

# Labor and Employment Alert

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## Reminder: New California Employment Laws for 2021

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### Key Points:

- Numerous new California laws going into effect on January 1, 2021 (or earlier), will impact employers and employees.
- The most significant laws include new obligations to report employee pay data, an expansion of protected leave under the California Family Rights Act, additional exemptions to California's worker classification law and further requirements related to COVID-19 in the workplace.
- Employers are reminded to carefully evaluate their policies and practices in order to comply with these new laws as they head into the New Year.

As the New Year approaches, California employers are reminded to review their practices to ensure compliance with numerous new California employment laws that will go into effect January 1, 2021 (or sooner as noted). The following is a summary of those laws.

### Equal Employment Opportunity:

- **Pay Data Reporting Requirements:** SB 973 provides that on or before March 31, 2021, and each year thereafter, a private employer that has 100 or more employees and who is required to file an annual EEO-1 report must submit a pay data report to the Department of Fair Employment and Housing (DFEH) covering the prior calendar year (i.e., the "Reporting Year").
  - The report must contain the following information:
    - The number of employees by race, ethnicity and sex in each of the following job categories: (1) executive or senior-level officials and managers, (2) first or mid-level officials and managers, (3) professionals, (4) technicians, (5) sales workers, (6) administrative support workers, (7) craft workers, (8) operatives, (9) laborers and helpers and (10) service workers (which correspond to the job categories found in the EEO-1 report).
    - 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. For purposes of calculating annual earnings, the employer shall calculate the total earnings as shown on

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the IRS Form W-2 for each employee in the “snapshot,” for the entire “Reporting Year,” even if the employee did not work the full calendar year.

- The total number of hours worked by each employee in each pay band during the “Reporting Year.”
- A section for employers to provide optional clarifying remarks regarding any of the information provided.
- For employers with multiple establishments, the employer shall submit a report for each establishment and a consolidated report that includes all employees.
- The required information shall be made available in a format that allows the department to search and sort the information using readily available software.
- The DFEH has issued a FAQ guidance page on its website, which can be found [here](#).
- **Sexual Harassment Training for Minors in the Entertainment Industry:** AB 3175 requires that a parent or legal guardian accompany age-eligible minors during employer-provided sexual harassment training made available online by DFEH, and certify to the Labor Commissioner that the training has been completed. The law became effective on September 25, 2020.
- **Statute of Limitations for DLSE Discrimination Complaints:** AB 1947 extends the time to file a complaint with the Division of Labor Standards Enforcement (DLSE) from six months to one year from the date on which the employee is “discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner.” Claims for discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA) can still be filed with the DFEH, for which the statute of limitations is three years.

### Protected Leave:

- **Expansion of the California Family Rights Act:** SB 1383 repeals the existing California New Parent Leave Act (NPLA) and California Family Rights Act (CFRA), and replaces them with a new expanded CFRA. Notable changes include the following:
  - Expanding the CFRA to apply to smaller employers. While the current CFRA applies to private employers with 50 or more employees within 75 miles of the worksite, SB 1383 expands the CFRA to now apply to private employers with five or more employees and eliminates the requirement that employees work within 75 miles of the worksite.
  - Expanding the scope of family members for whom 12 workweeks of unpaid protected leave during any 12-month period may be taken. Currently, the CFRA allows employees to take unpaid leave for a number of purposes, including to care for a “family member” with a serious health condition. A “family member” includes a minor child (unless the child is an adult and a dependent child), a spouse or a parent. SB 1383 expands the definition of “family members” to include siblings, grandparents, grandchildren and domestic parents. The definition of “child” is also expanded to cover all adult children regardless of whether they are dependent, and children of a domestic partner.

- Requiring that an employer who employs both parents of a child grant up to 12 weeks of leave to each employee, whereas the CFRA previously allowed an employer to grant only a total of 12 weeks combined to such employees.
- Removing the provision allowing an employer to refuse protected leave for salaried employees who are among the highest 10 percent of the employees and where the refusal is necessary to prevent substantial and grievous economic injury.
- **Kin Care:** Current law, Labor Code section 233, allows employees to use half of their paid sick leave entitlement to attend to the illness of a family member (i.e., “kin care”). AB 2017 amends Section 233 to provide that the designation of kin care is at the sole discretion of the employee. The amended law prevents an employer from erroneously designating sick days as kin care when sick days are actually taken due to an employee’s own illness.
- **Protected Leave for Crime Victims:** AB 2992 expands employers’ obligation to provide protected leave to employees who are victims of domestic violence, sexual assault or stalking to include protections for victims of crimes causing physical or mental injury. However, it appears that this expanded definition of “victim” does not also apply to entitlement to paid sick leave under Labor Code Section 246.5, which permits paid sick leave to be used by victims of domestic violence, sexual assault or stalking, but was not amended with AB 2992.

## Wage & Hour:

- **Additional Exemptions from Worker Classification Test:** AB 2257 and AB 323 exempt additional workers from the “ABC test” as codified in AB 5, the law establishing California’s standard to determine whether a worker is an employee or an independent contractor. AB 5 went into effect on January 1, 2020, and resulted in many professional industries lobbying for exemptions from the law. AB 2257 and 323 add over 100 new exemptions to the worker classification law, the most significant of which are summarized below. For a full list of exemptions, please see the text of the [statute](#).
- AB 2257 clarifies existing exemptions and adds additional exemptions under AB 5. For exempted workers, employee/independent contractor status will be determined under the pre-existing multifactored *Borello* test
- Business to Business Exemption
  - AB 2257 clarifies the exemption that AB 5 provided to “bona fide business-to-business contracting relationships” by modifying certain criteria necessary to satisfy the exemption. For example, the amended law provides that a “business location” may include a residence and that a business provider must provide its own tools, vehicles and equipment when “consistent with the nature of the work.” The exemption now also applies where a “public agency or quasi-public corporation” has retained an independent contractor.
- “Single Engagement” Business to Business Exemption
  - AB 2257 creates a “single-engagement” exemption from the ABC test for “a stand-alone non-recurring event in a single location, or a series of events in

the same location no more than once a week,” provided that a number of additional requirements are satisfied.

- Entertainment Industry Exemptions
  - AB 2257 creates numerous new entertainment industry exemptions, including for: (1) recording artists; (2) songwriters, lyricists, composers and proofers; (3) managers of recording artists; (4) record producers and directors; (5) musical engineers and mixers engaged in the creation of sound recordings; (6) musicians engaged in the creation of sound records; (7) vocalists; (8) photographers working on recording photo shoots, album covers and other items for press and publicity purposes; (9) independent radio promoters; and (10) any other individual “engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions.”
- Freelance Writers and Photographers Exemption
  - AB 5 provided that freelance writers and photographers that submitted more than 35 articles or projects per year were ineligible for exemption. AB 2257 removes the 35-submission limit and instead outlines new requirements for exemption. Writers and photographers are now eligible for the exemption if (i) there is a written contract that specifies rate of pay, intellectual property rights and an obligation to pay by a defined time; (ii) the individual doesn’t otherwise replace an employee; (iii) the individual does not primarily work at the location of the hiring entity; and (iv) there is no restriction preventing the individual from working for more than one entity.
- Professional Services Exemptions
  - Numerous additional professional occupations were given exemptions, including but not limited to interpreters, translators, producers, advisors, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors.
- Referral Agency Exemption
  - AB 5 provided an exemption for relationships between an individual operating as a sole proprietor or a business entity and a business that refers that individual’s services to clients. AB 2257 significantly expands the referral agency exemptions to a non-exhaustive list of services including consulting, youth sports coaching and wedding or event planning.
- AB 323 provides that newspaper distributors and publishers will be exempted from the ABC test until January 1, 2022. This law was dubbed the “Save Local Journalism Act” because it gives newspapers additional time to determine how to modify longstanding newspaper delivery practices in compliance with AB 5.
- **Rest Breaks for Security Guards:** AB 1512 authorizes a person employed as a security officer to be required to remain on the premises during rest periods and

to remain on call, and carry and monitor a communication device, during rest periods. The law became effective on September 30, 2020.

- **Classification of Educational Employees:** AB 736 expands the professional exemption set forth in Wage Orders Nos. 4-2001 and 5-2001 of the Industrial Welfare Commission to include part-time or “adjunct” faculty at private, nonprofit colleges and universities in California. The law became effective on September 9, 2020.
- **Labor Commissioner Representation:** SB 1384 extends the Labor Commissioner’s ability to represent claimants who are financially unable to afford representation to arbitral proceedings and/or in opposing a petition to compel arbitration.

## COVID-19

- **COVID- 19 Supplemental Paid Sick Leave:** AB 1687 implemented a broad supplemental sick leave law requiring employers with 500 or more employees (and health care employers with fewer than 500 employees who opted out of federal Families First Coronavirus Response Act emergency paid sick leave) to provide their California workers with up to 80 hours of paid COVID-19-related sick leave. The law became effective on September 19, 2020.
- **Cal/OSHA COVID Notice and Reporting Requirements:** AB 685 subjects California employers to new notice and recordkeeping requirements with respect to COVID-19 cases in the workplace.
- **Workers’ Compensation Presumption:** SB 1159 creates a presumption that employees’ COVID-19-related illnesses or deaths are covered injuries for purposes of workers’ compensation, under certain circumstances.  
Please see our previous [client alert](#) for further information about the above COVID-19 related laws.
- **Cal/OSHA Emergency Regulations:** On November 30, 2020, new Cal/Occupational Safety and Health Administration (OSHA) emergency COVID-19 regulations went into effect, which address prevention, testing and responding to exposures and outbreaks in the workplace. These new regulations are applicable to nearly all California employers, with the exception of those already subject to the Cal/OSHA Aerosol Transmissible Diseases standard. Please see our previous [client alert](#) for further information.

## Settlement Agreements:

- **Settlement Agreements in Employment Disputes:** AB 2143 implements an additional exception to the law banning no-rehire provisions in employment settlement agreements. Last year, AB 749 prohibited no re-hire provisions in settlement agreements unless the employer has made a determination that the employee engaged in sexual harassment or sexual assault. AB 2143 expands the exception to permit no-rehire provisions if the employer has made a determination that the employee engaged in criminal conduct.

## Privacy:

- **California Consumer Privacy Act's Employer Exemption Extended:** AB 1281 extends the employer exemption from certain provisions of the California Consumer Privacy Act (CCPA) to January 2022.

## Corporations:

- **Statements of Information:** AB 3075 requires a corporation's statement of information to disclose whether any officer or director has an outstanding final judgment for the violation of any wage order or provision of the Labor Code.
- **Boards of Directors:** AB 979 requires certain publicly held domestic or foreign corporations to have at least one director from an underrepresented community by the end of 2021.

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