Employers: Don't Put on Those Rose Colored Glasses Just Yet!

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This past year has been a difficult one to navigate, especially for employers in California. COVID-19 has added another complicated layer to an often burdensome environment in terms of regulation and compliance.

Tthe coming year does not seem to let up with the new laws impacting employers. While there are over 15 new employment-related bills set to become law next year, only some of them relate to the current pandemic. All of them do, however, continue to protect the rights of employees. A short summary of some interesting and important new laws follows.

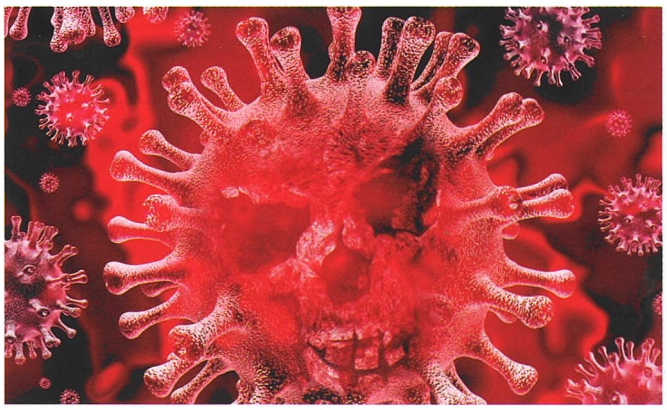
One striking addition for 2021: Cal/OSHA now has the power to issue an Order Prohibiting Use to shut down an entire worksite or a specific worksite area that exposes employees to an imminent hazard related to COVID-19 and can issue citations for serious violations related to COVID-19 without giving employers 15-day notice before issuance. From now until 2023, employers must comply with over 20 pages of new Cal/OSHA COVID-19 regulations in Sections 3205 to 3205.4. These regulations include notifying all employees at a worksite of potential exposures, notifying local public health agencies of all workplace outbreaks (three or more cases of COVID-19 among employees who live in different households within a two-week period, and strict reporting requirements for investigation, prevention, employee housing, and employee transportation. Employers should expect Cal/OSHA to be proactive when it comes to audit and enforcement, and this author has already been tasked with creating reporting summaries and audit checklists for clients.

Presumption In Favor Of

Another COVID-19 related executive order has now been extended. As of September 2020, an employee suffering illness or death from COVID-19 receives a rebuttable presumption in favor of Workers' Compensation benefits. If an employer has 5 or more employees and there is an "outbreak" at a workplace, any employee who tests positive within 14 days after reporting to work gets the benefit of the presumption that Workers' Compensation applies. Beware, however, there are many qualifications, some of which are: outbreaks are defined as 4% of the employer's workforce or a public health order to close the workplace, the employee must first exhaust any COVID-19 related supplemental paid sick leave benefits (e.g., FFCRA benefits or paid sick leave under AB 1867 discussed below), the employer must report to their workers' compensation claims administrator in writing within three business days when an employee has tested positive, and benefits are payable after a 30 (not 90) day period.

COVID-19 Related Paid Sick Leave

California has also taken the step to guarantee COVID-19 related paid sick leave to employees where FFCRA leaves off. If you have over 500 employees, or are a private or public employer of first responders who did not extend FFCRA benefits to workers, you must pay sick leave consistent with FFCRA upon an employee's request. IF you have already provided the FFCRA paid sick leave, you are not required to do so again., but you must ensure that you paid the correct rates under the new law. This new mandate is effective until the end of the year, or until any extension of FFCRA. Take care, as your wage statements must be updated to reflect the balance for such paid sick leave.



Of course, California lawmakers have focused on many non-COVID-19 issues as well. Employers must now report pay data to the Department of Fair Employment and Housing (DFEH) as of March 2021. The DFEH authorizes it to investigate and prosecute complaints unlawful wage rate discrimination, in coordination with the Division of Labor Standards Enforcement (DLSE). If you are a private employer with more than 100 employees and you file an Employer Information Report under federal law, you must submit a pay data report which includes information regarding the number of employees by race, ethnicity, and sex in multiple job categories including executive or senior level officials and managers, professionals, technicians, sales workers, administrative support workers, laborers and helpers, and service workers. The DFEH issued and FAQ page in November which helps employers navigate their way through the requirements, although much still needs to be clarified before March 31, 2021.

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In another move to protect the rights of employees, Labor Code amendments now allow employees one year (from six months) to file a complaint with the DLSE from the date they were discharged or otherwise discriminated against in violation of a law within the power of the Labor Commissioner. The new changes also allow employees to collect attorneys' fees if successful. This now means that employees are incentivized to file civil claims as opposed to using the DLSE to investigate. DLSE complaints have been on a steep rise in the last decade.

There are also changes to the scope of paid sick leave and parental leave in California that many employers must follow. Small employers (with at least five employees) are newly subject to the California Family Rights Act (CFRA). The CFRA permits employees to take up to 12 weeks of unpaid leave to care for a spouse, child or parent with a serious health condition or call to active duty in the military. The change will add domestic partners, their children, grandparents, grandchildren, siblings and parents-in- law to the list of family members. For most covered leaves, California law allows an employer to run CFRA and FMLA leave concurrently. However, as a result of the new law, CFRA will offer 12 weeks of job-protected unpaid leave for scenarios not covered by federal law. It is possible, that in some instances, an employee may be permitted both the unpaid leave, as well as paid leave under the California Paid Family Leave law. Employers should be careful to navigate the often confusing and overlapping laws.

A final tidbit to consider. Employees who cannot otherwise afford a lawyer may petition to have the Labor Commissioner represent them in wage claim arbitrations and proceedings to determine the applicability of an arbitration agreement. The Labor Commissioner's office will now have the ability to informally investigate the merits of claims where it did not before. Importantly, employers must serve petitions to compel arbitration of wage claims under Labor Code sections 98, 98.1 or 98.2 on the Labor Commissioner going forward.

California continues to blaze the trail for the protection of the worker, and the trend for more and more legislation will not likely slow down. While this summary does not discuss all of the new laws impacting employers, it does highlight the importance of keeping up to date with constant changes.

JoLynn M. Scharrer leads the Firm's Employment Law Group, handling all aspects of labor and employment issues. She regularly advises clients on COVID-19 related issues, as well as drafting/revising employee handbooks, employment contracts, and other documents to comply with changing law. She conducts California mandated sexual harassment prevention training for employers with an interactive participatory program. She handles all aspects of monitoring and resolving employment claims and litigation, including but not limited to conducting complaint investigations, wrongful termination, discrimination, harassment and wage and hour issues. We are here to help with any questions or issues you face as an employer, either due to COVID-19 or any facet of your business. Please contact JoLynn Scharrer at scharrer@huntortmann.com to discuss how our Employment Law Group can help.