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WHITE PAPER

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A Review of 2021 Labor & Employment Legislation in California

The 2021 California legislative session saw the passage of a number of new labor and employment laws. Although many relate to the COVID-19 pandemic, the Legislature adopted more nonpandemic-related statutes this term as compared to 2020.

On the COVID-19 front, the Legislature both updated laws passed in 2020 and enacted new legislation. For example, the Legislature updated COVID-19 reporting requirements and sanitation procedures for employers, although it also exempted new sectors from the reporting requirements. Additionally, in response to worker layoffs because of the pandemic, the Legislature adopted a "right of recall" for employees in the hospitality industry.

The Legislature was also active on wage and hour issues. Perhaps most notably, the Legislature designated intentional "theft of wages" as grand theft under the Penal Code, potentially subjecting violators to jail time. In addition, the Legislature has mandated disclosure of work quotas in warehouse distribution centers, and it is phasing out sub-minimum wages for mentally and physically disabled workers in the coming years.

Other new and amended statutes will require employers to update their internal documents and revisit company policies and practices. For instance, the Legislature put further restrictions on the language employers can include in settlement, nondisparagement, and separation agreements. The Legislature also amended the state's recordkeeping laws, requiring employers to keep certain employment records for four years instead of two years.

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

AB 654—NOTIFICATION OF COVID-19 EXPOSURE

Under existing law, an employer is required to take specific actions within one business day upon notice of a potential COVID-19 exposure. Effective October 5, 2021, Assembly Bill 654 expands the types of employers who are exempt from the COVID-19 outbreak reporting requirements to include community clinics, adult day health centers, community care facilities, and child daycare facilities.

AB 654 changes existing law to permit an employer, when giving notice to the local public health agency of a COVID-19 outbreak, to do so within 48 hours or one business day, whichever is later. A COVID-19 outbreak is defined as "at least three COVID-19 cases among workers at the same worksite within a 14-day period." The notification must include the names, number, occupation, and worksite of employees who have either: (i) a laboratory-confirmed case of COVID-19; (ii) a positive COVID-19 diagnosis; (iii) a COVID-related order to isolate; or (iv) died of COVID-19. Further, the employer must report the business address and North American Industry Classification System ("NAICS") code of their worksite to the local public health agency.

AB 654 defines "worksite," which the law did not previously define. As amended, a "worksite" means "the building, store, facility, agricultural field, or other location where a worker worked during the infectious period." The definition does not include "buildings, floors, or other locations of the employer that a qualified individual did not enter, locations where the worker worked by themselves without exposure to other employees, or to a worker's personal residence or alternative work location chosen by the worker when working remotely." AB 654 goes on to state that in a "multiworksite environment, the employer need only notify employees who were at the same worksite as the qualified individual."

AB 654 revises the notification requirement regarding employers' cleaning and disinfection plan. Now, the employer is required to notify only employees or subcontracted employees who were on the premises at the same worksite as the qualifying individual within the infectious period.

***Recommendations for Employers*:** As employers seek to return to in-person work, they must remember that notification and safety requirements remain in effect. Although the Legislature relaxed some regulations regarding reporting and cleaning, employers should review any changes of internal COVID-19 policies or procedures with counsel to ensure compliance with federal, state, and local law.

EXPIRATION OF COVID-19 SUPPLEMENTAL PAID SICK LEAVE

Effective September 30, 2021, California employers are no longer required to provide their employees supplemental paid sick leave for COVID-related reasons.

***Recommendations for Employers*:** Given the expiration of Supplemental Paid Sick Leave, employers should review their policies to determine whether they are still offering supplemental paid sick leave for COVID-19. Employers may also consider whether to continue providing Supplemental Paid Sick Leave as a measure to attract and retain employees.

SB 93—HOSPITALITY INDUSTRY RIGHT OF RECALL

Senate Bill 93, which took effect April 16, 2021, requires certain employers to offer open positions to employees laid off due to the COVID-19 pandemic before offering them to other individuals. This provision applies to employers in the hospitality industry including hotels, private clubs, event centers, airport hospitality operations, and airport service providers. It also applies to janitorial, building maintenance, and security services provided in office, retail, and commercial buildings.

A "laid-off employee" includes "any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic."

Where applicable, SB 93 requires an employer to first offer an open position to its "qualified" laid-off employees, within five business days of establishing the position. A laid-off employee is "qualified" for a position if he or she "held the same or similar position at the enterprise at the time of the employee's most recent layoff with the employer." Employers must offer laid-off employees positions in order of employee seniority. The laid-off employee has five business days to accept or decline the offer. If the employer declines to recall a laid-off employee due to personnel or other management issues and hires an employee who was not laid off instead, the employer must provide only the qualified laid-off employee with a written notice within 30 days, including specified reasons for the decision, and other information on those hired.

Unlike many local "right to recall" ordinances, SB 93 does not have a "right to cure" provision, meaning that an employee does not need to notify the employer of an alleged violation before bringing a lawsuit against the employer.

The law remains in effect until December 31, 2024.

***Recommendations for Employers*:** Employers in covered industries should carefully review records of all laid-off employees to see if any have a "right of recall." Covered employers should maintain a list of all employees with recall rights, and they should also establish procedures to ensure that those employees receive notice of open positions. If the employer declines to hire an employee with recall rights, it should ensure that the employee receives the necessary documentation explaining the reasons the employer declined to hire him or her.

SB 331—SETTLEMENT, NONDISPARAGEMENT, AND SEPARATION AGREEMENTS

Senate Bill 331 impacts settlement, nondisparagement, and separation agreements signed on or after January 1, 2022. Generally, it prohibits employers from incorporating into those agreements nondisclosure and nondisparagement clauses *unless* they allow employees to discuss or disclose information about unlawful acts in the workplace, including harassment, retaliation, and discrimination.

Settlement Agreements

SB 331 prohibits any provision in a settlement agreement for a civil or administrative action that prevents or restricts the disclosure of factual information related to any claim of harassment, discrimination, failure to prevent harassment or discrimination, or retaliation.

Nondisparagement Agreements

SB 331 prohibits an employer from requiring an employee to sign a nondisparagement agreement as a condition of employment or to receive a bonus or raise, if the agreement has the purpose of denying the employee the right to disclose information about unlawful acts in the workplace.

The bill provides that any such agreement should include the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Separation Agreements

SB 331 also prohibits an employer from including clauses in separation agreements that prohibit the disclosure of information about unlawful acts in the workplace.

Similar to the language for nondisparagement agreements, the bill provides that separation agreements should include the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Additionally, an employer offering an employee a separation agreement must notify the employee that he or she has a right to consult an attorney regarding the agreement and must provide the employee with at least five business days to do so.

***Recommendations for Employers*:** Employers should review with counsel all settlement agreements, nondisparagement agreements, and separation agreements to ensure compliance. We recommend including a bracketed note to the drafter in the employer's standard settlement agreement template that if the claim involves an act of workplace harassment,

discrimination, failure to prevent workplace harassment or discrimination, or retaliation, then the settlement agreement must not contain language that prevents or restricts the disclosure of factual information related to that claim. For nondisparagement and separation agreements, we recommend including the language identified in the bill and quoted above.

SB 807—RECORD RETENTION TO FOUR YEARS

The California Fair Employment and Housing Act ("FEHA") requires certain employers, labor organizations, and employment agencies to maintain specified employment-related records and files, such as applications, personnel, membership, or employment referral records, for two years. Senate Bill 807 increases the record retention requirement from two years to four years.

SB 807 adds guidance regarding record retention. When an employer receives notice of a verified complaint, the employer must "maintain and preserve any and all records and files until the later of the following: (1) the first date after the period of time for filing a civil action has expired or (2) the first date after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated." In a verified complaint, the plaintiff, or plaintiff's counsel, swears to the allegations contained in the complaint and attests that they investigated the charges against the employer and found them meritorious. Cal. Civ. Proc. Code § 446.

When a civil action under FEHA includes a class or group allegation, SB 807 permits the action to proceed in any county in the state.

SB 807 makes the following two changes to statutes of limitations in FEHA actions:

- Changes the three-year statute of limitations for sexual harassment that occurred as part of a professional relationship to a one-year statute of limitations. Harassment in a professional relationship includes, but is not limited to, sexual harassment that occurs between an attorney and client, doctor and patient, teacher and student, or elected official and constituent. Cal. Civ. Code § 51.9.
- Changes the two-year statute of limitations for discrimination by a state program or activity to a three-year statute of limitation.

SB 807 expands the methods of service the California Department of Fair Employment and Housing ("DFEH") may use to provide employers with notice of complaints filed with the DFEH. Generally, the DFEH or the private counsel of the aggrieved party may provide notice in any manner specified in the Code of Civil Procedure.

***Recommendations for Employers*:** Employers should update their record retention policies to account for the new four-year employment-related record retention requirement. Employers should consult their human resources department to implement these record retention changes.

SB 606—CAL/OSHA AUTHORITY FOR ENTERPRISE-WIDE AND EGREGIOUS VIOLATIONS

Senate Bill 606 significantly expands the enforcement power of California's Division of Occupational Safety and Health ("Cal/OSHA") by making two categories of violations: "enterprise-wide" violations and "egregious" violations. In investigating employers for violations, SB 606 permits Cal/OSHA to subpoena an employer who fails to promptly provide Cal/OSHA the requested information within a reasonable period of time.

Enterprise-Wide Violation

SB 606 establishes a rebuttable presumption of an enterprise-wide violation when either: (i) the employer has a written policy or procedure that violates certain safety rules; or (ii) Cal/OSHA has evidence of a pattern or practice of the violations committed by that employer at more than one of the employer's worksites. If the employer fails to rebut the presumption, Cal/OSHA can issue an enterprise-wide citation requiring enterprise-wide abatement.

Egregious Violation

An egregious violation occurs when Cal/OSHA believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order, or regulation. A violation is "egregious" when an employer "intentionally,

through conscious, voluntary action or inaction" makes no reasonable effort to eliminate the known violation. Each employee exposed to the egregious violation is considered a separate violation for purposes of fines and penalties.

***Recommendations for Employers*:** Given Cal/OSHA's increased enforcement power, employers should review their policies and procedures to ensure compliance with workplace safety regulations. In order to avoid a citation for an "egregious violation" due to "conscious, voluntary action, or inaction," employers should ensure that all members of their organization can internally report potential OSHA violations without fear of retaliation. Employers should ensure that policies are in place for management to take actions to remedy known violations to avoid an "enterprise-wide" violation. Employers should consult counsel if they receive notice from Cal/OSHA for an enterprise-wide or egregious violation.

AB 1003—WAGE THEFT ADDED TO PENAL CODE AS GRAND THEFT

Effective January 1, 2022, Assembly Bill 1003 categorizes the intentional "theft of wages" in an amount greater than $950 from any one employee, or $2,350 in the aggregate from two or more employees, in a consecutive 12-month period, as "grand theft." The Penal Code defines "grand theft" as the theft of money, labor, or real or personal property in excess of $950. Grand theft is punishable either as a misdemeanor by imprisonment in a county jail for up to one year or as a felony by imprisonment in county jail for 16 months or two to three years.

"Theft of wages" occurs under the terms of the statute when an employer intentionally deprives an employee of wages, gratuities, benefits, or other compensation due to the employee. AB 1003 does not define "intent." Generally, however, other intentional acts in the California Labor Code require proof that the employer acted "willfully," meaning that the conduct was deliberate.

The law includes independent contractors within its definition of "employee."

***Recommendations for Employers*:** Employers should carefully review their compensation policies and practices with counsel to ensure compliance with the law and avoid potential criminal liability.

AB 701—WAREHOUSE DISTRIBUTION CENTERS REQUIRED TO DISCLOSE QUOTAS

Effective January 1, 2022, Assembly Bill 701 requires employers with large warehouse distribution centers to disclose quotas and pace-of-work standards to each nonexempt employee upon hire or within 30 days of the bill's effective date (i.e., January 30, 2022). The employer must provide "a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota."

AB 701 applies to employers with 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers. A "warehouse distribution center" includes "an establishment as defined by any of the following North American Industry Classification System ("NAICS") Codes, however that establishment is denominated: (A) 493110 for General Warehousing and Storage. (B) 423 for Merchant Wholesalers, Durable Goods. (C) 424 for Merchant Wholesalers, Nondurable Goods. (D) 454110 for Electronic Shopping and Mail-Order Houses." The term "warehouse distribution center" does not include NAICS Code 493130, Farm Product Warehousing and Storage.

A "quota" means "a work standard under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or to produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard." AB 701 prohibits employers from taking adverse action against an employee for failing to meet a quota that has not been disclosed or for failure to meet a quota that does not allow the employee to comply with occupational health and safety laws.

***Recommendations for Employers*:** Employers with qualifying warehouse distribution centers should prepare quota and

pace-of-work standards and add them to their hiring documents and circulate the information to current employees by January 30, 2022. Further, employers should consult with counsel to ensure all established quotas follow occupational health and safety requirements.

AB 1033—CFRA AMENDMENT TO INCLUDE "PARENTS-IN-LAW"

The California Family Rights Act ("CFRA") provides eligible employees with up to 12 workweeks of unpaid protected leave during any 12-month period for family and medical leave. Assembly Bill 1033 amends CFRA to include "parent-in-law" in the list of family members for which an employee can take leave. A "parent-in-law" is the parent of a spouse or domestic partner.

***Recommendations for Employers*:** Employers should update family and medical leave documents as well as other internal employment documents to include "parents-in-law" as an eligible family member for which an employee may take leave. Employers should also prepare for additional employees taking leave under the expanded provisions of the act.

AB 1506—NEWSPAPER CARRIERS EXCEPTION FOR INDEPENDENT CONTRACTOR STATUS

In 2019, the California Legislature passed Assembly Bill 5. 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: (A) is free from the control and direction of the hiring entity in connection with the performance of the work; (B) performs work that is outside the usual course of the hiring entity's business; and (C) is customarily engaged in an independently established trade, occupation, or business.

Existing law exempts certain occupations and businesses from the ABC test. Courts use the *Borello* test (totality of the circumstances) to evaluate independent contractor status for occupations subject to the exemptions.

Assembly Bill 1506 extends the temporary exemption for newspaper distributors working under contract with a newspaper publisher from application of the ABC test until January 1, 2025. It also requires all newspaper publishers or distributors that hire or contract with newspaper carriers to submit to the Labor and Workforce Development Agency certain information related to their workforce on or before March 1, 2022, March 2, 2023, and March 1, 2024. Specifically, they must provide: (i) the number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes; (ii) the average wage rate paid to carriers classified as independent contractors and as employees; and (iii) the number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law. For the March 1, 2022, reporting date, every newspaper publisher and distributor must also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years.

AB 1506 revises the definition of "newspaper" to include a publication that is either published in print or posted on a digital platform.

***Recommendations for Employers*:** Newspaper distributors remain exempt from application of the ABC test. However, they should be cognizant of the information that needs to be filed with the Labor and Workforce Development Agency, and they should note the additional reporting data required for March 1, 2022.

AB 1561—INDUSTRY EXEMPTIONS FOR INDEPENDENT CONTRACTOR STATUS

Assembly Bill 1561 makes four changes to the application of the ABC test:

- Licensed manicurists remain exempted from the ABC test until January 1, 2025.
- The bill amends Labor Code Section 2782, which deals with the relationship between a data aggregator and an individual providing feedback to the data aggregator. This relationship remains exempt from the ABC test.

However, AB 1561 modifies the relationship in three ways: (i) it revises the exemption to apply instead to the relationship between a data aggregator and a "research subject"; (ii) it eliminates the requirement that "any consideration paid for the feedback provided, if prorated to an hourly basis, is an amount equivalent to the minimum wage"; and (iii) it defines "research subject" as "any person who willingly engages with a data aggregator in order to provide individualized feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences, and does not engage solely for the purposes of completing individual tasks, except as the tasks relate to providing such feedback."

- In the insurance industry, AB 1561 exempts persons who provide claims adjusting or third-party administration from the ABC test.
- AB 1561 clarifies that the statutorily imposed duties of a manufactured housing dealer are not factors to be considered under the *Borello* test.

***Recommendations for Employers*:** Employers should consult with counsel to determine whether they are one of the industries exempted from AB 5. Employers with questions on whether workers should be classified as independent contractors or employees in the foregoing industries should also consult with counsel.

SB 762—PAYMENT OF ARBITRATION FEES

Effective January 1, 2022, Senate Bill 762 requires employment and consumer arbitration providers to provide invoices for fees and costs to all parties to the arbitration on the same day and by the same means. The invoices must be issued as due upon receipt, unless the arbitration agreement expressly provides for a different time for payments. If fees and costs accrue during the pendency of the arbitration, SB 762 requires that any extension of time for the due date can be agreed upon by all parties to the arbitration.

***Recommendations for Employers*:** Employers negotiating arbitration agreements should consider adding a clause to the agreement that specifies the preferred time for payments or pendency fees.

SB 639—USE OF SUB-MINIMUM WAGES PHASED OUT

Under existing law, individuals with mental or physical disabilities may receive less than the established minimum wage upon the individuals' receipt of a license from the Industrial Welfare Commission ("Commission"). Senate Bill 639 terminates and phases out this program. Beginning January 1, 2022, the Commission will not issue any new licenses to mentally or physically disabled workers. SB 639 requires the Commission to develop a multiyear phaseout program by January 1, 2023, with the goal of paying all employees with disabilities the legal minimum wage starting on January 1, 2025.

Existing law also permits the Commission to issue special licenses to nonprofit organizations such as shelters or rehabilitation facilities to pay individuals with mental or physical disabilities a special minimum wage. Pursuant to SB 639, this law will be repealed on January 1, 2025.

***Recommendations for Employers*:** Beginning January 1, 2022, employers must pay individuals with mental or physical disabilities who do not have an Industrial Welfare Commission license the legal minimum wage. Any employee with a special license for a sub-minimum wage will be subject to the Commission's phaseout plan, and employers should expect to pay any employees with disabilities the legal minimum wage by January 1, 2025.

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