WINSTON & STRAWN LLP

CLIENT ALERT

California Enacts New Laws for 2021

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The California legislature had a busy year responding to the pandemic and implementing new laws for 2021. The newly enacted laws touch almost every aspect of employment law – including leaves of absence, COVID-19 notice and reporting obligations, wage and hour, and retaliation protections. Below is a summary of the changes that took effect on January 1, 2021, and that all California employers should be aware of.

2021 CALIFORNIA STATE MINIMUM WAGE LAWS

The start of the year brought new changes to California's minimum wage laws. Effective January 1, 2021, California's statewide minimum wage increased to $14 per hour for employers with 26 or more employees and $13 per hour for employers with 25 or fewer employees. This latest increase moves California closer to its goal of a $15 per hour minimum wage by 2023.

2021 CALIFORNIA LOCAL MINIMUM WAGE ORDINANCES

Some California cities and counties have enacted their own minimum wage ordinances that exceed state requirements. The chart below shows the increases to the local minimum wage rates throughout California that took effect on January 1, 2021:

JURISDICTION	MINIMUM WAGE – EFFECTIVE JANUARY 1, 2021
Alameda	$15.00/hour
Berkeley	$16.07/hour

JURISDICTION	MINIMUM WAGE – EFFECTIVE JANUARY 1, 2021
Emeryville	$16.84/hour
Fremont	$15.00/hour (26 or more employees) $13.50/hour (1–25 employees)
Los Angeles (City and Unincorporated Areas of the County)	$15.00/hour (26 or more employees) $14.25/hour (1–25 employees)
Malibu	$15.00/hour (26 or more employees) $14.25/hour (1-25 employees)
Milpitas	$15.40/hour
Novato	$15.24/hour (100 or more employees) $15.00/hour (26–99 employees), and $14.00/hour (1–25 employees)
Pasadena	$15.00/hour
San Francisco	$16.07/hour
South San Francisco	$15.24/hour
San Leandro	$15.00/hour
Santa Monica	$15.00/hour (26 or more employees) $14.25/hour (1–25 employees)

JURISDICTION	MINIMUM WAGE – EFFECTIVE JANUARY 1, 2021
Santa Rosa	$15.20/hour

SALARY INCREASES FOR EXEMPT EMPLOYEES

The statewide minimum wage increase affects many exempt employees because the minimum salary certain exempt employees must receive is at least twice the state minimum wage. The minimum salary threshold is now $58,240 per year (or $1,120 per week) for employers with 26 or more employees and $54,080 per year (or $1,040 per week) for employers with 25 or fewer employees.

TAKEAWAYS

Employers must comply with both the state and the local minimum wage increases. Where the local minimum wage rate exceeds the statewide rate, employers must comply with the local law. The location where the employee works determines the minimum wage that applies.

Employers should also ensure that exempt employees are paid the increased salary threshold. If the salary threshold is not satisfied, employers should evaluate whether to increase compensation to meet the threshold or to reclassify the employee as nonexempt.

CFRA SIGNIFICANTLY EXPANDED TO PROTECT CALIFORNIA WORKERS AFFECTED BY COVID-19

Effective January 1, 2021, California significantly expanded the California Family Rights Act ("CFRA") by applying it to all employers with five (5) or more employees, by expanding coverage to include the ability to care for a serious health condition of more family members, and by eliminating certain previous restrictions on the use of CFRA leave. These changes add further distinctions between the CFRA and the Family Medical Leave Act ("FMLA"), and could create entitlements for employees under both laws.

Under previous law, employers were not required to provide family care and medical leave under CFRA if the employee seeking the leave worked at a worksite with fewer than 50 employees within a 75-mile radius. In addition, employers were not required to provide "baby bonding" leave under the New Parental Leave Act if the employee seeking leave worked at a worksite with fewer than 20 employees within a 75-mile radius. All of this has changed in the new year.

Under the new law, an employee now must meet only the following criteria to qualify for up to 12 workweeks of unpaid, job-protected leave during any 12-month period for certain covered reasons under the CFRA:

- The employee worked for the employer for at least 12 months (can be nonconsecutive work over a seven-year period, except that any military leave time while employed is counted towards the 12 months); and
- The employee worked at least 1,250 hours in the 12-month period prior to taking CFRA leave.

The new law also expands CFRA leave to care for a family member with a serious health condition to include more family members of the qualified employee. Covered family members now include grandparents, grandchildren, and siblings, in addition to parents, children, spouses, or registered domestic partners. It also allows employees to care for their adult children over 18 years of age with a serious health condition unless that child is incapable of self-care because of a physical or mental disability.

With the new law's additions to CFRA leave use, qualified employees can take CFRA leave for any of the following reasons (with the new additions in bold text):

- Up to 12 weeks of baby-bonding **for both parents, even if they work for the same employer**, for the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee;
- To care for a child (**including an adult over 18 years of age**), parent, **grandparent**, **grandchild**, **sibling**, spouse, or registered domestic partner who has a serious health condition;
- Because of an employee's own serious health condition; or
- Because of a **qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child, or parent in the U.S. Armed Forces**.

The new law also contains other significant changes. It requires an employer that employs both parents of a child to grant up to 12 weeks of leave to each employee. Previously, employers only had to grant both employees a combined total of 12 weeks of leave. It also eliminates the "key employee" exception to an employee's right to reinstatement. Previously, under the CFRA (which mirrored the FMLA in this regard), there was a very limited "key employee" exemption that allowed an employer the ability to deny reinstatement to an employee who took CFRA leave where the employee was among the highest-paid 10% of the employer's employees, and certain other conditions were met.

The above-described changes to the CFRA create a greater potential for employees who are covered under both the FMLA and CFRA to have their leaves not run concurrently with FMLA, including under the following circumstances:

1. leave to care for a serious health condition of a registered domestic partner, grandparent, grandchild, sibling, or adult child with a serious health condition, regardless of whether the adult child is a dependent adult child; and
2. leave due to pregnancy-related conditions (because under the CFRA, pregnancy-related conditions are generally not considered a "serious health condition" unless the employee has already exhausted her separate Pregnancy Disability Leave, whereas they are considered a "serious health condition" under the FMLA).

In these two circumstances, it is possible that an employee could be eligible for up to 24 weeks of job-protected leave in a 12-month period.

Given the significant changes, we recommend that all California employers review their existing CFRA and leave policies to ensure compliance.

COVID-19 WORKPLACE EXPOSURE NOTICE AND REPORTING REQUIREMENTS

Effective January 1, 2021, California employers must notify their employees and their unions about potential COVID-19 exposure in the workplace. The new law is aimed at allowing the state to track COVID-19 cases in the workplace more closely and will be in effect until January 1, 2023.

Under AB 685, the requirement to notify employees who may be exposed to an infected employee is now mandatory for public and private employers under new *Labor Code* Section 6409.6. The new law requires employers to take the following actions **within one business day** of a "potential exposure" based on a positive confirmed case of COVID-19 in the workplace:

- Provide written notice to all employees and employers of subcontracted employees who were at the worksite within the infectious period who may have been exposed to COVID-19;
- Provide written notice to employee representatives, including unions (if applicable);
- Provide written notice to employees and employee representatives regarding COVID-19-related benefits that employee(s) may receive, including workers' compensation benefits, COVID-19-related leave, company sick leave, paid sick leave, and supplemental paid sick leave, as well as the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and

- Provide written notice to employees, employee representatives, and employers of subcontracted employees regarding the company's disinfection protocols and safety plan to eliminate any further exposure, per CDC guidelines.

The written notice to employees must be provided in both English and the language understood by the majority of the company's employees and should be provided in a manner that does not reveal the identity of the individual who tested positive for COVID-19. It should also be communicated in a manner that the employer normally uses to communicate employment-related information, which may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending.

The new law also requires employers to notify the local public health department within 48 hours of notice if there are three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period. The notice must identify the number of infected individuals; the name, occupation, and worksite of those individuals; the employer's business address; and the NAICS code of the worksite. There is also a continuing obligation to give notice to the local health department of any subsequent laboratory-confirmed cases at the worksite.

Failure to comply with the new law may result in a civil penalty of up to $25,000 for each violation.

EMPLOYEES NOW HAVE SOLE DISCRETION TO DESIGNATE SICK LEAVE AS KIN CARE

By way of background, employees may take up to half of their California paid sick leave for "kin care" – to care for a family member, which includes a child, parent, legal guardian, spouse, registered domestic partner, grandchild, grandparent, and sibling. Effective January 1, 2021, employees taking California paid sick leave may designate the leave either for kin care, or for the employee's own health condition, or for obtaining relief if the employee is a victim of domestic violence, sexual assault, or stalking.

The new law is designed to prevent the inaccurate designation by employers of sick leave as kin care where leave was in fact taken for personal reasons, thereby preventing the depletion of an employee's available kin care leave.

Employers with sick leave policies that provide annual use caps are encouraged to revise their sick leave policies and re-circulate them to employees to make clear that employees have the right to designate their sick leave. Employers are further encouraged to implement a system that accurately tracks the type and amount of sick leave each employee has taken. Employers should keep in mind that local sick leave ordinances may impose additional requirements and protections. Consult legal counsel for compliance issues and questions regarding local ordinances.

AB 2257 BREATHES NEW LIFE INTO INDEPENDENT CONTRACTOR STATUS FOR SOME WORKERS

In its 2018 *Dynamex* decision, the California Supreme Court adopted the so-called "ABC" test for independent contractors. The ABC test makes it more challenging for employers to properly classify workers as independent contractors because a worker is presumptively an employee and will be properly classified as an independent contractor only if:

A. The worker is free from the direction and control of the company;

B. The worker performs work that is outside the company's main business; and

C. The worker is normally performing work in an independent business or trade that is in the same vein as the work he or she is performing for the company.

In 2020, Governor Newsom signed Assembly Bill 5, which wrote the ABC test into state law. It also included carveouts for certain workers to maintain their independent contractor status if they met the previously used *Borello* test. Included among the carveouts were doctors, private investigators, barbers, and hairdressers.

The Legislature expanded the carveouts through AB 2257. Now, certain freelancers, gig-economy workers, entertainers, and others can more easily be classified as independent contractors. It is likely that there will be

further legislative efforts to make changes to the law and to enact further exemptions in the years to come. Given the rapidly changing landscape with regard to this area of the law, we recommend seeking counsel before reclassifying any existing workers.

CALIFORNIA PUBLICLY HELD CORPORATIONS MUST DIVERSIFY BOARDS OF DIRECTORS

By the end of 2021, certain publicly held corporations in California must include at least one director from an underrepresented community, defined as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender. This requirement applies to any publicly held domestic or foreign corporation with outstanding shares listed on a major U.S. stock exchange, whose SEC 10-K form identifies its principal executive offices as located in California – regardless of where the company is incorporated. By the end of 2022, this requirement may increase depending on the size of the board:

i. boards with four or fewer directors must continue to have at least one director from an underrepresented community;

ii. boards with five to eight directors must have at least two directors from an underrepresented community; and

iii. boards with nine or more directors must have at least three directors from an underrepresented community.

Corporations that fail to comply with the regulations may be subject to a fine of $100,000 for the first violation, or $300,000 for a second or subsequent violation. Failure to timely file board member information with the Secretary of State may also result in a $100,000 fine.

AB 1947 – AMENDMENTS TO CALIFORNIA *LABOR CODE* RETALIATION PROTECTIONS

California *Labor Code* section 98.7 allows employees who believe that they have been discharged or otherwise discriminated against in violation of any *Labor Code* section to file a complaint with the Labor Commissioner. Before 2021, employees were required to file any complaint within six months of any alleged violation. AB 1947, which took effect January 1, 2021, extended the time for employees to submit a complaint to one year.

Labor Code section 1102.5 provides whistleblower protection for employees who disclose or provide information the employee has reasonable cause to believe evidences a violation of a federal or state law. The previous version of Section 1102.5 permitted employees to recover damages for any violation but did not allow for a recovery of attorneys' fees. AB 1947 amended section 1102.5 to specifically allow courts to award reasonable attorneys' fees.

NEW PAY DATA REPORTING REQUIREMENTS

By March 31, 2021, and annually every March 31 thereafter, California employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) under federal law must also submit a pay data report to California's Department of Fair Employment and Housing. The pay data report must include:

- The number of employees and the hours they worked by race, ethnicity, and sex in the same job categories used to report demographic information on EEO-1 forms; and
- The number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey.

Employers with multiple establishments must submit a report for each establishment and a consolidated report that includes all employees.

For further information about any of the above employment laws that took effect in 2021, please reach out to any of the attorneys listed below, or your Winston relationship attorney.

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