

Mid-Year California Employment Update: A Review Of 2021 California Legislation And Its Impact On Employers

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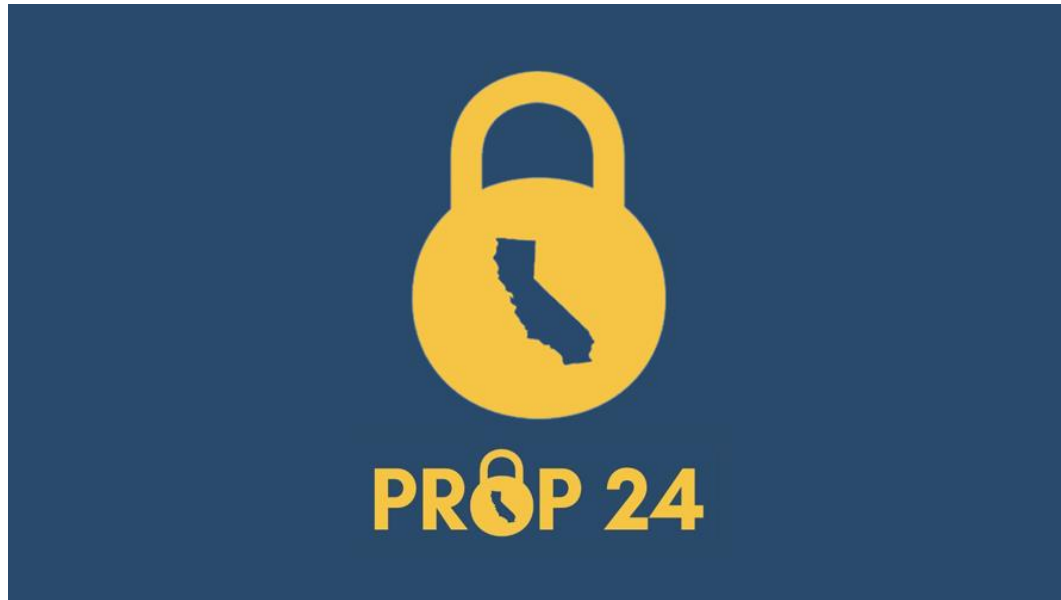
New Mandates



2021 CA Minimum Wage Increase

- Effective January 1, 2021
 - <25 Employees: **\$13/hour**
 - 26+ Employees: **\$14/hour**
 - Consider inside sales exempt employees (1.5x minimum wage)
- Effective July 1, 2021, the minimum wage will increase in several cities and counties
- Salary threshold for certain exempt employees
 - <25 Employees: **\$54,080**
 - 26+ Employees: **\$58,240**
- IRS Rate
 - **.56/mile** (down 1.5 cents)

Proposition 24 – CA Privacy Rights Act (CPRA)



- Data minimization: Cannot retain data for longer than necessary for disclosed purposes
- New requirements for a business's relationships with vendors/service providers
- New right of consumers to request correction of inaccurate personal information
- Establishes the California Privacy Protection Agency

SB 1383 (Jackson) – CFRA Expansion

- Originally part of Governor Newsom's budget proposal.
- Continuation of debate over recent years.
- One of the few bills not directly related to COVID-19.
- Employer concerns, especially on heels of COVID-19 crisis.



SB 1383 (Jackson) – CFRA Expansion

- Extends CFRA to apply to employers with **five or more** employees (from 50 or more).
- Expands **“family members”** to include adult children, siblings, grandparents, grandchildren.
- Potential stacking issue with FMLA.
- Eliminates “two employees at same employer” rule.
- Eliminates “highly compensated exemption” to reinstatement provisions.

AB 2992 (Weber) – Victims of Crime

- Amends existing law (LC 230 and 230.1) providing job-protected time off for employees who are victims of domestic violence, sexual assault or stalking to include:
 - A victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury.
 - The immediate family member (child, parent, spouse, sibling, or “equivalent”) of a person who is deceased as the direct result of a crime.

SB 973 (Jackson) – Pay Data Reporting



- Intent is to apply the Obama pay data reporting program that was halted by Trump administration
- Employers with 100 or more employees (and who must file an EEO-1) must provide pay data to the State
- Pay data reports will be due on March 31, starting in 2021, for the prior calendar year
- Reports must include race, ethnicity, and sex
- Amends California Equal Pay Act to allow DFEH to enforce, instead of just the Labor Commissioner

SB 973 (Jackson) – Pay Data Reporting

Who Has to File?

- Employees located inside and outside of California are counted when determining whether an employer has 100 or more employees (DFEH FAQs)
- Includes part-timers
- An employer has the requisite number of employees if the employer either employed 100 or more employees in the **Snapshot Period** chosen by the employer or regularly employed 100 or more employees during the **Reporting Year**

SB 973 (Jackson) – Pay Data Reporting

- Reports must include:
 - Race, ethnicity, and sex
 - Job category (10 categories provided)
 - Number of employees whose earnings fall within the pay bands used by BLS
 - Number of hours worked
 - Report for each establishment and a consolidated report (like EEO-1)
 - NAICS code
 - Any clarifying remarks (voluntary)
 - Allowed to use the EEO-1 as basis for the report

SB 973 (Jackson) – Pay Data Reporting

- The information is private until the DLSE or DFEH use it to file an enforcement action
 - Previously only DLSE could enforce the CA Equal Pay Act
- Reports will be maintained for 10 years
- This will be a lot of work, so plan *now!*

AB 3075 (Gonzalez) – Wage Theft

Establishes **“successor” liability** for a final judgment for wages and penalties where:

- 1) The successor uses substantially the same facilities or substantially the same workforce to offer substantially the same services.
- 2) The successor has substantially the same owners or managers that control labor relations.
- 3) Employs as a managing agent anyone who directly controlled the wages, hours or working conditions of the predecessor.
- 4) Operates a business in the same industry and the business owner has a partner, officer or director who is an immediate family member of the same of the predecessor.

AB 1947 – Retaliation Claims

- Extends the deadline for filing a retaliation claim under LC 98.7 with DLSE from 6 months to **one year**.
- Authorizes one-sided, **plaintiff-only** attorney's fees for LC 1102.5 (whistleblower) claims.
 - Increases the stakes for such claims.
 - Makes them more expensive to settle.
 - Makes them more likely to be filed in court.

AB 979 – Corporate Board Diversity

- Follow up to prior legislation on female board members.
- By end of 2021, a publicly held corporation with principal offices in California must have a minimum of one director from an “underrepresented community” on its board.



AB 979 – Corporate Board Diversity

- “Underrepresented community” (UC) means an individual who self-identifies as Black, African-American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as LGBT.
- By the end of 2022, these requirements increase:
 - If 9 or more directors, at least 3 directors from UCs.
 - If 5-9 directors, at least two directors from UCs.
 - If 4 or fewer, at least one director from UC.
- Litigation has already been filed challenging this law.

AB 1963 – Mandated Reporters



- Makes certain HR employees and those who supervise minors “mandated reporters” for abuse and neglect.
- Requires employers to provide those employees who are mandated reporters with training on such duties.
- May be online training from Department of Social Services.

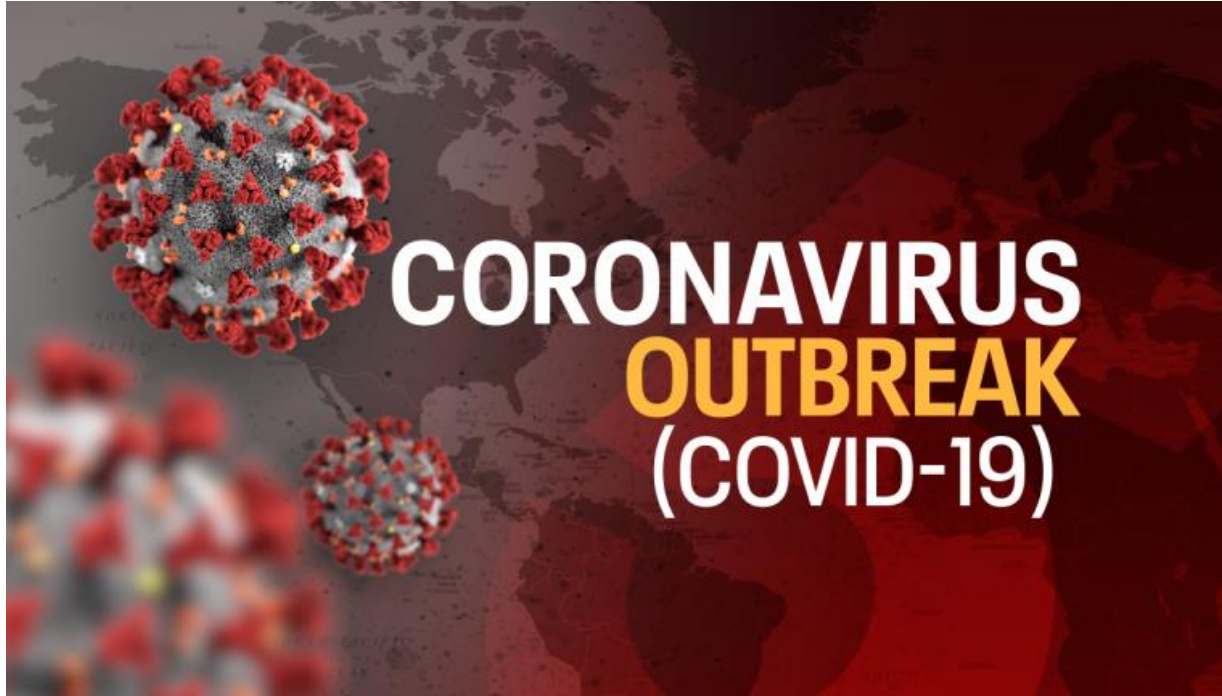
AB 1963 – Mandated Reporters

- “Human resource employee”
 - The employee designated by the employer to accept complaints under FEHA.
 - Only those who work for FEHA-covered businesses (5 or more employees).
- Supervisors of Minors
 - Those whose duties require direct contact with, and supervision of, minors in the workplace.
 - Is a mandated reporter of sexual abuse only.
 - Only those who work for FEHA-covered businesses (5 or more employees).

COVID Mandates & Litigation Trends



AB 685 – COVID-19 Reporting Obligation



- Legislation introduced following some highly-publicized “outbreaks” where employers were alleged to have not informed employees.
- Imposes some significant and **complex** notice requirements that went into effect on 1/1/2021.

AB 685 – What Triggers the Notice?

Employers are required to provide written notice *within one business day* when they receive “*notice of a potential exposure.*”

- Notification from a public health official or medical provider that an employee was exposed to a **qualifying individual** at work.
- Notification from the employee or their emergency contact that they are a **qualifying individual**.
- Notification through employer’s testing protocol that they are a **qualifying individual**.
- Notification from a subcontracted employer that a **qualifying individual** was on the worksite.

AB 685 – What is a Qualifying Individual?

- 1) Has a laboratory-confirmed case of COVID-19;
- 2) Has a positive COVID-19 diagnosis from a licensed health care provider;
- 3) Has a COVID-19 related order to isolate from a public health official; or
- 4) Has died from COVID-19.

* This definition is slightly different than ETS definition of “COVID-19 case”.

AB 685 – Who and What?

- 1) Written Notice
- 2) Notice to employees (and the exclusive representative) and any employers of subcontractors **who were on the premises** at the same worksite as the qualifying individual that they may have been exposed.
 - a. Per the ETS, must also provide notice to independent contractors
- 3) Notice to employees (and any employees of subcontractors) **who may have been exposed** with information about COVID-19 related benefits they might be entitled to under federal, state and local law as well as antiretaliation and antidiscrimination protections of the employee.
- 4) Notify **all employees** of the disinfection and safety plan that the employer plans to implement per CDC guidelines.

AB 685 – “Outbreak” Notice

*If number of cases meets the definition of an “**outbreak**” (generally 3 cases within a 14-day period) must notify local public health agency **within 48 hours** of:*

- Names of employees
- Number of employees
- Occupation and worksite of employees
- Business address and NAICS code of the worksite

Must also notify local public health of any subsequent cases.

Additional notice requirements in the ETS (e.g., contact information, hospitalization status, etc.)

SB 1159 – Workers' Compensation Presumption



- Subject of one of Governor Newsom's Executive Orders during the pandemic.
- One of the hot issues when the Legislature returned – multiple bills dealt with this subject.
- Ultimately, the bill that was signed was SB 1159.
- Went into effect ***immediately.***

SB 1159 – Workers' Compensation Presumption

The law has three parts:

1. Codifies E.O. that ran through July 5, which said:
 - A case is presumed to be covered by W/C if infected employee tests positive or is diagnosed within 14 days of their last day worked outside the home
 - The physician diagnosis must be confirmed by a test within 30 days
 - The presumption is rebuttable by evidence, but the claim must be denied within 30 days to be eligible for rebuttal
2. Extends the above for first responders and healthcare providers so that the E.O. provisions bridge beyond July 5 for those groups

SB 1159 – Workers’ Compensation Presumption

3. Creates a new rebuttable presumption for cases occurring on or after July 6 but only where the employer had an “outbreak”

An outbreak is:

- 4 positives in 14 days if 100 employees or less;
 - 4 percent of employees if over 100;
 - or closure by public health authorities
-
- Workers’ compensation carrier reporting requirement added as well when an employee tests positive – three business days (plus a “look back” reporting period to positive tests back to July 6...within 30 business days of effective date of bill).

New Cal/OSHA Emergency Temporary Standard (ETS)



- New emergency temporary standard became effective **November 30, 2020**.
- Very prescriptive and detailed, and now Cal/OSHA can cite employers for violations.
- Includes significant **testing** and **paid time off** mandates for employees excluded from the worksite.

New Cal/OSHA ETS

Who must comply with the ETS?

The ETS applies to all employers, employees, and to all places of employment with three exceptions:

- Workplaces where there is only one employee who does not have contact with other people
- Employees who are working from home
- Employees who are covered by the Aerosol Transmissible Diseases regulation (e.g., hospitals, skilled nursing facilities, etc.)

New Cal/OSHA ETS

Written COVID-19 Prevention Program

- Must include specific elements
- May be a stand-alone document or incorporated into an employer's existing IIPP

Notice of COVID-19 Exposures and Cases

- Must notify within one business day
- Many of the notice requirements overlap with AB 685 (discussed earlier), but there are some differences
- Must notify local public health department of “outbreaks”

New Cal/OSHA ETS

Exclusion of COVID-19 Cases and Exposures

- Very specific timelines for requiring exclusion of employees that have COVID-19 or have been exposed
- Must continue and maintain earnings, seniority, benefits and right to return to former job

Specific Return to Work Criteria

- Cannot insist that employees obtain a negative test before returning to work (differs from CDC guidelines)

New Cal/OSHA ETS

Testing

- Must offer free testing during working hours when there has been one positive case in the workplace
- Additional weekly or twice weekly testing requirements for “outbreaks” (3 cases in 14 days) and “major outbreaks” (20 cases in 30 days)

Additional specific requirements related to physical distancing, face coverings, employer-provided transportation and housing, and training and instruction

- ***Check out our [California COVID-19 Resource Center for Employers](#) and [legal alert](#) for additional information and resources about this new emergency regulation***

CLASS ACTION & PAGA CLAIMS RISING FOR NON-COMPLIANCE

- Class Actions and California Private Attorney General Act (“PAGA”) Actions on the rise for Cal OSHA violations
 - Cal OSHA regulations including California Labor Code Sections 6400, 6401, 6402, 6403, 6404, 6407
 - Lawsuits may also include multiple defendants under a joint employer liability theory
- Trends – Within the last nine months, we have seen a 16% increase in PAGA or class actions filed for these types of violations in California – likely will continue to rise

COVID LITIGATION TRENDS

- 2,632 COVID-19 Employment-Related Lawsuits Have Been Filed Since January 30, 2020
 - 655 cases filed in California so far
 - 77% of the lawsuits filed include claims of Retaliation, Discrimination or Remote Work/Leave Conflicts
- Employers who are in the Healthcare, Manufacturing and Retail Industries Hit Hardest
- Nearly 64% of employers sued to date have 500 employees or less



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Questions?



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