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Client Alert

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EMPLOYMENT LAW UPDATES TO PREPARE YOU FOR THE NEW YEAR

Before leaping into the new year, California employers should ensure that they are up to date on the latest modifications to the State's latest employment laws.

Expansion of Family Leave Rights

The California Family Rights Act (CFRA) which has historically mirrored the federal Family and Medical Leave Act (FMLA) has been changed. The CFRA will now apply to employers with five or more employees, as compared to fifty employees previously. There is no longer any requirement that the employees work within a 75-mile radius of the company. Employees will still, however, need to have logged 1,250 hours to be eligible for leave under the CFRA.

The reasons for taking leave under the CFRA have been expanded to include:

- An employee's serious health condition;
- To care for a parent, child (minor or adult), sibling, grandparent, grandchild, or registered domestic partner with a serious health condition;
- To care for and bond with a newborn or newly adopted child;
- Because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

The amended CFRA now permits parents working for the same employer to take up to 12 weeks of leave *per parent* for baby-bonding leave. The CFRA no longer contains a "key employee" exception.

Employee Designation of Sick Leave

Currently, California employers are obligated to permit employees to take up to half of their accrued sick leave to care for a family member ("kin care") or for time off related to domestic violence, sexual assault or stalking. Starting January 1, 2021 employees will have the sole discretion to designate the reason for which they use their available sick leave.

COVID-19 in the Workplace

Employer Notice Requirements

A new law imposes notice obligations upon California employers within one business day of receiving notice of a "potential exposure" to COVID-19. Employers must:

- 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. Employers should also notify anyone else who was at the worksite during the infectious period;
- Provide written notice to employee representatives, including unions and sometimes attorneys, who may represent employees;
- Provide written notice to employees and/or employee representatives regarding COVID-19-related benefits that employee(s) may receive, including

workers' compensation benefits, COVID leave, paid sick leave, and the company's anti-discrimination, anti-harassment, and anti-retaliation policies; and
- Provide notice to employees regarding the company's disinfection protocols and safety plan to eliminate any further exposures, per CDC guidelines.

The new law also obligates employers who experience a COVID-19 outbreak to report prescribed information to the local health department of the worksite within 48 hours of learning of the outbreak. There are similar reporting requirements in the event of COVID-19 fatalities of employees.

Workers' Compensation

In a separate piece of legislation that took effect in September, California has created two rebuttable presumptions that an employee's illness related to COVID-19 is an occupational injury giving rise to workers' compensation benefits where certain criteria are met. The first presumption applies to first responders and health care workers. The second presumption applies where an employer has 5 or more employees and an employee tests positive for COVID-19 during an "outbreak" at their specific workplace. An "outbreak" exists if within 14 days one of the following occurs at a specific place of employment: (1) four employees test positive if the employer has 100 employees or fewer; (2) four percent (4%) of the number of employees who reported to the specific place of employment test positive if the employer has more than 100 employees; or (3) a specific 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 of COVID-19.

Where an employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer must report certain information to its workers' compensation claims administrator within three business days. Employers who fail to report or who submit false or misleading information may be subject to civil penalties of up to $10,000.

Leaves of Absence

With regard to leaves of absence relating to COVID-19, the Families First Coronavirus Response Act ("FFCRA") applies to employers with less than 500 employees and certain government workers. The FFCRA allows an employee to take paid leave under certain circumstances, including COVID-19 illness, the need to quarantine due to COVID-19, or the need to care for a child whose school or place of care is closed due to COVID-19.

The FFCRA is currently set to expire on December 31, 2020. While it has not yet been extended, the likelihood is that Congress will take some form of action to either extend the Act or enact a new comparable piece of legislation. Employers are cautioned that if they refuse to allow leave pursuant to the Act after year's end, they risk liability exposure, including back pay, once the Act is renewed.

Local Supplemental Paid Sick Leave

In addition, California provides that all private employers with 500 or more employees must provide COVID-19 supplemental paid sick leave where under certain circumstances related to COVID-19, including the need to quarantine.

Los Angeles also enacted its own supplemental paid sick leave which covers employers with either 500 or more employees within the City of Los Angeles or 2,000 or more employees within the United States.

Quarantine Requirements

Earlier this month, Governor Newsom issued an executive order altering the Division of Occupational Safety and Health (Cal/OSHA) emergency temporary standard for COVID-19 related worker quarantines. Specifically, the order provides that all asymptomatic close contacts (within 6 feet of an

infected person for a cumulative total of 15 minutes or more over a 24-hour period) may discontinue quarantine after Day 10 from the date of last exposure with or without testing.

Employers should continue to monitor the State and local guidelines related to COVID-19 workplace safety protocols, along with the U.S. Centers for Disease Control's recommendations. Relevant information can be found at: https://www.cdph.ca.gov/, http://publichealth.lacounty.gov/ and https://www.cdc.gov/.

COVID-19 Vaccine

In California, where employment is at-will absent a written employment agreement to the contrary, employers are already permitted to make vaccinations mandatory subject to certain exceptions such as disability or religious belief. While the California Labor Commissioner has not yet issued guidance as to the COVID-19 vaccine, the Equal Employment Opportunity Commission (EEOC) published its guidance on this issue last week. Similar to other federal guidance relating to COVID-19, we expect California to follow suit and will continue to monitor and report on any developments.

According to EEOC, there are circumstances in which an employer can legally require an employee to receive the COVID-19 vaccination without violating the Americans With Disabilities Act (ADA), Title VII or other federal antidiscrimination laws. Specifically, a permissible basis to mandate vaccination is when a worker poses a "direct threat" to themselves or others by their physical presence in the workplace without being immunized. This means if the worker would pose "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." In other words, if an employee can work remotely without exposing other employees to the risk of transmission, the employer cannot require that person to become vaccinated.

Employers should keep in mind that they must still engage in the interactive process and provide a reasonable accommodation (absent undue hardship) that would eliminate any safety risk. Simply removing a disabled person from the workplace or taking other negative action would be unlawful. Supervisory personnel should be trained on how to recognize an employee's accommodation request and to take proper action in the event that the need for accommodation arises, including engaging in a flexible, interactive process to identify work options that do not create an undue hardship for the employer.

Note that employers are obligated to provide a reasonable accommodation to an employee whose religious beliefs prevent them from receiving the vaccination, unless doing so would pose an undue hardship under Title VII. An "undue hardship" is slightly different in the religious context than that of a disability. In a religious context, courts have defined it as "having more than a *de minimis* cost or burden" on the employer.

According to the EEOC, assuming that a mandatory vaccine is appropriate and accommodations do not come into play, employers can require employees to provide proof that they received the COVID-19 vaccine. To the extent that such proof includes private medical information, that information should be stored separately in a confidential file.

New Exceptions to AB 5, California's New "ABC Test" re Independent Contractor Status

AB 5 identified a series of specific categories of workers who were deemed exempt from the purview of the ABC Test such that the prior "Borello" factors would apply to determine independent contractor status. While the ABC Test continues to be in effect, a new law known as AB 2257 has expanded upon created additional exemptions, including real estate appraisers, competition judges, insurance underwriters and licensed landscape architects, among numerous others. The law also creates a new exemption for business-to-business relationships between two or more sole proprietors.

California voters passed Proposition 22 which sought to exempt app-based rideshare and delivery drivers from both AB 5 and AB 2257, allowing them to be treated as independent contractors.

Employer Pay Data Reporting Requirements

A new law will require private employers with 100 or more employees to submit an annual pay data report to the California Department of Fair Employment and Housing ("DFEH"). Specifically, employers must report: (1) The number of employees by race, ethnicity and sex in various job categories, including executive or senior-level positions, professionals, technicians, and laborers; (2) 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; (3) The total number of hours worked by each employee counted in each pay band during the reporting year; and (4) The employer's North American Industry Classification System (NAICS) code.

Submission will resemble annual Employer Information Reports (EEO-1) under federal law. Employers may choose any single pay period between October 1 and December 31 of each reporting year. The first reporting deadline is March 31, 2021, and on the same date each year thereafter.

Extension of Deadline for Employee Claims to Labor Commissioner

Currently, an employee with claims under the California Division of Labor Standards Enforcement (DLSE) have six months from the occurrence in which to file the claims. Starting January 1, 2021 employees will have one year to file these claims. The new law also adds a provision to the California Labor Code authorizing courts to award reasonable attorneys' fees to a plaintiff who brings a successful action for a violation of the law's "whistleblower" protections that prohibit an employer from retaliating against an employee who discloses suspected violations of the law to a government agency.

Mandatory Corporate Board Diversity

No later than the close of the 2021 calendar year, publicly held or foreign corporations whose principal executive office is in California must include a minimum of one director from an underrepresented community. This includes 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.

The number of directors from an underrepresented community that is required for corporations with four or fewer directors will remain the same for the year 2022. However, the requirement increases for larger boards. A corporation with nine or more directors must have at least three directors from underrepresented communities by the end of 2022. A corporation with over four but fewer than nine directors will need to have at least two directors from underrepresented communities by the end of 2022. The penalty for noncompliance is between $100,000-$300,000.

California Consumer Privacy Act ("CCPA") & California Privacy Rights Act of 2020 ("CPRA")

The CCPA went into effect January 1, 2020 and provides consumers with certain protections related to the collection, maintenance and use of their personal information. The law originally considered employees to be consumers under the law, thereby providing them with all of the expansive protections under the Act. This included the right to receive notice from employers about what personal information was being collected and maintained, and how that information would be used.

A subsequent law exempted employers from complying with the Act with regard to personal information obtained about an employee or job applicant (as well as contractor, director, medical staff member, officer or owner) if that information were to be used for (a) employment purposes; (b) having an emergency contact on file; or (c) administering benefits to the employee and their covered relatives. These employment-related exemptions were set to expire on January 1, 2021. However, in November California voters passed Proposition 24, the California Privacy Rights Act of 2020 ("CPRA") which extends the exemption related to job applicant and employee information to January 1, 2023.

Conclusion

As 2020 comes a close, now is the time to determine which of the above updates applies to your business and to make relevant policy changes. Employers should take a fresh look at their employee handbooks to verify that company policies are consistent with California law. It is also prudent for employers to implement COVID-19 supplements and to ensure that they are regularly updated as developments related to the pandemic continue to unfold.