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WHITE PAPER

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A Review of 2020 Labor & Employment Legislation in California

The 2020 California legislative session led to a number of new laws that already have had significant impact on employers in the state. Employers were barraged with a combination of state and federal pandemic-related legislation, numerous Executive Orders from Governor Gavin Newsom, and COVID-related health orders and ordinances from many counties and cities. However, the Legislature also adopted several important employment-related statutes that do not concern the pandemic, including annual pay data reporting requirements, modification of independent contractor requirements, and expansion of California Family Rights Act leave obligations. The challenges for employers with California workforces are greater than in any recent year.

Aside from the pandemic, the second year of Governor Newsom's term resembled his first in some respects: Governor Newsom exercised his veto power less often than did his predecessor, Governor Jerry Brown, and—for the second time—Governor Newsom signed a piece of legislation (SB 973: Annual Pay Data Reporting) that Governor Brown previously vetoed.

More than ever, employers with California workforces must be careful to pay attention to new developments and to understand and comply with both statewide requirements and local rules that apply in specific locations. Unfortunately, none of the COVID-related Executive Orders issued by Governor Newsom has any preemptive effect on local orders or ordinances.

TABLE OF CONTENTS

The following are summaries of the most important new enactments. Employers should consult with knowledgeable employment counsel about these new statutes.

COVID-19 WORKPLACE NOTICE AND REPORTING OBLIGATIONS: AB 685

The California Occupational Safety and Health Act of 1973 ("OSHA") requires the Division of Occupational Safety and Health ("Cal/OSHA") to prohibit entry to a place of employment when, in its opinion, the place of employment constitutes an imminent hazard to employees. This prohibition is limited to the immediate area in which the imminent hazard exists. OSHA also requires that a conspicuous notice of that condition be displayed at the place of employment. Violating this OSHA requirement is a crime.

Effective January 1, 2021, Assembly Bill 685 expressly authorizes Cal/OSHA to prohibit entry into a place of employment or the performance of an operation or process when, in its opinion, the place of employment or the operation or process exposes workers to the risk of infection of COVID-19 so as to constitute an imminent hazard to employees.

A "notice of potential exposure," which triggers the written notice requirement outlined below, occurs when the employer receives notice from:

- A public health official or licensed medical provider that an employee was exposed to a "qualifying individual" at the employer's worksite;
- An employee that the employee is a "qualifying individual";
- An employer's testing protocol that shows an employee is a "qualifying individual"; or
- A subcontractor that one of the subcontractor's employees is a "qualifying individual" and was at the employer's worksite.

A "qualifying individual" is a person who:

Has a laboratory-confirmed case of COVID-19;

- Has a positive COVID-19 diagnosis from a licensed health care provider;
- Has been ordered to isolate by a public health official due to COVID-19; or
- Has died due to COVID-19.

If an employer receives a "notice of potential exposure to COVID-19," AB 685 requires the employer to provide a written notice **within one business day** to:

- All employees and the employer of subcontracted employees who: (i) were at the same worksite as the "qualifying individual" within the infectious period (currently defined as 10 days by the California Health Department); *and* (ii) may have been exposed to COVID-19; and
- Any unions that represent the employees.

Note, the statute does not define "worksite."

The notice must include the employer's disinfection and safety plan, which must comply with CDC guidelines, and provide information regarding the applicable COVID-related benefits to which the employees may be entitled.

Recommendations for Employers. Employers should create a template notice of potential exposure that will allow them to comply with the stringent one-business-day notice requirement. Additionally, employers should review, or develop, their disinfection and safety plan to make sure it is compliant with CDC guidelines. Employers should also prepare for the possibility that one, or multiple, of their worksites could be temporarily shut down.

Cal/OSHA recently issued a regulation related to COVID-19. The regulation is described below.

CAL/OSHA COVID-19 EMERGENCY TEMPORARY STANDARDS

Cal/OSHA's COVID-19 emergency regulations went into effect on November 30, 2020. They apply generally to all California

employees and places of employment, except health care employees, employees who work from home, and places of employment with only one employee who does not have contact with any other persons. The regulations require employers to implement a variety of strict workplace protections and impose new testing and notification requirements for COVID-19 outbreaks. Although emergency regulations generally remain in effect for 180 days, due to Executive Orders issued by Governor Newsom, these regulations will remain effective until Saturday, October 2, 2021, unless they are amended or extended.

The most onerous aspect of the regulations requires employers to establish, implement, and maintain an effective, written COVID-19 Prevention Program, which can either be integrated into an employer's existing Injury and Illness Prevention Program or maintained as a separate document. The Program must include procedures for communicating COVID-19 information to employees, identifying and evaluating COVID-19 hazards, investigating and responding to cases in the workplace, physical distancing and use of face coverings, and return to work after a COVID-19 diagnosis or exposure, among others. Further, employers must maintain records of steps taken to implement the Program, and they must make such information available to employees and their representatives upon request, including detailed training records.

Among other COVID-19 standards, the regulations require employers to implement rules for the isolation and return to work of employees who are otherwise able to work but test positive for the virus, are subject to a COVID-related order to quarantine, or have been "exposed" to COVID-19. Of particular note, unless an employer can demonstrate that an employee's COVID-19 exposure is not work-related, employers must provide paid leave during the period of time such employees are excluded from the workplace. Employers can use employer-provided sick leave to meet these obligations and may consider benefit payments from public sources in determining how to maintain an employee's earnings, rights, or benefits. It is unclear whether Cal/OSHA has the authority to enact leave requirements, and it is likely this provision will be subject to litigation.

Employers are required to follow certain protocols if a local health department identifies the workplace as the location of a COVID-19 "outbreak" or if there are three or more COVID-19 cases in the workplace within a 14-day period. Employers must provide no-cost COVID-19 testing to *all* employees, contact the local health department and provide identifying information for each individual with COVID-19 within 48 hours, and investigate and determine possible workplace-related factors that contributed to the COVID-19 outbreak.

If there are 20 or more COVID-19 cases in the workplace within a 30-day period ("major outbreak"), employers must additionally provide no-cost COVID-19 testing twice a week to *all* employees and implement increased hazard-detection measures, including potential closure of the workplace until such time as the COVID-19 hazards have been corrected. These requirements remain in effect until such time as there are no new COVID-19 cases detected in the workplace for at least 14 days.

Recommendations for Employers. Employers must begin to draft and implement a COVID-19 prevention plan that addresses all 11 topics laid out in the regulations. Cal/OSHA's COVID-19 Model Prevention Program is a useful starting point, but employers will need to tailor the template to address the specifics of their workplace. Employers should train their human resources staff on reporting, data collection, and investigation requirements and ensure that all necessary records are being maintained. It is also important that employers keep up to date on developments related to the regulations, as their sunset date may be extended.

COVID-19 PRESUMPTION OF WORKERS' COMPENSATION LIABILITY: SB 1159

Under existing law, there is a presumption that specified injuries sustained in the course of employment are compensable under the Workers' Compensation system.

Effective September 17, 2020, Senate Bill 1159 creates a "disputable presumption" of workers' compensation coverage for COVID-19 illness or death due to workplace exposure from July 6, 2020, until January 1, 2023. The new law also establishes a reporting requirement for employers to notify their workers' compensation carrier of any employee's confirmed, positive COVID-19 test.

Under SB 1159, any worker who suffers an illness or death related to COVID-19 (other than certain first responders, for

whom there are separate requirements) is presumed to have suffered an occupational injury and is therefore entitled to workers' compensation insurance benefits provided that:

- The employee tests positive for COVID-19 within 14 days after a day he or she performed services at a "specific place of employment"; and

- The positive test occurred during a period of an "outbreak" at that "specific place of employment."

A "specific place of employment" is defined as "the building, store, facility, or agricultural field where an employee performs work at the employer's direction." The definition specifically excludes "the employee's home or residence, unless the employee provides home health care services to another individual at the employee's home or residence."

An "outbreak" occurs when, within a 14-calendar-day period:

- An employer of 100 or fewer employees at a specific place of employment has four employees test positive for COVID-19;

- An employer of more than 100 employees at a specific place of employment has 4% of the employees who reported to the specific place of employment test positive for COVID-19; or

- A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of COVID-19 infection.

SB 1159's presumptions are "disputable" by the employer. Evidence that may dispute the presumption includes evidence of measures in place to reduce potential transmission of COVID-19 in the workplace and evidence of non-occupational risks that could have caused the employee's COVID-19 infection.

When an employer "knows or reasonably should know that an employee has tested positive for COVID-19," the employer must report all of the following information to its workers' compensation claims administrator **within three business days**:

- The fact that an employee has tested positive. The employer may not provide any personal identifying information of the employee who tested positive, unless the employee has asserted that the infection is work-related or has submitted a workers' compensation claim related to the infection;

- The date the employee tested positive;

- The address(es) of the specific place(s) of employment the infected employee worked during the 14-day period preceding that date; and

- The highest number of employees who reported to work at each specific place of employment in the 45 days preceding the infected employee's last day of work at each location.

The Labor Commissioner may impose a civil penalty of up to $10,000 if an employer intentionally submits false or misleading data to its claims administrator.

Recommendations for Employers. Employers should be prepared to provide notice of any California employee's confirmed positive COVID-19 test to their workers' compensation claims administrator within three business days. Employers should consider creating a template form for such reports that includes all four pieces of information required under the statute. Employers should also be prepared to gather the required information in a timely manner, including in particular the number of employees who come into each "place of employment" on a daily basis. Employers should also train and prepare human resources staff to conduct investigations into whether an "outbreak" has occurred.

COVID-19 SUPPLEMENTAL PAID SICK LEAVE: AB 1867

Effective September 19, 2020, and retroactive to April 16, 2020, Assembly Bill 1867 requires all employers with 500 or more employees to provide COVID-19 supplemental paid sick leave

to California employees who must leave their home to perform work but are unable to work because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
- The employer prohibits the employee from working due to health concerns related to the potential transmission of COVID-19.

AB 1867 and its provisions expired on December 31, 2020, or upon the expiration of any federal extension of the Families First Coronavirus Response Act ("FFCRA"), whichever is later.

Full-time employees and all other employees who worked or were scheduled to work, on average, at least 40 hours per week in the two weeks preceding their leave start date are entitled to 80 hours of COVID-19 supplement paid sick leave.

Less-than-full-time employees are entitled to:

- The total number of hours the employee is usually scheduled to work for the employer over two weeks, if the employee has a normal weekly schedule;
- Fourteen times the average number of hours the employee worked each day in the six months prior to taking COVID-19 supplemental paid sick leave if the employee works a variable number of hours, or, if the employee has been employed for less than six months, over the entire period the employee has worked for the employer; or
- The total number of hours the employee has worked, if the employee works a variable number of hours and has worked for the employer over a period of 14 days or fewer.

An employer *may not* require an employee to use other paid or unpaid leave before taking COVID-19 supplemental sick leave.

Employers must provide notice of an employee's available COVID-19 supplemental sick leave each pay period, either as part of his or her itemized wage statement or in a separate writing.

The statute includes additional specific rules for certain industries, including for food-sector employees and firefighters.

This statute was designed to fill a perceived "gap" in the coverage provided by the federal FFCRA, which exempted larger employers from the COVID-related sick leave requirement. There are, however, some differences between the two laws.

AB 1867 also requires the Department of Fair Employment and Housing ("DFEH") to create a small-employer family leave mediation pilot program for employers with between five and 19 employees. The program allows employees and employers to request that all parties participate in mediation with the DFEH before proceeding to litigation over an alleged failure to grant leave under section 12945.2 of the California Government Code (California Family Rights Act leave).

Recommendations for Employers. Employers should determine whether they are covered by AB 1867 or by the FFCRA and ensure that they have appropriate leave policies in place and are complying with them. Human resource and payroll staff should be trained on the COVID-19 sick leave requirements, including the requirement that employees not be disciplined for requesting or taking such sick leave. Additionally, employers should make sure that they are providing employees with written notice of the COVID-19 supplemental sick leave balance each pay period, either as part of their wage statements or in a separate written document. Employers will need to monitor FFCRA's possible extension to determine if and when their AB 1867 obligations expire.

ANNUAL PAY DATA REPORTING: SB 973

Effective January 1, 2021, Senate Bill 973 requires employers to submit a pay data report to the DFEH that contains specified wage information. This information must be submitted to the DFEH by March 31, 2021, and by March 31 each year thereafter. The filing portal will open on February 15, 2021. Covered employers include employers who have 100 or more employees (in California or elsewhere) and who are subject to federal EEO-1 filing requirements.

SB 973 requires a report containing highly detailed pay data, broken down by race, ethnicity, and sex, for 11 categories of employees ("Component 2" data). Specifically, SB 973 requires

that covered employers are required to report the number of employees by race, ethnicity, and sex in each of the following job categories: executive or senior-level officials and managers, first- or mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers *This is essentially the same as the "Component 2" data previously described in the proposed changes to the federal EEO-1 form, discussed below.* Employers would count individuals in these groups by looking at a single pay period of their choosing between October 1 and December 31 of the calendar year preceding March 31.

SB 973 is modeled on the proposed amended federal Employer Information Report (EEO-1), which was withdrawn by the Trump Administration and now is the subject of litigation and further administrative action by the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC expects to begin collecting the usual 2019 EEO-1 Component 1 data along with the 2020 EEO-1 Component 1 data in April 2021, delayed due to the pandemic. It plans to notify all filers of the precise date the collections will open as soon as it is available. Notably, eligible employers do *not* need to include Component 2 data in their EEO-1 filing because the EEOC is currently conducting an independent assessment of Component 2 data, which it anticipates to be completed by December 31, 2021. The pay data report that employers must submit to the DFEH on March 31, 2021 will require "Component 2" data, even if the federal EEO-1 form does not require that data.

"Component 2" data is extremely detailed pay data. It requires employers to gather and report the number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay levels used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. To do so, employers would use W-2 data for each employee. Employers are also required to report the total number of hours worked by each employee in each pay level.

Recommendations for Employers. Employers with 100 or more employees, in California or elsewhere, should work with their human resources department to determine how to gather and report the data required by SB 973. Employers who already have a mechanism in place to track the compensation data previously required for the federal EEO-1 form must expand that mechanism to include the "Component 2" categories outlined above. Employers should also work with their counsel on compliance.

MINIMUM WAGE AND EXEMPTION COMPENSATION CHANGES AT THE STATE LEVEL: AB 3075

Effective January 1, 2022, or upon certification by the California secretary of state, whichever is earlier, Assembly Bill 3075 expressly authorizes local jurisdictions to enforce local standards relating to the payment of wages that are *more stringent* than state standards. This bill does not authorize local authorities, such as city attorneys, to enforce wage obligations under the Labor Code or IWC Wage Orders. Prior law did not expressly authorize cities or counties to enforce local labor standards that are more stringent than the state's standards.

AB 3075 also requires business entities filing a statement of information with the secretary of state to disclose whether any officer or director, or, in the case of a limited liability company, any member or manager, has an outstanding final judgment for the violation of a wage order or the Labor Code.

Recommendations for Employers. Many cities in California have local ordinances establishing "living wage" levels, local health insurance requirements, or local paid sick leave obligations and the like. Employers can find the local ordinances described by city here and should review the ordinances applicable to them to ensure compliance in the cities where they do business.

EXPANSION OF CALIFORNIA FAMILY RIGHTS ACT LEAVES: SB 1383

The California Family Rights Act ("CFRA") allows an eligible employee of any employer with 50 or more employees to take up to 12 workweeks of unpaid protected leave to bond with a new child of the employee or to care for himself, a child, a parent, or a spouse.

Effective January 1, 2021, Senate Bill 1383 decreases the threshold for employers to meet the requirements of the act to any employer with *five or more employees*. The bill also eliminates the "key employee" exemption to CFRA leave and

requires employers who employ both parents of a child to grant leave to each employee.

Additionally, SB 1383 expands the scope of the CFRA to include leaves to: (i) care for a grandparent, grandchild, sibling, or domestic partner who has a serious health condition; (ii) care for an adult child and child of a domestic partner with a serious health condition; and (iii) be with a spouse, domestic partner, child, or parent in the Armed Forces of the United States pursuant to a qualifying exigency.

Leave taken by an employee under the CFRA typically runs concurrently with Family Medical Leave Act ("FMLA") leave. However, because CFRA leave is now available to a greater range of employees than under the federal FMLA, there is a possibility that some employees might be eligible to take *both* FMLA and CFRA leave separately in the same year or 12-month period.

Recommendations for Employers. Employers should revise their handbook policies to account for the additional reasons an employee can take CFRA leave. Employers should also prepare for additional employees taking leave under the expanded provisions of the act.

EXPANSION OF PAID FAMILY LEAVE BENEFITS: AB 2399

Under previous law, the Paid Family Leave ("PFL") program provides for up to eight weeks of partial wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement.

Effective January 1, 2021, Assembly Bill 2399 will also allow employees to take time off under the PFL program pursuant to a qualifying exigency related to the covered active duty or call to active duty of the employees' spouse, domestic partner, child, or parent in the Armed Forces of the United States.

Specifically, Assembly Bill 2399 adds to the definition of "family care leave" to include leave pursuant to a qualifying exigency and adds to the definitions of "care recipient" and "care provider" to include an employee who is participating in a qualifying exigency. A "qualifying exigency" is defined in section 3302.2 as any of a multitude of various acts or activities.

Recommendations for Employers. Employers should update their employee handbooks to reflect the additional option for PFL benefits. Supervisors should be made aware that employees in the armed services or with close family members in the armed services may be out of the workplace for an extended period of time related to this leave.

EXPANSION OF CRIME VICTIM BENEFITS: AB 2992

Under previous law, specifically California Labor Code section 230 and 230.1, an employer is prohibited from discharging or discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking, for taking time off from work to obtain or attempt to obtain relief to help ensure the health, safety, or welfare of the victim or victim's child.

Effective January 1, 2021, Assembly Bill 2992 expands sections 230 and 230.1 of the Labor Code to prohibit an employer from discharging or discriminating or retaliating against an employee who is a victim of *any* violent crime, crime that caused physical injury, crime that caused mental injury and a threat of physical injury, or abuse for taking time off from work to obtain or attempt to obtain relief. Relief includes, but is not limited to, taking time off to seek a temporary restraining order or other injunctive relief, obtain medical attention, obtain services from a victim services organization or agency, or obtain counseling or mental health services.

The aforementioned leave protections are extended to immediate family members of homicide victims as well.

"Crime" is defined as "a crime or public offense as set forth in Section 13951 of the Government Code, and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime."

Recommendations for Employers. Employers should update their employee handbooks to reflect the additional protections for crime victims. Employers should circulate to their employees, or add to their training curricula, notice of the additional protections and ensure that their employees know no adverse actions should be taken against anyone who chooses to take this leave. Human resources staff should be trained on the new, expanded leave rights.

EXPANDED PROTECTIONS FOR LABOR CODE RETALIATIONS: AB 1947

Under previous law, employees may file a complaint with the Labor Commissioner within six months after suffering an adverse employment action in violation of any provision of the Labor Code. After receiving the complaint, the Labor Commissioner typically conducts an investigation. If the investigator concludes there is "reasonable cause" to support the complaint, the Labor Commissioner can seek temporary relief from a court, including an order to reinstate the complaining party until the complaint is resolved.

Effective January 1, 2021, Assembly Bill 1947 extends the six-month statute of limitations to file a complaint to one year.

AB 1947 also authorizes a court to award reasonable attorneys' fees to a worker who prevails on a retaliation claim under section 1102.5.

Recommendations for Employers. Any discipline of an employee who has made an internal or external complaint must be carefully considered in advance, preferably by a manager(s) not involved in the underlying complaint. Complaints or reports by employees of potentially illegal activity must be properly investigated. Proper policies and procedures must be in place to advise employees how to report potential unlawful activity, including required postings. Employers should also retain all documents and emails relating to investigations, internal reviews, discipline, and complaints. Employers may see an increase in litigation because claims will no longer lapse after six months and employees will now have one year to pursue a case before the Labor Commissioner.

SETTLEMENT AGREEMENT "NO-REHIRE" CLAUSE EXCEPTION: AB 2143

Beginning on January 1, 2020, employers were prohibited from including "no-rehire" clauses in settlement agreements in instances where employees had filed a complaint in court or with a government agency against their employer. However, employers could include a "no-rehire" clause in the settlement agreement when the employer had made a good-faith determination that the former employee engaged in sexual harassment or assault.

Effective January 1, 2021, AB 2143 expands the exception to include instances where the employer has made a good-faith determination that the former employee engaged in criminal conduct. Employers must make and document the good-faith determination *before* the former employee's complaint is filed.

AB 2143 also requires that the former employee's complaint be made in good faith in order for the employee to be eligible for the prohibition against a "no-rehire" clause.

The statute also continues to permit a no-rehire clause if "there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person."

Recommendation for Employers. Employers should utilize "no-rehire" provisions only in circumstances permitted by the statute. The reason for requesting the no-rehire provision should be well documented. Employers should also train their human resources staff to ensure that they are documenting and keeping records related to the decision whether to make use of the exception.

INDEPENDENT CONTRACTORS: AB 2257 AND PROPOSITION 22

Last year, AB 5 was signed into law. AB 5 adopted the "ABC test" for determining whether a worker can be classified as an independent contractor for purposes of Labor Code coverage, including wage/hour, unemployment insurance, and workers' compensation requirements. The ABC test states that a person providing labor or services for remuneration is considered an employee, and not an independent contractor, unless the hiring entity can demonstrate that the person: (i) is free from the control and direction of the hiring entity in connection with the performance of the work; (ii) performs work that is outside the usual course of the hiring entity's business; and (iii) is customarily engaged in an independently established trade, occupation, or business.

Effective September 4, 2020, Assembly Bill 2257 adds numerous occupations that qualify as "professional services" and are exempted from the ABC test, including videographers, photo editors, digital content aggregators, translators, copy editors, illustrators, content contributors, advisors, producers, narrators, or cartographers. The *Borello* (totality of circumstances) test is

used to evaluate independent contractor status for occupations subject to the exemptions. However, these exemptions are subject to various detailed requirements, as outlined below.

- **Business-to-Business Exemption**: AB 2257 modifies the "business-to-business" exemption to the ABC test. The "B2B" exemption now applies to contracts to provide services to public agencies or quasi-public corporations. It also eases the requirement that the business service provider "actually contracts" with other businesses to provide the same or similar services as advertised to the public and instead only mandates that the business provider show it "can contract" with other businesses. It also creates an additional exemption for relationships between two or more sole proprietors. Additionally, the bill mandates that the contract with the business service provider specify the payment amount, including the applicable rate of pay, and the date of expected payment for such services.

- **Referral Agencies**: AB 5 included the relationship between referral agencies and service providers as an additional exemption to the ABC test. AB 2257 further clarifies that, in order to utilize the exemption, service providers must be able to set and negotiate their hours and terms of work directly with the client. The same is true of rate of pay—service providers must be able to set their own rates, negotiate the rates with the referral agency or the client, or accept or reject rates provided by the client. In addition, it expands the types of services qualifying for the exemption to include graphic design, web design, tutoring, consulting, youth sports coaching, caddying, wedding planning, wedding and event vending, yard cleanup, captioning, and interpreting and translating services. It also lists a number of services that do not qualify, including high-hazard industry services, janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

- **Music Industry**: AB 2257 also adds a broad exemption for portions of the music industry, specifically "occupations in connection with creating, marketing, promoting or distributing sound recordings or musical compositions." It also clarifies that the *Borello* test applies to these exempted occupations. Some of the exempted occupations are recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers and mixers engaged in the creation of sound recordings, musicians engaged in the creation of sound recordings, vocalists, photographers working on recording photo shoots, album covers, and other press and publicity purposes, independent radio promoters, and certain types of publicists. Further, AB 2257 exempts musicians and musical groups engaged for a single-engagement live performance, unless they: (i) rehearse or perform as a symphony orchestra; (ii) rehearse or perform in a musical theater production; (iii) rehearse or perform at a theme park or amusement park; (iv) rehearse or perform as an event headliner in a venue with more than 1,500 attendees; or (v) rehearse or perform at a festival that sells more than 18,000 tickets per day of performance.

- **Individual Performance Artists**: Individual performance artists are exempt from the ABC test, and have *Borello* apply, if the individual is free from the control and direction of the hiring entity, the individual retains the rights to his or her intellectual property, and the individual has the ability to set the terms of work and negotiate his or her work. Some examples of individual performance artists are: comedians, illusionists, improvisers, magicians, spoken-word performers, storytellers, and puppeteers.

- **Journalist Submission Cap Removed**: AB 2257 eliminates the AB 5 provision that makes freelance writers, photographers, photojournalists, editors, and newspaper cartoonists automatically employees if they contract for more than 35 submissions in a single year. Instead, these positions are also covered by the *Borello* test.

- **Proposition 22**: On November 3, 2020, California citizens passed Proposition 22. Proposition 22 makes app-based rideshare and delivery drivers independent contractors and excludes them from AB 5's coverage. The proposition states that an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if four conditions are met: (i) the network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based

driver must be logged in; (ii) the network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the application; (iii) the network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time; and (iv) the network company does not restrict the app-based driver from working in any other lawful occupation or business. Proposition 22 also guarantees that drivers are paid no less than 120% of minimum wage for the time they are engaged and are given payment per mile. Covered companies are also required to provide health care subsidies and insurance coverage to drivers, develop anti-harassment policies, provide drivers with mandatory safety training, and conduct criminal background checks on drivers.

Recommendations for Employers. Employers should conduct internal reviews to ensure that their independent contractors are properly classified. Employers should also consult with counsel to determine whether any of the exemptions created by AB 5 or AB 2257 apply in their particular circumstances.

CORPORATE BOARDROOM DIVERSITY: AB 979

In 2018, Governor Brown signed SB 826, which required all publicly held corporations that have their principal executive offices in California to have at least one woman on their board of directors by December 31, 2019. Corporations with five directors must have two female directors, and corporations with six or more directors must have three female directors by the end of 2021.

Effective January 1, 2021, AB 979, which is modeled on SB 826, requires all publicly held corporations that have their principal executive offices in California to have at least one individual from an "underrepresented community" on their board of directors by December 31, 2021.

By December 31, 2022, all such corporations must have at least: (i) three individuals from "underrepresented communities" on their board if they have nine or more directors; (ii) two individuals from "underrepresented communities" on their board if they have more than four, but less than nine directors; and (iii) one individual from an "underrepresented community" on their board if they have four or fewer directors.

A director from an "underrepresented community" is defined as "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 gay, lesbian, bisexual, or transgender."

The secretary of state is authorized to impose fines in the amount of $100,000 for a first violation and $300,000 for a subsequent violation of the law. Each director seat that is required to be filled by an individual from an underrepresented community that is not filled by such an individual will count as a separate violation.

***Recommendations for Employers*.** Publicly held corporations whose principal executive office is in California should begin to put steps in place to comply with the law both by the end of 2021 and 2022, which can include increasing the total number of directors on the board. Covered employers should also keep track of legal developments related to the law, as there have been multiple lawsuits challenging the constitutionality of SB 826, and it is likely that AB 979 will be subject to similar lawsuits.

SEXUAL HARASSMENT PREVENTION TRAINING FOR MINORS: AB 3175

AB 2338, which went into effect on January 1, 2019, required all actors between the ages of 14 and 17 to take sexual harassment prevention training before they could obtain a permit to work in the entertainment industry. The law mentioned that the actor's parent or legal guardian needed to attend the training as well. It mandated that training be provided in the language understood by that person or persons.

Effective September 25, 2020, AB 3175 amends CA Labor Code Section 1700.52 and clarifies AB 2338's requirement regarding the actor's parent or legal guardian. The bill states that the actor must be accompanied by a parent or legal guardian during the training and that the parent or legal guardian must certify to the Labor Commissioner that the training has been completed. The bill also slightly altered previous language and mandates

that training be provided in the language understood by that person or persons "whenever reasonably possible."

Recommendations for Employers. Any employers involved in the entertainment industry that utilize minor actors should ensure that parents are aware of and understand the requirements of AB 3175 and the protocol they will need to follow in order to comply.

CHILD AND SEX ABUSE REPORTING: AB 1963

The Child Abuse and Reporting Act requires all mandated reporters, who have knowledge or reasonable suspicion of child abuse or neglect, to report the incident to public authorities. A mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect is guilty of a misdemeanor that is punishable by a fine of up to $1,000, up to six months in county jail, or both.

Effective January 1, 2021, AB 1963 makes the following employees "mandated reporters": (i) a human resources employee of a business with five or more employees that employs minors; and (ii) for the purposes of reporting sexual abuse, an adult whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace of a business with five or more employees.

A "human resources employee" is defined as any employee designated by the employer to accept complaints of discrimination, harassment, retaliation, or other misconduct made under California's Fair Employment and Housing Act.

Businesses with five or more employees employing minors are also required to provide training to employees who have reporting duties under the law. This must include training in both the identification and reporting of child abuse and neglect. This training requirement can be met by completing the general online training for mandated reporters, which is offered by the Office of Child Abuse Prevention in the State Department of Social Services.

Recommendations for Employers. Employers should give training to their human resources staff on the requirements of being a mandated reporter. The human resources staff should be knowledgeable on the signs of child abuse and neglect and the steps to take if there is a reasonable suspicion that such abuse or neglect has occurred.

CALIFORNIA CONSUMER PRIVACY ACT EXEMPTIONS EXTENSION: AB 1281 AND PROPOSITION 24

The California Consumer Privacy Act ("CCPA") created a temporary exemption, until January 1, 2021, for certain employment information collected by an employer in the course of the individual acting as a job applicant, employee, owner, director, officer, medical staff member, or contractor. The CCPA also temporarily exempted from its provisions, until January 1, 2021, specified personal information reflecting a written or verbal communication or a transaction between the business and the consumer if certain conditions are met.

On November 3, 2020, California voters passed Proposition 24, which extended the exemptions on certain rights and obligations related to job applicant and employee data ("employer exemption") to January 1, 2023. Specifically, Proposition 24 excludes from the CCPA's coverage the following sections:

- Data collected by a covered employer about a person, when that person is a job applicant, independent contractor, or employee and used solely within that individual's role with the business;
- Emergency contact information of an applicant, independent contractor, or employee; and
- Information about an applicant, independent contractor, or employee that the employer needs to administer benefits.

Recommendations for Employers. Employers should review their policies to make sure they are compliant with all of the CCPA's requirements as applied to employment-related information. The employer exemption does not exempt two provisions of the CCPA: Civil Code section 1798.100 – pre-collection notice for employment-related data; and Civil Code section 1798.150 – data breach protections and private right of action. Thus, employers should confirm that they are currently abiding by the CCPA's pre-collection notice requirements as well as its security requirements.

EMPLOYEE SICK LEAVE—KIN CARE: AB 2017

Under current law, an employer who provides sick leave for employees is required to permit an employee to use up to half of his or her accrued and available sick leave to attend to the illness of a family member. Employers had the ability to determine how to apply available sick leave to an employee's absence.

Effective January 1, 2021, Assembly Bill 2017 gives the employee sole discretion to choose the reason for using his or her available sick leave. Employees can now decide whether to designate this time for the purpose of diagnosis, care, treatment of their or their family member's health condition, or for obtaining relief if the employee is a victim of domestic violence, sexual assault, or stalking.

Recommendations for Employers. Employers must be aware and update their policies to ensure that they do not dictate how to apply available sick leave to an employee's absence.

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