FIND *your way*

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2022

What Employers Need to Know to Navigate the Regulatory Maze

BY MARK E. TERMAN, Esq.

To borrow from both the Grateful Dead and Miley Cyrus, "... what a long, strange trip it's been ..." and "there's always gonna be another mountain ... ain't about what's on the other side, it's the climb." Among the lasting 2021 impacts of politics, aberrant weather and wildfires—and COVID-19—is increased regulation of California employers. More than 330 bills introduced in the most recent California legislative session mention "employer," compared to about 560 bills in 2020. While most bills did not pass the Legislature, many were signed into law by Gov. Gavin Newsom, bringing more rules and risks for employers in our state dealing with COVID-19, workplace safety, wage and hour rules, worker classification, working conditions, leaves of absence, posters, Department of Fair Employment and Housing matters, settlements and nondisparagement agreements, and wage rates.

Elements of key state Assembly Bills (AB) and Senate Bills (SB) affecting private employers that became law Jan. 1, 2022 (unless otherwise noted) follow.

COVID-19 & WORKPLACE SAFETY

COVID-19 Exposure Notification

Effective Oct. 5, 2021, AB 654 amends existing law (AB 685 enacted the prior year; see Page 7, January/February 2021 *California CPA*, "Employer Beware") to parallel provisions of Cal-OSHA's COVID-19 Emergency Temporary Standard (dir.ca.gov/dosh/coronavirus/ETS.html) about employer-required notices of COVID-19 exposures (based on close contact with an infected individual) and outbreaks. AB 654 lists individuals and entities who must be notified, including all employees, and the employers of subcontracted employees, who were on the premises at the same worksite. This bill changes prior law that required notice to, "employees who may have been exposed." AB 654 also expands categories of employers who are exempt from the public health agency reporting requirements to include various licensed entities such as community clinics, adult day health centers, community care facilities and child day care facilities.

This bill amends Labor Code Sec. 6409.6.

Enterprise-wide and Egregious Health & Safety Violations

SB 606 expands Cal-OSHA's enforcement tools by establishing new levels of workplace health and safety violations: "enterprise-wide" and "egregious" violations. If an employer has multiple worksites, the bill provides that there is a rebuttable presumption that a violation is enterprise-wide if the employer has a written policy or procedure that violates workplace health and safety laws, or Cal-OSHA "has evidence of a pattern or practice of the same violation … committed by that employer involving more than one of the employer's worksites." Thereafter, if the employer fails to rebut the presumption of an "enterprise-wide" violation, Cal-OSHA may issue an enterprise-wide citation requiring enterprise-wide abatement.

The bill empowers Cal-OSHA upon inspection or investigation to issue a citation deeming a workplace health and safety violation "egregious" where, among other reasons, the employer: "Intentionally … made no reasonable effort to eliminate the known violation;" committed willful violations that "resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;" or committed willful violations resulting in "persistently high rates of worker injuries or illnesses."

Subject to narrow exceptions, "each instance of an employee exposed to [an egregious] violation shall be considered a separate violation for the purposes of the issuance of fines and penalties." SB 606 adds "enterprise-wide violation" to the list of willful or repeated violation of any occupational safety or health standard or order, and certain other violations upon which a civil penalty may be assessed of not more than $124,709 for each violation, but in no case less than $8,908 for each willful violation.

This bill amends secs. 6317, 6323, 6324, 6429, and 6602 of the Labor Code, and adds secs. 6317.8 and 6317.9.

WAGE & HOUR, WORKER CLASSIFICATION & WORKING CONDITIONS

Employee Production Quotas in Warehouse Distribution Centers

Citing the rapid growth of just-in-time logistics and of next-day consumer package deliveries—and the belief that production quotas imposed on non-exempt warehouse distribution center employees fulfilling that supply chain incentivize non-compliance with workplace safety rules, increase meal and rest break violations, and nullify minimum wage increases—the Legislature enacted AB 701 to regulate the use of production quotas in warehouse distribution centers.

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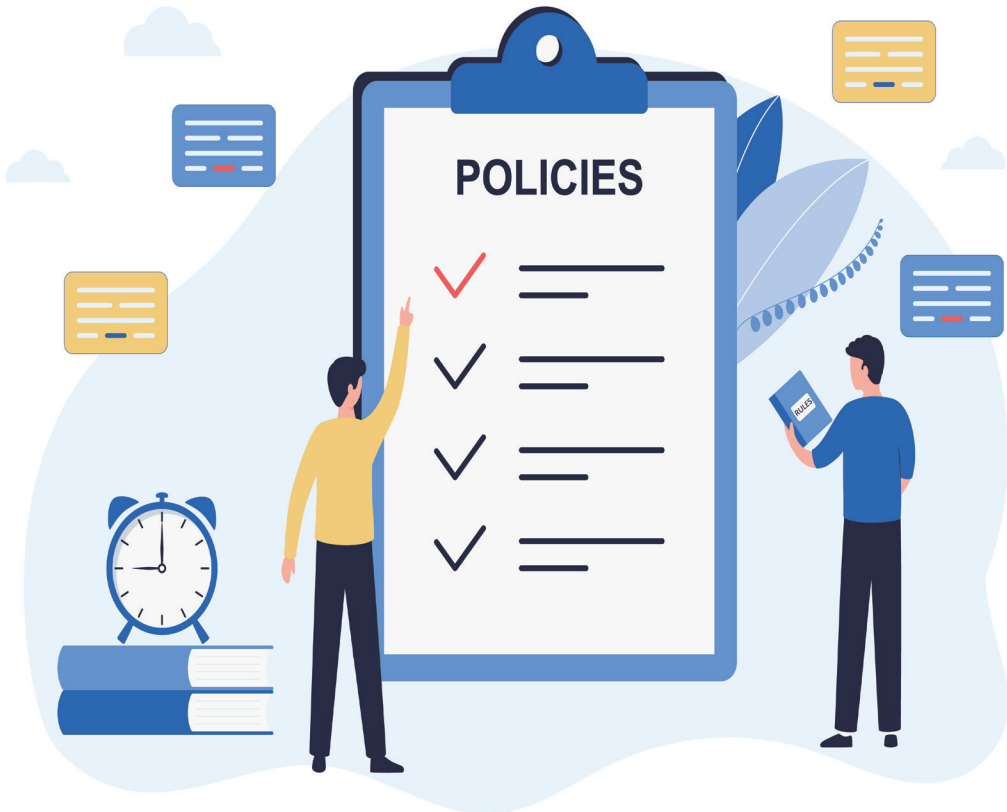


For purposes of AB 701, a "warehouse distribution center" is a business establishment operating under any of these North American Industry Classification System (NAICS) codes: 493110: General Warehousing and Storage; 423: Merchant Wholesalers, Durable Goods; 424: Merchant Wholesalers, Nondurable Goods; and 454110: Electronic Shopping and Mail-Order Houses (Notable is that NAICS code 493130: Farm Product Warehousing and Storage is not regulated by AB 701).

Of employers in the four NAICS codes, AB 701 regulates those who directly or indirectly, or through an agent (including the services of a third-party employer, temporary service or staffing agency), employ or exercise control over the wages, hours or working conditions of 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in California.

All employees of an employer's commonly controlled group (as the term is defined in Sec. 25105 of the Revenue and Taxation Code) are counted in determining the total employees.

The bill defines a "quota" as, "a work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard."

AB 701 provides that employees are not required to meet quota that prevents legally required meal and rest periods, use of and travelling to and from the bathroom, and compliance with California occupational health and safety laws.

The time employees spend complying with occupational health and safety laws must be considered as "on task" and productive for purposes of any quota, though meal and rest breaks are not considered productive time unless employees must remain on call. The bill prohibits adverse employment action by employer against an employee for failure to meet a quota due to any of the foregoing reasons, or where the quota was not disclosed as required by the bill.

Written disclosure of each quota to which the employee is subject must be given to the employee at the time of hire or within 30 days of the Jan. 1 effective date of this bill. It must describe the quantified number of tasks to be performed or materials to be produced or handled, the defined period to complete quota, and any potential adverse action that could result from failure to meet quota.

If a current or former employees believes that compliance with a quota violated their right to meal or rest periods or

many labor CODE PROVISIONS ALREADY CARRY MISDEMEANOR CLASSIFICATION, AND CRIMINAL PROSECUTIONS HAVE BEEN QUITE RARE, BUT GRAND THEFT COULD BE PROSECUTED (IF AT ALL) AS A FELONY.

occupational health and safety law, he or she can orally or in writing request a written description of each quota that applies to them and their personal work speed data the most recent 90-day work period of the employee. Employers must provide this information no later than 21 calendar days from the date of the request. Former employees may only make one such request. The law does not limit the number of requests current employees can make.

The new law creates a rebuttable presumption of unlawful retaliation if an employer discriminates, retaliates or takes adverse action against an employee who, in the previous 90 days, has requested for the first time in the calendar year their quota or personal work speed data, or complained to their employer or government agencies about an alleged violation of AB 701.

Current and former employees may bring an action for injunctive relief for any alleged violations of AB 701, may recover costs and attorneys' fees if they prevail, and may also pursue a Private Attorneys General Act (PAGA; Labor Code Sec. 2698, et seq.) action, though employers have the right to cure alleged violations (per under Sec. 2699.3) before PAGA lawsuit is filed.

This bill amends Labor Code Sec. 138.7 and adds secs. 2100 to 2112.

AB 1506 EXTENDS UNTIL JAN. 1, 2025, THE TEMPORARY EXEMPTION FOR NEWSPAPER PUBLISHERS AND DISTRIBUTORS FROM THE APPLICATION OF THE "ABC TEST" ...

Wage Theft Crimes

AB 1003 makes the intentional theft of wages by an employer punishable as grand theft if the wages equal more than $950 for one employee or $2,350 for two or more employees in any consecutive 12-month timeframe.

Wages subject to this section also include gratuities, benefits and other compensation. The law also applies to the "hiring entity of an independent contractor." Many Labor Code provisions already carry misdemeanor classification, and criminal prosecutions have been quite rare, but grand theft could be prosecuted (if at all) as a felony.

This bill adds Penal Code Sec. 487m.

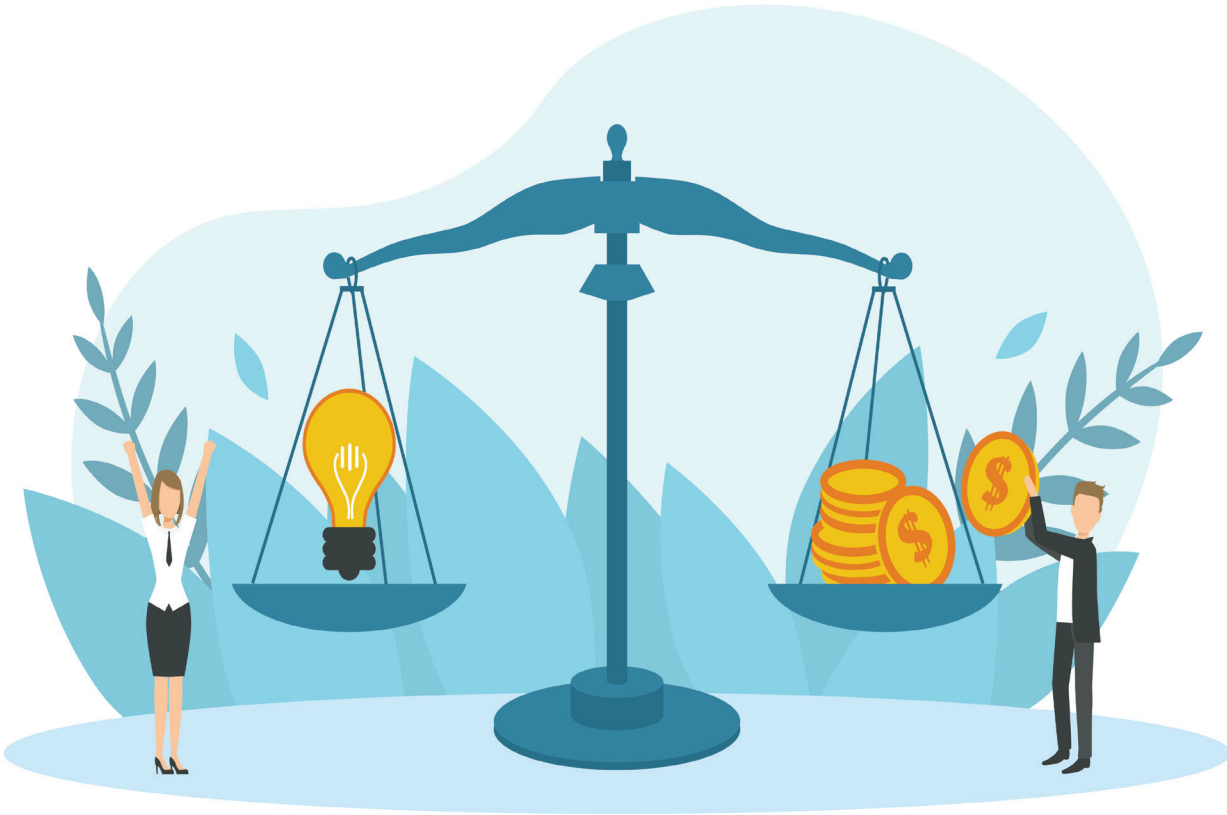
Independent Contractor Traction

AB 1506 extends until Jan. 1, 2025, the temporary exemption for newspaper publishers and distributors from the application of the "ABC test," which was established in the California Supreme Court's Dynamex decision in 2018 and AB 5 in 2019 to determine if workers are employees or independent contractors. The bill also imposes reporting requirements on publishers and distributors to ensure that they are complying with the multifactor test for employment status previously adopted in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations.* This bill amends Labor Code Sec. 2783.

As a general rule, an exemption to the ABC test still requires satisfaction of "control" and other well-known factors described in .

AB 1561 clarifies and updates four areas of AB 2257 in the prior year and AB 5:

- Extends to Jan. 1, 2025, the exemption for licensed



manicurists, within the Labor Code Sec. 2778 "professional services" exemption from the "ABC test."
- Extends from Jan. 1, 2022, to Jan. 1, 2025, the exemption from the ABC test in Labor Code Sec. 2781 for work performed by subcontractors in the construction industry.
- Clarifies the exemption in Labor Code Sec. 2782 for research subjects providing feedback to data aggregators.
- Extends the Labor Code Sec. 2783 exemption for Department of Insurance licensees and workers who provide underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries, to also apply to persons who provide claims adjusting or third-party administration.

This bill amends Labor Code secs. 2778, 2781, 2782 and 2783.

the California FAMILY RIGHTS ACT (CFRA) ALLOWS EMPLOYEES UP TO 12 WEEKS LEAVE OF ABSENCE DUE TO THEIR OWN MEDICAL CONDITION OR TO CARE FOR AN IMMEDIATE FAMILY MEMBER.

Responsibility for Garment Manufacturing Wages

SB 62 requires that garment manufacturing employees can no longer be paid by the piece or unit, or by the piece rate and must instead be paid an hourly rate no less than the minimum wage, except for employees covered by certain collective bargaining agreements. Employees' recourse under the bill is to file a claim with the Labor Commissioner who may, in turn, bring an action to enforce the statute or issue a citation. Statutory penalties now apply at the rate of $200 "per employee for each pay period in which each employee is paid by the piece rate."

The bill also aims to impose joint and several liability upon garment manufacturers, contractors and brand guarantors for unpaid wages, including overtime and premium wages, expenses reimbursements, attorneys' fees, and civil penalties for failure to secure workers compensation insurance "regardless of how many layers of contracting" exist. Brand guarantors are a broadly defined group of those "contracting to have garments

made." "Contracts for the performance of garment manufacturing include licensing of a brand or name, regardless of whether the person with whom they contract performs the manufacturing operations or hires contractors or subcontractors to perform the manufacturing operations." In addition, Brand guarantors must keep certain defined records regarding those contracts for four years.

This bill adds Labor Code Sec. 2673.2 and amends secs. 2671 and 2673.

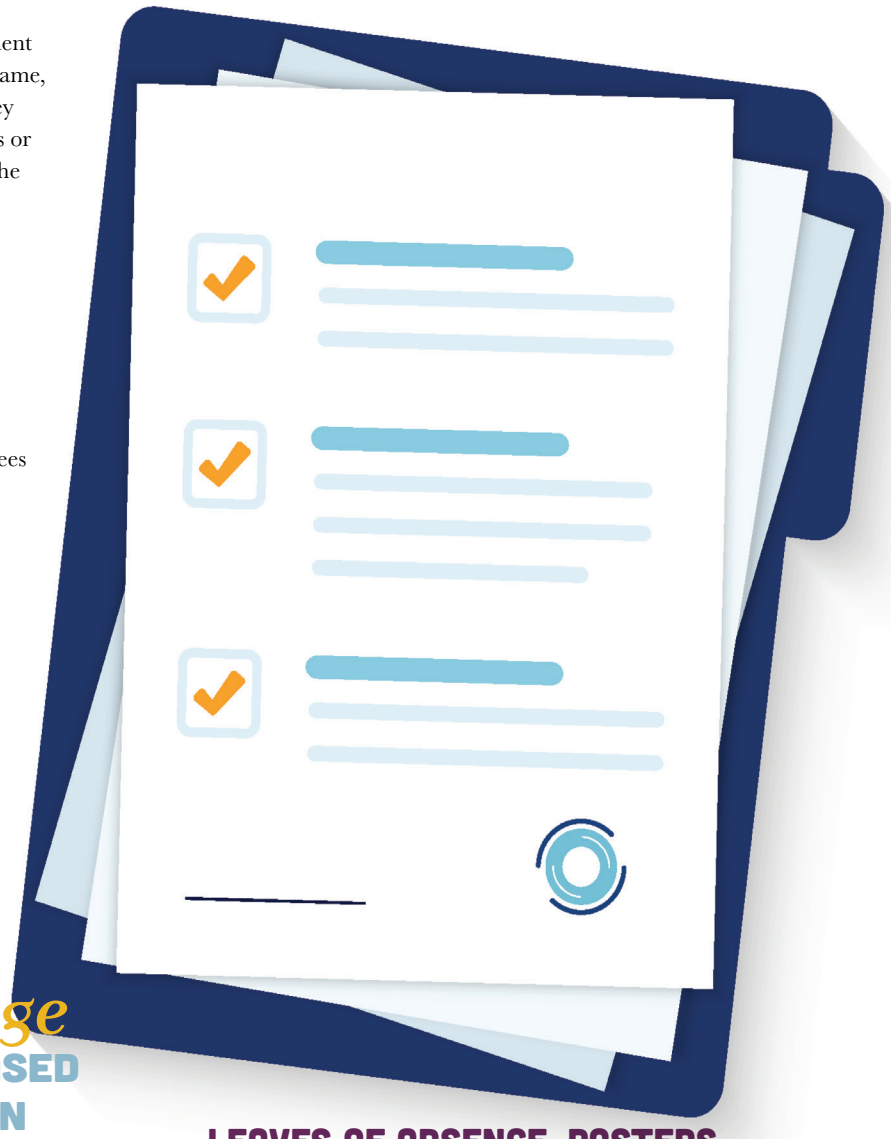
No PAGA for Janitorial Employers Working Under a CBA

SB 646 blocks janitorial employees represented by a labor organization and performing work under a collective bargaining agreement (CBA) from filing a suit under PAGA. This PAGA exemption expires on the date the CBA expires or July 1, 2028, whichever is earlier.

"Janitorial employee" means an employee whose primary duties are "to clean and keep in an orderly condition commercial working areas and washrooms, or the premises of an office, multiunit residential facility, industrial facility, health care facility, amusement park, convention center, stadium, racetrack, arena, or retail establishment."

The exemption from PAGA rights does not apply to workers who specialize in window washing, housekeeping staff who make beds and change linens as a primary responsibility, workers working at airport facilities or cabin cleaning, workers at hotels, card clubs, restaurants, or other good service operations, and grocery store employee and drug-retail employees.

This bill adds Labor Code Sec. 2699.8 until July 1, 2028.



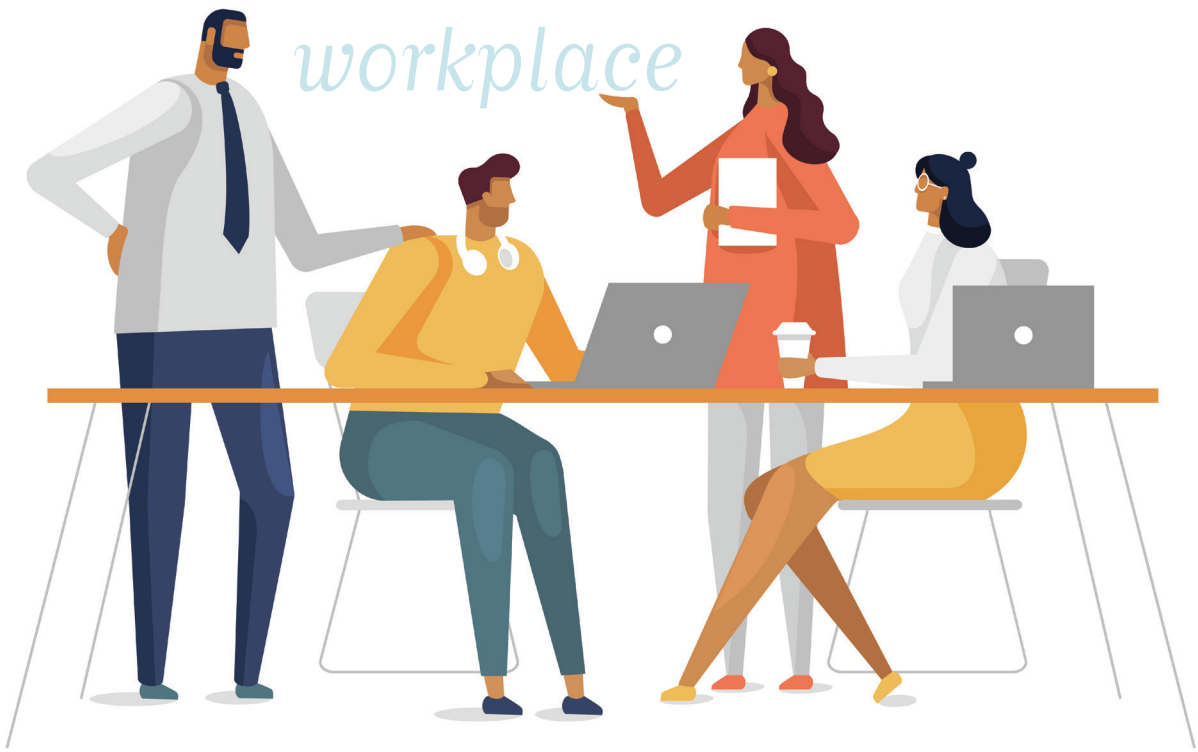
minimum wage IN CALIFORNIA INCREASED TO $15 PER HOUR ON JAN. 1 FOR EMPLOYERS WITH 26 OR MORE EMPLOYEES BASED ON LEGISLATION SIGNED BY GOV. JERRY BROWN IN 2015.

LEAVES OF ABSENCE, POSTERS & DFEH MATTERS

More California Family Rights

The California Family Rights Act (CFRA) allows employees up to 12 weeks leave of absence due to their own medical condition or to care for an immediate family member. AB 1033 expands immediate family members to include parents-in-law. This bill follows SB 1383 in the prior year which, among other things, expanded CFRA to cover any employer with five or more employees.

AB 1033 also requires the Department of Fair Employment and Housing (DFEH) notify an employee in writing of the requirement for mediation under the DFEH's small-employer mediation program prior to the employee filing a civil action if mediation is requested by the employer or employee. This program applies to employers with between five and 19 employees.



This bill amends Government Code secs. 12945.2 and 12945.21.

Electronic Delivery of Workplace Notices

SB 657 clarifies that where an employer is required to physically post information in the workplace to apprise employees of their rights under applicable statutes, it "may also distribute that information to employees by email."

This bill adds Labor Code Sec.1207.

More Time for DFEH Action & for Lawsuits

SB 807 extends the time by which an individual can file a civil action for statutory violations by tolling that period while the DFEH investigates. The DFEH's deadline to complete its investigation and issue a right-to-sue notice for employment discrimination complaints treated as class or representative complaints also is extended to two years.

The bill also requires that employers must now preserve personnel records for applicants and employees for four years from the date that the records were created after an employee is terminated, or when an applicant is not hired by a company.

employers
MUST NOW PRESERVE PERSONNEL RECORDS FOR APPLICANTS AND EMPLOYEES FOR FOUR YEARS FROM THE DATE THAT THE RECORDS WERE CREATED AFTER AN EMPLOYEE IS TERMINATED, OR WHEN AN APPLICANT IS NOT HIRED BY A COMPANY.

Once an employer receives notice that a verified complaint has been filed, the employer must preserve all relevant records until after the resolution of the complaint or the expiration of the statute of limitations for the claims, whichever is later.

This bill amends Government Code secs. 12930, 12946, 12960, 12961, 12962, 12963.5, 12965, 12981 and 12989.1.

SETTLEMENTS & NONDISPARAGEMENT AGREEMENTS

Silenced No More Act

The Stand Together Against Non-Disclosures (STAND) Act, effective Jan. 1, 2019, prohibits employers from settling lawsuits and administrative claims using agreements that prevent the disclosure of factual information regarding sexual assault, sexual harassment, workplace harassment and discrimination based on sex, the failure to prevent acts of workplace harassment or sex discrimination, and retaliation against workers who report sexual harassment or sex discrimination.

SB 331, known as the Silenced No More Act, expands that law to prohibit provisions in certain agreements that prevent or restrict the disclosure of factual information related to claims involving all forms of harassment, discrimination and retaliation.

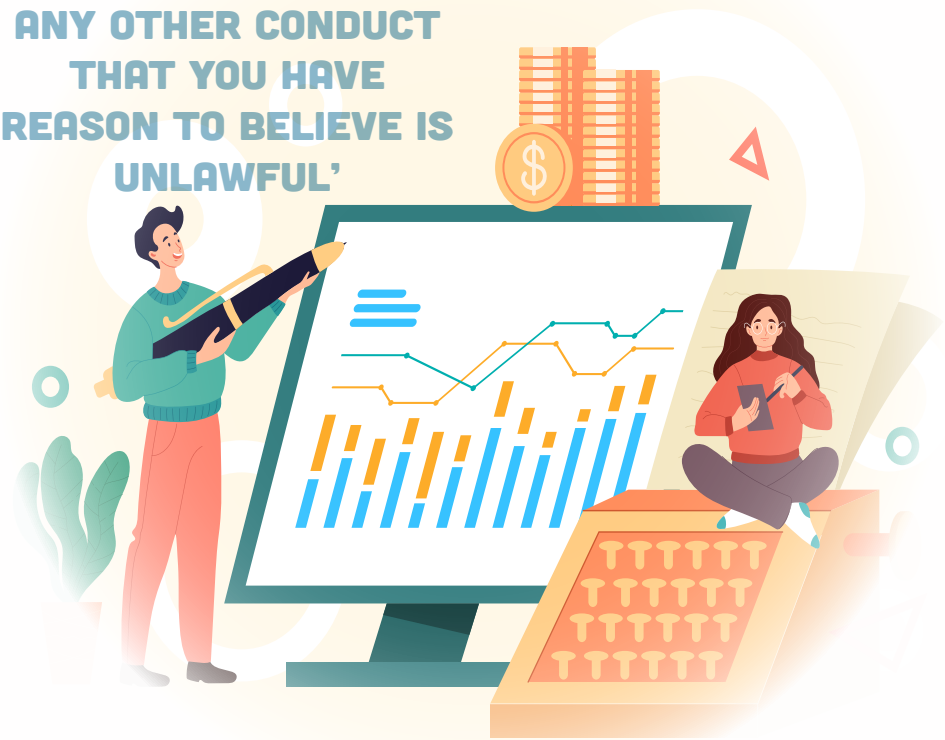
It prohibits employers from requiring an employee to sign a nondisparagement agreement or other document that has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace. It prohibits any provision in an employee's separation agreement that restricts the disclosure of information about unlawful acts in the workplace.

Moreover, the bill requires that a nondisparagement or other contractual provisions that restrict an employee's ability to disclose information related to conditions in the workplace to include specific language, substantially in this form, "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 employer must also notify the employee that he or she has the right to consult an attorney and has no less than five days in which to do so.

SB 331 applies to agreements made in exchange for a raise or bonus, made as a condition of employment or continued employment, and related to an employee's separation such as a severance agreement. Excluded are negotiated settlement agreements made to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum or through an employer's internal complaint process.

This bill amends Code of Civil Procedure Sec. 1001 and Government Code Sec. 12964.5.

'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'



WAGE AMOUNTS

Minimum Wage Going Up

Minimum wage in California increased to $15 per hour on Jan. 1 for employers with 26 or more employees based on legislation signed by Gov. Jerry Brown in 2015. The minimum wage for employers with 25 or fewer employees increased to $14 per hour.

State minimum wage changes impact classification of most exempt workers. In addition to "duties tests" for administrative, executive and

professional exemptions, a salary of at least twice the state minimum wage must be paid to meet the "salary basis test" (assuming another salary basis test does not apply).

By Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to $62,440. Employers with smaller workforces must pay at least $58,240 as salary to meet the test. State minimum wage increases also impact retailers who rely on the inside-sales exemption, which requires that employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

Municipalities continue to create and increase their own minimum wage for companies with employees working in their jurisdiction. Employers must pay the higher of the state or local minimum wage. These local rates typically change Jan. 1 or July 1. Some are already in excess of $16 per hour.

Employers should monitor the requirements to assure compliance in each municipality in which they have employees working. A good starting place is the UC Berkeley Labor Center Inventory of U.S. City and County Minimum Wage Ordinances: laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/.

Overtime Exemption for Some Computer Professionals

Labor Code Sec. 515.5 contains an overtime pay exemption for highly skilled computer professionals who spend more than half of their working time in top level intellectual or creative work that requires the exercise of discretion and independent judgment, such as software engineers and programmers, and systems designers and analysts.

To qualify for exemption, the employee also must be paid at least a minimum amount per hour or, alternatively, a salary equal to that hourly rate. Each year, the California Department of Industrial Relations sets that pay rate based on the California CPI increase.

For 2022, the minimum rates of pay required for this exemption are $50 per hour, or $8,679.16 salary monthly or $104,149.81 annual salary.

WHAT'S NEXT?

Employers should consider how these new laws impact their business and workplace, and then review and update their personnel and document retention policies and practices with experienced attorneys or human resource professionals. CPA

municipalities continue TO CREATE AND INCREASE THEIR OWN MINIMUM WAGE FOR COMPANIES WITH EMPLOYEES WORKING IN THEIR JURISDICTION. EMPLOYERS MUST PAY THE HIGHER OF THE STATE OR LOCAL MINIMUM WAGE.

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