



## California Employment Law Update Major Changes in 2021

Presented by:  
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## Today's Presenter



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# The More Things Change...

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## Annual Minimum Wage Increase

Date	Minimum Wage for Employers with 25 Employees or Fewer	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	\$10.00/hour	\$10.50/hour
January 1, 2018	\$10.50/hour	\$11.00/hour
January 1, 2019	\$11.00/hour	\$12.00/hour
January 1, 2020	\$12.00/hour	\$13.00/hour
January 1, 2021	\$13.00/hour	\$14.00/hour
January 1, 2022	\$14.00/hour	\$15.00/hour
January 1, 2023	\$15.00/hour	

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## Critical Statutes and Cases

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### It's Your Turn

**POLL: Arthur's grandmother has a serious health condition. Is Arthur entitled to 12 weeks of leave to care for her?**

- Yes
- No

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## It's Your Turn

**POLL: Assuming Arthur is entitled to 12 weeks of leave to care for his ill grandmother, is Arthur entitled to another 12 weeks of leave in the same year to care for his ill son?**

- Yes
- No

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## Extension of California Family Rights Act

- Applies CFRA to private sector employers with five or more employees and eliminates requirement that eligible employee be at a worksite with 50 or more employees in 75-mile radius
  - Impact is that CFRA now applies to private sector employers with five or more employees and ALL public sector employers (regardless of the number of employees)
- Adds grandparent, grandchild, and sibling of eligible employee to covered family member with a serious health condition
- Eliminates restrictions on taking leave to care for adult child with serious health condition

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## Extension of California Family Rights Act (cont'd)

- Adds qualifying exigency family military leave as CFRA qualifying leave
  - Now generally mirrors similar FMLA qualifying leave
- Eliminates ability for employer that employs both parents of child to limit bonding leave to collective 12 weeks for both employees
  - Each parent who works for same employer now entitled to 12 weeks for bonding leave
- Eliminates “key employee” exception to right to reinstatement from CFRA leave
- Creates more deviation from FMLA leave and potential for employees to get up to 24 weeks of protected leave

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## AB 2992 – Expansion of Leave Protections for Victims of Crimes

- AB 2992
  - Expands employee leave and reasonable accommodation protections of Labor Code Sections 230 and 230.1 to:
    - A victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury
    - A person whose “immediate family member” is deceased as the direct result of a crime
  - Broad definition of “immediate family member”
  - Expands acceptable documentation to verify need for leave to include written statement signed by employee

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## California's Independent Contract Laws

- AB 2257
  - Clean-up bill to last year's AB 5 "ABC" independent contractor test law, including:
    - Recodifies law into new Labor Code Sections 2775 – 2787
    - Clarified business-to-business exception to ABC test
    - Expands referral agency exception to ABC test to include additional services, but expressly excludes application to "high hazard industry" services and other specific services, including transportation, in-home care, and janitorial services.
    - Eliminates limit on annual submissions of freelance writer or photographer to qualify for Borello exemption

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## California's Independent Contract Laws (cont'd)

- AB 2257
  - Clean-up bill to last year's AB 5 "ABC" independent contractor test law, including (cont'd):
    - Expands Borello exemptions to include individuals in music industry and performing arts, licensed landscape architects, freelance translators, registered professional foresters, home inspectors, certain insurance industry inspectors/auditors, manufactured housing salespersons, competition judges, master class judges, digital content aggregators, and feedback aggregators

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## California's Independent Contract Laws (cont'd)

- Proposition 22 – Repeal of AB 5 for certain “app-based drivers”
  - Passed November 3, 2020 election with 58.6% of vote
  - Repeals impact of AB 5 and ABC independent contractor test for “app-based rideshare and delivery drivers” of a network company
  - Requires that network company provide “app-based rideshare and delivery drivers” earnings guarantees, healthcare subsidies, and anti-discrimination/harassment protections
  - Requires network company to conduct criminal background checks of “app-based rideshare and delivery drivers”

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## AB 1947 – Expansion of SOL for Labor Commissioner Claims

- Expands statute of limitations to file claim with Labor Commissioner from six months to one year from the occurrence of the violation
- Also adds a provision to Labor Code Section 1102.5 to authorize courts to award reasonable attorney fees to a plaintiff who brings a successful action for a violation of that law’s “whistleblower” protections for an employee who discloses suspected violations of law to a government or law enforcement agency

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## SB 973 – New Annual Pay Data Reporting for Larger Private Employers

- Requires private employer with 100 or more employees that is required to submit an EEO-1 federal report to also submit an Annual Pay Data Report to the California Department of Fair Employment and Housing (DFEH).
- Annual Pay Data Report to include:
  - Number of employees by race, ethnicity, and sex in various job categories within “snapshot” of single pay period between October 1 and December 31 of reporting year
  - Number of employees by race, ethnicity, and sex whose annual earnings fall within pay bands used by U.S. Bureau of Labor Statistics based on designated “snapshot”
  - Hours worked by each employee in each pay band during reporting year

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## SB 973 – New Annual Pay Data Reporting for Larger Private Employers (cont'd)

- Initial Annual Pay Data Report needs to be submitted on or before March 31, 2021, and on or before March 31 of each year thereafter
- New law also expands jurisdiction of DFEH to include investigation of Equal Pay Act claims (Labor Code Section 1197.5) with the existing jurisdiction of such claims under the Division of Labor Standards Enforcement (DLSE) and for the DFEH and DLSE to adopt procedures to coordinate such investigations

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## AB 2143 – Clean Up Bill to Prohibition on No-Rehire Clauses in Settlement Agreements

- Last year’s AB 749 generally prohibited employment-related settlement agreements from including a “no re-hire” clause
- Only exception to prohibition was where employer made good-faith determination that aggrieved person engaged in sexual harassment or sexual assault
- This bill clarifies exception to prohibition as follows:
  - Expands exception to also include good-faith determination that aggrieved employee engaged in criminal conduct
  - Requires employer’s good-faith determination of sexual harassment, sexual assault, or criminal conduct be made and documented before the aggrieved person filed the claim or civil action in good faith

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## Unlimited Paid Time Off

- *McPherson v. EF Intercultural Foundation*
- California law requires employers to fully compensate employees for accrued but unused PTO upon separation
- Does this apply to “unlimited” PTO policies by which employees don’t accrue specific amount of PTO but could take as much time as they want?
- Court in *McPherson* held that this law applies to these types of policies but that unlimited PTO policies can avoid triggering this law if they are in writing and they:
  - Clearly provide that unlimited PTO is not a form of wages;
  - Clearly communicate the rights and obligations of both employee and employer and the consequences of failing to schedule time off;
  - Realistically allow sufficient opportunities for employees to take time off; and
  - Are administered fairly.

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## Hours Worked

### *Amanda Friekin v. Apple Inc.*

- Apple had a policy of requiring employees to submit to security checks before leaving

### **POLL: Did Apple have to compensate its employees for this time?**

- **Yes**
- **No**

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## Hours Worked

### *Amanda Friekin v. Apple Inc. (cont'd)*

- **Yes!!!**
- Seems like a no-brainer here
- We all make mistakes . . . even multibillion-dollar companies

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# COVID-19

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## It's Your Turn

**POLL: Given that FFCRA was not renewed, are there any other remaining paid leaves specific to COVID-19?**

- Yes
- No

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## FFCRA and California COVID-19 Supplemental Paid Sick Leave

- Maybe
  - Even with the expiration of FFCRA and California COVID-19 supplemental paid sick leave, don't forget about local ordinances
  - Cal-OSHA Emergency Regulations

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## California Occupational Safety and Health Standards Board

- Mission is to ensure the health and safety of California workers
- Sharply criticized for response to COVID-19
- November 19, 2020: Approved emergency standards
- November 29, 2020: Standards approved by Office of Administrative Law
- November 30, 2020: Standards went into effect for at least 180 days

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## Key Points

- Standards apply to most California employers not covered by Cal/OSHA's Aerosol Transmissible Diseases standard
- Standards require written COVID-19 Prevention Plan addressing multiple factors

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## COVID-19 Prevention Plan

COVID-19 Prevention Plan must address the following:

- System for communicating
- Identification and evaluation of COVID-19 hazards
- Investigating and responding to COVID-19 cases in the workplace
- Correction of COVID-19 hazards
- Training and instruction
- Physical distancing
- Face coverings
- Other controls
- Reporting, recordkeeping, and access
- Exclusion of COVID-19 cases
- Return-to-work criteria
- Workplace outbreaks
- Employer-provided housing and transportation

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## Exclusion of COVID-19 Cases

- Exclude from the workplace:
  - COVID-19 cases
  - Employees with COVID-19 exposure for 14 days after the last known COVID-19 exposure
- **Excluded employees must still be paid!**
  - Does not include times when the employee can't work due to COVID-19 symptoms
  - Exception when COVID-19 exposure not work related (employer burden to show)
  - Exception for employees who have not been excluded or isolated by local health department, if they are temporarily reassigned to work where they do not have contact with other persons

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## AB 685 – Workplace Exposure Notices for COVID-19

- Requires employer to provide written notice within one business day of being informed of a potential COVID-19 exposure in the workplace by a “qualifying individual” with the following information:
  - Notice of potential exposure to COVID-19 in workplace;
  - Notice of COVID-19-related benefits and employee protections; AND
  - Notice of employer’s plan for implementing and completing a disinfection and safety plan in response to exposure.
- Written notice to be provided to all employees and employers of subcontracted employees present at same worksite as COVID-19 exposure during infectious period. If employees are represented, bargaining unit representatives also need to receive written notice.

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## AB 685 – Workplace Exposure Notices for COVID-19 (cont'd)

- “Qualifying individual” is defined as an:
  - Individual with laboratory-confirmed case of COVID-19;
  - Individual with positive COVID-19 diagnosis from licensed health care provider;
  - Individual subject to a COVID-19-related isolation order issued by a public health official; OR
  - Individual who died from COVID-19 as determined by county public health department
- Written notice must be sent in a manner the employer normally uses to communicate employment-related information (e.g., in person, e-mail, text message) so long as reasonable for employees to receive notice within one business day requirement. Notice must be in English and a language understood by majority of employees.

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## AB 685 – Workplace Exposure Notices for COVID-19 (cont'd)

- Separate notice requirement for employer to notify local public health agency within 48 hours of “qualifying individuals” if “outbreak” is established
- “Outbreak” is currently defined by California Department of Public Health as three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households
- Exemptions from “outbreak” notice requirements:
  - Employees whose regular duties include COVID-19 testing or who provide patient care to individuals known/suspected to have COVID-19, unless the “qualifying individual” is also an employee at the same worksite
  - Health facilities

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## AB 685 – Workplace Exposure Notices for COVID-19 (cont'd)

- Cal/OSHA's authority to respond to COVID-19 issues expanded through December 31, 2022 as follows:
  - Prohibit entry to a workplace or to the performance of an operation/process in a workplace where imminent hazard of risk of COVID-19 infection.
  - Exception: Cal/OSHA cannot impose restrictions that would materially interrupt critical government functions essential to ensuring public health and safety functions or the delivery of electrical power or water.
  - Ability to issue serious violation citations related to COVID-19 immediately without first providing an "alleged violation" 15 days prior to issuing the citation. an employer still has the ability to use existing appeal procedures of any citation violation.

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## Questions?



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