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REFERENCE GUIDE

2022 LEGISLATIVE UPDATE

An Employer's Guide to New Laws Impacting the Workplace in 2021 and Beyond

DAVID W. TYRA

The 2021 legislative session was lighter than past years in terms of significant legislation affecting the workplace. This likely was due to the need to address pressing issues resulting from the ongoing effects of the COVID-19 pandemic. Nevertheless, the Legislature did manage to pass a number of bills that will affect employment practices in 2022. Here is a description of the key new laws that will take effect at the beginning of the new year.

I. Discrimination

A. SB 331 (LEYVA) SETTLEMENT AND NON-DISPARAGEMENT AGREEMENTS.

SB 331 ("Silenced No More Act") expands prohibitions on non-disclosure provisions in settlement agreements resolving certain employment-related lawsuits.

In 2018, the Legislature passed SB 820, known as the STAND (Stand Together Against Non-Disclosures) Act, in response to the "Me Too" movement. The Act prohibited a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action. These acts include:

- sexual assault;
- sexual harassment;

- workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such act; and
- harassment or discrimination based on sex by the owner of a housing accommodation, or retaliation against a person for reporting such an act.

(Cal. Civ. Pro. § 1001.) SB 331 expands the coverage of Civil Code section 1001 to prevent the use of non-disclosure provisions in *any* action alleging unlawful discrimination, harassment, or retaliation, e.g., actions alleging discrimination, harassment, or retaliation based on race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. (Cal. Gov. Code §§ 12940 and 12955.)

SB 331 also amends Government Code section 12964.5 to provide that an employer is prohibited from requiring an employee to sign an agreement or document "to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace." Any non-disparagement or similar provisions in an employment contracts must include the following language: "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 bill also provides that "[i]t is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment [i.e., severance agreements] any provision to the extent it has the purpose or effect of denying the employee or former employee the right to disclose information about unlawful acts in the workplace."

The bill also adds a provision providing that *any* agreement or document in violation of Code of Civil Procedure section 1001 or Government Code section 12964.5 is against public policy and unenforceable. Importantly, the bill does not contain a severability provision and, therefore, use of a prohibited non-disclosure provision runs the risk of vitiating not just that provision, but the entire agreement.

Moreover, in offering an agreement related to an employee's separation from employment, the employer must notify the employee that the employee has a right to consult an attorney regarding the agreement.

Finally, SB 331 clarifies that confidentiality in severance agreements related to an amount paid, is permitted, and that the bill does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

B. SB 639 (DURAZO) MINIMUM WAGE: PERSONS WITH DISABILITIES.

This bill amends Labor Code section 1191 to prohibit employers from issuing licenses to disabled employees allowing them to earn less than the minimum wage. Under existing federal law, employers can apply for special waivers, called 14(c) certificates, which allow them to pay people with developmental disabilities below the federal minimum wage. Starting January 1, 2022, no California employer will be able to obtain a new 14(c) certificate. Existing licensees can renew their licenses until January 1, 2025.

C. AB 1033 (BAUER-KAHAN) CALIFORNIA FAMILY RIGHTS ACT: PARENT-IN-LAW: SMALL EMPLOYER FAMILY LEAVE MEDIATION PILOT.

This bill amends Government Code sections 12945.2 and 12945.21, also known as the California Family Rights Act (CFRA), to allow eligible California employees to take leave

to care for a parent-in-law. Under the revised definition of a family member, "parent-in-law" means the parent of a spouse or domestic partner.

The bill also modifies the Department of Fair Employment and Housing (DFEH) small employer family leave mediation pilot program. The CFRA applies to employers with 5 or more employees. Employers with 5 to 19 employees (small business employers) are eligible to participate in DFEH's mediation program if either the employer or employee requests mediation after a right-to-sue notice is issued.

The bill requires DFEH, when an employee requests an immediate right to sue alleging a violation of the provisions described above by an employer, to notify the employee in writing of the requirement for mediation prior to filing a civil action. The employee is also required to notify DFEH's dispute resolution division prior to filing a civil action.

The bill tolls the statute of limitations applicable to an employee's claim from the date the employee contacts the DFEH with the intent to pursue a legal action until the mediation is complete or deemed unsuccessful. Employers who are not notified when an employee fails to contact the DFEH are entitled to stay any pending civil action until completion of mediation.

II. Workplace Safety

A. SB 606 (GONZALEZ): WORKPLACE SAFETY: VIOLATIONS OF STATUTES.

This bill expands Cal/OSHA's enforcement power by creating two new categories of violations for which Cal/OSHA can issue citations: (1) Enterprise-wide Violations and (2) Egregious Violations.

Enterprise-wide Violations

The bill amends Labor Code section 6317 to provide that an employer has committed an "enterprise-wide" violation, defined as a violation at multiple worksites, if Cal/OSHA finds:

- The employer has a written policy or procedure that violates section 25910 of the Health and Safety Code, any standard, rule, order or regulation; or
- Cal/OSHA has evidence of a pattern or practice of the same violation or multiple violations committed by that employer involving more than one of the employer's worksites.

Cal/OSHA is not required to investigate other sites or observe violations in order to issue citations. Appeal of this violation stays abatement, but if the violation is affirmed, abatement will be required across all the employer's California worksites. Enterprise-wide citations carry the same penalties as willful or repeated citations (up to $134,334 per violation).

Egregious Violations

The bill amends Labor Code section 6317.8 to provide that Cal/OSHA may find an employer has committed an "egregious violation" if it finds:

- The employer, intentionally, through conscious voluntary action or inaction, made no reasonable effort to eliminate a known violation;
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;

- The violations resulted in persistently high rates of worker injuries or illnesses;
- The employer has an extensive history of prior violations;
- The employer has intentionally disregarded their health and safety responsibilities;
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duty to provide a safe work environment; or
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

According to the new law, each employee potentially exposed to the unsafe working conditions would be considered a separate violation for fines and penalties.

Subpoena Power

The bill adds Labor Code section 6317.9 to allow Cal/OSHA to issue a subpoena if the employer or related entity fails to promptly provide the requested information and to enforce the subpoena if the employer did not provide requested information within a reasonable amount of time.

III. COVID-19 Related Laws

A. AB 654 (REYES) COVID-19 EXPOSURE NOTIFICATION.

AB 654 amends Labor Code section 6325 and amends and repeals section 6409.6 and takes effect immediately as an urgency statute. The bill clarifies the time frame for employers to notify public health agencies of COVID-19 cases and narrows the definition of "worksite" for covered exposures. The bill also revises the requirement that employers provide information on COVID-19 employee-related benefits to only apply to employees who were on the premises at the same worksite as the qualifying individual within the infectious period..

B. SB 95 COVID-19 SICK LEAVE PROTECTIONS EXPIRED.

SB 95 expanded COVID-19 sick leave protections for employees by extending the 2020 Supplemental Paid Sick Leave statute to employers with more than 25 employees and providing additional reasons for leave. SB 95 expired September 30, 2021.

IV. Wage and Hour

A. AB 701 (GONZALEZ) WAREHOUSE DISTRIBUTION CENTERS.

This bill adds Labor Code section 2100 to create new requirements for qualified employers who use quotas.

Employers Covered

This new law applies to employers that 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 distribution warehouse centers in California. In determining those employees to be counted for purposes of the new law, employers must count workers provided through third parties, such as staffing agencies, if the employer exercises control over those workers' wages, hours, or working conditions. Employers must also include in the count all employees of the "commonly controlled group" who work at distribution warehouse centers in California.

Quota Regulations

The bill defines a "quota" as a work standard assigned to an employee that the employee must complete within a defined time period or face an adverse employment action. A "work

standard" is a requirement that the employee perform a specified productivity speed, perform a quantified number of tasks, or handle or produce a quantified amount of material.

Employers cannot require quotas that prevent compliance with meal or rest periods, use of bathroom facilities (including the time to travel to and from such facilities), or occupational health and safety laws. Additionally, the time employees spend complying with occupational health and safety laws must be considered as on task and productive for purposes of any quota — although meal and rest breaks are not considered productive time unless employees remain on call.

The bill requires employers to provide each new hire a written description of applicable quotas. A compliant written description must include each work standard, the defined time period the work standard must be completed in, and any potential adverse employment actions if the quota is not met. AB 701 also requires employers to give written descriptions of quotas to all current employees by January 31, 2022. Employers who do not already provide compliant written descriptions of quotas must act quickly to meet this deadline.

Employers may take adverse actions against employees who do not meet their quotas. However, employers cannot do so if the quotas prevent compliance with meal or rest periods or occupational health and safety laws. Additionally, employers cannot take adverse actions against employees for failing to meet a quota unless the employee received the quota in writing as required by the law and discussed above.

Record Requests

Current or former employees who believe that a quota violated their right to meal or rest periods or any occupational health and safety laws may request a written description of each quota that applies to them and their work speed data over the previous 90 days. Employers must provide this information no later than 21 calendar days from the date of the request. Former employees may only make one request. There is no limit on the number of requests current employees can make.

The bill allows current or former employees to make written or oral requests. Additionally, a request for records under AB 701 does not include qualitative performance assessments, personnel records, or itemized wage statements.

Enforcement

The bill presumes retaliation if employers take adverse action against employees who, in the previous 90 days, have 1) requested for the first time in the calendar year their quota and/or work speed data, or 2) complained to their employers or government agencies about an alleged violation. The bill allows current and former employees to bring an action for injunctive relief for any alleged violations of the bill. It also allows those employees to recover costs and attorneys' fees if they prevail. Additionally, the bill allows plaintiffs to include AB 701 violations in PAGA actions. However, employers may cure any alleged violations before plaintiffs file a lawsuit.

Government Actions

The bill also creates new requirements for public agencies. The Labor Commissioner must coordinate with other government agencies to educate employees, track injury data, and enforce the new law. The Labor Commissioner can also use already available enforcement mechanisms to enforce the law.

Additionally, the bill requires Cal/OSHA and the Division of Workers' Compensation to notify the Labor Commissioner if a worksite or employer has an annual employee injury rate of at least 1.5 times higher than the industry average.

B. SB 62 (DURAZO) EMPLOYMENT: GARMENT MANUFACTURING.

SB 62 increases legal liability on garment manufacturers and eliminates the piece-rate method for compensating garment workers.

The bill amends Labor Code Section 2670, part of the 1999 anti-wage theft statute (AB 633) to add a number of legislative findings and declarations related to exploitation of garment workers. These findings and declarations provide, in part, that the purpose of the legislation is to "restore the purpose of AB 633 (1999) to prevent wage theft against garment workers by clarifying ambiguities in the original language." As the Legislature found, several manufacturers of garments have tried to avoid liability as a guarantor by "adding layers of contracting between themselves and the employees manufacturing the garments."

The bill also amends Labor Code Section 2671 to define "garment manufacturer" as any person engaged in garment manufacturing who is not a contractor. The bill defines "brand guarantor" to mean any person contracting for the performance of garment manufacturing. 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 operation. Finally, the bill expands the term "contractor" to include "altering a garment's design, causing another person to alter a garment's design, or affixing a label on a garment."

SB 62 amends Labor Code Section 2673 to require garment manufacturers to keep accurate records for four years (instead of the current three years) with specified information. The bill also requires record retention for four years of all contracts, invoices, purchase orders, and job orders, as well as a copy of the garment license of every person engaged in garment manufacturing. In addition, brand guarantors must keep accurate records for four years.

The bill amends Labor Code Section 2673.1 to specify that a garment manufacturer or brand guarantor is jointly and severally liable with any manufacturer or contractor who performs operations for a garment manufacturer or brand guarantor for:

- The full amount of unpaid wages, expense reimbursements, and any other compensation, damages, and penalties for any employee who perform manufacturing operations;
- Liquidated damages owed to any employee who perform manufacturing operations;
- The employee's reasonable attorney's fees and costs; and
- Civil penalties for failure to secure valid workers' compensation coverage.

The bill amends Labor Code Section 2673.1 to eliminate the current liability limitation to the proportionate share of two or more persons, and replace it with language that, for those parties held jointly and severally liable, the parties can establish by contract or otherwise any lawful or equitable remedies such as contribution or indemnity. Employees may enforce this section only by filing a claim with the Labor Commissioner.

This bill amends Section 2673.1 to specify that, if an employee provides the Labor Commissioner with labels from a brand guarantor or garment manufacturer or other credible information about their identity, there is a presumption that the brand guarantor or garment manufacturer is liable with the contractor for any amount found to be due to the employee. Employee claims about compensation are presumed valid unless the brand guarantor, garment manufacturer, or contractor provides "specific, compelling, and reliable written evidence to the contrary." Additionally, a written declaration or testimony is not sufficient to rebut the presumption of validity of the workers' claim and liability of the respective parties.

This bill eliminates the provisions that limit the contractor's share of the attorney's fees and costs awarded to an employee only if the Labor Commissioner determines that the guarantor acted in bad faith. If a contractor, garment manufacturer, or brand guarantor appeals, they are required to post a bond with the Labor Commissioner in an amount equal to one and half times the amount of the award. However, no bond is required of an employee filing an appeal. An employee can request to be represented by the Labor Commissioner in any judicial proceeding.

SB 62 expands the Labor Commissioner's power to enforce the joint and several liability of a garment manufacturer or brand guarantor in the same manner as a proceeding against the contractor. In addition, the Labor Commissioner may enforce this law by issuing stop orders or citations. Any statutory damages or penalties recovered are payable to the employee.

This bill adds Labor Code Section 2673.2 to ensure employees are paid for all their hours worked and not paid by piece or unit, or by a piece rate. However, incentive-based bonuses are not prohibited. Also, this prohibition does not exist where the workplace is covered by a collective bargaining agreement that covers wages and working conditions. Any garment manufacturer or contractor who violates this section is subject to statutory damages of $200 for each pay period in which the employee is paid by the piece rate.

This section may only be enforced by filing a claim with the Labor Commissioner. The Labor Commissioner can also bring an action to enforce this section or issue a citation for a violation. Any statutory damages or penalties recovered are to be paid to the employee.

The bill amends Labor Code Section 2675.5 to require $75 of each registrant's annual registration fee to be placed into the Garment Manufacturers Special Account. Employees must assign to the Labor Commissioner all the employee's claims and judgment to be paid from this fund.

The Labor Commissioner determines whether a claim is accepted and the amount of money that is to be disbursed from the Garment Manufacturers Special Account on an accepted claim. The Labor Commissioner has authority to investigate any claims and hold a hearing to determine the claim's validity.

C. SB 572 (HERTZBERG) LABOR COMMISSIONER ENFORCEMENT: LIEN ON REAL PROPERTY.

SB 572 adds Section 90.8 to the Labor Code to grant authority to the Labor Commissioner to place a lien on real property in order to secure a final amount due to the Labor Commissioner's Bureau of Field Enforcement (BOFE) division.

Under the bill, these amounts can be assessed through Labor Commissioner citations, findings, or decisions. The amounts are subject to the real property lien once they become final and may be entered as a judgment. The lien may be created by the Labor Commissioner by recording a certificate of lien

with the county recorder in the county in which the party has real property. As a result, the lien could attach to all interests in that real property. The county recorder is required to accept and record the lien certificate.

Only upon payment of the amount due must the Labor Commissioner issue a certificate of release, which is recorded by any person at the person's expense. Finally, unless the lien is satisfied or released, a lien under this law would continue until 10 years from the date of its creation. The lien may be renewed for additional periods of 10 years by recording a renewal of certificate of lien or a copy of the renewed judgment at any time prior to its expiration.

V. Miscellaneous

A. AB 1023 (FLORA) CONTRACTORS AND SUBCONTRACTORS: RECORDS.

The bill requires certain records to be furnished in electronic format on the Department of Labor Standards Enforcement's website. A contractor or subcontractor who fails to furnish records related to employees will be subject to a fine of $100 for each day the party violated the Labor Code for a total of up to $5,000 per project. The Labor Commissioner is prohibited from levying a penalty until a contract or subcontractor fails to submit the required records in 14 days.

This bill also amends Section 1771.4 of the Labor Code to define the term "monthly" to mean that records will be submitted at least every 30 days while work is being performed on a construction project and within 30 days after the last day that work was performed on the project.

B. AB 1506 (KALRA) WORKER STATUS: NEWSPAPER DISTRIBUTOR AND CARRIERS.

In 2019, the Legislature passed AB 5, which exempted newspaper distributors working under contract with a newspaper publisher, and newspaper carriers working under contract with either a newspaper publisher or distributor, from application of the ABC test for purposes of classifying workers as either employees or independent contractors. AB 1506 extends this exemption for three more years. The bill acknowledges that newspaper carriers often work for more than one newspaper, and requiring carriers to be classified as employees would limit carriers' opportunities and drive up the cost of newspaper deliveries.

The bill also requires newspaper distributors to submit specified information related to their workforce to the Labor and Workforce Development Agency (LWDA) on or before March 1 of 2022, 2023, and 2024. Newspaper distributors must report on the number of carriers for which it paid and did not pay payroll taxes, as well as the wage rates and information to demonstrate compliance of their carrier with the *Borello* test, which is a multi-factor test for determining worker classification.

C. SB 461 (CORTESE) UNFAIR COMPETITION LAW: ENFORCEMENT.

The Unfair Competition Law (UCL) makes various practices unlawful and provides that a person who engages, has engaged, or proposes to engage in unfair competition is liable for a civil penalty, as specified. Existing law authorizes actions for relief prosecuted under the UCL to be brought by certain public attorneys, including the Attorney General,

a city attorney of a city having a population in excess of 750,000, and a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance.

This bill also authorizes a UCL action to be brought by a county counsel of a county within which a city has a population in excess of 750,000 people.

D. SB 657 (OCHOA BOGH) EMPLOYMENT: ELECTRONIC DOCUMENTS.

Existing law requires employers to make employees aware of their rights under various laws. SB 657 clarifies existing notice requirements for employers by providing that employers may send electronic notices to employees. The bill amends the Labor Code to provide that, in any instance an employer is required to physically post information, the employer can also distribute that information via email, with the document or documents attached. However, the bill specifies that it does not alter employers' obligation to physically display required posters.

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Author

David W. Tyra is a shareholder at Kronick with 30 years of experience in labor and employment law. He represents public and private employers in employment-related litigation in both state and federal courts at the trial and appellate levels and before numerous federal and state agencies. He also provides advice, counsel and training on the full spectrum of labor and employment law issues facing employers and serves as an independent investigator for workplace investigations. David can be reached at 916-321-4594 or dtyra@kmtg.com.

Assistance provided by Summer Mielke, Law Clerk.


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