No Rest For The Weary – California Employers Face Wave Of Pending Legislation Awaiting Action From Governor Newsom

Insights
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The California legislature just closed the books on one of the most interesting sessions in the State's history. Not only did it itself shut down completely on two different occasions due to the COVID-19 pandemic, the last few days of session featured the entire Republican contingent of the Senate quarantined and debating and voting on legislation remotely via video feed. Bizarre to say the least.

However, that didn't stop lawmakers from passing some significant labor and employment legislation before they left town. Here's a quick rundown on some of the more critical legislation of which California employers need to be aware.

We'll take a deep dive into each of these bills if/when they are signed into law. But in the meantime, here's a quick summary of the key components of each of the bills.

AB 1867 – Supplemental COVID-19 Paid Sick Leave
This bill was pushed by Governor Newsom and was passed as a budget "trailer" bill, which means it is very likely to be signed into law.

Earlier this year, Governor Newsom issued Executive Order N-51-20 mandating up to 80 hours of paid sick leave for "food sector workers" that work for employers with 500 or more employees. Please see our summary of that Executive Order here.

AB 1867 does a few different things. First, it essentially codifies the governor's Executive Order, presumably in an attempt to render moot any legal question as to whether he had authority to mandate such paid sick leave.

More importantly, AB 1867 exacts a similar supplemental paid sick leave requirement that applies to other employers in other industries with 500 or more employees. This requirement is also extended to health care providers and first responders whose employers elected to exclude them from the leave requirements under the federal Families First Coronavirus Response Act.

Employees who work for covered employers will be allowed to take paid sick leave for the following reasons:

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- The worker is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- The worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The worker is prohibited from working by the hiring entity due to health concerns related to the transmission of COVID-19.

See our recent legal alert for more detailed discussion of the provisions of AB 1867.

Employers that are potentially covered by AB 1867 should pay close attention and be prepared to take prompt action. As a budget "trailer" bill, AB 1867 will take effect immediately when signed by the governor, and the paid sick leave provisions will take effect not later than 10 days later. AB 1867 also has a notice requirement and will necessitate changes to employee wage statements to reflect the new supplemental paid sick leave. Therefore, covered employers will want to start the process immediately to ensure compliance with the new requirements in the short implementation period under the bill.

Governor Newsom already indicated his support for this bill (and his administration drafted the language) so this bill is all but certain to be enacted into law any day now.

AB 685 – Employer COVID-19 Reporting Obligations

If signed into law, AB 685 would impose a number of new reporting requirements on California employers related to COVID-19.

Among other things, AB 685 provides that if an employer receives "notice of a potential exposure" to COVID -19, they are required to do the following within one business day:

- Provide a written notice to all employees who were on the premises of the worksite at the same time as the qualifying individual within the infectious period;
- Provide notice to any union representative;
- Provide employees and union representatives with information regarding specified COVID-19 benefits to which the employee may be entitled to under federal, state or local laws; and
- Notify all employees of the disinfections and safety plan that the employer plans to implement and complete per DCD guidelines.

Employers who experience an "outbreak" (as defined by the state) also must notify the local public health agency within 48 hours.

Governor Newsom has similarly expressed his support for AB 685, so it is anticipated that he will sign this measure into law. If he does so, it will go into effect on January 1, 2021.

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SB 1159 – COVID-19 Workers' Compensation Presumption

There has already been much action this year related to COVID-19 and workers' compensation coverage. In May, Governor Newsom issued a sweeping Executive Order, providing that a broad swath of California workers who contract COVID-19 are presumed to have a workplace injury covered by the workers' compensation system. That Executive Order remained in effect only until July 5, 2020.

SB 1159 would extend similar presumptions for COVID-19 into the future by codifying the governor's earlier Executive Order. It would also establish a "rebuttable presumption" for COVID-19 claims for certain first responders (police and fire) and specified health care workers.

For all other employers, SB 1159 creates a "rebuttable presumption" for workers' compensation for COVID-19 for "outbreaks." An "outbreak" is satisfied under the following conditions:

- For employers with 100 employees or less, when 4 employees test positive for COVID-19 in a 14-day period.
- For employers with more than 100 employees, when 4 percent of the employees test positive in a 14-day period.
- For all employers if the workplace is ordered to close by public health authorities or Cal/OSHA due to risk of infection from COVID-19.

SB 1159 also contains some reporting obligations that require employers to provide information about positive tests to their workers' compensation carriers, and some pretty hefty potential civil penalties if an employer fails to do so.

SB 1159 is likely to be signed by Governor Newsom, so California employers should work closely with employment counsel and their workers' compensation carriers to begin implementation of the law's new requirements.

SB 1383 - Expansion of the California Family Rights Act (CFRA)

In January, Governor Newsom announced his strong support for an effort to expand the CFRA to provide job-protected family and medical leave to more Californians. That proposal was inserted into SB 1383 and makes a number of significant changes to the existing CFRA.

First, SB 1383 provides that CFRA applies to employers with five or more employees (the law currently applies to employers with 50 or more employees). This will significantly impact smaller employers who will have to get up to speed with all of the requirements and challenges of complying with the CFRA, and will entitle employees who work for such employers for up to 12 weeks of unpaid family and medical leave.

Second, SB 1383 expands the definition of "family members" for whom leave can be taken under the CFRA to include, among others, siblings, grandparents, grandchildren, and adult children. This

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change will also impact larger employers already covered by the CFRA and may result in "stacking" of leave entitlement for employees under the federal Family and Medical Leave Act (FMLA). For example, an employer covered under both the CFRA and the FMLA would be required to provide up to 12 weeks of leave for an employee under the CFRA to care for a sibling with a serious medical condition. However, because "siblings" are not included under the FMLA, that same employee could be eligible for an additional 12 weeks of leave under the FMLA to care for a parent, child or spouse. This could result in such employees being eligible for a combined total of 24 weeks of leave under the CFRA and FMLA.

Due to concerns expressed about potential litigation and the impact on small employers, some companion legislation was inserted into AB 1867 (discussed above). This language creates a temporary mediation pilot program for employers with between five and 19 employees. Until 2024, an employer may request that all parties participate in DFEH mediation before civil litigation may commence. However, this is of limited relief because it only applies to certain employers, only applies until 2024, and does not require a plaintiff to agree to settlement of any claims during the mediation process.

This bill was narrowly passed with only three minutes to spare before the legislature's deadline for passing bills. However, based on the governor's expressed support for this proposal at the beginning of the year, this measure is virtually guaranteed to be signed into law and become effective January 1, 2021.

AB 1281 – Extension of the CCPA Exemption for Employee Data

Last year, the legislature enacted AB 25 to exempt specified employee data from the California Consumer Privacy Act, which went into effect at the beginning of the year. However, that exclusion for employee information only applies until the end of the year.

A ballot initiative that has qualified for the November 2020 election (Proposition 24) would extend that exemption until 2023.

However, not knowing for certain whether Proposition 24 will pass, the legislature passed AB 1281. This bill, if signed by the governor, would extend the employee exemption for one year (until 2022) and will only go into effect if Proposition 24 does not pass. In essence, AB 1281 is a one-year "backstop" for the employer community should the extension contained in Proposition 24 not pass in November.

AB 2257 – More Changes to AB 5 and the "ABC Test"

Unless you been living under a proverbial rock for the last few years, you are likely aware that the hottest issue by far in California has been the classification of workers as employees or independent contractors.

This saga began back in April 2018, when the California Supreme Court issued an unprecedented ruling in the *Dynamex* case that adopted what is known as the ABC test for determining independent

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contractor status. Last year, the legislature codified and expanded this decision and the ABC test in AB 5, but also provided for dozens and dozens of exemptions from the application of the new standard.

This year, the legislature passed AB 2257 to make further changes to AB 5. Among other things, it establishes new exemptions for additional individuals, including recording artists, songwriters, musicians or musical groups, persons who provide underwriting inspections, premium audits, risk management or loss-control work for the insurance or financial service industries, licensed landscape architects, real estate appraiser and home inspectors, and competition judges (including umpires and referees).

In addition, AB 2257 clarifies the "business-to-business" exemption in AB 5 in a manner that may make it easier to satisfy the exemption. Finally, AB 2257 modifies the "referral agency/service provider" exemption, but also specifies that the exemption does not apply to certain industries (high hazard industries, janitorial, delivery, courier, transportation, trucking, agriculture, retail, logging, in-home care, and construction services beyond minor home repair).

A companion measure, AB 323, extends the AB 5 exemption for newspaper delivery for an additional year.

Governor Newsom signed AB 2257 on September 4. As an urgency measure, its provisions went into effect immediately upon signature, so the changes made to AB 5 are now in effect.

AB 3216 – Right of Recall/Worker Retention

Since the COVID-19 pandemic began, many local jurisdictions in California (including the City of Los Angeles, the County of Los Angeles, Long Beach, Pasadena, Oakland and San Francisco) have enacted "right to recall" ordinances that require employers in certain industries to offer to rehire by seniority workers who have been laid off due to the COVID-19 crisis and economic shutdown.

AB 3216 is a statewide version of that requirement that passed the legislature and is now sitting on Governor Newsom's desk.

AB 3216 applies to certain employers – hotels, private clubs, event centers, airport hospitality operations, airport service providers, or building service providers (janitorial, maintenance and security). The bill requires covered employers who have laid off employees dues to a state of emergency (not just COVID-19) to offer to rehire employees by order of seniority. The employer may make one simultaneous offer to employees, but must allow them five business days to respond. The employer is required to offer to recall employees not only to the same or similar position, but any position that they are or "can be qualified" for, which is complicated and fraught with peril.

AB 3216 also contains "worker retention" language. It provides that if employers in the covered industries go out of business during a state of emergency, a successor employer must retain the

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predecessor's employees for 90 days and, at the completion of that period, consider offering the employees permanent jobs.

Amendments during the process removed the private right of action, so there is generally only administrative enforcement. However, by adding new provisions to the Labor Code, AB 3216 likely raises potential PAGA claims.

As one can imagine, AB 3216 is being strongly pushed by labor groups. However, there is significant opposition from employer groups and covered industries, so it remains to be seen if Governor Newsom will sign or veto this proposal.

SB 973 – Pay Data Reporting

Pay data reporting is not a new issue or a new legislative proposal for California. However, SB 973 is the first such proposal to make it to the governor's desk.

As many employers will recall, during the Obama administration, the president proposed a requirement that certain large employers would be required to provide specified pay data as part of the federal Form EEO-1 reporting requirement. The Trump administration rescinded that rule, and several years of litigation followed. Following this litigation, the EEOC announced that it would collect such information for a limited period, but would not require such information to be provided in the future.

California has long sought to enact a similar requirement on its own, purportedly in an effort to combat pay inequities in employment. Therefore, SB 973 would (beginning in March 2021) require employers with 100 or more employees to provide pay data information by race, ethnicity, and sex to the Department of Fair Employment and Housing. Employers have argued that this may create a false impression of discrimination, as the law provides many lawful and non-discriminatory reasons why an employer may pay people differently.

SB 973 also provides that California Equal Pay Act claims may be enforced by the Department of Fair Employment and Housing, in addition to the Labor Commissioner's office.

AB 1066 – Unemployment Insurance

AB 1066 proposes to add some significant "hammers" to employers when it comes to providing unemployment insurance claim information.

First, it provides that if an employer fails to provide specified requested records or information to the Employment Development Department (EDD) within 10 days, there is a presumption that the claimant is entitled to the maximum amount of UI benefits under the law.

In addition, a provision likely aimed at disputes with large "gig" companies over misclassification claims allows EDD to delegate its authority for collecting UI contributions to the Attorney General for employing units with more than 500 employees (including misclassified independent contractors).

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Next Steps

Governor Newsom has until September 30, 2020 to sign or veto the bills discussed above. Unless otherwise noted, any legislation he signs will go into effect on January 1, 2021.

We'll keep you posted here and via legal alerts about any significant bills that the governor signs, and will walk you through what any new laws mean for your business and identify any steps you need to take to comply.

In the meantime, if you have any questions about how these pending measures may impact your business, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

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