CalChamber
HR Expert & Business Advocate™

New 2022 California Employment Laws

By James W. Ward, J.D.; Employment Law Subject Matter Expert/
Legal Writer and Editor, CalChamber

This year's legislative session has officially come to an end and, as usual, there are stacks of new laws taking effect in January.

While the COVID-19 pandemic was still challenging for the California Legislature this year, it didn't stop legislators from sending several hundred bills to Governor Gavin Newsom, many of which impact California employers.

Here's a quick look at some of the new laws signed by the governor of which employers should be aware. Unless otherwise stated, they're effective starting January 1, 2022.

The governor signed safety, wage enforcement, severance and settlement agreement, and worker classification laws, among others.

California Family Rights Act

AB 1033 cleans up and builds upon 2020's changes to the California Family Rights Act (CFRA).

First, the bill cleans up a drafting error in SB 1383, which dramatically expanded the CFRA to cover small employers and expanded the definition of family member for whom leave could be taken. Last year's law defined the term "parent-in-law," but inadvertently omitted the term from the list of family members for whom leave could be taken. AB 1033 clarifies that employees can take CFRA leave to care for a parent-in-law with a serious health condition.

AB 1033 also revises and adds more detailed provisions to the CFRA small employer mediation program. The program, initially created by 2020's AB 1867, is applicable to employers with five to 19 employees. It's intended to protect small businesses from costly litigation while simultaneously maintaining the rights of workers; however, employers often don't know that mediation is available since they don't receive a copy of the right-to-sue notice when an employee does. In fact, employers generally don't have notice that the employee filed a Department of Fair Employment and Housing (DFEH) complaint and received a right-to-sue notice until the employer is served with the lawsuit.

AB 1033 addresses some of these problems by:

- Making participation in the mediation program a prerequisite to filing a civil action.
- Requiring the DFEH to inform employees of this requirement, including instructions on how to initiate mediation, on all right-to-sue notices.
- Clarifying that a small employer may stay a civil lawsuit or arbitration proceeding to pursue mediation if the complaint should have been subject to the mediation pilot program.

Safety and Wage Enforcement and Penalties

SB 606 expands the California Division of Occupational Safety and Health's (Cal/OSHA's) enforcement authority by creating two new violations categories for which Cal/OSHA can issue citations — "enterprise-wide" violations and "egregious" violations.

This bill creates a rebuttable presumption that a violation committed by an employer with multiple worksites is "enterprise-wide" if the employer has a written policy or procedure that violates certain safety rules or Cal/OSHA has evidence of a pattern or practice. Cal/OSHA may issue an enterprise-wide citation requiring abatement if the employer fails to rebut the presumption. Enterprise-wide citations will carry the same penalties as repeated or willful citations, up to $134,334 per violation.

SB 606 requires Cal/OSHA to issue citations for 'egregious violations' of occupational safety and health standards.

Cal/OSHA also must issue a citation for an "egregious violation" if the division believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order or regulation based on several criteria listed in the statute. Violations may be egregious if, for example:

- The employer intentionally, through conscious voluntary action or inaction, made no reasonable effort to eliminate them;
- They resulted in worker fatalities, a workplace catastrophe (i.e., hospitalization) or large numbers of injuries or illnesses;
- They resulted in persistent injuries or illnesses;
- The employer has an extensive history of prior violations;
- The employer intentionally disregarded its health and safety responsibilities;
- The employer's conduct amounts to bad faith in the performance of their duties; or
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

The bill requires each instance of an employee exposed to that violation to be considered a separate violation for the issuance of fines and penalties.

AB 1003 makes the intentional theft of wages, benefits or compensation in the amount greater than $950 for one employee or more than $2,350 for two or more employees in a consecutive 12-month period **punishable as grand theft** under the California Penal Code, which prosecutors may charge as a misdemeanor or felony. Under this new penal code section, "employee" includes an independent contractor and "employer" includes an independent contractor's hiring entity.

SB 572 deals with enforcement of wage liens against employers by adding a provision to the Labor Code allowing the California Labor Commissioner to create, as an alternative to a judgment lien, a lien on real property to secure amounts due to the Commissioner under any final citation, findings or decision.

Settlement and Severance Agreements

Prompted by the "Me Too" movement, California passed laws in 2019 that restricted the use of non-disclosure provisions in settlement agreements for claims involving allegations of sexual harassment, sexual assault or discrimination based on sex.

SB 331 expands restrictions to prevent use of non-disclosure provisions in workplace harassment or discrimination settlement agreements.

SB 331 significantly expands those restrictions to prevent the use of non-disclosure provisions in cases of alleged workplace harassment or discrimination based on **any** characteristic protected under the Fair Employment and Housing Act, not just those based on sex. This includes allegations of discrimination or harassment on the basis of:

- Race;
- Religious creed;
- Color;
- National origin;
- Ancestry;
- Physical disability;
- Mental disability;
- Medical condition;
- Genetic information;
- Marital status;
- Sex;
- Gender;
- Gender identity;
- Gender expression;
- Age;
- Sexual orientation; or
- Veteran or military status.

While employees can't be prohibited from discussing underlying facts of the case, employers can still use clauses that prevent disclosure of the amount paid to settle the claim. SB 331 will apply to settlement agreements entered on or after January 1, 2022.

SB 331 also limits the use of non-disclosure provisions in employment severance agreements, stating it is unlawful to include any provision that prohibits the "disclosure of information about unlawful acts in the workplace," which is defined to include, but is not limited to, harassment, discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

It provides some sample language for employers to include in their agreements in connection with confidentiality/non-disclosure provisions: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

The law also clarifies that it doesn't prohibit use of a general release or waiver of all claims related to an employee's separation, nor does it prohibit an employer from protecting the employer's trade secrets, proprietary information or confidential information that doesn't involve unlawful acts.

Employers should consult with their legal counsel about SB 331's effects on the use of confidentiality/non-disclosure and non-disparagement provisions in their agreements.

Various bills made changes solely in certain industries, such as warehouse distribution centers, garment manufacturing and more.

Worker Classification

This year, the California Legislature made small adjustments to the state's worker classification laws, especially compared to the last two years.

You may recall the sweeping changes made in 2020 when the Legislature codified the "ABC Test" adopted by the California Supreme Court in a 2018 case, significantly changing how to determine whether someone was an employee or independent contractor. At the same time, the law carved out several industry exceptions to that test, in which case the common law, multi-factor Borello Test is used.

Last year, AB 2257 substantially revised the law, making changes to many of the industry exceptions and adding several more. This year, however, AB 1506 and AB 1561 made relatively small changes to the law, revising parts of the "data aggregator" exception to the ABC Test and **extending the exceptions for newspaper carriers, licensed manicurists and construction trucking contractors until December 31, 2024**. Again, these exceptions don't qualify these positions automatically as independent contractors; employers still must evaluate the worker using the common law Borello test before classifying the worker as an independent contractor.

Industry-Specific Measures

Various bills made changes solely in certain industries, including warehouse distribution centers, garment manufacturing, hospitality/building services, agriculture, health care, janitorial services and domestic workers.

Warehouse Distribution Centers: AB 701 specifically targets warehouse distribution centers, applying specifically to certain larger employers meeting industry definitions for general warehousing and storage, merchant wholesalers of durable and non-durable goods, and electronic shopping and mail-order houses. The law requires covered employers to provide each nonexempt employee working at a warehouse distribution center a written description of each quota to which they are subject, including tasks to be performed, materials produced or handled, time periods and any potential adverse employment actions that may result from failure to meet quotas.

Under AB 701, employees cannot be required to meet quotas that prevent compliance with meal or rest periods, use of bathroom facilities, or health and safety laws. If employees feel that quotas are interfering with these things, they can request a copy of applicable quotas and the last 90 days of their personal work speed performance, which the employer must produce within three weeks. The law also creates a rebuttable presumption of retaliation if the employer takes adverse action against an employee within 90 days of the employees request for their quota and personal work speed performance or an employee's complaint about a quota.

Garment Manufacturing: SB 62 requires garment manufacturers and "brand guarantors" who contract with another person for the performance of garment manufacturing to be jointly and severally liable with manufacturers or contractors for wage violations of employees in the supply chain. For purposes of expanding the shared liability under this law, the bill expands the definition of garment manufacturing to broadly include many companies in the clothing industry supply chain.

Under SB 62, garment manufacturing is defined as "sewing, cutting, making, processing, repairing, finishing, assembling, dyeing, altering a garment's design, causing another person to alter a garment's design, affixing a label to a garment, or otherwise preparing any garment or any article of wearing apparel or accessories designed or intended to be worn by any individual…."

This expanded definition means companies that may be tangentially part of garment manufacturing — by sticking their own logo on the clothing, for example — will be liable for wage and hour problems the actual maker creates with its own workforce.

SB 62 also prohibits the practice of piece-rate compensation for garment manufacturing, except in cases of worksites covered by a valid collective bargaining agreement. The bill imposes statutory damages of $200 per employee against a garment manufacturer or contractor, payable to the employee, for each pay period in which each employee is paid by piece rate.

The expanded definition of 'garment manufacturing' means companies tangentially part of the manufacturing process may be liable for wage and hour issues created by the garment's actual maker.

Hospitality/Building Services: SB 93, an urgency measure that took effect when it was signed on April 16, 2021, created what is commonly referred to as a "right of recall" for certain employees laid off due to COVID-19. It applies to hotels, clubs, event centers, airport hospitality operations and service providers, and building services such as janitorial, maintenance and security services. Qualified laid off employees are those employees who worked for the employer for six months or more in the preceding 12 months and whose most recent separation was due to COVID-19.

Under SB 93, if a covered employer is going to hire an employee, it must first offer the position to a laid off employee who's qualified for the position, i.e., if the employee held the same or similar position at the business at the time of the layoff. Employers who refuse to recall an employee on the grounds that the employee lacks the qualifications for the position must provide the employee a written notice with their reasons for not hiring them. Employers must keep records for three years, including records of communications regarding job offers.

Agriculture: AB 73 expands on one of last year's personal protective equipment (PPE) bills, SB 275, which established a state stockpile of PPE in the event of a pandemic. AB 73 broadens the law's scope to include wildfire smoke events as a health emergency under the law and includes agricultural workers in the definition of essential workers. The bill also requires Cal/OSHA to review and update its wildfire smoke training requirements, so employers should monitor Cal/OSHA's wildfire smoke training materials for updates.

Health Care: Two new laws impact health care employers. First, prompted by the high demand for COVID-19 vaccinations at pharmacies and the corresponding time pharmacists and technicians must spend on such vaccinations, SB 362 prohibits chain community pharmacies from establishing quotas, defined as a fixed number or formula related to certain duties that a pharmacist or pharmacy technician is required to perform (e.g., prescriptions filled, services to patients, etc.) while on duty. Second, AB 1407 requires that hospitals and nursing education programs include implicit bias training as part of the program for new nurses.

Janitorial Services: California's Private Attorneys General Act (PAGA) allows aggrieved employees to bring claims on behalf of themselves and other employees for wage and hour violations, essentially stepping into the state's shoes to enforce wage and hour laws. SB 646 creates an exception to PAGA for janitorial employees covered by a collective bargaining agreement that meets certain criteria. This is similar to another PAGA exception enacted recently for unionized employers in the construction industry.

Domestic Workers: SB 321 doesn't impose any new obligations on employers right now, but it does direct Cal/OSHA to create an advisory committee to recommend state policies to both protect domestic workers and provide health and safety guidance to educate employers and employees in the industry. This will be something to keep an eye on for future developments.

The California Department of Public Health must allow email sign-ups so businesses may more easily track and implement the most current COVID-19 orders and guidance.

COVID-19

On October 5, Newsom signed AB 654, which clarifies and cleans up last year's COVID-19 notice and reporting bill, AB 685. As previously reported, the bill revises the language AB 685 used to describe COVID-19 notice requirements to make it more consistent throughout. This was an urgency measure that took effect immediately upon signing.

Under SB 336, signed on October 4, when the California Department of Public Health (CDPH) or a local health officer issues an order or mandatory COVID-19-related guidance, they must publish the order or guidance on their website along with order or guidance's effective date. The CDPH or local health officer must also create an opportunity to sign up for an email distribution list to receive updates on the order or guidance. This measure will hopefully make it easier for businesses to track and implement the most current COVID-19 orders and guidance. SB 336 also went into effect immediately upon signing.

In addition to the new laws, employers should continue to monitor COVID-19 regulatory developments. As previously reported, the Cal/OSHA COVID-19 Emergency Temporary Standards may be re-adopted with amendments this winter. Additionally, a federal emergency regulation related to vaccines is on its way, after which Cal/OSHA will be required to adopt an equivalent or more stringent standard within 30 days. Employers should also continue to monitor their local ordinances for supplemental paid sick leave, vaccine leave or other COVID-19-related measures.

Vetoes

Newsom didn't sign everything that crossed his desk this year.

He vetoed SB 616, a CalChamber Job Killer bill that would have authorized unionization of agricultural employees through submission of representation cards signed by more than 50 percent of the employees, essentially eliminating the secret ballot election currently in place.

The governor also vetoed AB 123, a bill that would have increased the wage replacement rate for employees taking leave under the state's paid family leave program, and AB 1074, a hotel worker retention bill that, as Newsom noted in his veto message, overlapped significantly with the already-enacted SB 93, discussed in the Industry-Specific Measures section.

To ensure compliance with the new laws covered in this story, employers should consult with legal counsel.

v11092021