Tucker Ellis LLP

New California Employment Laws for 2022: What Employers Need to Know

DECEMBER 2021

With the upcoming new year comes a host of new California employment laws that will take effect on January 1, 2022 and beyond.

The new laws address several topics, including:

- Settlement Agreements
- Confidentiality
- Record Keeping
- PAGA[1]
- COVID-19 Reporting

All employers with personnel in California should be aware of these new laws, understand how these laws may affect their operations, and consult with counsel to address any compliance questions.

Senate Bill (SB) 331 – Silenced No More Act

Of all the new laws going into effect on January 1, 2022, the Silenced No More Act (SB 331) has garnered the most attention and likely will have the most wide-ranging repercussions for employers in California. In 2018, California passed the STAND Act (Stand Together Against Non-Disclosure Act) in response to the #MeToo movement. The STAND Act prohibited the use of confidentiality provisions in settlement agreements where the underlying claims were based upon sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. The law did not extend to claims based upon other protected characteristics. Therefore, a confidentiality provision in a settlement agreement could not prevent an individual from discussing the factual information related to sexual harassment or sex discrimination allegedly experienced in the workplace, but could preclude an individual from discussing factual information related to harassment or discrimination based upon any other protected characteristic (e.g., race, age, gender, etc.).

The Silenced No More Act expands the prohibitions of the STAND Act to broadly prohibit confidentiality provisions in settlement agreements involving workplace harassment or discrimination on any protected basis not just sexual harassment or discrimination based on sex. This amendment applies to the settlement of lawsuits that have been filed or claims that have been made with governmental agencies. The law further amends provisions of the Fair

Employment and Housing Act (FEHA) making it an unlawful employment practice for employers to require employees to sign a release of any right to disclose factual information relating to unlawful or perceived unlawful activity in exchange for a raise, bonus, or as a condition of continued employment. Moreover, it is an unlawful employment practice to include, in a separation agreement, any provision prohibiting the disclosure of information about unlawful acts in the workplace.

This new law applies to lawsuits, administrative claims, and employment or separation agreements even in the absence of a lawsuit or formal claim. The law does not prevent the use of all nondisparagement clauses in the employment context nor does it prevent the use of non-disclosure agreements to protect trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace. However, employers must ensure that they are not using language that prohibits an employee or former employee from disclosing factual information relating to harassment, discrimination, retaliation, or failure to prevent harassment or discrimination on the basis of any protected category. If using a nondisparagement clause, an employer must use disclaimer 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.”

SB 807 – Retention of Employee Personnel Records and Modification of DFEH’s Procedures for Enforcing Civil Rights Laws

Effective January 1, 2022, SB 807 expands record retention requirements and extends a number of deadlines for the filing of a civil action under investigation by the Department of Fair Employment and Housing (DFEH).

With respect to records, employers must now retain personnel records for applicants or employees for four years from the date the records were created or the date an employment action was taken. Additionally, if an employer is notified a complaint has been filed with the DFEH, personnel records must be retained until the employer is notified that the action has been fully resolved or until after the statute of limitations for a civil lawsuit has run.

SB 807 also tolls the statute of limitations, including retroactively but without reviving lapsed claims, for the filing of a civil action based on specified civil rights complaints under investigation by the DFEH until: (1) the DFEH files a civil action for the alleged violation; or (2) one year after the DFEH notifies the complainant that it is closing its investigation without electing to file a civil action for the alleged violation.

In addition, SB 807 tolls the deadline for the DFEH to file a civil action while a mandatory or voluntary dispute resolution is pending, and extends to two years the period of time that the

DFEH has to complete its investigation and issue a right-to-sue notice for employment discrimination complaints treated by the DFEH as a class or group complaint.

SB 973 – Reminder: Pay Data Report Compliance Deadline – March 31, 2022

California employers will need to put the finishing touches on their pay data reports in light of the DFEH's March 31, 2022 filing deadline. As a reminder, on September 30, 2020, California Governor Gavin Newsom signed into law SB 973, making California the first state to require employers to submit employee pay data by race and gender. SB 973 is modeled after the now-discontinued Component 2 of the federal EEO-1 form, although it covers only employees who work in California or are "assigned to" California work locations.

The first California pay data reports were due on March 31, 2021. Between February 16 and March 31, 2021, the DFEH granted employers' requests to have until April 30, 2021 to file their reports (known as an "enforcement deferral period"). The DFEH is no longer considering such requests. If an employer misses the March 31, 2022 filing deadline, the DFEH may seek a court order requiring the employer to comply with California's pay data reporting requirements and shall be entitled to recover the costs associated with seeking the order for compliance.

As with the Component 2 EEO-1 reports, the California pay data reports require employers with 100 or more employees and who are required to file an annual Employer Report (EEO-1) under federal law to report, among other things: (1) the number of employees by race, ethnicity, and sex in each of the 10 job categories used on the EEO-1 form; (2) the number of employees by race, ethnicity, and sex whose annual earnings (defined as W-2 income) fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey; and (3) the number of hours worked by each employee.

Employers with only some employees working in California must count all their employees, including those outside of California, in determining whether they reach the 100-employee threshold. Part-time employees are counted as if they were full-time employees in determining the 100-employee threshold. In addition, employees on leave – such as CFRA leave, pregnancy leave, disability leave, and disciplinary leave – must also be counted.

Assembly Bill (AB) 654 – Notice and Reporting Obligations for COVID-19 Exposure in Workplace

AB 654 took effect on October 5, 2021, and extends through January 1, 2023. The law amends California Labor Code section 6409.6, setting forth actions that employers must take upon receiving notice of potential COVID-19 exposure. Under the law, employers are

required to take the following actions within one business day or 48 hours of notice, whichever is later:

1. Provide a written notice to all employees and subcontracted employees who were on the premises within the infectious period that they may have been exposed to COVID-19;
2. Provide the exposed employees with information regarding COVID-19-related benefits to which they may be entitled under applicable federal, state, and local laws, including workers compensation benefits, company sick leave, COVID-19-related leave, state-mandated leave, supplemental sick leave, and antiretaliation/antidiscrimination protections to the employees; and
3. Provide the exposed employees or employers of subcontractor employees notice of the employer's cleaning and disinfection plan that the employer will implement.

The employer must maintain records of the written notifications for a period of at least three years.

AB 654 also modifies several definitions associated with the existing workplace COVID-19 exposure notification statute, including the following:

- "Close contact" means "being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the high-risk exposure period …."
- "Qualifying individual" is defined as any person: (1) with a laboratory-confirmed case of COVID-19 as defined by the State Department of Public Health; (2) diagnosed with COVID-19 by a licensed health care provider; (3) with a COVID-19-related order to isolate provided by a public health official; or (4) who has died due to COVID-19, in the determination of a county public health department or per inclusion in the COVID-19 statistics of a county.
- "High-risk exposure period" is defined as either of the following periods: "(A) For persons who develop COVID-19 symptoms, from 2 days before they first develop symptoms until 10 days after the symptoms first appeared, and until 24 hours have passed with no fever, without the use of fever-reducing medications and symptoms have improved. (B) For persons who test positive who never develop COVID-19 symptoms, from 2 days before until 10 days after the specimen for their first positive test for COVID-19 was collected."

AB 1033 – "Parents-in-law" Added to Definition of "Parents" under California Family Rights Act

The California Family Rights Act (CFRA) makes it an unlawful employment practice for an employer, with five or more employees, to refuse an eligible employee up to 12 workweeks of

unpaid protected leave during any 12-month period when the employee requests a medical leave of absence or requests a leave of absence to care for a family member with a serious health condition.

AB 1033 expands the scope of CFRA's permissible family care and medical leave to clarify that permitted leave to care for a "parent" includes in its definition a "parent-in-law," as well as a biological, foster, or adoptive parent, stepparent, legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

The criteria that constitutes an "eligible" employee remains unchanged by AB 1033 and is governed by Government Code section 12945.2. That section states, with some exceptions, that to be eligible, the employee must have accrued more than 12 months of service with the employer and at least 1,250 hours of service during the previous 12-month period.

Employers beware: This statute also expressly states that family care and medical leave requested will not be deemed to be "granted" by an employer unless a guarantee of employment in the same or comparable position is made to the employee once the leave terminates and the employee returns to work.

AB 701 – Regulation of Use of Quotas by Warehouse Distribution Centers

In response to the increased demand for next-day delivery by mega-retailers and alleged safety concerns in fulfillment centers, AB 701 establishes restrictions that regulate the use of production quotas by warehouse distribution centers. The law is the first of its kind in the United States and potentially applies to employers across a wide range of industries with warehousing and distribution facilities in California.

AB 701 applies to employers who employ or exercise control over the wages, hours, or working conditions of 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers. The law casts a wide net to include workers employed "directly or indirectly" through an agent, third-party employers, and temporary staffing agencies.

New Quota Disclosure Requirements and Restrictions: The new law defines "quota" to mean a work standard (e.g., productivity speed or the number of tasks to be performed during an allotted time). While AB 701 does not prohibit employers from taking adverse actions against employees who fail to meet quotas, they can do so only if: (1) the employee first received written notice of the quota; and (2) the quota does not prevent compliance with meal or rest periods or health and safety laws.

The bill requires employers to provide to each employee, upon hire (or by January 31, 2022 for current employees), a written description of each quota. It must include the number of tasks to be performed, or materials to be produced or handled, within the defined time period. It must also identify any potential adverse employment action that could result from the employee's failure to meet the quota. Employers cannot use quotas that prevent compliance with meal or rest periods, use of bathroom facilities (including "reasonable" travel time to and from such facilities), or occupational health and safety laws. Current or former employees who believe that meeting a quota violated one of these rights can request a written description of each quota that applied to them and their work speed data for the most recent 90-day period.

Opens the Door to New Claims Against Qualifying Employers: Significantly, AB 701 creates a rebuttable presumption of unlawful retaliation if an employer takes any adverse action against an employee within 90 days of the employee (1) requesting for the first time in the calendar year their quota or work speed data; or (2) complaining to their employer or any governmental agency about an alleged violation of the law. Further, current and former employees may pursue civil penalties under the California Labor Code Private Attorneys General Act (PAGA) for alleged violations of the new law. As with certain other PAGA claims, AB 701 allows employers to cure any alleged violations within 33 days of the postmarked date of the employee's PAGA notice.

AB 1003 – Penalties for Theft of Wages

AB 1003 adds a new wrinkle for employers to consider when it comes to compliance with wage and hour laws and the repercussions for the failure to pay full wages or other forms of compensation owed to employees. The new law makes *intentional* "wage theft" by employers a form of "grand theft" under California Penal Code section 487m, which is punishable either as a misdemeanor (up to a one-year prison term) or a felony (up to a three-year prison term).

Wage theft under AB 1003 occurs when an employer fails to pay employees or independent contractors their full wages (whether salary, commission, tips, benefits, or other compensation) with the knowledge that such wages are due and owed. Specifically, AB 1003 makes an employer's "intentional" theft of wages, which now includes gratuities, in an amount greater than $950 (from any one employee) or $2,350 (from two or more employees) in any consecutive 12-month period punishable as grand theft.

The amendment to Penal Code section 487m specifies that, for purposes of the new law, independent contractors are included within the meaning of "employee," and hiring entities of independent contractors are included within the meaning of "employer." This means that a company that misclassifies employees as independent contractors may also now be liable for

criminal sanctions under the law. Further, AB 1003 authorizes employees and independent contractors to recover as restitution any wages, gratuities, benefits, or other compensation, which are the subject of a prosecution under section 487m.

Bonus: Case Law Developments – Wage and Hour and PAGA

***Bernstein v. Virgin America, Inc.* (9th Cir. 2021) – No "Subsequent" PAGA Penalties Prior to Court or Labor Commissioner Citation**

In *Bernstein v. Virgin America*, the United States Court of Appeals for the Ninth Circuit ruled that the enhanced penalties under PAGA for subsequent violations do not come into play unless an employer has been notified of an actual violation of the California Labor Code via a ruling by a court or citation by the Labor Commissioner. The subsequent violation enhancement can be substantial as penalties are frequently double the initial violation penalty or in some cases four times the initial violation penalty. While this ruling benefits employers, PAGA penalties still can be substantial as the initial violation penalties are usually $100 or $250 and are assessed per employee per pay period.

Marquez v. Toll Glob. Forwarding U.S. Inc.* (C.D. Cal. July 6, 2021) – Employee's PAGA Claims Barred by Doctrine of *Res Judicata

In another victory for employers, the case of *Marquez v. Toll Glob. Forwarding U.S. Inc.* ruled that a plaintiff-employee was *not* entitled to a proverbial "second bite of the apple" by repacking his recently dismissed putative wage-and-hour class action lawsuit as a PAGA lawsuit alleging, among others, claims for failure to pay minimum wage and failure to reimburse necessary expenditures.

The *Marquez* court, applying the employers' defense of *res judicata* or claim preclusion, reasoned that the subsequent PAGA suit was barred because the plaintiff's claims arose from the same core set of facts (or "transactional nucleus") already considered and dismissed by the Ninth Circuit in the prior putative class action lawsuit. In both lawsuits, Marquez alleged his employers required him to work past the scheduled eight-hour shift for which he was not compensated appropriately, and that defendants failed and refused to reimburse him for business expenditures. Even though Marquez tried to avoid claim preclusion by alleging that one of his claims – the PAGA expense reimbursement claim – was not technically raised in his prior class complaint, the court was unmoved. It correctly noted that *res judicata* barred his re-litigation in the subsequent PAGA action any claims that were raised or *could have been* raised in the prior action. Hence, because the PAGA reimbursement claim arose from the same nucleus of facts already adjudicated by way of the class action, i.e., those related to his employment and his rights as an employee, Marquez had the opportunity but failed to assert the reimbursement claim at that time. Thus, each of his PAGA claims were precluded

by the prior dismissal of his class action lawsuit.

***Ferra v. Loews Hollywood Hotel, LLC* (Cal. Supreme Ct. 2021) – Time to Audit Regular Rate of Compensation Calculations for Missed Breaks**

In *Ferra v. Loews*, the Supreme Court of California settled a dispute between a bartender (the employee) and a Loews Hotel in California (the employer) about how much an employer should pay for a missed break. Section 226.7(c) of California's Labor Code states that an employer has to give an employee "one additional hour of pay at the employee's regular rate of compensation" for each workday that a break is not given.

The employer in *Ferra* argued that the regular rate of compensation meant just the employee's hourly rate. The employee argued that the regular rate of compensation included her hourly rate and her incentive pay. The *Ferra* employee's argument pointed out that when Labor Code section 510 requires an employer to pay one-and-one-half to two times an employee's "regular rate of pay" for overtime, the regular rate of pay includes an employee's base rate and any non-discretionary payments they receive. Non-discretionary payments are extra payments that come from an agreement between an employer and an employee. There are many kinds of non-discretionary payments, including commissions, bonuses, shift differentials, and incentive payments. The *Ferra* employer argued that the California Supreme Court should not calculate the regular rate of compensation for missed breaks the same way it calculates the regular rate of pay for overtime. The California Supreme Court sided with the employee and ruled that the regular rate of compensation for missed breaks should include the employee's base hourly rate and her incentive pay, similar to overtime compensation.

The California Supreme Court's decision in *Ferra* means that all employers throughout California will need to reexamine the way they calculate premiums for missed meal and rest breaks. Many also will choose to reexamine the desirability of paying bonuses and wage incentives of any kind due to their impact on the calculation of break premiums and overtime. They also create additional burdens related to pay stub compliance. Importantly, the decision is retroactive, which will likely result in a wave of new lawsuits, including class actions and PAGA.

Bonus: Case Law Developments – Arbitration Agreements

***Gamboa v. Ne. Cmty. Clinic* (Cal. Ct. App. Nov. 30, 2021) – Employer Must Establish by Preponderance of Evidence that Arbitration Agreement Is Valid if Employee Produces Evidence Challenging Authenticity of Arbitration Agreement**

In *Gamboa,* the employer filed a motion to compel arbitration. The employee, in opposing the motion to compel, produced a declaration stating that she did not remember signing the

arbitration agreement. The court held that a three-step process would establish whether arbitration should be compelled. *First*, the employer has a prima facie burden of establishing the existence of an arbitration agreement and can meet its burden by attaching a copy of the purported arbitration agreement purportedly bearing the employee's signature to a declaration. *Second*, the employee can challenge the authenticity of the purported arbitration agreement by testifying under oath or declaring under penalty of perjury that he or she never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement. *Third,* the burden then shifts to the employer who must provide evidence such as a declaration from the custodian of records showing by a preponderance of the evidence that the arbitration agreement is valid. The employer can meet its burden by submitting a declaration from the custodian of records explaining how he or she knows the employee signed the arbitration agreement. In other words, the custodian must have personal knowledge concerning the employee signing the arbitration agreement.

Having analyzed the three-step process, the court found that the arbitration agreement at issue was not valid because the employer failed to produce sufficient evidence in the third step. Providing a declaration from a human resources manager stating simply that the employee signed the arbitration agreement is not sufficient because it does not explain how the manager knew that the employee had seen or signed the arbitration agreement.

This decision reinforces a trend in California of not favoring arbitration agreements in the employment context and is in line with California's Labor Code section 432.6 banning mandatory arbitration agreements in employment contracts entered into after January 1, 2020. As *Gamboa* makes clear, to compel arbitration as related to the arbitration agreements entered into prior to January 2020, the employers would have to supply detailed declarations explaining when and how the employee signed the arbitration agreement and how the declarant knows the employee signed the agreement.

***Viking River Cruises, Inc. v. Moriana* (U.S. Dec. 15, 2021) – U.S. Supreme Court Granted Review of Lower Court's Decision Denying Motion to Compel Arbitration of PAGA Claims**

On December 15, 2021, the U.S. Supreme Court granted review in *Viking River Cruises, Inc. v. Moriana*. At issue in this case is whether a California employer may enter into a voluntary arbitration agreement with an employee whereby the employee agrees to bring only his or her individual claims in an arbitration proceeding and not bring any class or representative claim under PAGA. The petition for review by the U.S. Supreme Court was submitted and review was granted due to an apparent discrepancy between state and federal law on the issue of enforceability of arbitration agreements with class/representative action waivers.

In 2011, the U.S. Supreme Court ruled in *AT&T Mobility v. Concepcion* that arbitration agreements – in which the plaintiffs agreed to resolve only their individual claims and could not bring any class claims in the consumer context, such as with cell phone providers, cable providers, or services provided by internet companies – are enforceable.

In 2014, the California Supreme Court ruled in *Iskanian v. CLS Transportation Los Angeles, LLC* that pre-dispute agreements in which employees agree to arbitrate their individual claims and waive their ability to bring a representative PAGA claim on behalf of other employees is unenforceable and contrary to California's public policy. The *Iskanian* ruling barred employers from enforcing arbitration agreements that prohibit employees from bringing PAGA representative claims.

In 2018, the U.S. Supreme Court, in *Epic Systems Corp. v. Lewis*, held that employment arbitration agreements that bar class actions are enforceable. The U.S. Supreme Court's ruling in *Epic* confirmed its holding in *Concepcion* that agreements whereby employees forgo class or collective actions by agreeing to individual arbitrations are enforceable under federal law.

In *Viking River Cruises, Inc. v. Moriana*, the plaintiff worked for Viking as a sales representative in Los Angeles. Plaintiff sued Viking alleging various Labor Code violations and sought to recover PAGA penalties on a representative basis. However, when she started working for Viking, she agreed to resolve all employment issues with Viking in arbitration, and the parties would use individual procedures rather than class or representative action procedures such as PAGA. Viking sought to compel Moriana's individual claims to arbitration, but the trial court and the California Court of Appeal denied Viking's request, citing the California Supreme Court's holding in *Iskanian*. The California Court of Appeal noted that it "must follow the California Supreme Court, unless the United States Supreme Court has decided the same question differently." Therefore, Viking petitioned the United States Supreme Court to review the case, arguing that *Iskanian* is preempted by federal law and the U.S. Supreme Court holdings in *Concepcion* and *Epic*. The U.S. Supreme Court has agreed to review the case. A decision will likely be issued in the summer of 2022.

California employers should review their arbitration agreements with counsel to evaluate whether they should include language prohibiting representative PAGA actions given the U.S. Supreme Court's review of *Viking*. In addition, the U.S. Supreme Court's review of *Viking* will also likely impact current PAGA cases even before the final decision is issued, as defendants may have additional arguments to stay currently pending PAGA cases.

[1] PAGA is a California state statutory scheme within the Labor Code that allows aggrieved employees to step into the shoes of the State and enforce California's Labor Code provisions

by filing lawsuits against their employer to recover civil penalties. PAGA is considered a representative action, as an aggrieved employee is suing on behalf of both themselves and their similarly situated colleagues. It is oftentimes a more attractive option for plaintiffs and their counsel as it does not carry the stringent procedural certification requirements as class actions.

Additional Information

For more information, please contact:

- Ndubisi (Bisi) A. Ezeolu | 213.430.3239 | ndubisi.ezeolu@tuckerellis.com
- Lisa I. Carteen | 213.430.3624 | lisa.carteen@tuckerellis.com
- Edward W. Racek | 213.430.3405 | edward.racek@tuckerellis.com
- Kristen L. Chic | 213.430.3028 | kristen.chic@tuckerellis.com

This Client Alert has been prepared by Tucker Ellis LLP for the use of our clients. Although prepared by professionals, it should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.

© 2024 Tucker Ellis LLP, All rights reserved.