LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

2021 Employment Law Legislative Update

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OVERVIEW

2021-2022 legislative session:

- Second year of COVID-19
- Civil rights protests
- Bullish stock market
- Federal aid
- Budget surplus
- Recall election

Hundreds of bills sent to Governor:

- 770 (92%) signed and 66 (7.9%) vetoed
- More than 80 employment bills signed (see handout)
- Effective January 1, 2022, except for emergency measures

DISCRIMINATION, HARASSMENT AND RETALIATION | LEAVES

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SB 807 (Wieckowski), Chapter 278, Stat. 2021
DFEH Enforcement

Makes procedural modifications to how the Department of Fair Employment and Housing (DFEH) enforces California's civil rights laws.

- Authorizes DFEH to appeal court decisions to compel cooperation with investigations rather than by writ.
- Tolls statutes of limitation while DFEH is conducting investigations or attempting mediation.
- Expands DFEH methods for service of complaint.
- Expands where DFEH can file civil rights actions.
- Extends time from 2 to 4 years employers must retain employment records.

AB 1407 (Burke), Chapter 445, Stat. 2021
Nurses: Implicit Bias Courses

- Requires an approved school of nursing or an approved nursing program to include direct participation in one hour of implicit bias training as a requirement for graduation.
- Starting January 1, 2023, requires a licensee still within the first 2 years of holding license immediately following initial licensure to complete one hour of direct participation in an implicit bias course offered by a continuing education provider approved by the board.
- Requires hospitals to implement evidence-based implicit bias program as part of its new graduate training program that hires and trains new nursing program graduates.

AB 1033 (Bauer-Kahan) Chapter 327, Stat. 2021

California Family Rights Act: Parent-in-Law: Small Employer Family Leave Mediation: Pilot Program

- Expands the California Family Rights Act (CFRA) to allow time off to care for a “parent-in-law.”

- Recasts the notice provisions of the small employer family leave mediation pilot program under CFRA to require an employee alleging a violation of job protected leave to contact the dispute resolution division of the Department of Fair Employment and Housing (DFEH) prior to filing a civil action.

- Clarifies the duty of an employee or employer to request mediation and adopts timelines for the DFEH's initiation and completion of the mediation.

SB 352 (Eggman), Chapter 327, Stat. 2021
The Military: Sexual Harassment

- Makes active militia member lawfully ordered to any type of state duty and who commits sexual harassment to be punishable by military proceedings or by a court-martial, not precluding other military or civilian authority to exercise jurisdiction over violations of local, state, or federal law.

- Requires Military Department's annual report and Web site posting to include statistics on sexual harassment incidents against service members and plans for preventing and responding to sexual harassment involving service members.

- No exemption for militia members in active service of the state regarding acts of sexual assault or sexual harassment.

AB 468 (Friedman), Chapter 168, Stat. 2021 Emotional Support Animals

- Requires a person or business that sells or provides an emotional support dog to provide notice specifying that the dog does not have the special training required to be a guide, signal or service dog.

- Requires a person or business that sells or provides a certificate, tag, vest, leash or harness for an emotional support dog to provide notice to the buyer that the material does not entitle an emotional support dog to the rights and privileges afforded to a guide, signal or service dog.

- Prohibits a licensed healthcare practitioner from providing documentation about an individual's need for an emotional support animal without meeting specified requirements. Creates civil penalties for specified violations.

AB 628 (Garcia), Chapter 323, Stat. 2021
Breaking Barriers to Employment Initiative

Makes changes to Breaking Barriers to Employment Initiative (BBEI) administered by the California Workforce Development Board (CWDB).

- Targets racial, ethnic, and socioeconomic disparities in the labor market.
- Focuses on pipelines to quality jobs, upward mobility, and income security for workers historically excluded from quality jobs and economic prosperity.
- Addresses racial and ethnic exclusion and inequity in the labor force to enhance racial and economic justice.
- Provides that projects receiving funding should create pipelines to quality jobs, upward mobility, and income security for workers historically excluded.
- Revises grant selection criteria, application, and evaluation on the above.
- Requires posting of interim and final report on BBEI internet Web site.

WAGE & HOUR, CLASSIFICATION, AND LABOR REFORMS

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AB 1003 (Gonzalez), Chapter 325, Stat. 2021
Wage Theft: Grand Theft

Adds Penal Code § 487m, which creates new offense for the intentional theft of wages by an employer, punishable as either a felony or a misdemeanor.

- Makes intentional theft of wages punishable as grand theft. Includes gratuities greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees by an employer, in any consecutive 12-month period.
- Authorizes restitution of wages, gratuities, benefits, or other compensation that are the subject of a prosecution.
- Includes independent contractors within the meaning of employee.
- Includes hiring entities of independent contractors within the meaning of employer.

SB 639 (Durazo), Chapter 339, Stat. 2021

Minimum Wages: Persons with Disabilities

- Requires plan to phase out the use of the subminimum wage certificate program, which authorizes employers to pay less than minimum wage for employees with physical or mental disabilities by January 1, 2025.

- Requires the plan be posted online and reported to the Legislature by January 1, 2023, and requires annual reports providing status updates, data, and recommendations, beginning on January 1, 2024.

- Requires that no new licenses for the subminimum wage certificate program be issued beginning January 1, 2022.

- Requires existing license holders to meet benchmarks provided for in the phaseout plan in order to be relicensed.

AB 286 (Gonzalez), Chapter 513, Stat. 2021
Food Delivery: Purchase Prices and Tips

Food delivery platforms must:

- Not charge a customer any higher purchase price than that posted on the platform's internet website at the time of order.
- Disclose to the customer and the food facility an itemized cost breakdown of each transaction.
- Pay all tips on delivery orders to the person delivering the food and all tips for pickup orders to the restaurant.

AB 701 (Gonzalez), Chapter 197, Stat. 2021 Warehouse Distribution Center Workers

- Establishes new protections for workers at warehouse distribution centers.
- Requires employers operating large warehouses in the state to disclose worker production quotas.
- Prohibits quotas that interfere with meal or rest periods, use of bathroom facilities, or health and safety laws.
- Prohibits disciplinary action against workers for missing quotas as a result of health- or safety-related breaks or for failing to meet a quota that has not been disclosed."
- Requires enforcement by Labor Commissioner in coordination with the Department of Industrial Relations, Division of Occupational Safety and Health and the Division of Workers' Compensation.

SB 362 (Newman), Chapter 334, Stat. 2021
Chain Community Pharmacies: Quotas

- Prohibits a chain community pharmacy from establishing a quota for measuring or evaluating the number of times either pharmacists or pharmacy technicians perform tasks or provides services.

- Prohibits a chain community pharmacy from communicating the existence of quotas to pharmacists or pharmacy technicians, who are employees or contractors.

- Authorizes enforcement by the State Board of Pharmacy.

SB 62 (Durazo), Chapter 329, Stat. 2021
Employment: Garment Manufacturing

- Prohibits the practice of piece-rate compensation for garment manufacturing, except in the case of worksites covered by a valid collective bargaining agreement.
- Broadens the scope of persons and companies liable for labor violations in the garment manufacturing industry: “a person contracting to have garments made” is liable for violations, including unpaid wages.
- Any garment manufacturer, contractor, or brand guarantor, who enters into contracts for garment manufacturing operations, is jointly and severally liable for violations.
- Allows the Labor Commissioner to amend regulations to clarify and make consistent with industry practices, but not to limit the scope of the definition of “garment manufacturing.”

SB 646 (Hertzberg), Chapter 646, Stat. 2021– PAGA: Janitorial Employees

- Allows janitorial employees covered by a collective bargaining agreement that meets certain conditions to be exempt from filing a lawsuit against their employer under the Private Attorneys General Act of 2004.

SB 338 (Gonzalez), Chapter 333, Stat. 2021 – Joint and several liability: port drayage motor carrier customers

- Expands the set of violations that can cause port drayage contractors to be placed on a Division of Labor Standards Enforcement (DLSE) list that extends joint liability for future violations to customers of that contractor.
- DLSE must post the information for a port drayage motor carrier that is a prior offender with a subsequent judgment, ruling, citation, order, decision, or award finding a violation of a labor or employment law or regulation, even if all periods for appeals have not expired.
- But if the prior offender subsequently prevails on appeal, DLSE must remove the posting within 15 business days after determining that there remains no other basis upon which to retain the prior offender's information on the internet webpage.
- DLSE must also remove the posting within 15 business days after the division determines: (1) there has been payment or settlement of the unsatisfied judgment or any other financial liabilities and (2) the port drayage motor carrier has submitted certification, under penalty of perjury, that all identified violations have been remedied or abated and, after the division issues certain regulations, sufficient documentation that all violations have been remedied or sufficiently abated.

SB 321 (Durazo), Chapter 332, Stat. 2021 – Employment Safety Standards: Household Domestic Services

- Requires Cal/OSHA Chief to convene an advisory committee to make recommendations to the department or Legislature to protect the health and safety of household domestic service employees.
- Requires development of voluntary industry-specific occupational health and safety guidance for to educate household domestic service employees and employers.
- Requires Cal/OSHA to release and publicly post a report of the advisory committee on its internet website and submit a copy to the Legislature by January 1, 2023.

SB 606 (Gonzalez), Chapter 336, Stat. 2021 – Workplace Safety: Statutory, Enterprise-Wide or Egregious Violations

- Establishes a rebuttable presumption that an employer's written policy that violates specified health and safety regulations exists at all of an employer's worksites.

- Adds a definition of "egregious violation" that carries specified additional penalties.

SB 727 (Leyva), Chapter 338, Stat. 2021

Labor-Related liabilities: Direct Contractor

- Expands existing direct contractor liability to include liquidated damages and penalties in circumstances where the direct contractor fails to meet payroll monitoring and corrective action requirements for contracts entered into on or after January 1, 2022.

- Requires the Labor Commissioner to notify the direct contractor and any subcontractor on a private works project at least 30 days prior to holding a hearing, issuing a citation, or filing a civil action for the failure of a subcontractor to pay specified wage, fringe or other benefits due to workers.

SB 572 (Hertzberg), Chapter 335, Stat. 2021

Labor Commissioner: Enforcement: Lien on Real Property

- Authorizes the Labor Commissioner to create, as an alternative to a judgment lien, a lien on real property to secure amounts due under any final citation, findings, or decision.

- Requires the Labor Commissioner to include specified information on the certificate of lien to be recorded on the party's real property.

- Requires the Labor Commissioner to issue a certificate of release once the amount due, including any interest and costs, has been paid.

SB 657 (Both), Chapter 109, Stat. 2021

Employment: Electronic Documents

- In any instance in which an employer is required to physically post information, an employer may also distribute that information to employees by email with the document or documents attached.

- Does not alter the employer's obligation to physically display the required posting

AB 1506 (Kalra), Chapter 328, Stat. 2021
Worker Status

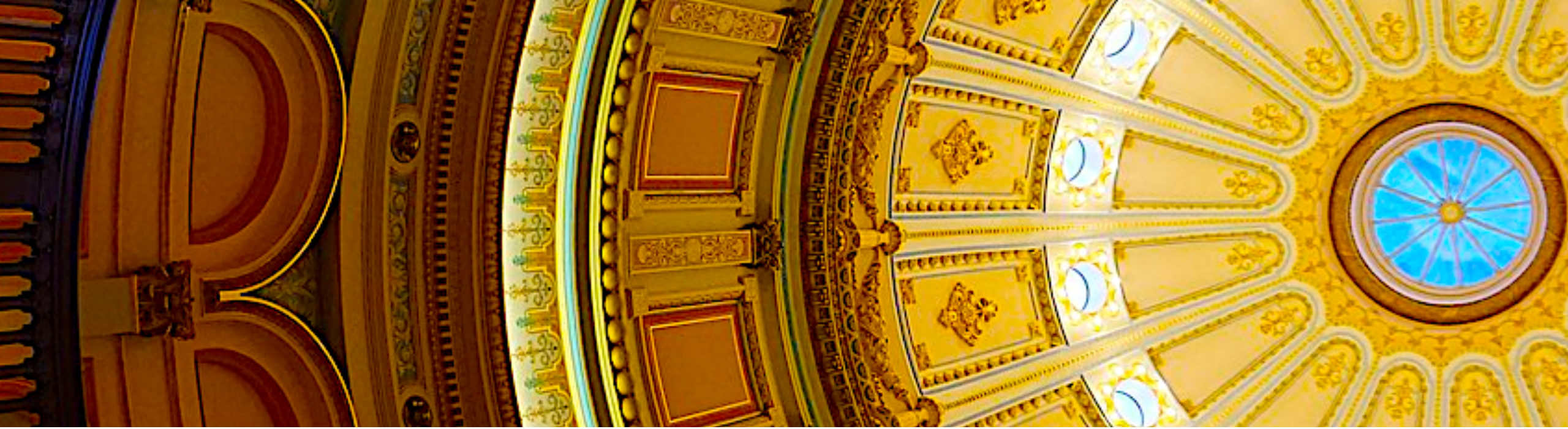
- Extends exemption for newspaper distributors working under contract with a newspaper publisher and newspaper carriers from January 1, 2022, to January 1, 2025.

- Requires every newspaper publisher or distributor that hires or directly contracts with newspaper carriers to submit specified information related to their workforce to the Labor and Workforce Development Agency on or before March 1, 2022, March 1, 2023, and March 1, 2024.

AB 1561 (Com. on Labor & Employment), Chapter 442, Stat. 2021 - Worker Classification

Makes four key changes to California's law on the proper classification of independent contractors and the application of the "ABC test" established in *Dynamex*.

1. Amends Labor Code section 2778 -- the "professional services" exemption -- extending the sunset date on the provisions related to licensed manicurists by three years, to January 1, 2025.
2. Amends Labor Code section 2781 -- the relationship between a contractor and an individual performing work as a subcontractor in the construction industry -- extending the sunset date to work performed before January 1, 2025.
3. Amends Labor Code section 2782 -- the relationship between a data aggregator and an individual providing feedback to the data aggregator (another exemption from the "ABC test").
4. Amends Labor Code section 2783 extending the exemption for persons or organizations that are licensed by the Department of Insurance, and persons 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.



FARM WORKERS

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SB 721 (Hueso), Chapter 496, Stat. 2021 California Farmworker Day

- Designates August 26 of each year as California Farmworker Day.
- Requires the Governor to annually proclaim August 26 as California Farmworker Day.

AB 941 (Bennett), Chapter 203, Stat. 2021
Farmworker Assistance: Resource Centers

Requires the Department of Community Services and Development (CSD) to establish a grant program for counties to establish farmworker resource centers that provide farmworkers and their families with services related to:

- Labor and employment rights;
- Education;
- Housing;
- Immigration; and
- Health and human services.

AB 73 (Rivas), Chapter 322, Stat. 2021 - Health Emergencies: Employment Safety: Agricultural Workers: Wildfire Smoke

- Expands the definition of essential workers to include agricultural workers for the purpose of accessing the personal protective equipment (PPE) stockpile for emergencies established by the State Department of Public Health and the Office of Emergency Services.
- Directs the Division of Occupational Safety and Health (Cal/OSHA) to review and update the content of wildfire smoke training in existing regulations.
- Requires training provided by employers to be in a language and manner readily understandable by employees, taking into account their ethnic and cultural backgrounds and educational levels, including the use of pictograms, as necessary.
- AB 73 took immediate effect upon its enactment on September 27, 2021 as an urgency statute.

PEACE OFFICERS

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SB 2 (Bradford), Chapter 409, Stat. 2021
Peace officers: Certification: Civil Rights

- Creates a process for decertification of previously certified law enforcement officers by creating a new division within the Commission on Peace Officer Standards and Training (POST).

- POST to create an Advisory Board. tasked with hearing evidence of misconduct and making determinations as to the certification or decertification of peace officers.

- Permits discussion of peace officer personnel records introduced in these proceedings subject to public disclosure.

AB 958 (Gipson), Chapter 408, Stat. 2021
Peace Officers: Law Enforcement Gangs

- Defines law enforcement gang as group of law enforcement officers that engages in a pattern of specified unlawful or unethical on-duty behavior.

- Requires law enforcement agencies to have a policy prohibiting law enforcement gangs and making participation in such a gang grounds for termination.

- Requires agency to disclose an officer's termination for involvement in a law enforcement gang on pre-employment background investigation by another law enforcement agency.

AB 26 (Holden) Chapter 403, Stat. 2021
Peace Officers: Use of Force

- Requires law enforcement policies to require officers to immediately report potential excessive force.

- Requires those policies to prohibit retaliation against officers, who report violations of law or regulation of another officer to a supervisor.

- Requires officer, who fails to intercede, be disciplined in the same manner as the officer who used excessive force.

COVID-19

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SB 95 (Skinner), Chapter 13, Stat. 2021, Employment: COVID-19: Supplemental Paid Sick Leave

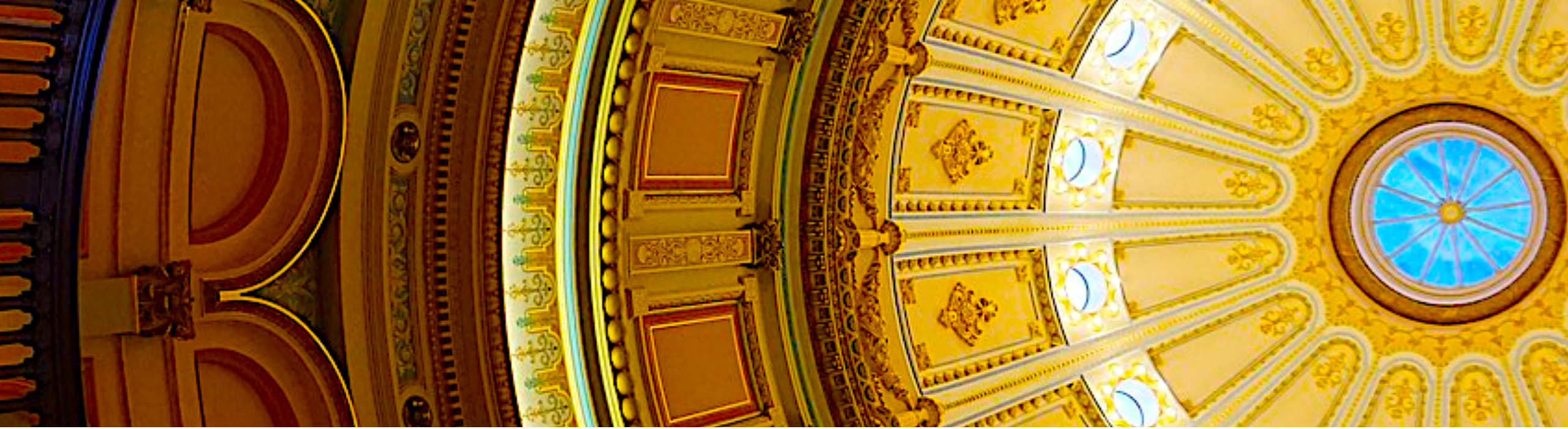
- Provides for COVID-19 supplemental paid sick leave for covered employees, who are unable to work or telework due to certain reasons related to COVID-19.
- Entitles a covered employee to 80 hours of COVID-19 supplemental paid sick leave if that employee either works full time or was scheduled to work, on average, at least 40 hours per week for the employer in the 2 weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave.
- Provides a different calculation for supplemental paid sick leave for a covered employee who is a firefighter subject to certain work schedule requirements and for a covered employee working fewer or variable hours.
- Provides that the total number of hours of COVID-19 supplemental paid sick leave to which a covered employee is entitled to under these provisions is in addition to any paid sick leave available under the act.
- Urgency measure effective March 29, 2021.

SB 93 (Skinner), Com. on Budget and Fiscal Rev., Chapter 16, Stat. 2021 Employment: Rehiring and Retention: COVID-19 Pandemic

- Makes various statutory changes to implement rehiring rights for hospitality workers who were laid off for reasons related to the COVID-19 pandemic.
- Urgency measure effective April 16, 2021.

AB 654 (Gómez Reyes), Chapter 522, Stat. 2021
COVID-19: exposure: notification

- Requires the employer, when giving notice to the local public health agency of a COVID-19 outbreak, to give that notice within 48 hours or one business day, whichever is later.
- Expands the employers exempt from the COVID-19 outbreak reporting requirement to various licensed entities, including, but not limited to, community clinics, adult day health centers, community care facilities, and child day care facilities. The bill would repeal these provisions on January 1, 2023.
- Specifies the list of individuals and entities (including all employees, and the employers of subcontracted employees, who were on the premises at the same worksite) who must be notified of a potential exposure to COVID-19.
- The bill would repeal these provisions on January 1, 2023.
- Urgency measure effective October 5, 2021.



DISPUTE RESOLUTION

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SB 331 (Leyva), Chapter 638, Stat. 2021
Settlement and Nondisparagement Agreements

"Silenced No More Act"

- Amends C.C.P. § 1001 to expand the prohibition on confidentiality provisions in settlement agreements (NDAs) to encompass claims of discrimination, harassment, or retaliation based on any protected category covered by the FEHA (not just those based on sex).
- Applies only to agreements involving civil or administrative actions.
- This expanded prohibition applies to agreements entered into on or after January 1, 2022.
- Clarifies that C.C.P. § 1001 prohibits provisions that prevent or restrict the disclosure of such information.

SB 331 (Leyva) (continued)

Amends Government Code § 12964.5 as follows:

- Prohibits nondisparagement agreements or other documents to the extent that they have the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.

- Prohibits employers from including in separation agreements any provisions that prohibit the disclosure of information about unlawful acts in the workplace—defined to include harassment, discrimination, or any other conduct that the employee has reasonable cause to believe is unlawful.

SB 331 (Leyva) (continued)

- Requires nondisparagement provisions or other contractual provisions that restrict an employee's ability to disclose information related to conditions in the workplace to include, in substantial form, 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."

- An employer offering an employee a separation agreement must notify the employee that they have a right to consult counsel regarding the agreement and must be given at least five business days to do so.

- Remains inapplicable to negotiated settlements to resolve claims filed in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process.

SB 762 (Wieckowski), Chapter 222, Stat. 2021
Contracts – Payment of arbitration fees

- Requires the arbitration provider to provide invoices for the fees and costs described above, in their entirety, to all parties to the arbitration on the same day and by the same means.

- Requires those invoices to be issued as due upon receipt unless the arbitration agreement expressly provides a different time for payment.

- For fees and costs due during the pendency of the arbitration, requires any extension of time for the due date to be agreed upon by all parties to the arbitration.

THANK YOU

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