PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2020*

LEGISLATIVE

California

COVID-19

AB 685 (Reyes)

AB 685 requires employers to provide written notice and instructions to employees who may have been exposed to COVID-19 at their worksite and enhances the Division of Occupational Health and Safety's ability to enforce health and safety standards to prevent workplace exposure to and the spread of COVID-19. This law becomes effective January 1, 2021.

Notice of Potential Exposure to COVID-19

An employer must provide notice of potential exposure to COVID-19 in the following circumstances: a laboratory-confirmed case of COVID-19 as defined by the State Department of Public Health; a positive COVID-19 diagnosis from a licensed health care provider; a COVID-19-related order to isolate provided by a public health official; or a death due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.

Notice to Employees

If an employer or representative of an employer receives notice of potential exposure to COVID-19, the employer is required to take the following actions within one business day of the notice of potential exposure:

1. Provide a written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19 in a manner the employer normally uses to communicate employment-related information.

2. Provide a written notice to the exclusive representative, if any, of employees described above.

3. Provide all employees who may have been exposed and the exclusive representative, if any, with information regarding COVID-19-related

benefits to which the employee may be entitled under applicable federal, state, or local laws.

4. Notify all employees, and the employers of subcontracted employees and the exclusive representative, if any, on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

Employers must maintain records of written notifications for a period of at least three years.

Other Important Considerations

AB 685 confirms that an employer cannot require employees to disclose medical information unless otherwise required by law. This new law also states that an employer cannot retaliate against a worker for disclosing a positive COVID-19 test, diagnosis, or an order to quarantine or isolate. This law enables employees who believe they have been retaliated against to file a complaint with the Division of Labor Standards Enforcement. The California Department of Public Health must make occupation and industry information received available on the internet to enable the public to track outbreaks. AB 685 also provides that personally identifiable information is not subject to a California Public Records Act request or shared with any other state or federal agency. Importantly, this law does not apply to health facilities. This law also does not apply to an employee who, as part of their duties: conducts COVID-19 testing or screening; provides direct patient care or treatment to an individual who has tested positive for COVID-19; are persons under investigation; or are in quarantine or isolation related to COVID-19, unless the qualifying individual is an employee at the same worksite.

Lastly, AB 685 expands Cal/OSHA's authority to prohibit workers from entering or using a work area that poses an imminent risk to employees of COVID-19 infection. This prohibition will only apply to the immediate area in which the imminent hazard of COVID-19 infection exists, and other employer areas or processes that do not pose such a risk will not be affected. Moreover, the employer may still enter the area for the sole purpose of eliminating the conditions creating the imminent hazard.

SB 1159 (Hill)

Earlier this year, Governor Newsom signed an executive order creating a rebuttable presumption that essential workers who contracted COVID-19 were exposed to the virus at work and thereby suffered a compensable workplace injury. SB 1159 codifies executive order N-62-20 and also creates a similar presumption of workers' compensation coverage for COVID-19-related deaths and illnesses moving forward.

Employees Who Contracted COVID-19
Between March 19, 2020 and July 5, 2020

Per newly enacted Labor Code section 3212.86, an employee who tested positive for COVID-19 within 14 days after performing work at the place of

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

employment (during the period of March 19 through July 5) is entitled to a "disputable presumption" that such illness arose out of and in the course of employment. This presumption may be disputed by evidence including, but not limited to measures in place to reduce potential transmission of COVID-19 in the employee's place of employment; and evidence of an employee's nonoccupational risks of COVID-19 infection. Notably, the "place of employment" does not include the employee's residence. The claims administrator has 30 days from the filing of the claim form to deny the claim, otherwise the presumption attaches and may thereafter only be disputed with evidence discovered *subsequent* to the 30-day period.

Essential Workers Who Contracted COVID-19 from July 6, 2020 Onward

Similar rules apply to essential workers whose date of injury fell on or after July 6, 2020. Per Labor Code section 3212.87, firefighters, peace officers, employees who provide direct patient care or custodial services in a health facility (as defined), registered nurses, and EMTs, among select other workers, are entitled to a disputable presumption that illness or death caused by COVID-19 constituted an industrial injury if the employee tested positive within 14 days after a day the employee worked at the place of employment. This presumption may be disputed by the same types of evidence listed above, and "place of employment" excludes the employee's residence. Claims must be rejected within 30 days, or else only evidence discovered after the 30-day period may be used to dispute the presumption that the injury is covered by workers' compensation.

Notably, employees of health care facilities other than those identified above are also subject to the same disputable presumption, unless the employer can show that the employee did not have contact with a health facility patient within the last 14 days of work. In that circumstance, the claim will be evaluated according to normal (non-COVID) workers' compensation standards.

Other Employees Who Contracted COVID-19 from July 6, 2020 Onward

All employees who are not described in Labor Code section 3212.87 and who work for an employer with five or more employees are subject to slightly different rules. Per Labor Code section 3212.88, such an employee is entitled to a disputable presumption that a COVID-19-related illness or death was covered by workers' compensation if the following criteria are satisfied: (1) the employee tested positive for COVID-19 within 14 days after a day the employee worked at the place of employment (on or after July 6, 2020); and (2) the employee's positive test occurred during a period of an outbreak at the employee's specific place of employment.

"A specific place of employment" means the building, store, facility, or agricultural field where an employee performs work at the employer's direction. "A specific place of employment" does not include 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" exists if, within 14 calendar days, one of the following occurs: (1) if the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (2) if the employer has more than 100 employees at a specific place of

employment, four percent of the number of employees who reported to that specific place of employment test positive for COVID-19; or (3) a specific place of employment is ordered to close by the local health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

This presumption may be disputed by the same types of evidence listed above. Claims must be rejected within 45 days, or else only evidence discovered after the 45-day period may be used to dispute the presumption that the injury is covered by workers' compensation.

Once an employer knows or reasonably should know that an employee has tested positive for COVID-19, the employer must report to the claims administrator in writing (via email or fax) within three business days of all of the following: (1) that an employee tested positive (no personally identifiable information regarding the employee need be reported unless the employee asserts the infection is work-related or has filed a DWC-1 claim form); (2) the date of the positive test (i.e., the date the specimen was collected for testing); (3) the specific address(es) of the employee's specific place of employment during the 14-day period preceding the date of the positive test; and (4) the highest number of employees who reported to work at the employee's specific place of employment in the 45-day period preceding the last day the employee worked at each specific place of employment.

Under Labor Code sections 3212.86, 3212.87, and 3212.88, an employee must exhaust any paid sick leave benefits specifically available in response to COVID-19 before any temporary disability benefits or select other workers' compensation benefits are due and payable. If the employee has no such sick leave benefits, there is no waiting period for temporary disability benefits. This bill became effective on September 17, 2020.

AB 1867 (Committee on Budget)

This bill creates Labor Code sections 248 and 248.1, which authorize supplemental paid sick leave for employees of large employers and other groups of employees ineligible for emergency paid sick leave under the Families First Coronavirus Response Act ("FFCRA"). This bill went into effect on September 19, 2020 and will remain in effect until December 31, 2020 or upon the expiration of the FFCRA, whichever is later. Covered employees may immediately request and use supplemental paid sick leave, beginning on September 19.

Under AB 1867, employees of health care providers, emergency responders, and businesses with 500 or more workers are entitled to supplemental paid sick leave if they are unable to work because: (1) the worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or (3) the worker is prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19. Other workers eligible for supplemental paid sick leave include those ineligible for California paid sick leave as identified in Labor Code section 245.5, including: employees covered by collective bargaining agreements; flight and cabin crews; and employees of the state or local public entities.

Like emergency paid sick leave under the FFCRA, supplemental paid sick leave is capped at $511 per day and $5,110 in the aggregate for each covered worker, and must be paid at a rate *equal or greater to* the worker's regular rate for the last pay period, the state minimum wage, or the local minimum wage. Notably, this supplemental paid sick leave is *in addition to* any paid sick leave the worker is already entitled to under California law (the Healthy Workplace Healthy Family Act, as codified in Labor Code section 245 et seq.). However, if the hiring entity already provides a similar benefit (such as other supplemental paid leave) that would permit a worker paid time off for reasons (1), (2), and (3) above, and such benefit is equal to or greater than the supplemental paid sick leave required by AB 1867, then the hiring party need not provide supplemental paid sick leave under AB 1867. As under the FFCRA, employers may not require covered workers to use any form of paid leave prior to using supplemental paid sick leave.

A covered worker is entitled to 80 hours of supplemental paid sick leave if the hiring entity considers the worker to work "full time" or if the worker worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks preceding the date of leave. If a worker does not satisfy the foregoing criteria, then the worker is entitled to supplemental paid sick leave as follows: (a) if the worker has a normal weekly schedule, the total number of hours the worker is normally scheduled to work for or through a hiring entity over two weeks; or (b) if the worker works a variable number of hours, 14 times the average number of hours the worker worked each day for or through the hiring entity in the six months preceding the date the worker took supplemental paid sick leave.

Employers must also identify the amount of supplemental paid sick leave available for use either on employees' paystubs or on a separate writing provided on the designated pay date, as is the case for California paid sick leave. A poster outlining employees' rights under AB 1867 must be posted in a conspicuous place in the workplace. If employees are working remotely, the poster should be sent to remote employees electronically. Copies of the Labor Commissioner's model notices may be found here and here.

AB 1867 also codifies the supplemental paid sick leave authorized for food sector workers under Executive Order N-51-20.

Lastly, employees working in food facilities are authorized to wash their hands every 30 minutes, and even more frequently if needed.

AB 2537 (Rodriguez)

This bill requires public and private employers of workers in a general acute care hospital (as defined under Health and Safety Code section 1250(a)) to supply employees who provide direct patient care or provide services that directly support personal care with the personal protective equipment ("PPE") necessary to comply with occupational health and safety regulations. Moreover, beginning April 1, 2021, such employers must maintain a stockpile of specified PPE (including N95 respirators, powered air-purifying respirators with high efficiency particulate air filters, elastomeric air-purifying respirators and appropriate particulate filters or cartridges, surgical masks, isolation gowns, eye protection, and shoe coverings)

that is equal to three months of normal consumption. The failure to maintain such a stockpile carries a $25,000 penalty for each violation, unless the Division of Occupational Safety and Health determines the employer could not do so due to circumstances beyond its control. The employer must also establish and implement written procedures for periodically determining the quantity and types of equipment used in its normal consumption. The employer must provide an inventory of its stockpile and its written procedures to the Division of Occupational Safety and Health upon request. Finally, AB 2537 requires a general acute care hospital, on or before January 15, 2021, to be prepared to report to the Department of Industrial Relations, under penalty of perjury, its highest seven-day consecutive daily average consumption of personal protective equipment during the 2019 calendar year. This law becomes effective on January 1, 2021.

SB 275 (Pan)

This bill requires health care employers, including clinics, health facilities, and home health agencies, to maintain an inventory of new, unexpired personal protective equipment ("PPE") for use in the event of a declared state of emergency and would require the inventory to be at least sufficient for 45 days of surge consumption. Moreover, employers must provide the Division of Occupational Safety and Health an inventory of the stockpile upon request. Employers that fail to comply with these requirements risk a civil penalty of up to $25,000 for each violation. The Department of Industrial Relations may exempt an employer if it determines that supply chain limitations make meeting this standard infeasible, and the employer has made a reasonable effort to obtain PPE or shown it cannot comply due to reasons outside its control. This law becomes effective on January 1, 2021.

AB 1731 (Boerner Horvath)

This bill streamlines the process for employers to apply for approval work-sharing plans as an alternative to layoffs. AB 1731 authorizes the Employment Development Department ("EDD") to create an online portal through which employers may submit work sharing plan applications. Moreover, the bill provides that applications submitted between September 15, 2020 and September 1, 2023, upon approval by Director of Employment Development, will be deemed approved for one year (unless a shorter plan is requested and approved). AB 1731 will also require the EDD to make claim forms available online for those employers who submitted work sharing plan applications electronically. This law became effective on September 28, 2020.

AB 2658 (Burke)

This bill affords additional protections to domestic workers who refuse to perform work in hazardous conditions. Labor Code section 6310 and 6311 are amended to prohibit retaliation against domestic work employees who report safety violations or refuse to work under unsafe conditions. Excluded from coverage under these amendments are domestic workers who perform household services that are publicly funded. This bill also makes it a crime for a person, after receiving notice to evacuate or leave, to willfully and knowingly direct an employee to remain in, or enter, an area closed under prescribed provisions of law

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

due to a menace to the public health or safety. This provision will likely be enforced against employers who require employees to remain in or enter an area ordered closed due to COVID-19 infection risk.

AB 2043 (Robert Rivas)

Employees who work in agricultural occupations covered by Industrial Welfare Commission Wage Order 14, or in an industry covered by Wage Order 13 (industries preparing agricultural products for the market, on the farm) or Wage Order 8 (industries handling products after harvest) are now covered by enhanced health and safety standards. The California Division of Occupational Safety and Health must disseminate, in both English and Spanish, information on best practices for COVID-19 infection prevention, work collaboratively with community organizations and organizations representing employees and employers to conduct a statewide outreach campaign to disseminate best practices information, and educate employees about any COVID-19-related benefits to which they may be entitled. This law became effective on September 28, 2020.

AB 276 (Friedman)

This bill aligns California tax law with the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") in that it permits employees to take loans from qualified employer retirement plans in order to access funds during the pandemic, without incurring penalties. This bill applies to loans made during the 180-day period beginning on March 27, 2020. The maximum amount of a permitted loan is up to (1) the greater of $10,000 or 100% of a participant's vested account balance or (2) $100,000, whichever is less. This law became effective as of September 11, 2020.

Leave of Absence Rights and Benefits

SB 1383 (Jackson)

SB 1383 significantly amends the California Family Rights Act ("CFRA") such that nearly all California businesses will be "covered employers" required to offer job-protected family and medical leave, more employees will be eligible for such leave, and the reasons for taking leave and the rights of employees upon return from leave will be expanded. These amendments become effective on January 1, 2021.

Previously, employers were only required to provide CFRA leave if the employer had 50 or more employees within 75 miles. Under SB 1383, employers with five or more employees must offer CFRA leave to eligible employees (thus, virtually all California employers are "covered employers" for purposes of the CFRA). While an employee is on CFRA leave, the employer must also pay for the employee's medical insurance under a group health plan as if the employee were still working.

SB 1383 also expands the definition of "family care and medical leave" to cover additional family members. Instead of only covering the serious health condition of a child, spouse, or parent, employees will soon be entitled leave to care

for grandparents, grandchildren, siblings, and domestic partners. The definition of "family care and medical leave" is also expanded to include a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

This new law also deletes some provisions that placed limits on the CFRA. Previously, covered employers were not required to provide more than a combined 12 weeks of leave to parents working for the same employer for the birth, adoption, or foster care of a child. This limitation on baby bonding leave has been removed. Additionally, SB 1383 also eliminates the "key employee" exception whereby employers were permitted to refuse reinstatement to salaried employees who were among the highest paid 10% of employees, where such refusal was needed to prevent substantial and grievous economic injury. Under the new amendments, all employees are guaranteed a right of reinstatement – returning employees must be offered employment in the same or a comparable position (meaning a position with the same or similar duties and pay that can be performed at the same or similar geographic location as the position held before the leave).

SB 1383 therefore creates a framework for job-protected leave that significantly departs from the Family and Medical Leave Act ("FMLA"). Employers covered by both statutes must take care to properly designate leave under the appropriate statute, as it is now less likely that a single leave of absence will run concurrently under both FMLA and CFRA.

AB 2017 (Mullin)

This bill amends the "kin care" statute (Labor Code section 233) to provide that the employee, and only the employee, may choose whether to designate any portion of the employee's sick leave as kin care leave. Employers may no longer unilaterally charge sick leave as kin care time. This law becomes effective January 1, 2021.

AB 2399 (Committee on Insurance)

This bill expands the reasons for which employees may obtain wage replacement benefits under California's Paid Family Leave law. Currently, employees caring for a seriously ill family member or bonding with a new child may receive temporary Paid Family Leave benefits. Effective January 1, 2021, an employee may also obtain wage replacement benefits if the employee needs time off to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the Armed Forces. The employee must provide documentation of a qualifying exigency.

AB 2992 (Weber)

This bill amends Labor Code sections 230 and 230.1 to afford greater protections to employees who are victims of crime or abuse. Previously, all employers were prohibited from discharging or discriminating against employees victimized by domestic violence, sexual assault, or stalking. Per AB 2992, adverse action is prohibited against employees who are victims of a crime that (1) caused

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

physical injury or (2) caused mental injury and included a threat of physical injury, and (3) against employees whose immediate family member died due to a crime. Notably, "crime" is defined very broadly to include an action that would have constituted a misdemeanor or felony, regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime. Moreover, while documentation of the need for time off to seek a restraining order or judicial relief due to a crime may be required, such documentation need only be a writing, signed by the employee or someone on the employee's behalf, stating that the employee missed work to seek such relief. The law previously required that such documentation consist of a police report or medical certification.

Moreover, employers with 25 or more employees must offer job-protected leave to employees who are victims of crimes or whose family member died because of a crime. This leave may be used to: (1) seek medical attention for injuries caused by the crime or abuse; (2) obtain services from a domestic violence shelter, program, rape crisis center or victim services organization or agency as a result of the crime or abuse; (3) obtain psychological counseling or mental health services related to the crime or abuse; or (4) participate in safety planning or take other actions to increase safety from future crime or abuse. This law becomes effective on January 1, 2021.

Wage and Hour

AB 736 (Irwin)

This bill expands the professional exemption in Industrial Welfare Commission Wage Orders 4 and 5, such that part-time (adjunct) faculty members at institutions of higher learning fall within the exemption. AB 736 provides that adjunct faculty members may be properly classified as exempt professional employees if they satisfy the duty and salary requirements set forth in newly created Labor Code section 515.7. The duty test remains the same as for other types of exempt professionals: exempt adjunct faculty members must (1) be primarily engaged in an occupation that is commonly recognized as a learned or artistic profession, and (2) customarily and regularly exercise discretion and independent judgment about the performance of their duties. Under the salary test, the faculty members must either be paid a monthly salary of no less than two times the state minimum wage or, when employed per course or laboratory, be paid for classroom hours (defined as classroom or laboratory time, preparation, grading, office hours, and other course- or laboratory-related work) at the rate of at least $117 per hour in 2020, $126 per hour in 2021, $135 per hour in 2022, and an inflation-adjusted amount thereafter. Other non-course related work must be separately compensated. This law went into effect on September 9, 2020.

AB 1512 (Carrillo)

The Labor Code typically requires that employees be authorized and permitted to take a rest break for every four hours of work, or major fraction thereof, lest the employer be subject to penalties. Existing law confirms that, during an employee's rest break, the employee must remain free from the employer's control and free to leave the premises. Pursuant to AB 1512, security officers who work for an employer registered under the Private Security Services

Act may be required to remain on site during rest periods and remain on call, and also may be required to carry and monitor a communication device during their rest breaks, without the employer incurring penalties. Such security officers must continue to be authorized and permitted to take at least one ten-minute, uninterrupted rest break for every four hours of work or major fraction thereof (or else be entitled to a rest break premium), but, if a security officer's rest break is interrupted, the employee can restart the rest break as soon as practicable, and a subsequent uninterrupted rest break will satisfy the employer's rest break obligation. Though AB 1512 went into effect on September 30, 2020, it does not apply to lawsuits filed before January 1, 2021.

AB 2479 (Gipson)

Existing law creates an exemption from the normal rest break rules for certain employees holding safety-sensitive positions at a petroleum facility. Per the exemption, such employees may be permitted to carry and monitor a communication device, respond to emergencies, and remain on site to monitor the premises and respond to emergencies, without the employer incurring penalties. AB 2479 extends this exemption until January 1, 2026.

AB 1947 (Kalra)

This bill extends the period of time in which an employee can file a complaint with the Labor Commissioner. Previously, employees had to file such complaints within six months of the occurrence of the violation; now, employees will have one year to file such complaints. AB 1947 also amends Labor Code section 1102.5, which prohibits an employer from retaliating against an employee who "blows the whistle" on violations of law or regulation, where the employee reasonably believes a violation has occurred. Labor Code section 1102.5 now authorizes employees who prevail on such claims to recover their reasonable attorneys' fees and costs. This law becomes effective on January 1, 2021.

AB 2257 (Gonzalez)

Last year, the Legislature enacted AB 5, which drastically modified the applicable tests for determining whether workers are properly classified as independent contractors or employees. Under AB 5, the primary test of this relationship is the so-called ABC Test, whereby a worker may only be classified as an independent contractor if:

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B. The worker performs work that is outside the usual course of the hiring entity's business; and

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

AB 2257 confirms that the ABC Test remains the default rule for independent contractor classification. However, the bill clarifies and expands the (already lengthy) list of exemptions from the ABC Test. Notably, Governor Newsom signed AB 2257 on September 4, and the law became effective immediately. Below is a summary of many of the key revisions to AB 5.

Business-to-Business Contracting Relationships

The ABC Test does not apply to businesses (including sole proprietorships, partnerships, limited liability companies, limited liability partnerships, or corporations) ("business service provider") that contract to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"). In such circumstances, the multifactor test articulated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("Borello") applies, as long as the contracting business demonstrates that the following criteria are satisfied:

1. The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

2. The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. (This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.)

3. The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

4. If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

5. The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

6. The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

7. The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

8. The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

9. Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

10. The business service provider can negotiate its own rates.

11. Consistent with the nature of the work, the business service provider can set its own hours and location of work.

12. The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required.

Referral Agency Relationships

Similarly, the *Borello* test—not the ABC Test—applies for "service providers" working for referral agencies. Specifically, if an individual acting as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, then the contractor/employee relationship will be determined by *Borello* if the referral agency demonstrates that the following criteria are satisfied:

1. The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

2. If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency must keep the certifications for a period of at least three years.

3. If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

4. If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency must keep the certifications for a period of at least three years.

5. The service provider delivers services to the client under the service provider's name, without being required to deliver the services under the name of the referral agency.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

6. The service provider provides its own tools and supplies to perform the services.

7. The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

8. The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

9. The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

10. Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

11. The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

The bill contemplates the following, non-exhaustive list of commonly referred services as falling within the scope of this exemption: graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services.

Contracts for Professional Services

The professional services exemption was greatly expanded to include additional professions. Under this exemption, the *Borello* test applies if the hiring entity demonstrates that the following criteria are satisfied:

1. The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. (Though the individual may choose to perform services at the location of the hiring entity.)

2. If work is performed more than six months after AB 2257 goes into effect (approximately February 2021) and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

3. The individual has the ability to set or negotiate their own rates for the services performed.

4. Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

5. The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

6. The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

The definition of "professional services" has been expanded to include: marketing, human resources administration, travel agent services, graphic design, grant writing, fine artists, agents licensed to practice before the IRS, payment processing agents, still photographers, photojournalists, videographers, photo editors, freelance writers, editors, illustrators and cartoonists, various contributors to journals and periodicals, licensed individuals in the beauty and personal grooming industry, performing artists, appraisers, real estate licensees, home inspectors, and repossession agencies. (Please note this list is not exhaustive and there are many nuances to whether individuals, in fact, meet the foregoing classifications. Please consult the text of AB 2257 and/or your employment counsel for further details.) Notably, the prior restrictions in AB 5 limiting the number of "submissions" by independent contractors to 35 per year in a single forum have been removed. Now, such individuals must not "displace" existing employees.

Music Industry Exemptions

Various workers in the music industry are also exempt from the ABC Test (and instead their classification is determined by *Borello*). Such workers include (with conditions and exceptions): recording artists, songwriters, composers, producers, directors, engineers, musicians, vocalists, photographers, and radio promoters.

The bill also expands the government's ability to enforce the misclassification laws. Whereas previously only the Attorney General and select others had the right to file an action for injunctive relief against businesses, now all district attorneys may also pursue enforcement actions.

AB 323 (Blanca Rubio)

AB 323 expands the temporary exemptions for certain workers in the newspaper industry from the ABC Test set forth in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903. Prior legislation authorized an exemption from the ABC Test for newspaper distributors working under contract with a newspaper publisher, and newspaper carriers working under contract either with a newspaper publisher or newspaper distributor; however, this exemption was only to last until January 1, 2021. Per AB 323, the Legislature has deemed journalism to

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

play an essential role in California, particularly during the pandemic, and therefore has extended this exemption until January 1, 2022.

AB 2588 (Kalra)

This bill expands the expense reimbursement obligations for employers that are general acute care hospitals, as defined in Health and Safety code section 1250(a). Labor Code section 2802 requires employers to reimburse employees for all necessary and reasonable business expenses incurred in the course of their duties. Newly created Labor Code section 2802.1 applies section 2802 to any expense or cost of any employer-provided or employer-required educational program or training for an employee providing direct patient care or an applicant for direct patient care employment. Such program or training includes, but is not limited to, residencies, orientations, or competency validations necessary for direct patient care employment. However, such training or program does not include requirements for a license, registration, or certification to legally practice in a specific employee classification to provide direct patient care, or education or training that is voluntarily undertaken by the employee or applicant solely at their discretion.

Miscellaneous

AB 979 (Holden)

Existing law requires a publicly held corporation with its principal executive office located in California to have at least one female director on its board by December 31, 2019. Existing law also requires, by the end of 2021, such corporations with five directors to have a minimum of two female directors and such corporations with six or more directors to have at least three female directors. AB 979 now requires that all such corporations have a minimum number of directors from underrepresented communities. The bill defines a "director from an underrepresented community" 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. Pursuant to AB 979, corporations must constitute their boards as follows:

- By the end of 2021, all publicly held corporations with their principal executive office located in California must have at least one director from an underrepresented community.

- By the end of 2022, corporations with more than four but fewer than nine directors must have at least two directors from an underrepresented community, and corporations with nine or more directors must have at least three directors from an underrepresented community.

  This law will become effective January 1, 2021.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

AB 2143 (Stone)

Existing law prohibits a settlement agreement resolving an employment dispute from barring the settling employee from working for the employer (or any affiliate) in the future, unless the employer has determined that the employee engaged in sexual harassment or sexual assault. This bill clarifies that the settling employee must have filed the claim in good faith in order for this prohibition to apply. The bill also expands the carveout for employee misconduct to include "any criminal conduct." However, the carveout for employee misconduct only applies if the employer has made and documented a good faith determination, before the employee filed the claim at issue, that the employee engaged in sexual harassment, sexual assault, or any criminal conduct. These amendments become effective on January 1, 2021.

AB 2210 (Aguiar-Curry)

Contractors licensed by the Contractors' State license Board ("Board") are already subject to disciplinary action by the Board for specified safety violations that result in death or serious injury. This bill would also authorize disciplinary action against a contractor for violations of certain regulations regarding tree work, including maintenance and removal, regardless of whether death or serious injury resulted from the violation. The bill also extends the time period in which the Board may initiate disciplinary action from within 180 days to 18 months. This law becomes effective on January 1, 2021.

AB 3075 (Gonzalez)

California law requires corporations, limited liability companies, and limited liability partnerships transacting business in the state to register and file certain statements regarding the type of business activity of the entity. Per AB 3075, beginning in 2022, these statements must also include information regarding whether any officer or director (or, for limited liability companies, members or managers) has an outstanding judgment issued by the Division of Labor Standards Enforcement or a court, for which there is currently no appeal pending, for the violation of any wage order or provision of the Labor Code.

AB 3075 also amends the Labor Code to authorize liability for a successor employer for wages, damages, and penalties. Newly enacted Labor Code section 200.3 provides that a successor employer is liable for unpaid wages, damages, and penalties if it meets any of the following criteria:

- It uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the predecessor employer;
- It has substantially the same owners or managers that control the labor relations as the predecessor employer; or
- It employs as a managing agent any person who directly controlled the wages, hours, or working conditions of the affected workforce of the predecessor employer.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

AB 3075 becomes effective on January 1, 2021.

SB 973 (Jackson)

Employers with 100 or more employees are required by federal law to file with the Equal Employment Opportunity Commission an annual employer information report (the EEO-1) containing information about the employer's workforce. This bill requires that, on or before March 31, 2021, and on or before March 31 for each year thereafter, employers with 100 or more employees submit to the Department of Fair Employment & Housing a "pay data report" containing the following information:

- 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.

- The number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey.

The total number of hours worked by each employee counted in each pay band during the reporting year must also be provided. An employer may submit a copy of its EEO-1 report to satisfy this obligation, provided the report contains the same or substantially similar pay data information as required by SB 973. This bill becomes effective on January 1, 2021.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Mihret Getabicha, or Sevada Hakopian at (310) 649-5772.