

EMPLOYMENT LAW UPDATE

STAR STAFFING

DECEMBER 8, 2021

Agenda



- Reminders – Existing Laws and Deadlines
- New Laws for 2022
- COVID-19 in the Workplace: Laws and Regulations
- Questions

Reminders – Existing Laws and Deadlines

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Minimum Wage Continues to Increase

California Minimum Wages

Year	26 or more	25 or less
2022	\$15.00	\$14.00
2023	TBD	\$15.00

Local Ordinances

If you have employees working in certain cities (generally 2hr/week) you need to comply with local minimum wage.

City	Date	26+	25 or less
Sonoma	1/1/2022	\$16.00	\$15.00
Petaluma	1/1/2022	\$15.85	\$15.85
Santa Rosa	1/1/2022	\$15.85	\$15.85
San Francisco	7/1/2021	\$16.32	\$16.32

- After all employees at \$15.00 (in 2023), the rate cannot be decreased.
- Will increase up to 3.5% per year (tied to CPI)
- Check the local ordinances in every city you have employees working 2 hours or more per week.

Salaried Employees: Don't Forget!

- Exempt salary must be at least 2x California **state** minimum wage for full-time employment
- 40 hrs/week = 2,080 hrs/year
- Results is a \$4,160 raise each year (\$2 x 2080)

<u>Year</u>	<u>26 or more</u>	<u>25 or less</u>
2018	\$45,760	\$43,680
2019	\$49,920	\$45,760
2020	\$54,080	\$49,920
2021	\$58,240	\$54,080
 2022	\$62,400	\$58,240
2023	TBD	\$62,400

Change in Ag Overtime

- For employers with 26 or more employees OT for ag workers is now 8 hrs/day and 40hrs/week
- The phase in for employers with 25 or fewer employees starts on January 1, 2022

Overtime for Ag. Workers – 25 or Fewer Employees				
	2022	2023	2024	2025
Daily Work	9.5	9	8.5	8
Work Week	55	50	45	40

Important Reminders

- Harassment/Abusive Conduct training required every 2 years for employers with 5+ employees
 - 2 hours for supervisory employees and 1 hour for non-supervisory employees
 - New employees/new supervisor within 6 months of hire/promotion
- CFRA update – family and medical leave now applies to all employers with 5+ employees
 - Employees who have worked at least 12 months and at least 1,250 hours for an employer can take up to 12 weeks of job-protected leave each year for qualifying reasons related to health and family care
 - Leave is unpaid but health benefits must continue

Important Reminders – Cont.

- 2016 Secure Choice Retirement Savings Program – Now being implemented. Employers must have private retirement plan, like 401k or enroll in CalSavers.
- CalSavers is a state run retirement savings program.
 - www.calsavers.com
- Employers are required to put a payroll arrangement into place that requires employees to contribute a portion of the wages to a retirement savings plan, unless they opt out.
- Deadlines:
 - Sept. 30, 2020 - 100 or more employees
 - June 30, 2021 – 50 or more employees
 - June 30, 2022 – 5 or more employees

Update: Law Prohibiting Arbitration Agreements Still On Hold

- AB51 prohibited employers from requiring that employees enter into arbitration agreements as a condition of employment, where the agreements cover California Labor Code claims or FEHA claims
- Only applies to contracts entered into, extended or modified after January 1, 2020
- **Currently not enforceable (and never has been) – AB51 was immediately challenged in the court as a violation of the FAA and that case is still ongoing**
- Employers should continue to closely monitor case developments and weigh the risks associated with proceeding with mandatory arbitration agreements as a condition of employment

New Laws Passed in 2021

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NEW: SB657 - Electronic Notice

Adds Section 1207 to the Labor Code

- Whenever employers are required to post certain information in the workplace, employers may now also distribute that information to employees by email with the document or documents attached
- Still required to physically display the posting in the workplace
- Best practice for remote workers to also send required postings and notices by email

NEW: SB331 - Restrictions on Settlement and Non-Disparagement Agreements

Amends CCP Section 1001 and Gov. Code Section 12964.5

- Existing law prohibits a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action
 - Such acts include an act of workplace harassment or discrimination based on sex
- For agreements entered into on or after January 1, 2022, the bill expands the prohibition to include acts of workplace harassment or discrimination not based on sex

(Cont.) Restrictions on Settlement and Non-Disparagement Agreements

- Also prohibits employers from requiring an employee to sign a non-disparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about any unlawful acts in the workplace, including harassment and discrimination
- Severance agreement cannot contain any provision that prohibits the disclosure of information about unlawful acts in the workplace
- Non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must 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."

NEW: SB639 - Minimum Wage for Disabled Employees

Amends Labor Code Section 1191; amends and repeals Labor Code Section 1191.5

- Requires the development of a plan to phase out the use of the sub-minimum wage certificate program, which authorizes employers to pay less than minimum wage for employees with physical or mental disabilities by January 1, 2025
- No new licenses for the sub-minimum wage certificate program will be issued beginning January 1, 2022
- Existing license holders are required to meet benchmarks provided for in the phaseout plan in order to be relicensed

NEW: AB1003 - Criminalizing Wage Theft

Adds Section 487m to the Penal Code

- Intentional theft of wages, including gratuities, in the amounts below by an employer in any consecutive 12-month period is punishable as grand theft
 - Amount greater than \$950 from any one employee, or
 - \$2,350 in the aggregate from 2 or more employees
- Grand theft is punishable either as a misdemeanor by imprisonment in a county jail for up to 1 year, or as a felony by imprisonment in county jail for 16 months or 2 or 3 years
- In addition to civil penalties and remedies for the recovery of wages (restitution)
- Independent contractors are included within the meaning of “employee”

NEW: AB1033 - CFRA Clarifications

Amends Sections 12945.2 and 12945.21 of the Government Code

- While SB 1383 (passed last year) included a definition of “parent-in-law” that was intended to be one of the new family members covered under CFRA, the law did not actually apply any such family leave to a parent-in-law
- AB 1033 fixes this issue by adding care for a parent-in-law with a serious health condition as a qualifying CFRA leave for a covered employee
 - ▣ **Update your CFRA policy in your employee handbook**
- AB 1033 also expands on the small employer family leave mediation program for employers with less than 20 employees to allow such smaller employers a better opportunity to invoke the mediation program in lieu of a civil action

NEW: SB606 - Expansion of Cal/OSHA Authority

Amends Labor Code Sections 6317, 6323, 6324, 6429, and 6602; adds Labor Code Sections 6317.8 and 6317.9

- Establishes a rebuttable presumption that a violation committed by an employer that has multiple worksites is “enterprise-wide” if:
 - The employer has a written policy or procedure that violates the Labor Code/Health & Safety Code/ or other Cal/OSHA rules and standards, or
 - Cal/OSHA has evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer’s worksites
- EXCEPT policies that violate an emergency regulation adopted or amended within the last 30 days
- Cal/OSHA can issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut the presumption
- Willful or egregious violations: each employee exposed to that violation will be considered a separate violation for purposes of penalties and fines
- Expands Cal/OSHA investigation tools: can issue subpoenas, seek injunctions, and temporary restraining orders against employers

Significant Cases



Ferra v. Loews Hollywood Hotel, LLC

11 Cal.5th 858 - July 2021



- Court found that employers must pay premium payments to employees for missed meal, rest, and recovery breaks at the employee's "regular rate of pay"
- NOT at employee's base hourly rate, as many employers were doing
- Ruling is retroactive
- Employers should audit to determine if true-up payments are necessary

Donohue v. AMN Services, LLC

11 Cal.5th 58 – February 2021



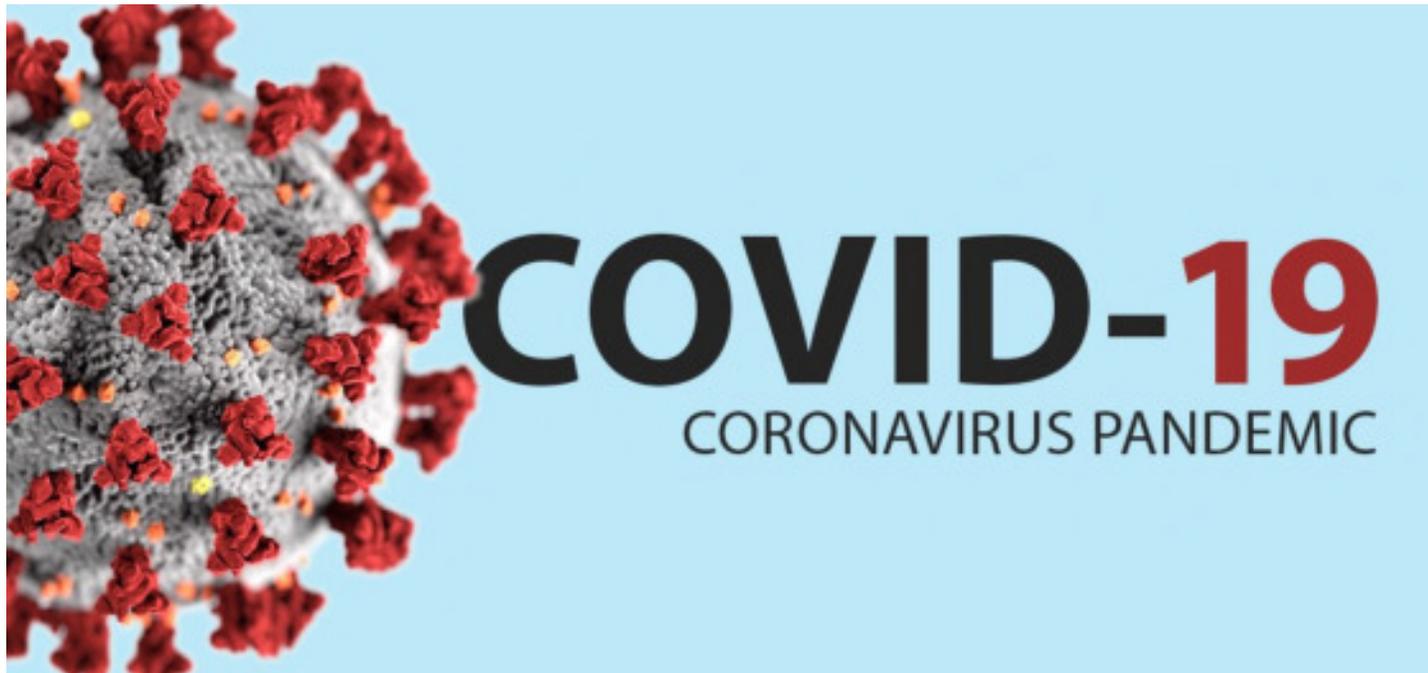
- Employer used an electronic timekeeping system that rounded employee time punches to the nearest 10-minute increment at the beginning and end of each shift, as well as when employees clocked in and out for meal periods
- The Supreme Court found that such a rounding policy when applied to meal periods was not “neutral”
- Inconsistent with Labor Code 512 and IWC Wage Orders because employees must take an unpaid and duty-free meal period of not less than 30 minutes
- **Thus rounding is inappropriate for meal periods**
- The Court also held that when employer records show noncompliant meal periods, whether late, interrupted or missed, it raises a rebuttable presumption of a meal period violation

Donohue v. AMN Services, LLC (cont.)

11 Cal.5th 58 – February 2021

- **Rebutting the presumption:**
 - Accurate, to the minute, timekeeping
 - Court confirmed the considerable evidentiary weight of acknowledgments as a factor in determining whether premiums are warranted when timecard deviations occur
 - Supervisors/managers can review missed, late, or short meal periods and have employees ack. if voluntary
 - May have option to confirm in timekeeping system
 - Ack. at end of pay period when submitting time

COVID-19 Laws and Regulations



COVID-19: Laws and Regulations

- **SB 1159** – Worker’s Comp presumption during an “outbreak” and reporting requirement, expires Jan. 1, 2023
- **AB 685/654** – Written notice requirement to potentially exposed employees
- **SB 93** – Re-hire for hospitality workers
- **Cal/OSHA ETS** – Workplace safety regulations
- **Leave Laws**
- **Vaccine Mandates**

SB 1159: Worker's Comp Presumption and Reporting Requirement

Added Labor Code Sections 77.8, 3212.86, 3212.87, and 3212.88

- Effective September 17, 2020 until January 1, 2023
- Applies to employers with 5+ employees
- Rebuttable presumption that employee's illness related to COVID-19 is occupational injury and eligible for workers' compensation benefits
- Only applies if the employee tests positive within 14 days of working at a workplace where there is an "outbreak" *defined as:*
 - 4 employees test positive within 14 days if 100 or fewer employees
 - 4% of employees test positive within 14 days if >100 employees; or
 - Workplace is ordered to close by public health department, or Cal-OSHA due to a risk of COVID-19 infection

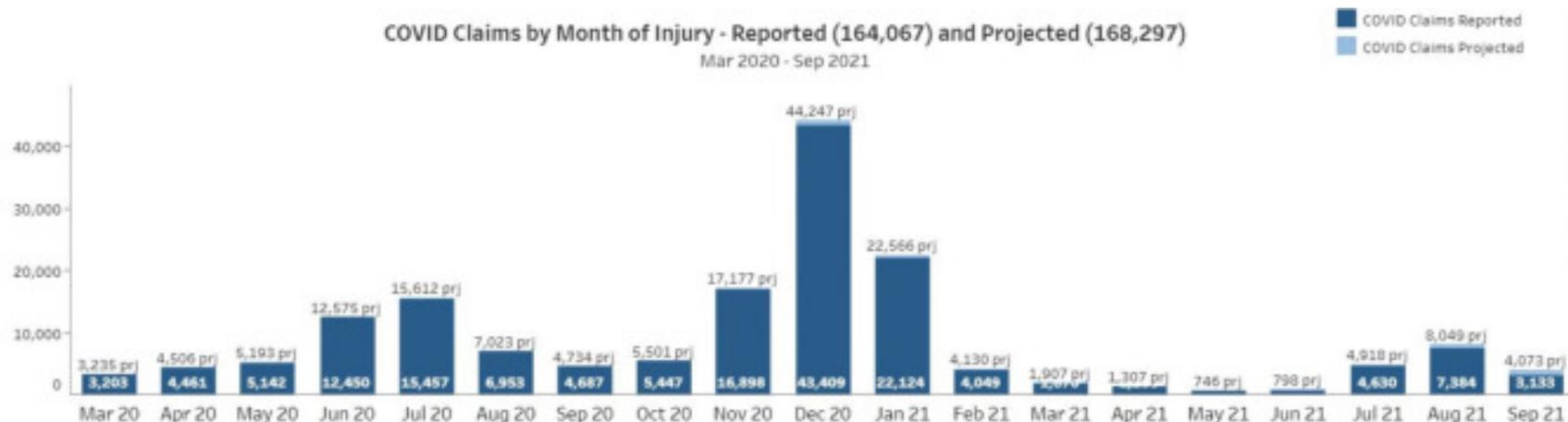
SB 1159: Worker's Comp Presumption and Reporting Requirement (cont'd)

- Employers must report *all* positive cases of COVID-19 to your WC carrier within 3 business days:
 - That an employee tested positive (without identifying information);
 - The date of the test;
 - The place where the employee worked during the 14 days prior to the test; and
 - The highest number of employees who reported to work at the employee's workplace identified above in the 45 days prior to the date of the positive test.
- Employers may be subject to civil penalties of up to \$10,000 for intentionally submitting false or misleading information, or for failing to report required information

SB 1159: Worker's Comp Presumption and Reporting Requirement (cont'd)

□ California Workers' Comp Claims

- 164,320 total number of COVID-19 claims with 1,163 deaths through October 18, 2021



California Workers' Compensation Institute

<https://cwci.org/CV19claims.html>

AB 685/654: Notice to Employees of Potential COVID Exposure

Amended and added Labor Code Sections 6325, 6432, and 6409.6



- Effective Jan. 1, 2021
- Must notify employees in writing of potential exposure to COVID-19 within 1 business day
- Notify all employees, and employers of any subcontracted employees, who were on the premises at the same worksite as the infected/positive individual during the “infectious period”
 - Include COVID related benefits (WC, sick leave, etc.), notice of anti-retaliation and anti-discrimination protections, disinfection and safety plan
 - “Worksite” does not include buildings, floors, or other locations that the positive individual did not enter during the infectious period
 - “Infectious period” starts 48 hours before symptoms start or a positive test (date test was collected)
- **Maintain records of notice for at least 3 years**

AB 685/654: Notice Requirements (cont'd)

- Required to report an outbreak in the workplace within 48 hours or one business day (whichever is later) to the local public health agency (i.e. County Health Dept.)
 - ▣ Exceptions for certain licensed entities (community clinics, health facilities, child day cares)
- Definition of “outbreak” – uses CDPH definition
 - ▣ *Three or more lab-confirmed cases of COVID-19 among employees from different households within a two-week period*
- An employer that has an outbreak must continue to give notice to their local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite

SB 93: COVID Re-hire Bill for “Hospitality”

Added Labor Code Section 2810.8

- Effective April 16, 2021, expiring December 31, 2024
- Requires certain employers to recall eligible workers who were laid-off for reasons related to COVID-19 if their prior positions become available
 - Must have worked for six months or more in the 12 months preceding Jan. 1, 2020 & performed at least 2 hours/week of work
 - Most recent separation due to a reason related to COVID-19
 - Open positions after April 16, 2021 that are *the same or similar* to the laid off employee’s position
- Only applies to employers who operate an “enterprise”:
 - Hotel or private clubs with 50 or more guestrooms; event centers (with seating capacity of at least 1,000 or 50,000 sq. ft.); airport services; commercial property building services (i.e. janitorial, maintenance, and security)

SB 93: COVID Re-hire Bill for Hospitality (cont'd)

- *Employer must:*
 - Notify laid-off employee within 5 business days of any job posting for which employee is qualified
 - Must offer job to qualified laid-off employee that held same or similar position at time of layoff, in order or seniority, with 5 business days to accept/reject
 - If decline to hire laid-off employee for lack of qualifications, must provide the laid-off employee a written notice within 30 days with the length of service with the employer of those hired and reasons for the decision
 - Maintain records for 3 years from layoff of all notices
 - Failure to comply may lead to steep penalties for employer

Cal/OSHA Regulations

Added Sections 3205-3205.4 to Title 8 of the California Code of Regulations

- Went into effect Nov. 30, 2020
 - Recent revision: June 17, 2021
- The “emergency temporary standards” (ETS) apply to all California employers and employees **except**:
 - workplaces with one employee who does not have contact with others;
 - employees that are working from home; and
 - employees subject to Cal/OSHA’s Aerosol Transmissible Diseases standard (such as healthcare facilities, nursing homes, paramedics and emergency responders)

Cal/OSHA Regulations (cont'd)

- Must have written COVID-19 Prevention Program (“CPP”) – (can be part of IIPP)

- Required to track employee vaccination status
 - Can require proof of vaccination or use self-attestation form (decline to state = treat as unvaccinated)
 - Note that many local mask mandates require actual proof of vaccination for certain “stable cohorts” to work unmasked
 - Vaccination status is confidential medical information
 - Employers should not require employees to wear a badge/wristband/etc. indicating they are vaccinated
 - OK to give information to managers/supervisors who need to know for purposes of enforcing safety regs. but still confidential

Cal/OSHA Regulations (cont'd)

- Return to work criteria for employees with COVID
(regardless of vaccination status)
 - For COVID positive employees with symptoms:
 - At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
 - COVID-19 symptoms have improved; and
 - At least 10 days have passed since COVID-19 symptoms first appeared
 - For COVID positive employees without symptoms:
 - At least 10 days have passed since first positive test

Cal/OSHA Regulations (cont'd)

- Close contacts: within 6 feet for cumulative total of 15 minutes or more in a 24-hour period during contagious period (2 days before symptoms or positive test until 10 days after and symptoms improved)

- Return to work criteria for close contacts:
 - Fully vaccinated close contacts do not have to be excluded from the workplace unless they develop symptoms
 - Employees who had COVID in last 90 days and recovered do not have to be excluded from the workplace
 - Unvaccinated close contacts must be excluded from the workplace until:
 - 7 days from the date of last exposure if a negative test after day 5, or
 - 10 days since last exposure without testing
 - Developed symptoms (regardless of vaccination status):
 - Same as for COVID positive employee with symptoms

Cal/OSHA Regulations (cont'd)

- Testing after close contact at work:
 - Must offer testing to employees who are unvaccinated and vaccinated employees with symptoms at no cost and during paid time
 - Must make periodic testing available during an outbreak

- Exclusion Pay and Benefits:
 - Must maintain pay and benefits if employee:
 - Excluded from work because of workplace exposure to COVID
 - Unable to work remotely
 - Not receiving state disability benefits or worker's comp during the exclusion period

Cal/OSHA Regulations (cont'd)

- Special Circumstances:
 - Additional requirements for outbreaks (3 or more cases in 14 days) and major outbreaks (20 or more cases in 30 days)
 - Employer-provided housing and employer-provided transportation have additional requirements
- Contact Cal/OSHA within 8 hours (or 24 hours if exigent circumstances) once discover an employee became seriously ill with COVID or dies if connected with work/workplace (8 CCR §342)
- DIR resources:
 - Comprehensive FAQ, updated often:
 - <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>
 - Model COVID-19 Prevention Program (CPP):
 - https://www.dir.ca.gov/dosh/dosh_publications/ CPP.doc

COVID-19 Leave Laws Today

- FFCRA, California Supplemental Paid Sick Leave, and many local leave laws (ex. Sonoma County COVID Paid Sick Leave) expired Sept 30, 2021
- Cal/OSHA ETS Regulations
- CA Mandated Sick Leave (24 hours)
- **Stay up to date:** Future legislation at the state, federal and/or local levels may change employees' rights to leave



COVID-19 Vaccinations



- Employers can mandate vaccinations as long as they provide reasonable accommodations for employees with:
 - Disability or Medical Condition
 - Sincerely held religious belief
- Should booster shots be required as part of vaccine policies?
- **Held up in court:** OSHA emergency temporary standards requiring all employers with 100+ employees to ensure their workers are vaccinated or submit to weekly testing still on hold (awaiting court decision)

Questions



THANK YOU!



DP&F office: (707) 261-7000

Marissa Buck: mbuck@dpf-law.com

Sarah Hirschfeld-Sussman: shs@dpf-law.com