



CALIFORNIA EMPLOYMENT LAW 2021 UPDATE

2020 presented a myriad of challenges for California employers, including new restrictive employment laws. Start the new year right by staying informed about recent employment law developments.

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*Bills marked with an asterisk went into effect January 1, 2021.

New Employment Laws

Below is a summary of the most notable employment-related laws Governor Newsom passed in 2020. All bills took effect on January 1, 2021, unless otherwise noted.

Corporate Boardroom Diversity

Assembly Bill 979 requires any publicly held foreign or domestic corporation whose principal executive office is headquartered in California to comply with the following requirements:

1. No later than the close of the 2021 calendar year, the corporation must have a minimum of one director from an underrepresented community; and
2. No later than the close of the 2022 calendar year, corporations with nine or more directors must have a minimum of three directors from underrepresented communities, corporations with more than four but fewer than nine directors must have a minimum of two directors from underrepresented communities, and corporations with four or fewer directors must have a minimum of one director from an underrepresented community.



Rest Periods for Security Officers

Assembly Bill 1512 permits private patrol operator employers to require security officer employees registered under the [Private Security Services Act](#) to remain on the premises, remain on call, and carry and monitor a communication device during rest periods. If a security officer's rest period is interrupted, the officer must be allowed to restart a rest period anew as soon as practicable; this subsequent, uninterrupted rest period qualifies as a compliant rest period. If a security officer is not able to take an uninterrupted rest period of at least 10 minutes for every four hours worked (or major fraction thereof), the officer must be paid one additional hour of pay at their regular base hourly rate. As an emergency statute, this bill took effect immediately as of September 30, 2021. However, it does not apply to claims filed before January 1, 2021.

DLSE Complaints

California Labor Code Section 98.7 allows individuals who believe that they have been discharged or otherwise discriminated against in violation of any law under the Labor Commissioner's jurisdiction to file a complaint with the California Division of Labor Standards Enforcement (DLSE). [Assembly Bill 1947](#) extends the statute of limitations for these complaints to one year after the occurrence of the violation. The bill also authorizes courts to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of [Section 1102.5](#) of the Labor Code, which prohibits

employers from retaliating against employees for reporting employer violations or noncompliance with local, state, or federal statutes and regulations.

CANRA Mandated Reporters

Assembly Bill 1963 expands the list of mandated reporters codified in the Child Abuse and Neglect Reporting Act (Section 11165.7 of the Penal Code) to include:

- human resource employees of businesses with five or more employees that employ minors, and
- adults whose duties require direct contact with and supervision of minors in the performance of the minor's duties in the workplace of businesses with 5 or more employees.

Under AB 1963 employers are required to provide mandated reporters with training on identification and reporting of child abuse and neglect.

Paid Sick Leave Designation

Under Section 233 of the Labor Code, employees are permitted to use at least half of their annual employer-provided sick leave to care for their family. Assembly Bill 2017 gives employees the sole discretion to designate paid sick leave to care for their family.

No Rehire Provisions in Settlement Agreements

Last year, Assembly Bill 749 prohibited the inclusion of "no-rehire" provisions in settlement agreements, except in the case that the employer made a good faith determination that the aggrieved person engaged in sexual harassment or sexual assault. Assembly Bill 2143 expands the statute's sexual harassment/sexual assault exception to allow the inclusion of no re-hire

provisions if the employee engaged in "any criminal conduct." AB 2143 requires employers to document the good faith determination of sexual harassment, sexual assault, or other criminal conduct before the aggrieved person files a claim or civil action against the employer. The aggrieved person must also file their claim in good faith for the prohibition to apply.



Amended Independent Contractor Laws

Assembly Bill 5 created the ABC Test for determining if a worker is an employee or an independent contractor under California law. Assembly Bill 2257 creates additional exemptions for certain occupations and contractual relationships from the restrictions that AB5 posed on many employers and workers. AB 2257 upholds the ABC Test for classifying independent contractors, with additional exemptions. Businesses exempted from using the ABC Test are required to use the Borello test, which is significantly less rigorous than the ABC Test, to classify their workers as independent contractors. The bill's provisions went into effect immediately as of September 4, 2020. Find out more about how AB 2257 affects California businesses and workers [here](#).

Military Paid Family Leave Extension

Assembly Bill 2399 amends the definitions in Sections 3302 and 3307 of the Unemployment Insurance Code in order to extend additional Paid Family Leave protections to active military members and their families. The bill revises the definitions for “care recipient,” “care provider,” and “family care leave” and adds a definition of “military member” for the purpose of the qualifying exigency provisions.

Extended Rest Period Exemption for Certain Petroleum Workers

Labor Code Section 226.75 exempts specified employees who hold a safety-sensitive position at a petroleum facility from rest period requirements, to the extent that the employee is required to carry and monitor a communication device and to respond to emergencies or is required to remain on employer premises to monitor the premises and respond to emergencies. Assembly Bill 2479 extends this exemption past January 1, 2021 to January 1, 2026.

Reimbursement for Direct Patient Care Training

Under Assembly Bill 2588, employers must reimburse employees that provide direct patient care and applicants for direct patient care employment for the costs of any employer-provided or employer-required educational program or training.

Protections for Victims of Crime

Assembly Bill 2992 revises Labor Code Sections 230 and 230.1, which prohibit discrimination or retaliation against an employee that takes time off to seek psychological counseling, medical attention, or related services after an incident of domestic violence, sexual assault, and/or stalking. The bill expands these protections

to include employees who are:

- A victim of stalking, domestic violence, or sexual assault;
- A victim of a crime that caused physical injury, or that caused mental injury and a threat of physical injury; or,
- A person whose immediate family member is deceased as the direct result of a crime.

The bill defines “crime” as “a crime or public offense as set forth in Section 13951 of the Government Code, and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime.”



Anti-Discriminatory Jury Selection

AB 3070 prohibits the use of peremptory challenges to remove prospective jurors on the basis of their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of prospective jurors in any of those groups. The bill also creates a presumption that certain specified justifications for excluding jurors are improper proxies for racial or gender discrimination. These provisions take effect for criminal cases on January 1, 2022 and for civil cases on January 1, 2026.

Successor Employer Liability

Assembly Bill 3075 establishes criteria for successorship and imposes liability on a successor to any judgement debtor for any unpaid wages, damages, and penalties owed to the judgement debtor's former workforce. The bill also requires corporations to document whether any officer, director, or in the case of a limited liability company, a member or manager, has an outstanding final judgment issued by the DLSE or a court of law for a violation of any wage order or provision of the Labor Code. This information should be included within a corporation's statement of information filed with the Secretary of State starting on the earlier of either the date of certification by the Secretary of State that California Business Connect is implemented or January 1, 2022. AB 3075 also amends Section 1205 of the Labor Code to authorize local jurisdictions to enforce state labor standards requirements with respect to imposing minimum penalties for noncompliance with wage-related statutes.



FEHA Clarification

Assembly Bill 3364, a "Judiciary omnibus" bill, amends the Fair Employment and Housing Act (FEHA) to clarify that the bill prohibits discrimination against individuals who have military **or** veteran status, as opposed to veteran **and** military status.

Annual Pay Data Reports

Senate Bill 973 requires private employers with 100 or more employees that are required to file an annual Employer Information Report under federal law to also submit a pay data report to the California Department of Fair Employment and Housing (DFEH). This report should be submitted on or before March 31, 2021, and each year after, and should include the number of employees by race, ethnicity, and sex in the following categories, which correspond to the federal EEO-1 categories:

- Executive or Senior Level Officials and Managers.
- First or Mid-Level Officials and Managers.
- Professionals;
- Technicians;
- Sales Workers;
- Administrative Support Workers;
- Craft Workers;
- Operatives;
- Laborers and Helpers; and
- Service Workers.

Employers must include previous year W-2 earnings and hours worked for all employees, based on an employee workforce "snapshot" taken from a single pay period of the employer's choice between October 1 and December 31 of the "Reporting Year."

The report must account for and include all employees who were active as of that snapshot pay period, regardless of whether or not an employee worked for the full calendar year.

The DFEH is required under SB 973 to make these reports available to the Department of Labor Standards Enforcement (DLSE) upon request and to maintain the pay data reports for a minimum of 10 years. The bill also authorizes the DFEH to seek an order requiring non-reporting employers to comply.

Extended Deadline for CalSavers Retirement Program

CalSavers, a state-sponsored retirement savings program for private sector workers, extended its first implementation deadline, which applies to businesses with 100 or more employees, to September 30, 2020. All businesses with 5 or more employees are required by California law to offer a retirement plan or register for and facilitate the implementation of CalSavers by the appropriate deadlines, which are staggered by business size over three years. The deadlines are as follows:

- Businesses with 100 or more employees: **September 30, 2020**
- Businesses with 50 or more employees: **June 30, 2021**
- Businesses with 5 or more employees: **June 30, 2022.**

Minimum Wage Increases

On July 1, 2020, the minimum wage in both the City of Los Angeles and unincorporated areas in the County of Los Angeles increased:

- For small businesses (25 or fewer employees) and non-profit corporations, the minimum wage increased to \$14.25 per hour.
- For all other employers (26 or more employees) the minimum wage increased to \$15.00 per hour.

Santa Monica, Pasadena, and Malibu have similar city ordinances increasing the minimum wage to either \$14.25 or \$15.00 per hour depending on the number of employees, as of July 1, 2020. On July 1, 2021, all employers in the City and unincorporated areas in the County of LA will be required to pay a minimum wage of \$15.00 per hour.

State of California Minimum Wage Increases

For the purposes of this diagram, "small businesses" are considered businesses that employ 25 or fewer employees, and "large businesses" employ 26 or more employees.

January 1, 2021

Small Businesses:
\$13.00 per hour

Large Businesses:
\$14.00 per hour

January 1, 2022

Small Businesses:
\$14.00 per hour

Large Businesses:
\$15.00 per hour

January 1, 2023

All California
Businesses:
\$15.00 per hour

Pandemic Response Legislation

Below is a summary of the laws passed in 2020 in response to the Coronavirus pandemic. As emergency legislation, some of these bills went into effect immediately.

Notice/Reporting Obligations

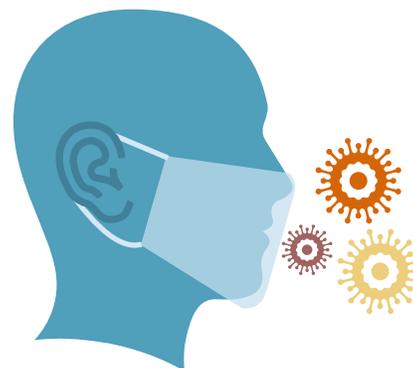
Assembly Bill 685 strengthens Cal/OSHA's ability to issue Orders Prohibiting Use (OPU), also known as Stop Work Orders, to workplaces that pose a risk of a COVID-19-related "imminent hazard." The bill also requires employers to take all of the following actions within one business day if the employer or representative of the employer receives a notice of potential exposure to COVID-19:

1. Provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19 in a manner the employer normally uses to communicate employment-related information. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.
2. Provide written notice to the exclusive representative, if any, of employees under paragraph (1).
3. Provide all employees who may have been exposed and the exclusive representative, if any, with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to,

workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as anti-retaliation and anti-discrimination protections of the employee.

4. Notify all employees, and the employers of subcontracted employees and the exclusive representative, if any, on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

Employers are also required to report information regarding a [COVID-19 outbreak](#), as defined by the State Department of Public Health, to the local public health department within 48 hours of learning of the outbreak. AB 685 will be in effect from January 1, 2021 until January 1, 2023.



Expanded Paid Sick Leave

AB 1867 codifies existing COVID-19-related supplemental paid sick leave requirements for food sector workers and extends mandatory sick leave protections to private employers with over 500 employees nationwide, as well as public and private employers of first responders and health care employees who opted not to provide paid sick leave under the federal FFCRA. AB 1867 also strengthens the enforcement provisions in California's preexisting paid sick leave law, codifies existing COVID-19-related hand washing standards, and requires the Department of Fair Employment and Housing (DFEH) to create a small employer family leave mediation pilot program. The bill went into effect on September 9, 2020 immediately upon Governor Newsom's approval.

OSHA Infection Prevention Awareness

Under Assembly Bill 2043, Cal-OSHA is required to disseminate information on best practices for COVID-19 infection prevention in both English and Spanish, along with other awareness and prevention measures. These measures expire when the state of emergency ends. The bill went into effect immediately on September 28, 2020.



Worker's Compensation Liability

Senate Bill (SB) 1159 extends the rebuttable presumption created by Executive Order (EO) N-62-20 that employees who test positive for or are diagnosed with COVID-19 were exposed to the virus at the workplace. This presumption makes employees that are "injured" as a result of COVID-19 exposure in the workplace eligible for workplace compensation benefits.

The bill also requires employers to report the following information in writing to their claims administrator within 3 business days when the employer knows or reasonably should know that an employee has tested positive for COVID-19:

1. An employee has tested positive. For the purposes of this report, the employer shall not provide any personally identifiable information regarding the employee who tested positive for COVID-19 unless the employee asserts the infection is work related or has filed a claim form pursuant to Section 5401.
2. The date that the employee tests positive, which is the date the specimen was collected for testing.
3. The specific address or addresses of the employee's specific place of employment during the 14-day period preceding the date of the employee's positive test.
4. The highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

As an emergency bill, these provisions took effect immediately as of September 17, 2020

Job-Protected Family Leave

SB 1383 requires businesses with 5 or more employees to offer 12 weeks of job-protected unpaid family leave by January 1, 2021. Businesses with 5 or more employees will be required to grant requests by employees to take up to 12 weeks of unpaid protected leave during any 12-month period for any of the following reasons:

1. to bond with a new child of the employee
2. to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner, as specified
3. due to a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

Although the bill does not require employers to offer paid leave, it requires that employers hold an employee's job until he/she returns to work and maintain the employee's employer-paid health benefits. The bill also requires small businesses to grant spouses who work for the same employer 12 weeks of family leave each. As the leave does not constitute a break in service, employers are required to maintain employees' seniority status when they return to work for purposes of layoffs, promotions, and other seniority-related benefits. Workers who qualify for job-protected unpaid leave may apply for California's Paid Family Leave Program, which provides employees with 8 weeks of partial pay that amounts to between 60-70% of their weekly salary.

Case Law Update

Below is a summary of the most notable employment-related cases decided in 2020.

Arbitration? Not So Fast (& Furious)

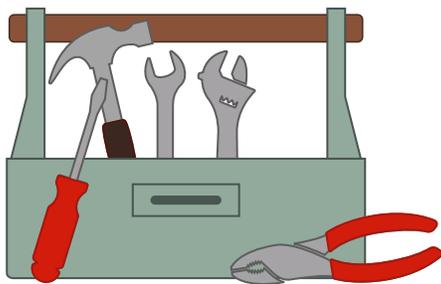
Neal Mortiz v. Universal City Studios, et al.

In a dispute concerning the Fast and the Furious film franchise, the California Court of Appeals affirmed the denial of a motion to compel arbitration of a contractual dispute over the film Hobbs & Shaw, ruling that the arbitration provisions in a prior production contract did not apply to spinoff films.

Hindsight is 2020

Aerotek, Inc. v. Johnson Group Staffing Company, Inc.

Attorneys' fees awarded under the California Uniform Trade Secrets Act belong to the lawyer, not the client.



Paid Commute Time: Not a Drill

Oliver v. Konica Minolta Business Solutions U.S.A., Inc.

If employees are under their employer's control during their commutes, they must be paid for their commute time.

No More Nonparty Discoveries in LA

Aixtron, Inc. v. Veeco Instruments, Inc.

Neither the Federal Arbitration Act (FAA) nor the California Arbitration Act (CAA) give an arbitrator the power to order a nonparty

to produce documents as part of pre-hearing discovery.

(Commute) Time is Money

Carlos Gutierrez v. Brand Energy Services of California, Inc.

The California Court of Appeals held that the Wage Order for construction employees and the California Labor Code precludes an employer from agreeing in a collective bargaining agreement (CBA) to not pay employees at least minimum wage for all time worked, including required travel.

Baggage Claims

Frlakin v. Apple Inc

The time employees spend waiting for a bag check must be paid even if the bag was brought purely for personal convenience. This time is considered "hours worked" and therefore compensable in California.

Sign at the Dotted Line

Conyer v. Hula Media Services, LLC

The California Court of Appeal found that an employee may be bound by an arbitration clause in an employee handbook despite unconscionable terms, which could be severed. The Court rejected the employee's argument that he did not know the employee handbook contained an arbitration agreement and that the employer failed to call the employee's attention to it. The Court reasoned that the employee had a duty to read the handbook prior to signing the written acknowledgement of receipt of the handbook and that the employer was not required to call it out.

The Threat Within

Galeotti v. International Union of Operating Engineers Union Local # 3

The California Court of Appeals ruled that a threat to terminate employment may constitute extortion, and that a resulting extortion claim may support a claim that the employer violated the Racketeer Influenced and Corrupt Organizations Act (RICO) when union leaders required employees to pay \$1000 to fund their re-election campaign or threatened to terminate them.

Equal Pay for Equal Work

Rizo v. Yovino

The Ninth Circuit ruled that a female employee's past earnings are not a "factor other than sex" that, under the federal Equal Pay Act, allows employers to justify pay disparities. The court affirmed that employers may only defend pay disparities based on "job-related factors."

Wipe After

Arnold v. Dignity Health

Plaintiff alleged that her employer engaged in "discrimination, harassment, and retaliation based on her age and her association with her African-American coworkers, including by terminating her employment in violation of the Fair Employment and Housing Act (FEHA)." The court ruled that the employer presented sufficient evidence of legitimate reasons for terminating the plaintiff's employment when plaintiff had warnings for performance issues, including a final written warning and a 3-day suspension and violated patient confidentiality by failing to wipe patient identifying information off a urine cup before throwing it away. The Court further found that plaintiff did not offer any evidence that the employer's actions were discriminatory, harassing, or retaliatory.

Two Bites at Wage and Hour Cases

Kim v. Reins International California, Inc.

Employees that have settled their individual wage and hour claims are not barred from pursuing claims under the Private Attorneys General Act (PAGA).

Where Do You Want to Go?

Midwest Motor Supply Co. v. Superior Court (Finch)

The Court of Appeal found that if any provision in an employment contract including a forum-selection clause is amended on or after January 1, 2017, an employee's rights under Labor Code section 925 to void a form-selection clause in an employment agreement is applicable.



Give Me a Break!

McPherson v. EF Intercultural Foundation, Inc.

Employers cannot avoid Labor Code Section 227.3, which requires employers to payout unused vacation time upon separation, by leaving vacation policies "undefined." "Unlimited" vacation policies must be unlimited in policy and in practice, and do not necessarily exempt employers from Section 227.3.

A Failure to Communicate

Sansone et al. v. Charter Communications Inc. et al.

The Ninth Circuit Court of Appeals found that, upon Time Warner Cable's change of ownership to Charter Communications, TWC's employees were effectively fired by their original employer and were entitled to payment for accrued PTO.

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