

# Hot Issues in Employment Law

## *Taking Stock of 2020 and Preparing for 2021*

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2020

## COVID-19: The Slow Return to Normal

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### Eight Months Into the Pandemic, Many Issues Linger

FFCRA Compliance - necessary until December 31, 2020

Workplace Safety

Eagerness and reluctance to return to the workplace

Economic fallout

Long term trends of Remote Working

Employee privacy concerns

## COVID-19: The Slow Return to Normal

### Eight Months Into the Pandemic, Many Issues Linger

#### FFCRA Compliance

- Law is in effect until December 31, 2020
- Emergency Paid Sick Leave
  - Various reasons relating to COVID-19
  - Up to two weeks of paid leave
  - Paid at regular rate of pay, but capped at \$511 per day
- Emergency Family Leave (up to 12 weeks)
  - If the employee is unable to work or telework because the employee's child's school is closed or childcare is unavailable
  - Up to 12 weeks of paid leave (10 weeks plus 2 weeks of sick leave)
  - Paid at 2/3 regular pay, but capped at \$200 per day
- Offset to Costs to Employers: a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA

## COVID-19: The Slow Return to Normal

### Eight Months Into the Pandemic, Many Issues Linger

#### Workplace Safety

- OSHA - general duty clause
- State and local mandates applicable to certain workplaces
- Patchwork of state laws providing COVID-19 liability protections

#### Eagerness and reluctance to return to the workplace

- Can employees refuse to return to work if requested by their employer?

## COVID-19: The Slow Return to Normal

### Eight Months Into the Pandemic, Many Issues Linger

#### Economic fallout

- Restructurings and furloughs
- Layoffs
- WARN Act compliance
- Status of unemployment compensation and other government support
- Severance plans

## COVID-19: The Slow Return to Normal

### Eight Months Into the Pandemic, Many Issues Linger

#### Long term trends of Remote Working

- Will teleworking be more accepted post-pandemic?
- Telework as an ADA accommodation
- State and local tax considerations
- Compliance with employment laws in locality where employee works remotely

## COVID-19: The Slow Return to Normal

### Eight Months Into the Pandemic, Many Issues Linger

#### Employee privacy concerns

- Can employers mandate COVID-19 testing?
  - Active virus tests versus antibody tests
- Can employers dictate off-duty conduct, such as mask wearing or refraining from travel?
- Can employers require employees to wear monitors that assist with social distancing and contact tracing?
- Can employers require employees to get a COVID-19 vaccine when it becomes available?

## The View from California

### California - Key Updates

#### CA COVID-19 Supplemental Paid Sick Leave

- Fills FFCRA gap: applies to employers with 500+ employees in the US
- In effect until December 31, 2020, unless FFCRA extension
- Covers:
  - Food sector workers (starting April 16, 2020)
  - Non-Food sector employees who leave home to perform work (starting September 19, 2020)
- Reasons For Supplemental Paid Sick Leave - similar to FFCRA
  - Various reasons relating to COVID-19
  - Up to two weeks of paid leave
  - Paid at regular rate of pay, but capped at \$511 per day

## California - Key Updates

### Notice Of Potential COVID-19 Exposure [AB 685, effective Jan. 1, 2021]

- **When?** Within **one** business day of the notice of potential exposure.
- **Who?** Employees their representatives, and subcontracted employees who were at the same worksite.
- **What?**
  - Advise of potential exposure.
  - Information regarding all COVID-19-related benefits and options under federal, state, or local laws.
  - Disinfection & safety plan employer plans to implement per federal Centers for Disease Control.
- **Additional Outbreak Reporting**
  - Notify local public health agency within 48 hours of a COVID-19 outbreak. (3+ cases among workers of different households in a 2-week period).

## California - Key Updates

### Notice Of Potential COVID-19 Exposure

#### Recommended Next Steps:

1. Designate individual(s) responsible for compliance process
2. Identify procedure for notifications
3. Prepare notice template
4. Develop disinfection and safety guidelines

## California - Key Updates

California Family Rights Act Expanded [SB 1383, effective Jan. 1, 2021]

### Significant Expansion of CFRA

#### Small Employers Now Covered

##### **Original Eligibility Requirements**

- CFRA like FMLA originally applied to employees who:
  - Worked at least 1,250 hours in prior 12 month period
  - Worked for employers with 50 or more employees w/in 75 miles radius from worksite.

##### **New Eligibility Requirements**

- Employers with only 5 or more employees
- There no longer is a requirement that the employees be located in a 75 mile radius

## California - Key Updates

California Family Rights Act Expanded

### **Expanded Relationships Now Covered**

- **Originally** "family member" included:
  - Parent
  - Child
  - Spouse
- **New definition** "family member" includes:
  - Parent
  - Child
  - Spouse
  - **Grandparent**
  - **Grandchild**
  - **Sibling**
  - **Domestic Partner**

## California - Key Updates

### California Family Rights Act Expanded

#### Risk of Double Entitlement

- Generally CFRA and FMLA run concurrently: limit of 12 weeks under both
  - CFRA now allows leave beyond leave permitted by FMLA
- **Potential for double entitlement: 24 weeks of protected leave in a 12 month period:**
- Starting 2021 an employee could take 24 weeks of FMLA and CFRA leave in a year:
1. 12 weeks leave to care for a grandparent under CFRA
  2. 12 weeks of FMLA leave to care for a child

## California - Key Updates

### California Family Rights Act Expanded

#### Recommended next steps:

1. If not previously subject to CFRA, evaluate if you are covered by CFRA
2. If previously subject to CFRA, evaluate if additional employees are now covered
3. Update employee handbooks / policies

## California - Key Updates

### Pay Data Submission [SB 973]

#### Requirement to submit employee pay data to the State of California

##### Why?

- To address the continuing gender pay gap
  - As of 2016, in California, women working full time still made a median 88 cents for every dollar earned by men
  - Gap increases even further for women of color

##### • History?

- Employers with 100 + employees: history of reporting demographic data to EEOC via EEO-1 report
- In 2016, the Obama Administration announced intent to expand the EEOC reporting requirements to include pay data (EEO-1 Component 2), but the current Administration decided it would not collect such pay data.

## California - Key Updates

### Pay Data Submission

##### Who?

Private California employers that:

1. are required to file an EEO-1 report under federal law, and
2. have 100 or more employees to submit pay data to the state (Dept. Fair Employment and Housing)

##### What?

- Number of employees by race, ethnicity, and sex in certain job categories
- Earnings by specified pay bands for each of the employees in each of those categories

##### When?

- First report is due **March 31, 2021**
- Each year annually thereafter

## California - Key Updates

### Pay Data Submission

#### Recommended next steps:

1. Evaluate readiness for compliance now
2. Review systems to ensure data is available in format mandated by the DFEH
3. Conduct pay equity analysis to address areas of concern
4. Review DFEH website periodically for additional guidance  
<https://www.dfeh.ca.gov/paydatareporting/>

## California - Key Updates

### California's Independent Contractor Law

#### AB 5 & "ABC Test": Employee or Independent Contractor?

- 2019 - Legislature passes AB 5 adopting "ABC Test"
  - Presumes worker is an employee unless you can establish all three factors:
    - A. free from control and direction
    - B. work is outside the company's usual course of business
    - C. worker is engaged in an established trade, occupation, or business of the same nature as the work performed
- Limited AB 5 exemptions do not encompass gig-economy workers

## California - Key Updates

### California's Independent Contractor Law

#### **Proposition 22 - Carve Out For App Based Drivers: PASSED**

- AB 5 carve out: app based drivers are independent contractors, subject to certain conditions & benefits:
  - Drivers must be paid no less than 120% of minimum wage
  - Must provide specific benefits

#### ➤ **Likely to see ripple effect across the country**

- Uber CEO Dara Khosrowshahi:  
"Going forward, you'll see us more loudly advocate for new laws like Prop 22."
- DoorDash CEO Tony Xu:  
"Now we're looking ahead and across the country, ready to champion new benefits structures that are portable, proportional and flexible."

## California - Key Updates

### Expansion of California's Privacy Laws

#### **Proposition 24 California Consumer Privacy Rights Act of 2020 (CPRA): PASSED**

- CPRA significantly amends the current CCPA, California's sweeping data privacy law that took effect in January 2020
- The CCPA provides consumers the right to know what personal information has been collected and other rights
- **The CPRA significantly extends protections relating to personal information**
  - Critical for employers is that exceptions to most parts of the CCPA relating to applicant and employee information have been extended to January 1, 2023
  - But employers are still subject to pre-collection notices and data breach protections and should confirm compliance with those parts of the law

## California - Key Reminder

### State-Wide & Local Sick Leave Laws

#### California State-Wide Sick Leave

- Applies to all employees (full time, part time and temporary)
- Amount:
  - 1 hr / 30 hrs worked, leave must be carried over to next year but 48 hr. cap, or
  - 24 hrs up front, no carry over
- Provide written notice at hire
- Display poster
- Show available leave on pay stub
- **Claims for failure to follow pay stub requirements seen in most new cases we have received**

#### Many Local Sick Leave Ordinances

## Hot-Button Social Issues Confront the Workplace

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### Sexual Orientation and Gender Identity: *Bostock v. Clayton County*

- In June 2020, the US Supreme Court (6-3) held that Title VII of the Civil Rights Act of 1964 protects sexual orientation and gender identity
- So long as plaintiff's sex was one but-for cause of an adverse employment decision, that is enough to trigger liability under Title VII
  - Put another way: if changing the employee's sex would have yielded a different choice by employer, then it is based on "sex"
- Individuals can use either a "but for" causation or the lesser mixed motive standard when attempting to prove disparate impact cases under Title VII
- In many parts of the country (where sexual orientation and gender identity are not protected by state/local law), this results in a significant expansion of the employment discrimination laws.

## Hot-Button Social Issues Confront the Workplace

### Religious Exemptions to Discrimination Laws: *Our Lady of Guadalupe School v. Morrissey-Berru*

- In July 2020, the US Supreme Court (7-2) reaffirmed and expanded the "ministerial exception" to the employment discrimination laws
- Holding: The First Amendment's freedom of religion clauses bar courts from adjudicating employees' discrimination claims against their religious employers.
- Ministerial exception applies to teachers in Catholic schools, meaning that they are barred from bringing employment discrimination claims against their employer.
- Given the current composition of the Supreme Court, it is likely that religious liberty claims will be used to create additional exceptions to generally-applicable laws such as employment discrimination laws.

## Hot-Button Social Issues Confront the Workplace

### Executive Order on Combating Sex and Race Stereotyping

- Executive order issued in September 2020
- Impacts federal government contractors and federal agencies
- Prohibits training that addresses certain categories of “divisive” and “anti-American” topics, such as training that suggests that members of any one race are presumptively likely to be biased or prejudiced against others.
- Does not prohibit all types of diversity and inclusion training, but requires contractors to examine content of D&I training and perhaps scrub some content.
- Sets up a “hotline” at the US Department of Labor for employees to report violations by their employers.
- This EO is issued amid a backdrop of increasing conversations within many workplaces regarding racial justice and unconscious bias.

## Looking Ahead to 2021

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### Increased Federal Enforcement in the new Administration

Given perpetual gridlock in Congress, major new employment legislation seems unlikely

Stimulus legislation remain uncertain.

Expectation of increased enforcement within federal agencies:

- OSHA
- OFCCP
- EEOC
- Wage & Hour Division
- NLRB

## Looking Ahead to 2021

### Continued Action at State and Local Levels

Trend of addressing employment issues at the state (and even local) level creates an increasingly complex patchwork of rules for multi-state employers to navigate.

Many issues are subject to regulation at state and local levels:

- Minimum wage
- Paid sick leave
- Paid family leave
- Characteristics protected by discrimination laws
- Salary history inquiries during hiring process
- Meal and rest breaks
- Restraints on enforcement of noncompete covenants
- Independent contractor vs. employee classifications

## Thank you



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