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LEGAL NOTICE TO CONTRACTOR MEMBERS

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NEW EMPLOYMENT LAWS FACING CALIFORNIA EMPLOYERS IN 2020 AND 2021

November 13, 2020

Over the past few months, the California Legislature passed several employment bills. Some of those laws went into effect immediately and some of those laws will become effective on January 1, 2021. California voters also approved two employment-related propositions during the November 2020 election. These draconian laws, which impose several new requirements on employers, are summarized below. We also summarize several California and Federal COVID-19-related laws that went into effect earlier this year and that were the topics of prior E-BLASTS to remind you of the requirements under these laws.
Employers doing business in California should review these new laws and should contact legal counsel before January 1, 2021 to make sure that they are in compliance. Several of these new laws require changes to Employee Handbooks. We are available to review and revise your Employee Handbooks to ensure that they comply with and accurately summarize these new California laws.

Retaliation and Discrimination:

SB 973 (Pay Data Reporting): SB 973 obligates private employers with 100+ employees who are required to file a federal EEO-1 report to also submit a pay data report to the Department of Fair Employment and Housing ("DFEH") that contains specified wage information. Reports must be submitted every year by March 31 starting in 2021. This law also authorizes the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging wage discrimination.

AB 979 (Corporate Boardroom Diversity): This law requires all publicly held companies whose principal executive offices are located in California to have a minimum number of directors from underrepresented communities on their board of directors. The phrase "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." By the end of 2021, publicly held corporations must have one director from an underrepresented community on its board and by the end of 2022, the number of directors from underrepresented communities that a publicly held corporation must have on its board depends on the total number of directors that sit on the corporation's board:

- If the corporation has 9+ directors, it must have 3+ directors from underrepresented communities.
- If the corporation has 5-9 directors, it must have 2+ directors from underrepresented communities.
- If the corporation has 1-4 directors, it must have 1+ director from an underrepresented community.

AB 1947 (Expanded Labor Code Retaliation Protections): Effective January 1, 2021, AB 1947 extends the deadline for filing a retaliation claim pursuant to Labor Code Section 98.7 (retaliation for complaining about a Labor Code violation) with the Labor Commissioner to one year from the date of the violation. Previously, employees only had six months to file such a claim with the Labor Commissioner. AB 1947 also authorizes a court to award reasonable attorneys' fees to employees who prevail on whistleblower claims pursuant to Labor Code Section 1102.5. Previously, employees who prevailed on such claims were not entitled to attorneys' fees.

AB 3364 (Veteran or Military Status): This bill clarifies that the Fair Employment and Housing Act ("FEHA") protects military or veteran status (as opposed to veteran and military status).

Leave Laws:

SB 1383 (Expansion of California Family Rights Act and New Parent Leave Act): SB 1383, which goes into effect on January 1, 2021, significantly expands the California Family Rights Act ("CFRA"), California's family and medical leave law that requires employers to provide 12 weeks of leave to their employees for qualifying medical reasons. Under SB 1383, employers with 5+ employees must provide CFRA leave to its employees. Previously, the CFRA only applied to employers with 50+ employees.

SB 1383 also expands the definition of "family members" and potential reasons for which an eligible employee may take leave. Under SB 1383, eligible employees may take leave to bond with a new child of the employee or to care for an expanded list of family members now including siblings, grandparents, grandchildren, and domestic partners. The definition of "child" is expanded to cover all adult children (regardless of whether they are dependent) and children of a domestic partner. SB 1383 also now requires an employer that employs both parents of a child to grant up to 12 weeks of leave to each employee in connection with the birth, adoption or foster care placement of a child. (Previously, the employer only had to grant both employees a combined total of 12 weeks of leave). The new law also now requires employers to provide up to 12 weeks of unpaid job-protected leave during any 12-month period due to 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. Finally, SB 1383 does not permit an employer to refuse reinstatement of "key employees" as was previously allowed by the CFRA under qualifying circumstances. Note that because SB 1383 expands the definition of "family member" under the CFRA, making the definition of family member different from the definition under the federal Family Medical Leave Act ("FMLA"), the two laws are no longer in sync. This creates a potential situation in which an employee is eligible for 12 weeks of leave under the CFRA and could remain eligible for a full additional 12 weeks of leave under the FMLA. This could leave the employer faced with providing up to 24 weeks of leave. For a more detailed summary of this law, please reference the Hill Farrer E-Blast: https://hillfarrer.com/notable-items/california-legislation-expands-employee-coverage-under-state-family-and-medical-leave-law/

AB 2017 (Paid Sick Leave): Existing law requires employers who provide paid sick leave to employees to permit employees to use their sick leave for the illness of a family member or for time off related to domestic violence, sexual assault, or stalking. Previously, employers could require that leave taken for these reasons be designated as sick leave. Pursuant to AB 2017, effective January 1, 2021, employers cannot require employees to designate leave taken for these reasons as sick leave. Whether or not such leave is designated as sick leave and counts towards the employee's paid sick leave entitlement is in the sole discretion of the employee.

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AB 2399 (Paid Family Leave): As of January 1, 2021, California's state-funded family temporary disability insurance program, the Paid Family Leave program, is expanding to provide wage replacement benefits to individuals who take time off to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individuals' spouse, domestic partner, child, or parent in the Armed Forces of the United States.

AB 2992 (Expansion of Laws Relating to Time Off for Certain Victims of Crimes): As of January 1, 2021, AB 2992 expands Labor Code Sections 230 and 230.1, which prohibit discrimination and retaliation against employees for taking time off who are victims of domestic violence, sexual assault, or stalking. Starting on January 1, 2021, AB 2992 expands the leave protections provided under Sections 230 and 230.1 to victims of any violent crime or abuse, including employees whose immediate family members are deceased as a direct result of a crime.

Privacy Law:

California Consumer Privacy Act: The California Consumer Privacy Act ("CCPA"), which went into effect in 2018, imposes new obligations on employers beginning on January 1, 2021. Starting January 1, 2021 employees and job applicants have a right to receive a limited CCPA-specific privacy notice and have a private right of action under the CCPA in the event of a data breach that is due to their employer's failure to implement reasonable security measures. For a more detailed summary of this law, please reference the Hill Farrer E-Blast: https://hillfarrer.com/notable-items/californias-new-privacy-law-imposes-notice-requirements-for-employers/

Note Regarding Proposition 24: Recently, Proposition 24, titled the California Privacy Rights Act of 2020 (CPRA), passed. The act amends the CCPA and expands compliance obligations for companies. However, the Act extends the exemption for employee personal information until January 1, 2023. Companies should still ensure compliance with current requirements including providing employees and job applicants with limited CCPA-specific privacy notices

Wage and Hour:

Minimum Wage: On January 1, 2021, the California minimum wage will increase to $14 for employees with 26+ employees. The minimum salary threshold for exempt employees will increase to $58,240. It is critical to ensure that exempt employees are paid a salary of at least $58,240, which is one of many requirements for classifying those employees as exempt. Employers that operate in cities or counties with higher minimum wages should ensure that they are complying with the city and county minimum wage laws.

AB 2257 (Independent Contractors): As a result of AB 5, which codified the California Supreme Court decision in Dynamex Operations West v. Superior Court (2018) and its adoption of the so-called "ABC" test for determining whether a worker is an independent contractor or employee, it has become increasingly difficult to classify workers as independent contractors. (Please see Hill Farrer's previous analysis of AB5 and the Dynamex case here: https://hillfarrer.com/employment-updates/california-supreme-court-severely-limits-appropriate-classify-worker-independent-contractor/; https://hillfarrer.com/notable-items/new-california-employment-bills-approved-by-the-governor/). AB 5 changed the standard for determining whether a worker is an independent contractor, but created certain industry-specific exceptions. AB 2257, which became effective on September 4, 2020, made certain clarifications to these exceptions and listed additional occupations that are exempt from the "ABC" test. Because the law is extremely nuanced and fact-specific, we recommend that you reach out to us if you have questions regarding classifying workers as independent contractors.

Note Regarding Proposition 22: Most recently, Proposition 22 passed granting app-based transportation and delivery companies an exception to AB 5 by allowing those companies to classify their drivers as "independent contractors," thereby exempting them from providing benefits to certain drivers. However, Proposition 22 provides workers minimum compensations levels, health insurance subsidies, medical costs for on-the-job injuries, and will prohibit drivers from working more than 12 hours in a 24-hour period for a single company. It also requires companies to develop sexual harassment policies, conduct criminal background checks, and require safety training of drivers.

AB 3075 (Enhanced Enforcement Mechanisms for Wage and Hour Judgments): AB 3075 was enacted in response to concerns that employers attempted to avoid liability for unpaid wages by creating multiple subsidiaries or dissolving the company and reincorporating, which made it difficult to enforce judgments against employers. This law imposes certain additional requirements for parties that create new business entities, including submitting declarations from each party under penalty of perjury that there are no outstanding judgments against them for wage and hour violations. This law also clarifies the standard for determining whether a company is a successor employer for purposes of collecting a judgment based on Labor Code violations. This new law will become effective on January 1, 2022 unless the Secretary of State certifies that it has implemented California Business Connect prior to that date.

SB 1384 (Wage Claims/Arbitration): Effective January 1, 2021, this bill amends Labor Code Section 98.4 to allow the Labor Commissioner to represent a claimant in connection with opposing an employer's petition to compel arbitration and in any arbitration hearing so ordered. SB 1384 also requires that a petition to compel arbitration of a claim that is pending under Section 98, 98.1 or 98.2 be served on the Labor Commissioner.

Settlement Agreements:

AB 2143 (Expansion of Bases for No-Rehire Clauses in Settlement Agreements): Existing law prohibits "no-rehire" clauses in settlement agreements resolving employment disputes in which an employee has filed a complaint in court or with a government agency unless the employer made a good-faith determination that the former employee engaged in sexual harassment or assault. Pursuant to AB 2143, "no-rehire" clauses can now also be used in cases where the employer has made a good-faith determination that the former employee engaged in criminal conduct. In order to take advantage of a "no-rehire" clause in these limited circumstances, the employer must make and document the good-faith determination that the employee engaged in sexual harassment, assault, or criminal conduct before the employee files his or her complaint. This law is effective January 1, 2021.

Child and Sex Abuse Reporting:

AB 1963 (Additional Mandated Reporters of Child Abuse): Under existing law, mandated reporters are required to report known or suspected instances of child abuse or neglect to certain public authorities. AB 1963 makes the following employees "mandated reporters": (1) human resources employees of a business with 5+ employees that employs minors; and (2) for the purposes of reporting sexual abuse, an adult whose duties require direct contact and supervision of minors in the performance of the minors' duties in the workplace of a business with 5+ employees. The bill also requires employers with 5+ employees who employ minors to provide their employees who are mandated reporters with training on identification and reporting of child abuse and neglect.

Reminder Re: COVID-19 Related Laws:

Families First Coronavirus Response Act: This law, which went into effect immediately upon enactment on April 1, 2020, requires employers with less than 500 employees to provide 12 weeks of paid leave at the rate of up to $511 per day for certain qualifying reasons relating to COVID-19. It also provides corresponding tax credits to employers. For a more detailed summary of this law, please reference the Hill Farrer E-Blast at https://hillfarrer.com/notable-items/federal-legislation-in-response-to-coronavirus-covid-19/

AB 1867 (Supplemental Paid Sick Leave Relating to COVID-19): AB 1867, which went into effect immediately upon enactment on September 9, 2020, requires private employers with 500+ employees and employers of healthcare providers to provide 80 hours of supplemental paid sick leave at the rate of up to $511 per day to employees for certain qualifying reasons. Unlike the FFCRA, this California law does not offer tax relief for the paid leave required under this law. For a more detailed summary of this law, please reference the earlier Hill Farrer E-Blast: https://hillfarrer.com/notable-items/california-legislation-regarding-supplemental-paid-sick-leave-relating-to-covid-19/

AB 685 (OSHA Reporting Requirements Related to COVID-19):
AB 685, which goes into effect on January 1, 2021 imposes certain reporting obligations on an employer after the employer receives notice of potential exposure to COVID-19 in the workplace. It also expands the power of the California Occupational Safety and Health Administration (Cal/OSHA) to enforce and take action to protect employees. For a more detailed summary of this law, please reference the Hill Farrer E-Blast: https://hillfarrer.com/notable-items/california-legislation-makes-covid-19-outbreaks-reportable-to-cal-osha/

SB 1159 (Expansion of COVID-19 Workers' Compensation Presumption):
SB 1159, which went into effect immediately upon enactment on September 17, 2020, and which is retroactive in some respects, creates a rebuttable presumption that certain employees who test positive for COVID-19 contracted the virus at work for workers' compensation purposes and are therefore eligible for benefits, unless the employer can prove otherwise. The law also requires employers to provide notice to their workers' compensation carrier of employees who test positive for COVID-19. For a more detailed summary of this law, please reference the Hill Farrer E-Blast: https://hillfarrer.com/notable-items/california-legislation-expands-definition-of-covid-19-workers-compensation-presumption/