BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

OCTOBER 13, 2020

RAINESFELDMAN

IMPENDING DEADLINE

By January 1, 2021, all employers with five or more employees must give at least two hours of interactive instruction regarding sexual harassment to all supervisory employees in California. Non-supervisors must receive one hour. Contact us to schedule your training.

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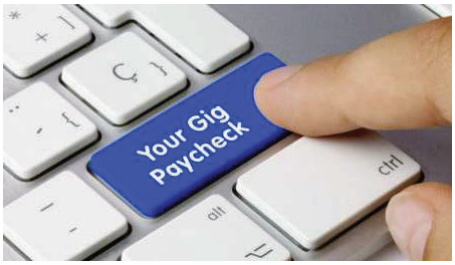
California Enacts New Exemptions to Employee vs. Independent Contractor "ABC" Test

BY: LETICIA KIMBLE AND PHILLIP R. MALTIN

SUMMARY In September, California Governor Gavin Newsom signed AB 2257 into law creating additional exemptions to the "ABC test," the default test for determining whether a worker is an independent contractor or an employee. The new exemptions became effective on September 4, 2020. While the exemptions permit wider use of the multi-factor *Borello* test rather than the more stringent *ABC* test, they do not automatically classify individuals as independent contractors. The new exemptions are:

- **Photographers, photojournalists, videographers, photo editors, freelance writers, translators, editors, copy editors, illustrators, and newspaper cartoonists**: people in these categories are no longer limited in the number of submissions they can provide to an outlet before having to be classified as an employee, as long as businesses refrain from displacing existing employees when utilizing these types of independent contractors.
- **Content contributors, advisors, producers, narrators, cartographers for certain publications, specialized performers hired to teach a class for no more than a week, appraisers, registered professional foresters, and home inspectors.**
- **Recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers and mixers, musicians, vocalists, photographers, independent radio promoters, and certain types of publicists.**
- **Musicians and people in musical groups**: these professionals are exempt from the ABC test (but subject to the *Borello* test) for a single-event live performance unless they (a) perform as a symphony orchestra, or in a musical theater production, or at a theme park or amusement park, (b) are an event headliner in a venue with more than 1,500 attendees, or (c) perform at a festival that sells more than 18,000 tickets per day.
- **Individual performance artists**: including comedians, improvisers, magicians and illusionists, mimes, spoken-word performers, storytellers, and puppeteers who perform original work they created are exempt so long as they (i) are free from the hiring entity's control, (ii) retain the intellectual property rights related to their performance, and (iii) set their terms of work and negotiate their rates.
- **Manufactured housing salespersons, certain individuals engaged by international exchange visitor programs, and competition judges (including amateur umpires and referees)**: people in these categories must meet certain criteria.
- **Inspectors for insurance underwriting**.
- **Business-to-business exemption**: this also applies to public agency or quasi-public corporations now.
- **"Single-engagement" business-to-business interactions:** this may apply when one individual contracts with another individual to perform services at "a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week."



In addition to these exemptions, AB 2257 impacts all California employers by expanding the government's enforcement powers. The new law allows district attorneys, including the Attorney General and certain city attorneys, to seek injunctive relief against businesses suspected of misclassifying independent contractors.

TAKEAWAY California employers should carefully evaluate each position to determine whether workers are properly classified as employees or independent contractors. Additional changes to California's independent contractor law may be on the horizon. On November 3, 2020, Californian will vote on Proposition 22, which creates special

employment status rules for drivers working for app-based companies like Uber, Lyft, and DoorDash. On September 22, 2020, the U.S. Department of Labor ("DOL") announced a new rule for determining independent contractor status under the Fair Labor Standards Act which is much more relaxed than the tests and exemptions under AB 5 or AB 2257. Although DOL's new rule has no direct impact on California law, it reflects a growing sentiment that the current situation with California's independent contractor law does more harm than good to California workers and businesses.

Beginning January 1, 2021, Businesses Must Notify Employees of COVID-19 Outbreaks

BY: PHILLIP R. MALTIN

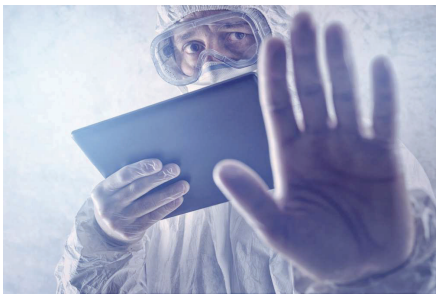
RULE A new statute, Labor Code section 6409.6 (AB 685), requires employers to give written notice of a COVID-19 outbreak to all employees (and the "exclusive representative" of subcontractors) who were on the premises at the same worksite as a person who (a) received a diagnosis of COVID-19 from a laboratory or healthcare provider, (b) received an order to isolate by a public health official, or (c) died from COVID-19. An employer who learns of any of those things must disclose:

(i) Benefits available under federal, state, or local laws, including, workers' compensation;

(ii) Options for COVID-19 related leave, including company-offered sick leave, state-mandated leave, supplemental sick leave, or leave under collective bargaining provisions; and

(iii) Protections the workers have from retaliation and discrimination.

The employer must notify the entire workforce of actions taken to (i) disinfect the workplace and (ii) protect employees by following the guidelines of the CDC.



It must also "reasonably ensure" the employees receive this information within one business day of learning of the exposure.

If the number of cases qualifies as an "outbreak," the employer must also notify the local public health agency within 48 hours. The California Department of Public Health defines an "outbreak" in most business-related situations as "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period." (California uses a different definition for an "outbreak" that prompts workers' compensation coverage.)

TAKEAWAY The California Occupational Safety and Health Administration may find a "serious violation" of its regulations if it can prove a "realistic possibility that death or serious physical harm could result from the actual hazard created by" a business when it violates its obligations to notify employees. One way to avoid the penalty is with timely and complete notice. Another is to take "all steps" of a "reasonable and responsible employer" in the same situation. Transparency and quick remedial action are keys to protecting the business and its workers. (These new requirements apply from January 1, 2021 to January 1, 2023.)

Effective Immediately, California Presumes Some COVID-19 Positive Employees Were Infected at Work and Should Receive Workers' Compensation Benefits

BY: PHILLIP R. MALTIN

RULE California Governor Gavin Newsom signed SB 1159 into law. It creates a "disputable presumption" for purposes of workers' compensation benefits that illness or death resulting from COVID-19 arose out of employment. The state considers the new statute (Labor Code section 3212.88) "urgency legislation" so it is in effect now until January 1, 2023.

The presumption applies to all employees who: (i) test positive during an outbreak at the employee's specific place of employment, and (ii) whose employer has five or more employees. The following conditions must exist:

(i) The employee tests positive for COVID-19 within 14 days of working at the jobsite;

(ii) The day the employee worked is on or after July 6, 2020; and

(iii) The employee's positive test occurred during an outbreak at the place of employment.

Under the new law, an "outbreak" exists if within 14 calendar days one of the following occurs:

- Employers of 100 employees or fewer at the location: Four employees test positive for COVID-19.
- Employers of 100 employees or more at the location: Four percent of the employees who worked at the specific place of employment tested positive for COVID-19.

- All employers: A local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent orders that the specific place of business close because of the risk of COVID-19 infection.

TAKEAWAY Ensure your workers' compensation coverage is current and corresponds to the size of your workforce. Continue to monitor the CDC's website and the websites of local health departments for updates on how to protect your employees. Conduct and document thorough contact tracing efforts in case there is a need to dispute the presumption that an infection originated at work. Above all, train your workers, particularly those returning from extended periods working from home, on your safety procedures.

REMINDER: CalSavers Program Began for Large Employers (100+) on September 30, 2020

BY: LAUREN KATUNICH

SUMMARY California started its pilot program for a state-sponsored retirement savings plan for businesses to offer employees. *CalSavers Retirement Savings Program*, or CalSavers for short, has a tiered registration and implementation deadline for various sized businesses. California requires private employers without a company-sponsored 401(k) or Simple IRA plan to join CalSavers. The state designed the program to help offset the retirement savings crisis in the United States by enabling eligible employees to contribute a portion of their paycheck to a Roth IRA—up to $6,000 a year or $7,000 a year if age 50 and over.

Employer requirements, registration deadlines, and penalties

Employers without a qualified retirement plan in place by the statutory deadline must comply with the CalSavers requirements and registration deadlines. The deadlines are:

- **Sept. 30, 2020**: Businesses with 100-plus employees.
- **June 30, 2021**: Businesses with 50-plus employees.
- **June 30, 2022**: Businesses with five-plus employees.

While there is no fee to register for the CalSavers program, employers could face financial penalties for not having a retirement savings plan available for eligible employees. The proposed fines range from $250 per eligible employee if an employer remains noncompliant after 90 days of being served notice, and then escalating to $500 per eligible employee if noncompliance reaches 180 days or more after notice.

CalSavers is theoretically at no cost to employers, but they must consider the administrative time and effort of registering for the program and setting up the account. Account setup includes creating a payroll list to enroll employees, designating a payroll service provider, and transmitting payroll to a third-party administrator. Account management duties require employers to submit employee contributions and add new employees when necessary.

TAKEAWAY Employers should speak with their business advisors about whether to create a qualified 401(k) or equivalent plan versus enrolling in CalSavers. Please contact Raines Feldman LLP if you would like more information about creating a qualified 401(k) or joining CalSavers.

Large Employers Must Offer COVID-19 Supplemental Paid Sick Leave

BY: RICARDO ROZEN AND PHILLIP R. MALTIN

RULE On September 9, 2020, California Governor Gavin Newsom signed AB 1867 into law requiring California employers with 500 or more employees nationwide (and employers of certain health care providers and emergency responders) to provide COVID-19 supplemental paid sick leave. The new law closes the gap created by the Federal Families First Coronavirus Response Act ("FFCRA"), which only applies to employers with fewer than 500 employees. Under the new law, employees are entitled to COVID-19 supplemental sick leave pay if they are unable to work due to one of the following:

(i) The covered worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;

(ii) The covered worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

(iii) The covered worker is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

Unlike the FFCRA, the new law does not provide for supplemental sick leave pay for school or childcare related reasons.

The amount of supplemental paid sick leave available will vary depending on the employee's status. Full-time employees will receive 80 hours of leave. Part-time employees with regular, established weekly schedules will receive the total hours the employee is normally scheduled to work over a two-week period. Employers must calculate available leave for employees with variable schedules as follows:

- If the employee has worked for the company for at least six months at the time leave is requested, then the calculation is 14 times the average number of hours the employee worked per day in the six months preceding the start of the leave.
- If the employee has worked more than 14 days for the company but less than six months, then the calculation is 14 times the average number of hours the employee worked each day during the employment.
- If the employee has worked 14 or fewer days for the company, then the calculation is the total number of hours worked during the employment.

Employers must pay the supplemental paid sick leave at an hourly rate that is the highest of (i) the employee's regular rate of pay for the last pay period, (ii) state minimum wage, or (iii) local minimum wage. The statute, however, caps the amounts at $511 per day and $5,110 in total.

Employers may not require employees to use other leave, paid or unpaid, before taking COVID-19 supplemental paid sick leave. If the employer already provided COVID-19 related paid sick leave (in addition to normal sick leave), the employer can count the hours already provided against the hours the new law requires (assuming it was paid at the rates set above).

Employers subject to the law must update their wage statements to notify employees of the amount of supplemental paid sick leave available. (Reminder: California requires this under existing sick leave laws.) The law also obligates employers to display a poster the Labor Commissioner's office recently released regarding the details of the new law. Click here for a copy of the poster for "non-food sector" employees; click here for a copy of the poster for "food-sector" employees.

TAKEAWAY All California employees are eligible for COVID-19 supplemental paid sick leave (whether through the federal FFCRA or this new law) if they meet one criterion outlined above. Ensure your wage statements reflect the emergency sick pay available to the employee to avoid costly penalties under the Labor Code. If you have questions, contact Raines Feldman.

On January 1, 2021, the California Family Rights Act Will Apply to Businesses with Five or More Employees

BY: PHILLIP R. MALTIN

RULE California Governor Gavin Newsom signed SB 1383 expanding the California Family Rights Act ("CFRA"). The changes take place on January 1, 2021. The prior law and new law permit protected leaves of absence of 12 weeks for employees who have worked 1,250 hours during any 12-month period ("eligible employees").

Presently, the CFRA applies to businesses with 50 or more employees in California. Starting January 1, 2021, the new Government Code section 12945.2 will expand its coverage, including these two significant changes: first, the CFRA will apply to businesses with five or more employees, and second, eligible employees will receive protected leave to care for their grandparents, grandchildren and siblings suffering a serious health condition. Businesses must permit eligible employees to take leave for the following reasons:

(i) Child Bonding: To bond with or care for a new child, whether born, adopted, or placed in foster care. If both parents work for the same employer, only one is eligible for up to 12 workweeks of unpaid protected leave. Beginning next year, if both parents work for the same employer, each is eligible for up to 12 workweeks of unpaid protected leave.

(ii) Family Care: To care for the employee's spouse, domestic partner, child, or parent who has a serious health condition. Starting January 1, 2021, the family members to whom the employee may provide care expands to grandparents, grandchildren and siblings.

(iii) Employee's Serious Illness: Because of a serious health condition that makes the employee unable to perform the essential functions of the employee's job. Next year, an employee may take leave due to pregnancy.

(iv) Military Service: Because of qualifying exigencies arising out of military duty by the employee's spouse, son, daughter, or parent, under the federal Family and Medical Leave Act ("FMLA"). This is unchanged.

(v) Military Family Member with Serious Illness: The FMLA provides up to 26 weeks of leave to care for a service member with a serious injury or illness. The first 12 weeks may run under CFRA.

Under current law, an employer may refuse to reinstate an employee returning from leave to the same or a comparable position if, among other things, the employee is salaried and among the highest paid 10 percent of the employer's employees. That exception disappears on January 1, 2021.

Leave under the FMLA and the CFRA run concurrently, meaning employees receive one 12-week period of leave within the same 12-month period for a reason that both statutes cover. Beginning next year, in some circumstances, California will permit employees to receive up to 24 weeks of unpaid protected leave in two 12-week periods, one under the CFRA and one under the FMLA.

TAKEAWAY Update policies and update handbooks. Obtain new workplace posters reflecting the changes. Employers with over 50 employees must remain vigilant for places where CFRA and FMLA do not overlap.

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Beginning January 1, 2021, California Will Require Mediation Over CFRA Disputes Before Employee May File a Lawsuit

BY: PHILLIP R. MALTIN

RULE "Small employers," with between 5 and 19 employees, may request mediation to resolve claims that the business violated section 12945.2, the amended California Family Rights Act. It must do this within 30 days of receiving a right-to-sue letter from the Department of Fair Employment and Housing. The employee may also request mediation within 30 days of obtaining a right-to-sue notice. The employee may not sue until the parties complete mediation, if either requests it.

TAKEAWAY While the new statute requires the parties to participate in mediation if requested by either the employee or the employer, it does not require that the parties settle the dispute.

What kind of COVID-19 Lawsuits Are on the Horizon?

BY: BETH SCHROEDER

SUMMARY Historically, employment litigation has been recession proof. A downturned economy predictably spawned legal activity from disgruntled, unemployed workers. But it was murkier to envision what havoc a worldwide pandemic could spark for employers and the legal traps it would set. Employers may face various types of legal threats depending on actions they have taken the last several months. Below we examine some of the litigation we anticipate as the world claws back to normal.

LAYOFFS/REHIRES The most obvious lawsuit we expect emanates from widespread business closures, re-openings, and downsizing. The pandemic forced business to make a choice of who stayed, who left, who was rehired and who was not. The factors used in determining all these decisions are often second-guessed, especially when they are not made with objective factors such as seniority. The existence of a world-wide catastrophe does not erase all the federal and state non-discrimination laws. Additionally, if the entire workplace has been shut and the workforce is large enough, or a mass layoff was instituted, a claim under the Worker Adjustment and Retraining Notification Act may be triggered. Employers are covered, generally, if they have just 75 employees at a workplace under California law; or 100 employees anywhere under federal law.

LEAVE LAWS AND ADA ACCOMMODATIONS We know under state and federal laws that employers must provide paid leave for employees in certain COVID-19 related circumstances, including extended time off to employees who need to care for school age children due to school closures. But what about an employee whose doctor recommends that she not work around COVID-19 during pregnancy because she has an auto-immune disorder? Does a business have to hold that job open, or provide a remote work situation? These are complicated situations and most certainly will spark litigation.

REMOTE WORK-RELATED WAGE AND HOUR ISSUES With so many employers having to shift their workforce home, new legal issues are triggered. California law requires that employers reimburse employees for increased Wi-Fi or cell phone usage, expenses normally shouldered by the office. Also, relaxed time keeping may inspire break and overtime claims, which do not evaporate just because employees control their own work environments.

SAFETY AND WHISTLEBLOWER CLAIMS Never before have employees become so familiar with the acronyms OSHA (Occupational Safety and Health Administration) and CDC (Centers for Disease Control and Prevention), and they do not hesitate to drop them into everyday conversation. We expect attorneys will similarly drop these phrases into their demand letters and lawsuits. That only provides additional incentive for employers to double down on their safety efforts as businesses reopen and social distancing guidelines continue to relax.

TAKEAWAY As the business world begins to reopen, we expect a new normal. With it, a new wave of COVID-19 litigation will emerge. Employers must revisit their employment practices and stay up to date with ever-changing health and safety requirements. Crafting compliant policies is only half the battle, and employers must ensure that new policies are also strictly enforced.

Reminder: Temporary Layoffs Become Permanent, Requiring Notice, After Six Months Under the WARN Act

BY: MATTHEW GARRETT-PATE AND PHILLIP R. MALTIN

SUMMARY The federal Worker Adjustment and Retraining Notification Act ("WARN Act") requires that covered employers laying off a specified number of employees, or closing a worksite, provide 60 days' advance written notice to employees. The notice requirement does not apply to temporary layoffs lasting less than six months but does kick in if the "temporary layoff" exceeds six months. With the COVID-19 pandemic, many employers chose to place their employees on temporary furloughs or layoffs anticipating the pandemic to abate and jobs to return in short order. However, more than six months into the pandemic, it is clear that restrictions on businesses will remain for the foreseeable future. It is also likely that laid off employees will not return to work. As many employers approach the six-month mark for temporary layoffs instituted in April and May, they must consider whether it is time to give their employees WARN notices. Employers must give notice to employees as soon as it is "reasonably foreseeable" that the layoff will exceed six months. Employers should also review their state's laws to ensure they comply with any state-equivalent to the federal WARN Act.

RULE The federal WARN Act requires employers to give written notice to employees 60 days before a mass layoff or plant closing. While the WARN Act exempts temporary layoffs of less than six months, employers who realize that a layoff will exceed six months must notify their employees as soon as the layoff extension beyond six months becomes reasonably foreseeable.

TAKEAWAY Unless employers covered by the federal WARN Act have concrete bases to believe they will return laid off employees before the six-month mark, they should evaluate whether their layoff falls under the federal WARN Act and, if necessary, notify employees that the layoff will exceed six months. For information on the California and federal WARN Acts, click here. Contact Raines Feldman with questions.

PAGA Cases Alleging Violations of the Labor Code Unrelated to Wage and Hour Violations Are on the Rise

BY: ALLISON WALLIN

SUMMARY The Private Attorneys General Act of 2004 ("PAGA") allows employees to serve as proxies for the State of California and to sue their employer for violations of the Labor Code. Employees typically use PAGA to seek penalties for violations of wage and hour laws. In *Doe v. Google, Inc.*, the California Court of Appeal allowed a group of employees to pursue PAGA claims under unique theories that reach beyond simple wage and hour claims. In *Doe*, employees sued under PAGA to seek penalties because Google, using a confidentiality policy, tried to prohibit employees from using or disclosing (i) the skills, knowledge, and experience they obtained at Google (violating unfair competition statutes), (ii) violations of state and federal law (implicating whistleblower statutes), and (iii) their wages and working conditions (violating the employees' "rights to free speech"). Google argued that federal law "preempts," or invalidates, PAGA in this context. The Court disagreed and permitted the case against Google to proceed.

RULE The court evaluated whether the National Labor Relations Act ("NLRA") preempts state PAGA claims. Under the NLRA, employees may exercise their rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In other words, they may communicate with each other to try to establish labor unions. Employers that try to silence this communication violate federal law. The penalties under the NLRA are minimal, particularly when compared to PAGA, so Google urged the court to conclude that federal law applied. The court determined, however, that the claims against Google were so "deeply rooted" in local interests, that California, not federal law, must govern.

Google's confidentiality policy contained a "savings clause" stating the company did not intend to limit employees' right to discuss wages, terms, or conditions of employment. The clause did not protect Google from the PAGA claim because the court rejected it.

TAKEAWAY PAGA penalties are hefty, and the lawsuits are expensive to fight, expensive to settle, and not covered by insurance. In addition, officers, directors, owners, and supervisors may be personally liable for PAGA penalties. PAGA cases alleging violations of the Labor Code unrelated to wage and hour violations are rare, but could become common place, particularly with this decision. Make sure your policies follow the guidance the court gives. Contact us for details.

TAKEAWAY Employers involved in interstate transportation should reevaluate whether California's wage statement (Section 226) and pay timing (Section 204) requirements apply to any members of their workforce based on the newly articulated "principal place of work" test. Additionally, with remote work becoming prevalent, the Supreme Court's decision serves as a reminder that California employers must be cognizant that if out-of-state employees travel to California to perform work (even for trainings or short periods of time) the California Labor Code and wage orders may apply.

How Long do Employees Have to Physically Work in California to Obtain the Protections of the California Labor Code?

BY: RICARDO ROZEN AND PHILLIP R. MALTIN

SUMMARY Delta flight attendants sued the company claiming it violated the California Labor Code. The company argued California's Labor Code did not apply to the flight attendants because they worked in California sporadically and for less than a day at a time.

RULE The California Supreme Court held that California Labor Code Sections 226 (itemized wage statements) and 204 (timing of payment) will not protect an employee unless California is the principal place of the employee's work during the relevant pay period. The Court clarified that California would be the principal place of an employee's work if the employee either (i) works primarily in California during the pay period, or (ii) does not work primarily in any state but has his or her base of operations in California. The Court reasoned that any other conclusion would lead to impractical and burdensome results for multi-state employers. The Court also clarified that the location or residence of the employer is irrelevant.

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Please note: The changes to California employment laws in 2020 are numerous and significant. Please closely review the articles above and contact us with any questions or concerns.

You can also visit www.raineslaw.com for the posted copy of this newsletter.
https://www.raineslaw.com/blog/category/employment-law-brief/