



The California Legislature Is Back in Town! Which Pending Bills (and Executive Orders) Will Impact The Workplace?

Insights

7.24.20

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The author would like to thank Zachary Jones (a summer clerk with Fisher Phillips' Irvine office) for his significant contributions to this blog post.

After returning from its hiatus on May 4, the California legislature has wasted no time in drafting a flurry of new bills which will affect employers in the aftermath of the state's response to COVID-19. While the state legislature was away, however, Governor Gavin Newsom issued dozens of unilateral executive orders and local county and city governments passed COVID-19 paid sick leave and other ordinances which will affect California employers.

Looking ahead, the last day for the California legislature to pass these or any other new or proposed bills is August 31. Governor Newsom would then have until September 30 to sign or veto these bills. All bills that receive the governor's signature (or survive his veto via legislative override) would then become law with full statutory effect on January 1, 2021 – unless the text of the bill contains an urgency clause which would enact immediately upon signature.

Before examining the pending legislation, here's a review of recent Executive Orders that impact the workplace.

New Gubernatorial Executive Orders Affecting California Employers

Executive Order N-31-20 – 60-day WARN Act Notifications

California's equivalent of the federal Worker Adjustment and Retraining Notification (WARN) Act ordinarily requires that employers in the state larger than certain minimum size guidelines must give 60-days' notice to employees before conducting mass layoffs or implementing workplace closings or relocations. This executive order temporarily "loosens" employers' 60-days' notice requirement until the end of the governor's current state of emergency declaration if the following three conditions are met:

1. Workplace shutdowns or work cessations were caused by unforeseen COVID-19-related business circumstances;

2. The affected employer still must provide “as much notice as is practicable” in its written notice of layoffs or workplace closings/relocations to all affected employees, the California Employment Development Department, and all relevant local government offices and officials; and
3. The written notice must contain the following statement: “If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at ca.gov/coronavirus2019.”

Executive Order N-51-20 – **Paid Sick Leave for Food Sector Workers**

This order affects all such employees working anywhere within the broadly defined food supply industry (e.g. agriculture, food processing, grocery stores, restaurants, food delivery, etc.). It requires employers with 500 or more U.S. employees in these industries to provide up to 80 hours of additional “COVID-19 Supplemental Paid Sick Leave” to all full-time or full-time equivalent employees who are exempt from government stay-at-home orders and are required to leave home to perform work for their employers. This order lasts through the duration of the governor’s stay-at-home order.

Executive Order N-62-20 – **Workers’ Compensation COVID-19 Presumption**

This order applies to all COVID-19-related workers’ compensation claims within the State of California between May 6 to July 5, 2020, and it establishes a rebuttable presumption that an employee who contracts COVID-19 caught it at their workplace and is covered by workers’ compensation if:

- The employee tested positive or was diagnosed with COVID-19 within 14 days of performing work at the employer’s direction (on or after March 19, 2020);
- The employee’s workplace is not the employee’s own home; and
- A licensed physician issued the diagnosis and a test confirmed the diagnosis within 30 days.

This order also shortened the timeframe for rejection of claims from 90 days to 30 days.

Pending Legislative Bills And Developments Affecting California Employers

Here are the legislative proposals that you should keep your eye on as the legislative session heads towards its conclusion.

COVID-19 Response

Assembly Bill 3216 (Kalra, D-San Jose & Gonzalez, D-San Diego)

This major bill is shaping up to be California’s primary state legislative response to policies enacted by both local county and city governments and Congress’s Families First Coronavirus Response Act (FFCRA). AB 3216 sets out new employer requirements in several sections:

Unpaid Family And Medical Leave

AB 3216 would amend the California Family Rights Act (CFRA) to require employers in the state to provide unpaid leave for the following purposes due to an official declaration of a “state of emergency”:

- To care for a child, parent or spouse if the school or place of care has been closed;
- Being subject to a federal, state or local quarantine or isolation order (including shelter-in-place);
- Being advised to self-quarantine by a health care provider;
- Experiencing symptoms and seeking a diagnosis;
- Being a member of a “vulnerable population at high risk;” or
- Living with or being responsible for a family member who is a member of a vulnerable population.

AB 3216 would not require affected employees to provide medical certification of their diagnoses during the duration of the state of emergency declaration if it is not feasible for the employee to obtain this certification. However, the bill also allows employers to require employee self-certification or attestation of their being subject to one or more of the conditions listed above.

The bill is meant to enact these additional conditions upon which employees may claim unpaid family and medical leave, and as such any unpaid leave claimed by employees under this section *would run concurrently* with the existing 12-week period of unpaid leave as established by CFRA.

Paid Sick Leave

As originally drafted, AB 3216 required California employers to provide an *additional* seven days or 56 hours of paid sick leave to employees upon employee request for any of the following reasons:

- To seek diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee’s family member;
- For an employee subject to a federal, state, or local public health order;
- To care for a family member subject to such an order;
- To care for a child or family member whose school or place of care has been closed by a public health emergency; or
- For an employee who is subject to a federal, state, or local evacuation order related to a state of emergency.

However, amendments by the state Senate have reduced this additional paid leave requirement down to three days or 24 hours. Further Senate amendments also removed a requirement for employers to provide paid sick leave to employees *even if the place of employment was closed by the employer or by a public health official due to a state of emergency*.

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Right of Recall And Worker Retention

AB 3216 would also almost identical language to a local ordinance adopted by the Los Angeles City Council, and would apply to hotels, event centers, airport hospitality operations, and building services (including janitorial and security services). Employers in these industries would be required to offer employees who were laid off due to a public health emergency any position which the employee previously held or may have become qualified for before the declaration of the state of emergency.

Employers would be required to re-hire laid-off employees by seniority of their previous positions and would have to allow these employees 10 business days to accept or reject any re-hire offer. This section of the bill also contains a 90-day “worker retention” provision when ownership of business entities in the covered industry categories changes hands.

COVID-19 And Workers’ Compensation

A handful of other proposed bills would affect presumptions and burdens of proof in establishing workers’ compensation claims and benefits for industries heavily impacted by the coronavirus response.

- Assembly Bill 664(Cooper, D-Elk Grove) would create a “conclusive presumption” that any COVID-19 infection or injury arose out of and in the course of employment for police, fire, and health care employees who provide direct patient care.
- Assembly Bill 196(Gonzalez, D-San Diego) would create a similar “conclusive presumption” that COVID-19 infection or injury arose out of and in the course of employment for all “essential workers” other than those covered by AB 664.
- Senate Bill 1159(Hill, D-San Mateo & Daly, D-Anaheim) is intended to be a compromise bill which would both (1) codify the requirements of the governor’s Executive Order N-62-20 (as explained above), and (2) would establish a narrow “rebuttable presumption” that infection of COVID-19-positive employees arose out of and in the course of employment, although this bill is still being negotiated.

CFRA Expansion

Expansions of coverage under the California Family Rights Act were originally part of Governor Newsom’s budget proposal for 2020, continuing debate over the amount and extent of this expansion from recent legislative fiscal years. California employers are naturally concerned about the rising business costs associated with the state government’s mandatory employee leave and retention policies, especially heading into the economic aftermath of the COVID-19 pandemic.

CFRA requirements currently apply to employers with 50 or more employees. However, dramatic expansions of these requirements were recently introduced in otherwise unrelated Senate Bill 1383 (Jackson, D-Santa). These amendments would extend CFRA to additionally apply to *employers with five or more employees*, effectively mandating all the law’s requirements as a cost on all employers conducting business in the state going forward.

Currently when both new parents are employees of the same employer CFRA allows employers to limit leave to 12 work weeks in a 12-month period between both parents. SB 1383 would eliminate this exemption.

The bill would also expand the definition of “family members” under CFRA family leave requirements to include adult children, siblings, grandparents, and grandchildren. Finally, the bill eliminates the “highly compensated” exemption to CFRA’s employee reinstatement provisions.

Bereavement Leave

Assembly Bill 2999 (Low, D-Silicon Valley) would require California employers with 25 or more employees to provide up to ten days of unpaid bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. “Small businesses” (defined by this bill as having fewer than 25 employees) would also be required to provide up to three days of unpaid bereavement leave to their employees.

This bill does not require employees to satisfy any minimum time or hours-worked to qualify for bereavement leave, and it additionally creates a new private civil right of action which employees can bring for reinstatement, specified damages, and attorney’s fees against employers who violate this bill’s requirements.

Ongoing AB 5 Independent Contractor/Employee Classification Issues

In May 2019, the California legislature passed Assembly Bill 5, which codified the California Supreme Court’s *Dynamex* decision. AB 5 effectively eliminated the ability of many businesses to classify their workers as independent contractors under the state’s employee-friendly tax and regulatory environment, which alongside the COVID-19 crisis has severely hampered the state’s burgeoning gig economy in 2020.

As a result of these developments, the debate continues surrounding numerous proposed additional carveouts and exemptions to AB 5’s requirements on employers. As previously covered by the California Employers’ Blog, independent workers in many different fields and industries – including journalists, musicians, freelance writers, therapists, and even youth sports coaches – are seeking legislative exemptions to AB 5 employee-classification requirements which would allow them greater scheduling freedom and independence along with lower cost overhead to pursue their professions.

As was the case last year, organized labor and Assembly Member Lorena Gonzalez (D-San Diego) remain committed to controlling the terms of any proposed discussion regarding AB 5 exemptions. Indeed, several dozen Republican-sponsored bills have been proposed in both chambers of the state legislature but were not heard on the floor of either house.

Instead, Assembly Bill 1850 seeks to consolidate all proposed discussions of changes to AB 5 policy, and currently only provides exemptions for “referral agencies,” “specialized performers,” and journalistic professionals who submit content fewer than 35 times per year. Assembly Bill

2257 would additionally exempt musicians or musical groups for single-engagement live performances along with “certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions.”

It is anticipated that there may be further additional exemptions added to AB 1850 or AB 2257 before the legislative session is over, so we will keep you updated on any developments.

Pay Data Reporting

Senate Bill 973 (Jackson, D-Santa Barbara) would require California employers with 100 or more employees to report to the state their pay data by race, ethnicity, and sex. This bill comes following years of legislative Congressional debate at the federal level regarding the EEO-1 form. In addition, SB 973 would authorize the California Department of Fair Employment and Housing to enforce the California Equal Pay Act alongside the Division of Labor Standards Enforcement’s current authority to do so.

Crime Victims

Assembly Bill 2992 (Weber, D-San Diego) would amend existing California law which provides job-protected time off for employees who are victims of domestic violence, sexual assault, or stalking. This bill would extend these protections to additionally cover victims of crime that caused any physical injury or that caused any mental injury and a threat of physical injury.

SB 2992 would also expand existing law to include job-protected time off not only for employees who are the direct victims of crimes themselves, but also for employees who are the immediate family members (i.e. child, parent, spouse, sibling, or “equivalent”) of a person who is deceased as a direct result of a crime.

Wage Theft

Assembly Bill 3075 (Gonzalez, D-San Diego) would require new California business at the time of incorporation in the state to attest that no proposed owner, director, or officer of the new business has an outstanding final judgment issued against them by any federal or state court or the state Division of Labor Standards Enforcement for violation of any wage order or provision of the California Labor Code. This bill would also specify that local jurisdictions can enforce *state* wage standards. Finally, this bill would make a successor employer liable for wage and hour violations of a predecessor employer where specified conditions are met.

Warehouse Distribution Centers

Assembly Bill 3056 (Gonzalez, D-San Diego) would apply to any warehouse work in the state, regardless of the industry that any particular warehouse services. The bill would provide that time spent by employees doing certain activities (i.e. restroom breaks, handwashing, taking any legally mandated rest, recovery, or meal period, and documenting or reporting a colorable claim of a state Labor Code violation to the employer or to the responsible government authority) cannot be counted toward employer production quotas or employee performance standards. AB 3056 would

additionally require the Division of Labor Standards Enforcement to enforce its provisions and would authorize the DLSE commissioner to adopt regulations implementing its provisions.

Garment Manufacturing

Senate Bill 1399 (Durazo, D-Los Angeles) would amend the landmark legislation of AB 633 enacted in 1999. The bill would make clothing “brands” and holding companies jointly liable as wage guarantors alongside garment manufacturer contractors for all civil legal responsibility for all workers employed by the contractor. SB 1399 would additionally eliminate “piece rate” work in California’s garment manufacturing industry and would prohibit garment manufacturers in the state from choosing to pay their workers a set rate per piece or article of clothing produced.

Paid Sick Leave For Food Sector Workers

Senate Bill 729 (Portantino, D-La Cañada Flintridge) would codify the requirements of the Governor’s Executive Order N-51-20 (as explained above). This bill would establish supplemental paid sick leave for food sector workers for the full duration of any local or statewide state of emergency declaration.

This proposal would go further than the governor’s executive order, which only extends paid sick leave for food sector workers until the end of the stay-at-home order. The rate of paid leave paid to COVID-19-affected employees under SB 729 “would be the highest of the worker’s regular rate of pay in the last pay period, the state minimum wage, or an applicable local minimum wage, up to daily and aggregate total maximum payments.” Food sector workers would also have full discretion over how many hours of supplemental paid leave they would take up to 80 total hours, and could elect to take all, some, or none of this extra paid sick leave time.

However, this bill would also exempt food sector business from having to provide this supplemental paid sick leave to COVID-19-affected employees if the employer provides such qualifying employees with other supplemental benefits “that would compensate the food sector worker in an amount equal to or greater than the amount the food sector worker would be compensated through taking COVID-19 supplemental paid sick leave to which the food sector worker would otherwise be entitled.”

Finally, no food sector business would “be required to pay more than five hundred eleven dollars (\$511) per day and five thousand one hundred ten dollars (\$5,110) in the aggregate to a food sector worker for COVID-19 supplemental paid sick leave taken by the worker.”

Required Disclosures and Notifications of Employee COVID-19 Exposure

Assembly Bill 685 (Reyes, D-San Bernardino) would require all public and private employers to specifically notify all their employees, the California Division of Occupational Safety and Health, and the State Department of Public health relating to the exposure of their employees to COVID-19.

“Within 24 hours that the employer knew or reasonably should have known” of an employee exposure to COVID-19, this bill would require employers to:

1. Provide written notice to all employees at the worksite where the exposure occurred, and to “make every reasonable effort necessary to notify workers verbally”;
2. Notify employees of their options, including COVID-19-related leave, company sick leave, state mandated leave, supplemental sick leave, or other negotiated leave provisions;
3. Notify employees of the cleaning and disinfecting plan that the employer plans to implement prior to returning to work;
4. Notify the California Division of Occupational Safety and Health of the number of employees by occupation with a COVID-19 positive test, diagnosis, order to quarantine, or death that could be COVID-19 related; and
5. Notify the California Department of Public Health and the appropriate local public health agency of the number of employees by occupation with a COVID-19 positive test, diagnosis, order to quarantine, or death that could be COVID-19 related.

Failure to meet any of the above requirements would be classified as a misdemeanor crime punishable by a \$10,000 fine. AB 685 defines “exposure to COVID-19” as any of the following:

- A positive COVID-19 test;
- A positive COVID-19 diagnosis from a licensed health provider;
- A COVID-19-related order to quarantine from a licensed health provider; or
- A fatality that was or could have been caused by COVID-19.

Conclusion

Things can move quickly during the last few weeks of the legislative session, and many of these bills may be significantly amended before they cross the finish line. Check back here to find out which bills make it to the governor’s desk – and which are signed or vetoed!

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Related People





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