an inventory of new, unexpired PPE for use in the event of a declared state of emergency, and the inventory must be at least sufficient for 45 days of surge consumption, as determined by regulation. Such health care employers must provide an inventory of its PPE to the Division upon request. The law further requires the Department of Industrial Relations to adopt regulations, in consultation with the State Department of Public Health, setting forth requirements for determining 45-day surge capacity levels for a health care employer's PPE inventory.

Lastly, AB 2658 amends legal protections against retaliation of any employee for refusing to perform work in violation of prescribed safety standards, to define "employee" to include a ***domestic work employee*** (except for where the individual's work is publicly funded). The legal protections are codified under Labor Code sections 6310, 6311 and 6399.7.

Employer Submission of Employee Pay Data (SB 973)

SB 973 requires private employers with 100 or more employees to submit an annual report of employee pay data to the California Department of Fair Employment and Housing (DFEH), beginning March 31, 2021 and annually each year thereafter. The SB 973 pay data report is similar to the now suspended federal EEO-1 pay reporting requirement.

The pay data reported to the DFEH must include at least the following information:

- The number of employees by race, ethnicity, and sex in each of the following ten job categories: executive or senior level officials and managers; first or mid-level officials and managers; professionals; technicians; sales workers; administrative support workers; craft workers; operatives; laborers and helpers; and service workers. (For purposes of establishing the numbers required to be reported, an employer must create a "snapshot" that tabulates the number of the individuals in each job category by race, ethnicity, and sex, employed during the snapshot period).
- The number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. (For purposes of establishing the numbers to be reported, the employer must identify the total earnings during the reporting year, as shown on the Internal Revenue Service Form W-2, for each employee in the snapshot, regardless of whether the employee worked for the full calendar year).
- The total number of hours worked by each employee counted in each pay band during the reporting year.

The data reports must be submitted in a searchable format. DFEH intends to issue a standard form for employers to use in submitting their pay data reports and provide a submission portal to do so. SB 973 prohibits employees of the DFEH or Division of Labor Standards Enforcement from making public any individually identifiable information submitted to DFEH as a part of the pay data report prior to certain investigation or enforcement proceedings.

Independent Contractor Status

The ABC test, introduced by the California Supreme Court's 2018 *Dynamex* decision and expanded by last year's AB 5, has evolved yet again with AB 323 and 2257. Existing law provides that for purposes of the Labor Code, Unemployment Insurance Code, and wage orders of the Industrial Welfare Commission, a worker who performs services for hire is an independent contractor only if the hiring entity establishes each of the following three factors:

(A) that the worker is free from the control and direction of the hiring entity in performing the work;
(B) that the worker performs work that is outside the usual course of the hiring entity's business; and
(C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Existing law also provides a number of exemptions from the ABC test for specified occupations and business relationships.

AB 323 expands the exemption for newspaper carriers by deleting the condition that a newspaper carrier work under contract either with a newspaper publisher or a newspaper distributor. The bill also extends the exemption period for newspaper carriers to January 1, 2022.

AB 2259 updates a number of existing exemptions, including those for business service providers, referral agencies and business-to-business relationships. The legislation also recognizes various additional exemptions including certain occupations within the performance arts and journalism, professions providing underwriting inspections and other services for the insurance industry, manufactured housing salespersons, workers engaged by an international exchange visitor program, consulting services, animal services, competition judges with specialized skills, licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, and feedback aggregators.

As was the case with AB 5, the exemptions are numerous and often include various restrictions and conditions that must be met for an exemption to apply. In general, where a worker is covered by an exemption, the determination of employee or independent contractor status is governed by the multi-factor test established by the California Supreme Court's decision in *Borello* rather than the ABC test. However, note that some exemptions alter the test that will apply in determining employee or independent contractor status.

Additionally, with the approval of Proposition 22 by voters in the November 3, 2020 election, app-based transportation and delivery drivers are considered independent contractors if they meet a number of conditions, including that the drivers be permitted to determine the hours they work, the requests they accept, and whether they work for other companies. Proposition 22 requires mandates specific to app-based companies including minimum earnings requirements, limits on working hours, certain healthcare subsidies and insurance requirements, as well as anti-discrimination and sexual harassment policies, training requirements, zero-tolerance policies for driving under the influence of drugs or alcohol, and criminal background checks.

Wage and Hour Developments

On Call Security Guards Subject to Collective Bargaining Agreement (AB 1512)

In its 2016 decision in *Augustus v. ABM Security Services*, the California Supreme Court concluded that state law prohibits an employer from requiring on-duty and on-call rest periods. AB 1512 creates a limited exception to this general rule for certain security officers through January 2, 2027. Where a registered security services officer is covered by a valid collective bargaining agreement meeting certain conditions, such worker may be required to remain on the premises and on call during rest periods, and may be required to carry and monitor a communication device during rest periods.

The collective bargaining agreement must expressly provide for the wages, hours of work, and working conditions of employees, and must expressly provide for rest periods for those employees, final and binding arbitration of disputes concerning application of rest period provisions, premium wages for all overtime hours worked, and a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate. Such security officers must be permitted to restart a rest period as soon as practicable if the officer's rest period is interrupted. A subsequent uninterrupted rest period satisfies the rest period obligation. Employees who are not allowed to take a rest period must be paid one hour of pay for the missed rest period.

On Call Safety Sensitive Positions Subject to Collective Bargaining Agreement (AB 2479)

AB 2479 creates a similar exception from the general rule that nonexempt employees must be relieved of all duties during rest periods for certain employees in safety-sensitive positions at petroleum facilities, to the extent such employees may be required to carry and monitor a communication device and to respond to emergencies, or remain on the premises to monitor premises and respond to emergencies even during breaks. The exception only applies to employees covered by a valid collective bargaining agreement expressly providing for the wages, hours of work,

and working conditions of employees, and for rest periods for those employees, final and binding arbitration of disputes concerning application of rest period provisions, premium wages for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate. If an employee's rest period is interrupted, another rest period must be authorized. If circumstances do not allow for the employee to take a rest period, the employer must pay one hour of pay for the missed rest period. AB 2479 remains in effect until January 1, 2026.

Reimbursable Expenses for General Acute Care Hospitals (AB 2588)

Current law requires employers to reimburse employees for necessary business expenses. AB 2588 makes explicit that employer-provided or employer-required educational programs or training for an employee providing direct patient care for a general acute care hospital or an applicant for such employment are reimbursable expenses. Employer-provided or employer-required educational programs or training does not include licensing, registration, or certification programs necessary to legally practice in a specific employee classification to provide direct patient care. Likewise, education or training that is voluntarily undertaken by the employees or applicants solely at their discretion is not reimbursable. An employer is prohibited from retaliating against an applicant or employee for refusing to enter into a contract that violates this new provision.

Corporate Disclosures and Successors to Judgment Debtors (AB 3075)

AB 3075 requires a business entity filing a statement of information with the California Secretary of State to disclose whether any officer, director, member or manager has an outstanding final judgment issued by the Division of Labor Standards Enforcement or court of law, for which no appeal is pending, for a violation of any wage order or provision of the Labor Code. This requirement takes effect January 1, 2022, or upon certification by the Secretary of State that its California Business Connect is implemented, whichever is earlier.

This law also expressly provides that a successor to any judgment debtor shall be liable for any wages, damages and penalties owed to the judgment debtor's former workforce pursuant to a final judgment. Lastly, the law makes explicit that local jurisdictions may enforce local standards relating to the payment of wages that are more stringent than state standards.

Public Works Contracts for Charter School (AB 2765)

Existing law defines "public works" for the purpose of regulating public work contracts, including the payment of prevailing wages for workers employed on such projects. AB 2765 expands the definition of "public works," for the purpose of prevailing wage payments, to include construction, alteration, demolition, installation, or repair work done *under private contract on a project for a charter schoo*l, as defined, when the project is paid for with proceeds of conduit revenue bonds issued on or after January 1, 2021.

Exception to the "No Rehire" Ban (AB 2143)

In last year's legislative update, we addressed AB 749 barring any agreement to settle an employment dispute from containing a provision "prohibiting, preventing or otherwise restricting" the employee from obtaining employment with the employer or "any parent company, subsidiary, division, affiliate or contractor of the employer." This year, AB 2143 adds an exception permitting no rehire clauses where the employee engaged in criminal conduct. Therefore, two exceptions to the no-rehire provision exist where either: (1) a good faith determination was made of sexual harassment or sexual assault *before* the aggrieved party filed its claim against the employer, or (2) a good faith determination of criminal conduct was made *before* the aggrieved party filed its claim.

Amendments to Labor Code Discrimination Claims (AB 1947)

AB 1947 extends the statute of limitations under Labor Code section 98.7 for an employee to file a discrimination complaint with the California Labor Commissioner, from six months to one year after the employee was "discharged or otherwise discriminated against." AB 1947 also amends Labor Code section 1102.5 to authorize the court to award reasonable attorneys' fees to an employee who prevails in demonstrating that their employer violated these provisions against retaliation. Section 1102.5 specifically prohibits employers from, among other actions, retaliating against an employee who has disclosed information that the employee believes supports a legal violation to a government agency, or an employee with authority to investigate, discover or correct the alleged violation.

Leave Entitlements

Kin Care (AB 2017)

Existing law requires California employers to allow employees to take up to half of their accrued sick leave to care for a family member, as defined, under what is commonly referred to as "kin care." AB 2017 clarifies that the designation of such sick leave "shall be made at the sole discretion of the employee."

Expanding Paid Family Leave to Include Military Service (AB 2399)

AB 2399 expands paid family leave to cover qualifying military service. Under the state disability insurance program, employees may be eligible for Paid Family Leave that replaces wages and benefits to employees who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth of placement. Beginning January 1, 2021, covered California employees will also be able to take paid family leave to *participate in a qualifying exigency related to the covered active duty or call to covered active duty of the covered employee's spouse, domestic partner, child, or parent in the United States Armed Forces.* AB 2399 requires the same documentation as existing law to qualify for leave—a copy of the new active duty order or other documentation issued by the military.

Expanded Protections for Crime Victims (AB 2992)

AB 2992 expands protections for employees who are victims of crime. Existing law prohibits an employer with 25 or more employees from discharging, discriminating, or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off work to obtain or attempt to obtain relief to help ensure the health, safety, or welfare of the victim or the victim's child. AB 2992 clarifies that these protections apply to all victims of a crime who must miss work, either planned or otherwise, (1) to seek medical attention for injuries caused by the crime or abuse, (2) to obtain services from prescribed entities because of the crime or abuse, (3) to obtain psychological counseling or mental health services related to the crime or abuse, and (4) to participate in safety planning and take other actions to increase safety from future crime or abuse.

* * * * * * * * * *

Please contact us with any questions about this update.

Andrew J. Sommer
Partner, Labor • Employment Practice Group
& OSHA • Workplace Safety Group
Conn Maciel Carey LLP
415.268.8894
asommer@connmaciel.com

Megan S. Shaked
Associate, Labor • Employment Practice Group
& OSHA • Workplace Safety Group
Conn Maciel Carey LLP
415.268.8882
mshaked@connmaciel.com

Ashley D. Mitchell
Associate, Labor • Employment Practice Group
& OSHA • Workplace Safety Group
Conn Maciel Carey LLP
312.971.9402
amitchell@connmaciel.com

Last Updated December 23, 2020

Conn Maciel Carey's national Labor & Employment Practice Group represents employers in all aspects of the employment relationship. The firm works to create dynamic solutions for difficult workplace challenges facing employers. Our litigators defend employers in lawsuits filed in both federal and state courts. We also advise unionized and non-unionized workplaces regarding management's rights under federal labor law. For more information, please visit www.connmaciel.com.