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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *November 3, 2023*

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LEGISLATIVE

California

Governor Newsom approved a number of new laws which impact employers and employees alike. All new laws are effective January 1, 2024, unless stated otherwise.

SB 235

SB 235 amends sections 2016.090 and 2023.050 of the Code of Civil Procedure. The new law requires parties to a civil action in state court to exchange initial disclosures with all other parties within 60 days of a demand by any party to the action, unless modified by stipulation. Similar to the initial disclosures already required pursuant to the Federal Rules of Civil Procedure, these disclosures must include: (1) the name and contact information of persons likely to have discoverable information and the subject of the information; (2) a copy or description of all documents in support of the party's claims or defenses, or that is relevant to the action; and (3) contractual agreements or insurance policies under which an insurance company or person may be liable to satisfy a judgment entered in the action, or to indemnify or reimburse for payments made to satisfy the judgment. The only documents and information expressly excluded from these disclosures are those to be used solely for impeachment purposes. The new law also increases sanctions imposed for failure to respond in good faith to a document request, meet and confer in good faith regarding discovery disputes, or produce documents within seven days of a motion to compel discovery due to a failure to respond in good faith from $250 to $1,000.

SB 428

SB 428 will, starting January 1, 2025, allow employers to seek restraining orders on behalf of their employees who have been harassed, or suffered unlawful violence or a credible threat of violence in the workplace or reasonably construed to be carried out in the workplace, or where there is "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." SB 428 amends, repeals, and adds section 527.8 of the Code of Civil Procedure and will prohibit a court from issuing such an order if it would prohibit speech or activities protected by the National Labor Relations Act or provisions governing the communications of exclusive representatives of public employees.

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SB 476

SB 476 requires an employer to pay costs associated with an employee obtaining a food handler card, including the time it takes for the employee to complete the training (which would be considered "hours worked"), the cost of the food handler certification program, and the time it takes to complete the certification program. The law also prohibits an employer from conditioning employment on an applicant or employee having an existing food handler card. The bill amends section 113948 of the Health and Safety Code.

SB 497

SB 497 amends sections 98.6, 1102.5, and 1197.5 of the Labor Code and creates a rebuttable presumption of retaliation under Labor Code sections 98.6 and 1197.5 if an employer subjects an employee to an adverse action within 90 days of an employee engaging in the conduct described by those sections (i.e., making complaints or claims related to rights under the jurisdiction of the Labor Commissioner, making complaints about unpaid wages, or making complaints about equal pay violations). The law also increases the civil penalty imposed on an employer under Labor Code section 1102.5 from $10,000 generally to $10,000 per employee per violation.

SB 525

SB 525, effective June 1, 2024, will raise the minimum wage for health care workers. The law includes five separate minimum wage schedules for covered health care employees depending on the nature, size, and structure of the employer's business, which establish three separate minimum wage schedules (setting minimum wages at a rising scale over time from $18-$25) for covered health care employees. SB 525 adds sections 1182.14 and 1182.15 to the Labor Code.

SB 553

SB 553 amends, repeals, and adds section 527.8 of the Code of Civil of Procedure, and amends section 6401.7 and adds section 6401.9 to the Labor Code. The new law, effective July 1, 2024, requires nearly all employers in the State of California to prepare a Workplace Violence Prevention Plan, train employees on how to identify and avoid workplace violence, and maintain a violent incident log. SB 553 also has similar provisions regarding allowing employers to seek temporary restraining orders on behalf of employees suffering violence or credible threats of violence, similar to SB 428.

SB 616

SB 616 amends sections 245.5, 246, and 246.5 of the Labor Code. This new law increases the annual amount of paid sick leave from three days or 24 hours to five days or 40 hours for eligible employees and raises the accrual cap from 48 hours to 80 hours. It also extends the anti-retaliation and procedural provisions in California's sick pay law to include those covered by a valid collective bargaining agreement ("CBA"), and expressly excludes railroad carrier

employers and their employees. Also, the new law preempts certain procedural, notice, and use provisions in local ordinances that contradict California's law. Specifically, on January 1, 2024, several key changes to California's existing paid sick leave law will take effect:

- *Increased Annual Paid Sick Leave Usage Cap*: The new paid sick leave law increases the annual paid sick leave usage cap from 24 hours or three days per year to 40 hours or five days per year (whichever is greater). The increased annual usage cap will apply whether an employer opts to accrue or frontload paid sick leave.

- *Increased Alternative Accrual Rate*: Although accrual under the California paid sick leave law generally calls for an accrual rate of one hour for every 30 hours worked, the current law permits employers to use a different accrual method if the employee receives no less than 24 hours of accrued paid sick leave by their 120th calendar day of employment and in each calendar year. The amendments afford employers an alternative to the permitted accrual method. Specifically, in addition to ensuring that employees accrue at least 24 hours of paid sick leave by their 120th calendar day of employment, employees must also accrue at least 40 hours of paid sick leave by their 200th calendar day of employment. For each benefit year after the first year of employment, employees must accrue at least 40 hours of paid sick leave per year.

- *Increased Rolling Accrual Cap*: The new law also increases the current California paid sick leave rolling accrual cap and, therefore, year-end carryover cap from 48 hours (six days) to 80 hours (10 days). Employers can avoid the accrual and carryover requirements by providing a frontload of paid sick leave at the start of each benefit year.

- *Increased Frontload Grant to Avoid Accrual and Carryover*: Per current law, employers can avoid accrual tracking and year-end carryover of paid sick leave with a lump grant of at least 24 hours or three days (whichever is greater) of paid sick leave for new employees to use by their 90th calendar day of employment, and then each subsequent benefit year. Under the amended law, employers who want to avoid accrual and carryover of paid sick leave will need to grant new hires the greater of 40 hours or five days, at a minimum, of paid sick leave upon hire that is available to use by their 90th calendar day of employment, and then at the beginning of each subsequent benefit year.

- *Rolling Accrual Cap*: The amended law impacts existing local California paid sick leave ordinances. While each existing local paid sick leave mandate in California generally establishes an annual usage cap of at least 40 hours or five days of paid sick leave or other compensated time off per year (and most have usage caps that exceed the amended California standard), the impact of the increased rolling accrual cap will likely be more significant in these localities because many of the local ordinances currently have accrual thresholds lower than 80 hours or 10 days.

- *Partial Preemption*: The new law contains a new section which partially

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preempts local California paid sick leave ordinances that have different substantive standards on the following topics: (a) advances on paid sick leave before it accrues; (b) reinstatement of earned, unused paid sick leave upon rehire; (c) balance notification each pay period; (d) rate of pay for sick leave and the timing of such pay; and (e) employee notice to employers for planned and unplanned paid sick leave use.

- *Expanded Application to Employees Covered by Collective Bargaining Agreement*: To date, the California paid sick leave statute contains an exemption for certain employees covered by a CBA assuming the CBA meets several conditions. The specific conditions that must be satisfied extend beyond just paid sick leave or paid time off, and also impact the topics of dispute resolution and rates of pay within the CBA. The amendments change the application of California's paid sick leave law to employees covered by CBAs where the CBA qualifies for the above exemption. Specifically, employers that rely on the CBA exemption must satisfy certain aspects of the paid sick leave law including reasons for use, no requirement to find a replacement worker, and no retaliation for use of paid sick leave (which would appear to include counting use of paid sick leave as an instance of absence for disciplinary purposes).

California employers should review existing sick leave or PTO policies and practices, including those with a separate local paid sick leave mandate, and either implement new policies and practices or revise existing policies and practices to ensure compliance.

SB 699 and AB 1076

SB 699 and AB 1076 amend section 16600 of, and add sections 16600.1 and 16600.5 to, the Business and Professions Code. SB 699 makes any contract that is void under California law unenforceable regardless of where and when the employee signed the contract. In short, AB 1076 codifies *Edwards v. Arthur Andersen LLP* to void a non-compete clause or agreement in an employment context, no matter how narrowly tailored, with limited exception. The new law also adds additional protections including a notification requirement for California employers and makes a violation of these provisions a violation of California's unfair competition law (found in Business and Professions code sections 17200 et seq.).

SB 700

SB 700 amends section 12954 of the Government Code and expands existing law which, starting January 1, 2024, makes it unlawful for an employer to discriminate against a candidate or employee because of the person's use of cannabis off the job and away from the workplace. The new law also makes it unlawful to request information from an applicant relating to the applicant's prior use of cannabis, with certain exceptions.

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SB 848

SB 848 adds section 12945.6 to the Government Code and requires employers to provide eligible employees up to five days of (unpaid, unless the employer has an existing policy stating otherwise) reproductive loss leave upon suffering a failed adoption or surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction. The law also prohibits retaliation against an individual who uses this leave or shares information about it.

AB 594

AB 594 amends sections 218 and 226.8 of, and adds chapter 8 and repeals section 181 of, the Labor Code. The new law authorizes public prosecutors, including the Attorney General, a district attorney, a city attorney, a county counsel, or any other city or county prosecutor, to independently prosecute specified violations of the Labor Code that occur within their geographic jurisdictions. The law also provides that any individual agreement that requires arbitration of a dispute or limits representative actions does not affect the prosecutor or Labor Commissioner's ability to enforce the Labor Code.

AB 933

AB 933 adds section 47.1 to the Civil Code and extends the defamation privilege to expressly include an individual's communications made, without malice, regarding factual information related to incidents of sexual assault, harassment, or discrimination, experienced by that person, provided the individual had a reasonable basis to file a complaint (regardless of whether it was filed or not). The law also authorizes a defendant who prevails in an action related to making such a privileged communication to recover its reasonable attorney's fees and costs, treble damages, and punitive damages.

AB 1228

AB 1228 repeals existing law, presently suspended due to a referendum petition, which established the Fast Food Council within the Department of Industrial Relations, only if the referendum is withdrawn by January 1, 2024. If withdrawn by that date, the bill will, until January 1, 2029, re-establish the Fast Food Council, deem the council to be a governmental agency, and re-establish its duties to include setting minimum wage as well as requirements and review procedures for health, safety, and employment standards. AB 1228 also increases minimum wage for fast food workers to $20 an hour, effective April 1, 2024. AB 1228 adds part 4.5.5 (commencing with section 1474) to Division 2 of the Labor Code and repeals part 4.5.5 (commencing with section 1470) of Division 2 of the Labor Code.

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Governor Newsom also vetoed a number of employment-related bills, including:

SB 403

SB 403 would have added "caste" as a protected class under the Fair Employment and Housing Act ("FEHA") and the Unruh Act.

SB 627

SB 627 would have required chain businesses consisting of 100 or more nationwide establishments to provide a 60-day displacement notice prior to closing a location to employees who have worked for the employer for at least six months. For one year after the closure of a covered establishment, employers would have had to offer workers the opportunity to remain employed by the employer and to transfer to a location of the chain within 25 miles of the closed location, as positions become available. To comply with the bill, employers would have also needed to maintain a preferential transfer list of covered workers and make transfer offers to covered workers based on their length of service.

SB 725

SB 725 was vetoed by Governor Newsom as "unduly prescriptive and overly burdensome". The bill would have required a successor grocery employer to provide a dislocated worker a one-week allowance of pay for each year of employment if the successor grocery employer does not hire or retain the eligible grocery worker.

SB 731

SB 731 would have required an employer to provide 30 days' written notice to an employee working remotely that the employee has the right to ask the employer to allow continued remoted work as a reasonable accommodation before requiring that employee to return to work in person.

SB 799

SB 799 would have made striking workers eligible for unemployment benefits after two weeks of leaving work due to a trade dispute (other than a lockout.

AB 524

AB 524 would have added "family caregiver" status as a protected class under the FEHA.

AB 575

AB 575 would have, beginning February 1, 2025, added "an individual's assumption of responsibilities for a child in loco parentis" to the reasons for which an employee taking leave may receive family temporary disability

insurance benefits to bond with a minor child within one year (in addition to existing reasons of the child's birth, and placement of the child in connection with foster care or adoption). The bill also would have removed the restriction that only one family member at a time is allowed to access paid family leave benefits and prohibited the employer from requiring a worker to take vacation leave before receiving benefits.

AB 1356

AB 1356 would have amended California's Worker Adjustment and Retraining Act (Cal-WARN) to expand its application beyond industrial or commercial facilities to all places of employment that have employed 75 or more persons in the preceding 12 months and included non-temporary employees of labor contractors. The bill would also have increased the notice period for employees from 60 to 75 days prior to initiating a mass layoff and revise the definition of "mass layoff" to include employees "reporting to" to those at a covered establishment. The bill would also have prohibited employers from conditioning severance payments in a mass layoff situation on the employee assenting to a general release, waiver of claims, or non-disparagement or nondisclosure agreement, unless additional consideration for those terms is provided and clearly stated.

JUDICIAL

Federal

Indefinite Furlough Triggers Immediate Vacation Payout

In *Harstein v. Hyatt Corporation*, the Ninth Circuit Court of Appeals concluded that Hyatt ("the Employer") violated the California Labor Code by not paying the value of accrued and unused vacation time when the employees were furloughed at the start of the COVID-19 pandemic. Rather, the Employer paid out the vacation time when the furlough was made a permanent layoff in June 2020.

The Ninth Circuit adopted the enforcement guidance of the California Division of Labor Standards Enforcement and held that "a temporary layoff with no specific return date within the normal pay period is a discharged within the meaning of [Labor Code section] 201." The Ninth Circuit further opined that a broad reading of the term "discharge" furthers the public policy supporting Labor Code section 201 which is "to avoid depriving employees of the necessities of life and making them a 'charge upon the public.'"

Labor Code section 203 requires that an employer that "willfully fails to pay" all wages, including the value of unused vacation time, due at discharge to pay the employee a waiting time penalty up to 30 days of pay. An employer that had a good faith, reasonable belief that no wages are owed may be exempted from paying waiting time penalties. The Ninth Circuit directed the district court to address this issue.

A California employer that furloughs employees with no definite return

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date must immediately pay those employees the value of their accrued, unused vacation time. Furloughed employees should not continue to accrue vacation time so the employer will not incur an ongoing obligation to pay out its value.

California

Arbitration Agreement Not Applicable to a State Action

A California Court of Appeal (the "Court") upheld a lower court's order denying Uber's and Lyft's motion to compel arbitration against the State of California (the "People") and the Labor Commissioner in *In re Uber Technologies Wage and Hour Cases.* The Court held that a valid and enforceable arbitration agreement between private parties does not bar civil enforcement actions in a court of law, even when the relief sought is particularized to a signatory of a valid arbitration agreement.

In re Uber consolidated separate actions brought by the People and the Labor Commissioner (collectively referred to as the "State") pursuant to its statutory and regulatory authority under the California Labor Code and the Division of Labor Standards Enforcement against Uber and Lyft (collectively referred to as the "Defendants") for the alleged misclassification of its drivers as independent contractors. In addition to injunctive relief, and civil penalties payable to California, the State sought restitution due to Defendants' misclassified drivers; remedies which Defendants cast as 'individualized' and 'driver specific'. Defendants sought to enforce arbitration agreements they had with their drivers that compelled drivers to arbitrate on an individual basis for disputes arising from their employment with Uber and Lyft against the State for those actions seeking driver specific or individualized relief. Defendants contended that the drivers were the real parties in interest, accordingly the State should be bound to the drivers' agreement to arbitrate disputes arising from their employment.

The Court, affirming the lower court, was unpersuaded by Defendants' position. Parties' agreement to arbitrate is predicated on consent. Here, the State did not submit itself to arbitration and the restitution it sought for individual drivers did not serve as an adequate supplement for consent.

This case underscores that even the most robust arbitration agreements will not insulate employers from the prosecutorial discretion of state entities, even where the conduct in question falls squarely within the contours of a valid and enforceable arbitration agreement. This prospect does not diminish the need for well-crafted arbitration agreements in place for current or prospective employers, it merely encourages employers to be mindful of public policy limitations.

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, Christine Clark, Jessica O'Malley, Nicole Allen, Haley Murphy, Noah Diamant, Michelle Perez-Yanez, or John Solis at (858) 755-8500; or Lisa Mallinson, Andres Uriarte, Arsalan AlNasir, Greg Feldman, or Alysha Zapata at (310) 649-5772.